

INTERNAL REVENUE BULLETIN



HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

ADMINISTRATIVE

Notice 2020-66, page 785.

This notice provides interim guidance addressing whether certain Medicaid coverage of COVID-19 testing and diagnostic services is minimum essential coverage for purposes of the premium tax credit under section 36B of the Internal Revenue Code. This notice also announces that the Department of the Treasury and the Internal Revenue Service intend to amend § 1.5000A-2 of the Income Tax Regulations to add Medicaid coverage of COVID-19 testing and diagnostic services to the list of health care coverage that is not minimum essential coverage under a government-sponsored program.

ADMINISTRATIVE, EMPLOYEE PLANS

Announcement 2020-17, page 794.

Announcement 2020-17 postpones, until January 15, 2021, the due dates for reporting and paying the excise taxes under §§ 4971(a)(1) and 4971(f)(1) of the Internal Revenue Code with respect to certain delayed minimum required contributions to a single employer defined benefit plan. This postponement applies with respect to a required contribution to which the extended due date under § 3608(a) of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (134 Stat. 281) (CARES Act), applies.

EMPLOYEE PLANS

Notice 2020-72, page 789.

This notice sets forth updates on the corporate bond monthly yield curve, the corresponding spot segment rates for September 2020 used under § 417(e)(3)(D), the 24-month average segment rates applicable for September 2020, and the 30-year Treasury rates, as reflected by the application of § 430(h)(2)(C)(iv).

Bulletin No. 2020-40 September 28, 2020

INCOME TAX

Notice 2020-59, page 782.

This notice contains a proposed revenue procedure with a safe harbor for a trade or business that manages or operates a qualified residential living facility to be treated as a real property trade or business solely for purposes of qualifying as an electing real property trade or business under section 163(j)(7)(B) of the Internal Revenue Code.

Notice 2020-71, page 786.

Optional special per diem rates. This notice provides the 2020-2021 special per diem rates for taxpayers to use in substantiating the amount of ordinary and necessary business expenses incurred while traveling away from home. The notice includes (1) the special transportation industry rate, (2) the rate for the incidental expenses only deduction, and (3) the rates and list of high-cost localities for the high-low substantiation method.

REG-107911-18, page 795.

This notice of proposed rulemaking supplements TD 9905 and provides rules concerning the limitation on the deduction for business interest expense. Specifically, these proposed regulations address application of the limitation in contexts involving passthrough entities, regulated investment companies (RICs), United States shareholders of controlled foreign corporations, and foreign persons with effectively connected income in the United States. These proposed regulations also provide guidance regarding the definitions of real property development, real property redevelopment, and a syndicate.

Rev. Proc. 2020-41, page 793.

Revenue Procedure 2020-41 provides domestic asset/liability percentages and domestic investment yields needed by foreign life insurance companies and foreign property and liability insurance companies to compute their minimum ef-

fectively connected net investment income under section 842(b) of the Internal Revenue Code for taxable years beginning after December 31, 2018.

Rev. Rul. 2020-19, page 611.

This revenue ruling provides guidance on what constitutes a change in basis of computing life insurance reserves under § 807(f) of the Internal Revenue Code, as amended by the Tax Cuts and Jobs Act. This revenue ruling provides specific holdings in a number of different situations, with each holding indicating whether the described situation is a change in basis under § 807(f).

T.D. 9905, page 614.

This document contains final regulations providing guidance about the limitation on the deduction for business interest expense. The regulations provide guidance to taxpayers on how to calculate the limitation, what constitutes interest for purposes of the limitation, which taxpayers and trades or businesses are subject to the limitation, and how the limitation applies in consolidated group, partnership, international, and other contexts.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned

against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

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Part I

Section 807.—Rules for certain reserves

Rev. Rul. 2020-19

ISSUE

In the situations described below, is there a change in basis of computing life insurance reserves under § 807(f) of the Internal Revenue Code, as amended by section 13513 of Public Law No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA), 131 Stat. 2054, 2143 (2017)?

FACTS

IC, a calendar year life insurance company within the meaning of § 816(a), issues life insurance and annuity contracts directly and also reinsurance the risks on such contracts issued by other companies. IC is required to determine life insurance reserves under § 807(d) with respect to both directly written and reinsurance contracts and to take net increases or decreases in the reserves into account in computing life insurance company taxable income. IC computes the amount of the life insurance reserve for a contract in accordance with the net surrender value (NSV) floor of § 807(d)(1)(A) and (B) and the statutory cap of § 807(d)(1)(C).

Situation 1. Beginning in Year 1, IC issues variable annuity contracts within the meaning of § 817(d). On its Federal income tax returns for Years 1 and 2, IC computed the amount of the reserve with regard to each of those contracts under the Commissioners' Annuities Reserve Valuation Method (CARVM) prescribed by the National Association of Insurance Commissioners (NAIC) but incorrectly applied the 92.81% factor of § 807(d)(1)(B) to that entire amount, rather than only to the excess of that amount over the greater of each contract's NSV or the portion of the reserve separately accounted for under § 817.

Situation 2. In Year 4, the NAIC makes a change to the NAIC Valuation Manual 21 (VM-21) that imposes a new compu-

tational requirement as a component of CARVM on issuers of variable annuities with guaranteed minimum benefits. The requirement applies to the determination of statutory reserves as of December 31, Year 4, with regard to contracts issued after December 31, Year 1. On its Federal income tax returns for Years 2 and 3, IC determined its reserves for variable annuity contracts under the requirements of VM-21. As a result of the change in VM-21, IC's statutory reserves for these contracts as of December 31, Year 4, will be lower than they would have been had the change not been made.

Situation 3. The facts are the same as in Situation 2, except that the change to VM-21 applies to the determination of statutory reserves as of December 31, Year 4, with regard to contracts issued after December 31, Year 3.

Situation 4. The NAIC issues a new Actuarial Guideline that imposes a new computational requirement for the Commissioners' Reserve Valuation Method (CRVM) for universal life contracts issued before Year 1. The requirement applies to the determination of statutory reserves for these contracts as of December 31, Year 3. IC's statutory reserves for these contracts as of December 31, Year 3, will be lower than they would have been had the NAIC not issued the new Actuarial Guideline.

Situation 5. IC computes its reserves for a group of life insurance contracts under NAIC Valuation Manual 20 (VM-20). The group of contracts passes both the stochastic exclusion test and the deterministic exclusion test of VM-20, and the company elects to exclude the group from both the stochastic reserve calculation and the deterministic reserve calculation. Accordingly, the statutory reserve for the group is equal to the sum of the policy net premium reserves.

VM-20 prescribes the mortality standard to be used to compute the net premium reserves for the contracts. The NAIC changes the Valuation Manual to require the use of the Year 1 Commissioners' Standard Ordinary (CSO) mortality tables to compute the net premium reserves for all contracts subject to VM-20. The requirement applies to the determination of statutory reserves for these contracts as of December 31,

Year 3. IC's statutory reserves for each of the contracts in the group of contracts as of December 31, Year 3, will be lower than they would have been had the NAIC not changed the Valuation Manual to prescribe the use of the Year 1 CSO mortality tables.

Situation 6. IC computes its reserves for certain life insurance contracts under VM-20. Under VM-20, the minimum statutory reserve for the contracts is equal to the sum of the policy minimum net premium reserves for the contracts, plus the excess, if any, of the greater of the deterministic reserve for the contracts and the stochastic reserve for the contracts. For the taxable years ended December 31, Year 1, and December 31, Year 2, the deterministic reserve exceeded both the stochastic reserve and the sum of the policy net premium reserves for the contracts and thus was the statutory reserve reported on the NAIC annual statement. The excess of the deterministic reserve over the sum of the policy net premium reserves was allocated to individual contracts in the manner prescribed by VM-20. IC's statutory reserves at December 31, Year 3, were equal to the sum of the policy net premium reserves for the contracts because this amount exceeded the deterministic reserve and stochastic reserve as of that date. There was no change in the method of computing the deterministic reserve, the stochastic reserve, or the sum of the policy net premium reserves for the contracts in Year 3.

Situation 7. IC computes its reserves for certain life insurance contracts under VM-20. Under VM-20, the minimum statutory reserve for the contracts is equal to the sum of the policy minimum net premium reserves for the contracts, plus the excess, if any, of the greater of the deterministic reserve for the contracts and the stochastic reserve for the contracts. For the taxable years ended December 31, Year 1, and December 31, Year 2, the deterministic reserve exceeded both the stochastic reserve and the sum of the policy net premium reserves for the contracts, and thus was the statutory reserve reported on the NAIC annual statement. Pursuant to the requirements of VM-20, this excess was allocated to individual contracts. For purposes of computing the deterministic reserve, section 9.c.2 of VM-20 requires that

company experience mortality rates be determined for each mortality segment and that the company experience data used to determine those rates be updated at least every three years. Because of the VM-20 mandated update, the mortality rates used for certain segments to compute the deterministic reserve as of December 31, Year 2, differed from those used for purposes of computing the deterministic reserve as of December 31, Year 1.

Situation 8. On its Federal income tax return for the taxable year ended December 31, Year 1, IC reported tax reserves for certain fixed annuity contracts equal to 92.81% of the CARVM reserves for the contracts, because that amount for each contract exceeded the NSV for each contract. For the taxable year ended December 31, Year 2, IC instead reported tax reserves equal to the NSV of those same contracts because that amount for each contract was greater than 92.81% of the CARVM reserve for each contract. There was no change in the CARVM or in the method of computing the NSV for any contract in Year 2.

Situation 9. For purposes of computing its life insurance reserves under § 807(d), IC organizes its life insurance contracts into policy groupings or cells, each consisting of policies that are identical as to plan of insurance, year of issue or contract duration, age of issue, and other factors. In Year 2, after filing its Federal income tax return for the Year 1 taxable year, IC discovered that due to a computer programming error the policy cells for certain contracts issued during Year 1 had been omitted from the computation of IC's closing Year 1 tax reserves. Had the omitted policy cells been included in IC's closing Year 1 reserves, IC's life insurance reserves under § 807(d) at December 31, Year 1, would have been greater than the amounts originally claimed. The computer programming error took place in Year 1 and affected no other taxable year.

Situation 10. In Year 2, IC announced to certain of its policyholders that their policies would, at no increase in premium, henceforth carry an additional indemnity benefit should death result from a non-occupational vehicular accident. At the end of Year 2, IC included in its reserves for the relevant contracts an additional amount for the present value of this additional fu-

ture unaccrued obligation. The additional amount would be a life insurance reserve under § 816(b) and was determined under a tax reserve method within the meaning of § 807(d)(2).

LAW AND ANALYSIS

Section 811(a) provides that a life insurance company is required to compute its taxable income using an accrual method of accounting or, to the extent permitted under regulations prescribed by the Secretary of the Treasury or his delegate (Secretary), using a combination of an accrual method of accounting with another permissible method (other than the cash receipts and disbursements method). To the extent not inconsistent with the requirement in the preceding sentence or other Federal income tax rules applicable to life insurance companies, all such computations, however, are to be made in a manner consistent with the manner required for purposes of the annual statement approved by the NAIC.

Section 803(a)(2) requires income to be taken into account for any net decrease in reserves described in § 807(c). Similarly, § 805(a)(2) authorizes a deduction for any net increase in reserves described in § 807(c). Under § 807(c)(1), the reserves to which this treatment applies include "life insurance reserves (as defined in § 816(b))."

Section 807(d)(1) provides rules for determining the amount of life insurance reserves other than for purposes of § 816 (relating to qualification as a life insurance company). In general, the amount of the life insurance reserve with respect to any contract is the greater of the NSV of the contract or 92.81% of the reserve determined under § 807(d)(2). For a variable contract, the reserve is the sum of (1) the greater of the NSV of the contract and the portion of the reserve separately accounted for under § 817 plus (2) 92.81% of the excess of the total reserve determined under § 807(d)(2) over the NSV or § 817 reserve, as applicable.

Section 807(d)(2) provides that the reserve for any contract must be determined using the tax reserve method applicable to the contract. Section 807(d)(3) provides that the applicable tax reserve method is (1) in the case of a contract covered by

the CRVM, the CRVM prescribed by the NAIC that is applicable to the contract and in effect as of the date the reserve is determined and (2) in the case of a contract covered by the CARVM, the CARVM prescribed by the NAIC that is applicable to the contract and in effect as of the date the reserve is determined.

Section 807(f) provides that if the basis for determining any item referred to in § 807(c), which includes life insurance reserves, as of the close of any taxable year differs from the basis for determining that item as of the close of the preceding taxable year, then so much of the difference between (1) the amount of the item at the close of the taxable year, computed on the new basis, and (2) the amount of the item at the close of the taxable year, computed on the old basis, as is attributable to contracts issued before the taxable year, is taken into account under § 481(a) as an adjustment attributable to a change in method of accounting initiated by the taxpayer and made with the consent of the Secretary.

Section 1.807-4(a) of the Income Tax Regulations provides that a change in basis of computing an item referred to in § 807(c) is a change in method of accounting for purposes of § 1.446-1(e), unless § 1.446-1(e) provides otherwise. Accordingly, a change in basis under § 807(f) is a change in method of accounting subject to § 446(e) and the regulations thereunder. In accordance with § 446(e) and § 1.446-1(e), before computing an item described in § 807(c) under a new basis, a life insurance company must obtain the consent of the Commissioner of the Internal Revenue or his delegate (Commissioner) pursuant to administrative procedures prescribed by the Commissioner. See section 26.04 of Rev. Proc. 2019-43, 2019-48 I.R.B. 1107 (or successor) (generally providing the Commissioner's automatic consent for a life insurance company to change its basis of computing an item referred to in § 807(c)). Section 1.807-4(b) provides rules relating to the required adjustments under § 481(a). Section 1.807-4(c) describes how opening and closing balances of § 807(c) items are determined under § 807(a) and (b) when there is a change in basis under § 807(f).

As with the general rules for methods of accounting, a company adopts a basis of

computing an item referred to in § 807(c) when it uses a permissible basis of computing the item on the first Federal income tax return that reflects the item. If a company uses an impermissible basis of computing an item on the tax return for one taxable year, such computation does not constitute the adoption of a basis of computing the item. However, the consistent use of an impermissible basis of computing an item on two or more consecutively filed tax returns establishes the basis of computing the item. If a company has adopted a basis of computing an item, it may not change the basis by amending its prior tax returns. *See Rev. Rul. 90-38, 1990-1 C.B. 57; Rev. Rul. 2003-127, 2003-2 C.B. 1245; Thrasys, Inc. v. Commissioner, T.C. Memo 2018-199.* Additionally, a change in an item referred to in § 807(c) resulting from a change in underlying facts or from the correction of mathematical or posting errors is not a change in basis of computing the item under § 807(f). *See § 1.446-1(e)(2)(ii)(b).*

In Situation 1, IC applied the 92.81% factor of § 807(d) impermissibly on two consecutively filed Federal income tax returns – those for Year 1 and Year 2. IC therefore adopted an impermissible basis of computing reserves (old basis). Applying the 92.81% factor to the correct portion of the reserve determined under § 807(d)(2) (new basis) for Year 3 (year of change) is a change in basis under § 807(f). For the year of change, IC must obtain the consent of the Commissioner to make this change following the applicable administrative guidance under § 446(e) and § 1.446-1(e) and account for the difference between the tax reserve computed on the new basis as of December 31, Year 3, and the tax reserve computed on the old basis as of December 31, Year 3, attributable to contracts issued before Year 3, as an adjustment under § 481(a).

In Situation 2, a change to VM-21 imposes a new computational requirement as a component of CARVM on issuers of variable annuities with guaranteed minimum benefits (new basis). The requirement applies to the determination of reserves as of December 31, Year 4 (year of change), and revises the prior VM-21 requirements (old basis) with regard to contracts issued after December 31, Year 1. Because for Federal income tax purpos-

es § 807(d)(3)(B)(ii) requires the use of the CARVM “which is applicable to the contract and in effect as of the date the reserve is determined,” the change to VM-21 is required to be taken into account for purposes of applying § 807(d). The new requirement represents a change in the methodology for satisfying the CARVM as prescribed by the NAIC. The change is therefore a change in basis under § 807(f). IC must obtain the consent of the Commissioner to make this change and must account for the difference between the tax reserve computed on the new basis as of December 31, Year 4, and the tax reserve computed on the old basis as of December 31, Year 4, attributable to contracts issued after Year 1 and before Year 4 as an adjustment under § 481(a).

In Situation 3, as in Situation 2, the new requirement (new basis) is a change in the methodology for satisfying CARVM and is therefore a change in basis under § 807(f). IC must obtain the consent of the Commissioner to make this change. Because the change only applies to contracts issued after Year 3, the change is made on a cut-off basis and no adjustment is required under § 481(a). *See section 2.07 of Rev. Proc. 2015-13.*

In Situation 4, a newly-issued Actuarial Guideline imposes a new computational requirement for the CRVM for universal life contracts (new basis). The requirement applies to the determination of reserves as of December 31, Year 3 (year of change), and revises the prior CRVM requirements (old basis) with regard to contracts issued before Year 1. Because for Federal income tax purposes § 807(d)(3)(B)(i) requires the use of the CRVM “which is applicable to the contract and in effect as of the date the reserve is determined,” the new Actuarial Guideline is required to be taken into account for purposes of applying § 807(d). The new requirement represents a change in the methodology for satisfying the CRVM prescribed by the NAIC. The change is therefore a change in basis under § 807(f). IC must obtain the consent of the Commissioner to make this change and account for the difference between the tax reserve computed on the new basis as of December 31, Year 3, and the tax reserve computed on the old basis as of December 31, Year 3, as an adjustment under § 481(a).

In Situation 5, a group of contracts that is subject to VM-20 passes both the stochastic and deterministic exclusion tests of VM-20, and IC elects to exclude the group from both the stochastic and deterministic reserve calculations. As a result, the statutory reserve with regard to each contract is equal to the policy net premium reserve, and the tax reserve is the greater of 92.81% of this amount or the contract’s NSV (old basis). The NAIC changes the Valuation Manual to require the use of the Year 1 CSO mortality tables to compute the net premium reserves for all contracts subject to VM-20 (new basis), effective for the determination of statutory reserves (and, as a result, tax reserves) as of December 31, Year 3 (year of change). IC’s statutory reserves for each of the contracts in the group of contracts will be lower than they would have been had there not been a change in tables. The new requirement represents a change in the methodology for satisfying the CRVM prescribed by the NAIC. The change is therefore a change in basis under § 807(f). IC must obtain the consent of the Commissioner to make this change and account for the difference between the tax reserve computed on the new basis as of December 31, Year 3, and the tax reserve computed on the old basis as of December 31, Year 3, as an adjustment under § 481(a).

In Situation 6, the comparison of the sum of the policy net premium reserves to the stochastic reserve and deterministic reserve is required under VM-20, which is the CRVM and the tax reserve method required to be used under § 807(d)(3). As a result, a change from using the deterministic reserve to using the sum of the policy net premium reserves is not a change in basis but rather a function of the year-over-year change in those amounts. The result would be the same if there had been a statutory deterministic reserve in Years 1, 2, and 3, and under the terms of VM-20 some contracts were not allocated any deterministic reserve in Years 1 and 2 but were allocated a portion of the deterministic reserve in Year 3.

In Situation 7, the statutory reserve for the relevant contracts was equal to the deterministic reserve, and the mortality rates that IC used for purposes of computing the deterministic reserve as of December 31, Year 2, differed from those used for

purposes of computing the deterministic reserve as of December 31, Year 1. The rates were different, however, by reason of a requirement of VM-20 that the company experience rates be determined for each mortality segment and that experience data used to determine those rates be updated at least every three years. The update in mortality rates, therefore, was by operation of the reserve methodology of VM-20, which IC used consistently in both Year 1 and Year 2. The change therefore is not a change in basis of computing reserves.

In Situation 8, IC reported tax reserves as of December 31, Year 1, equal to 92.81% of the CARVM reserve determined under § 807(d)(2) for certain of its fixed annuity contracts because that amount for each contract exceeded the NSV for each of those contracts. It reported tax reserves as of December 31, Year 2, equal to the NSV of the contracts because this amount for each contract exceeded 92.81% of the CARVM reserve determined under § 807(d)(2) for each contract. Just as in Situation 6, where the reserve methodology entailed a comparison of the deterministic reserve and the sum of the policy net premium reserves, here the reserve methodology entails a comparison of two amounts, in this case prescribed by § 807(d) itself. The fact that year-over-year changes in these amounts results in different calculated amounts being taken into account does not change the principle that the comparison is inherent in the reserve methodology itself, and applying that methodology consistently is not a change in basis of computing reserves.

In Situation 9, the understatement of IC's reserves at December 31, Year 1, caused by the omission of the policy cells for certain contracts issued during Year 1 is the result of a mathematical or posting error. Correction of IC's omission of reserves for certain contracts is not a change in basis of computing reserves. See § 1.446-1(e)(2)(ii)(b). Because this mathematical or posting error occurred only on its Federal income tax return for Year 1, IC should file an amended return for that taxable year, restating the closing reserves at December 31, Year 1, to reflect the correct reserve amounts and taking these recomputed reserves into account in

redetermining its life insurance company taxable income for that year.

In Situation 10, there was no reserve attributable to the new life insurance benefit at the close of Year 1 because the new life insurance benefit did not exist before the company became contractually liable for it in Year 2. The addition of the new benefit in Year 2 is a change in fact. An increase in reserve resulting from a change in fact is not a change in basis of computing reserves. See § 1.446-1(e)(2)(ii)(b). Accordingly, the increase in reserves solely to provide for the additional contractual obligation of IC pursuant to the additional benefits provided during Year 2 under existing policies is not attributable to a change in basis of computing reserves.

HOLDINGS

(1) In Situation 1, a change in the consistent, impermissible application of the 92.81% factor prescribed by § 807(d) is a change in basis.

(2) In Situation 2, an NAIC Valuation Manual change in the methodology for computing reserves on previously-issued contracts is a change in basis.

(3) In Situation 3, an NAIC Valuation Manual change in the methodology for computing reserves on contracts issued in the year of the change is a change in basis.

(4) In Situation 4, a change in Actuarial Guideline that results in a change in the methodology for computing reserves is a change in basis.

(5) In Situation 5, a change in the NAIC-prescribed mortality tables is a change in basis.

(6) In Situation 6, a change under VM-20 from the deterministic reserve to the sum of the policy net premium reserves due solely to the fact that the sum of the policy net premium reserves is greater is not a change in basis.

(7) In Situation 7, an experience-based update in mortality rates as required by VM-20 to determine the deterministic reserve is not a change in basis.

(8) In Situation 8, a change from tax reserves based on 92.81% of the reserve determined under § 807(d)(2) to tax reserves based on the contract NSV resulting solely from a year-over-year change in which is greater is not a change in basis.

(9) In Situation 9, an inclusion of policy cells that were previously omitted on a single return is a mathematical or posting error that is not a change in basis.

(10) In Situation 10, the increase in reserves to provide solely for new benefits on existing contracts is not a change in basis.

DRAFTING INFORMATION

The principal author of this revenue ruling is Ian Follansbee of the Office of the Associate Chief Counsel (Financial Institutions and Products). For further information regarding this revenue ruling contact Ian Follansbee at 202-317-4453 (not a toll-free number).

26 CFR 1.163(j)-1 through -11, etc.

T.D. 9905

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Parts 1

Limitation on Deduction for Business Interest Expense

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance about the limitation on the deduction for business interest expense after amendment of the Internal Revenue Code (Code) by the provisions commonly known as the Tax Cuts and Jobs Act, which was enacted on December 22, 2017, and the Coronavirus Aid, Relief, and Economic Security Act, which was enacted on March 27, 2020. The regulations provide guidance to taxpayers on how to calculate the limitation, what constitutes interest for purposes of the limitation, which taxpayers and trades or businesses are subject to the limitation, and how the limitation applies in consolidated group, partnership, international, and other contexts.

DATES: *Effective date:* The regulations are effective on November 13, 2020. Sections 1.163(j)-1 through 1.163(j)-11 are generally applicable to taxable years beginning on or after November 13, 2020.

Applicability dates: For dates of applicability, see §§1.163(j)-1(c), 1.163(j)-2(k), 1.163(j)-3(d), 1.163(j)-4(g), 1.163(j)-5(h), 1.163(j)-6(p), 1.163(j)-9(k), 1.163(j)-10(f), 1.163(j)-11(d), 1.263A-15(a), 1.381(c)(20)-1(d), 1.382-2(b)(3), 1.382-5(f), 1.382-6(h), 1.383-1(j), 1.446-3(j)(2), 1.469-11(a)(3) and (4), 1.1502-36(h)(2), 1.1502-99(d), and 1.1504-4(i).

Pursuant to section 7805(b)(7), taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may apply the rules set forth in §§1.163(j)-1 through 1.163(j)-11, in their entirety, to a taxable year beginning after December 31, 2017, and before November 13, 2020, so long as the taxpayers and their related parties consistently apply these rules, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-90, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year. However, see §1.163(j)-1(c) for the applicability date rules relating to notional principal contracts and the interest anti-avoidance rule; see also part II(E)(2) (relating to notional principal contracts) and part II(E)(4) (relating to the interest anti-avoidance rule) of the Summary of Comments and Revisions section of this preamble.

Alternatively, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may rely on proposed §§1.163(j)-1 through 1.163(j)-11, which were issued in a notice of proposed rulemaking (REG-106089-18) and published on December 28, 2018, in the **Federal Register** (83 FR 67490), in their entirety, for a taxable year beginning after December 31, 2017, and before November 13, 2020, so long as the taxpayers and their related parties consistently apply proposed §§1.163(j)-1 through -11, and, if applicable, proposed §§1.263A-9, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1,

1.469-9, 1.469-11, 1.882-5, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year. Notwithstanding the preceding sentence, taxpayers applying the provisions in the notice of proposed rulemaking may apply §1.163(j)-1(b)(1)(iii) in these final regulations for taxable years beginning after December 31, 2017.

With respect to §1.382-2 and, if applicable, §§1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §1.382-2), and with respect to §1.382-5 and, if applicable, §§1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §1.382-5), the regulations apply to testing dates and ownership changes, respectively, occurring on or after November 13, 2020.

Taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of §1.382-2 and, if applicable, §§1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §1.382-2), and §1.382-5 and, if applicable, §§1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §1.382-5), to a testing date or an ownership change, respectively, that occurs in a taxable year beginning after December 31, 2017, and before November 13, 2020, so long as the taxpayers and their related parties consistently apply the rules of §§1.163(j)-1 through -11, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, and 1.383-1, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-90, 1.1502-91, 1.1502-95, 1.1502-98, 1.1502-99, or 1.1504-4, Russell Jones, (202) 317-5357, John Lovelace, (202) 317-5363, Aglaia Ovtchinnikova, (202) 317-6975, or Marie C. Milnes-Vasquez, (202) 317-3181; concerning §1.163(j)-6, §1.469-9(b)(2), §1.469-11, §1.704-1, §1.1362-3, §1.1368-1, or §1.1377-1, William Kostak, (202) 317-6852, Anthony McQuillen, (202) 317-5027, or Adrienne Mikolashek, (202) 317-5050; concerning §1.163(j)-7, §1.163(j)-8, or §1.882-5, Azeka Abramoff, (202) 317-3800, Angela Holland, (202) 317-5474, or Steve Jensen, (202) 317-6938; concerning §1.446-3, §1.860C-2, RICs, REITs, REMICs, and the definition of the term “interest”, Michael Chin, (202) 317-5846 (not toll-free numbers).

18) and published on December 28, 2018, in the **Federal Register** (83 FR 67490), with respect to a testing date or an ownership change, respectively, that occurs in a taxable year beginning after December 31, 2017, and before November 13, 2020, so long as the taxpayers and their related parties consistently apply the rules of proposed §§1.163(j)-1 through -11, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, and 1.383-1, and, if applicable, proposed §§1.263A-9, 1.381(c)(20)-1, 1.469-9, 1.469-11, 1.882-5, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-90, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year. As noted previously, taxpayers relying on the provisions in the notice of proposed rulemaking may apply §1.163(j)-1(b)(1)(iii) in these final regulations for taxable years ending after December 31, 2017.

FOR FURTHER INFORMATION
CONTACT: Concerning §1.163(j)-1, §1.163(j)-2, §1.163(j)-3, §1.163(j)-9, §1.263A-9, or §1.263A-15, Sophia Wang, (202) 317-4890 or Justin Grill, (202) 317-4850; concerning §1.163(j)-4, §1.163(j)-5, §1.163(j)-10, §1.163(j)-11, §1.381(c)(20)-1, §1.382-1, §1.382-2, §1.382-5, §1.382-6, §1.382-7, §1.383-0, §1.383-1, §1.1502-13, §1.1502-21, §1.1502-36, §1.1502-79, §1.1502-90, §1.1502-91, §1.1502-95, §1.1502-98, §1.1502-99, or §1.1504-4, Russell Jones, (202) 317-5357, John Lovelace, (202) 317-5363, Aglaia Ovtchinnikova, (202) 317-6975, or Marie C. Milnes-Vasquez, (202) 317-3181; concerning §1.163(j)-6, §1.469-9(b)(2), §1.469-11, §1.704-1, §1.1362-3, §1.1368-1, or §1.1377-1, William Kostak, (202) 317-6852, Anthony McQuillen, (202) 317-5027, or Adrienne Mikolashek, (202) 317-5050; concerning §1.163(j)-7, §1.163(j)-8, or §1.882-5, Azeka Abramoff, (202) 317-3800, Angela Holland, (202) 317-5474, or Steve Jensen, (202) 317-6938; concerning §1.446-3, §1.860C-2, RICs, REITs, REMICs, and the definition of the term “interest”, Michael Chin, (202) 317-5846 (not toll-free numbers).
ADDRESSES: Submit electronic submissions to the Federal eRulemaking Portal at <http://www.regulations.gov> (indicate

IRS and REG-106089-18) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) will publish for public availability any comment received to its public docket, whether submitted electronically or in hard copy. Send hard copy submissions to CC:PA:LPD:PR (REG-106089-18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

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This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 163(j) of the Code. The final regulations reflect amendments to section 163(j) made by Public Law 115-97, 131 Stat. 2054 (December 22, 2017), commonly referred to as the Tax Cuts and Jobs Act (the TCJA) and the Coronavirus Aid, Relief, and Economic Security Act, Public Law No. 116-136 (2020) (the CARES Act). Section 13301(a) of the TCJA amended section 163(j) by remov-

ing prior section 163(j)(1) through (9) and adding section 163(j)(1) through (10) and significantly changed the limitation for deducting interest on certain indebtedness. The provisions of section 163(j) as amended by section 13301 of the TCJA are effective for tax years beginning after December 31, 2017. The CARES Act further amended section 163(j) by redesignating section 163(j)(10), as amended by the TCJA, as new section 163(j)(11), and adding a new section 163(j)(10) providing special rules for applying section 163(j) to taxable years beginning in 2019 or 2020. All references to “old section 163(j)” in this document are references to section 163(j) prior to amendment by the TCJA and the CARES Act, and all references to “section 163(j)” are references to section 163(j) as amended by the TCJA and the CARES Act.

Old section 163(j) generally disallowed a deduction for “disqualified interest” paid or accrued by a corporation in a taxable year if the payor’s debt-to-equity ratio exceeded 1.5 to 1.0, and if the payor’s net interest expense exceeded 50 percent of its adjusted taxable income. Disqualified interest included interest paid or accrued to (1) related parties when no Federal income tax was imposed with respect to such interest; (2) unrelated parties in certain instances in which a related party guaranteed the debt; or (3) certain real estate investment trusts (REIT). Interest amounts disallowed for any taxable year under old section 163(j) were treated as interest paid or accrued in the succeeding taxable year and could be carried forward indefinitely. In addition, any excess limitation, the excess of the taxpayer’s net interest expense over 50 percent of its adjusted taxable income, could be carried forward three years. The interest limitation under old section 163(j) was designed to prevent a taxpayer from deducting interest from its U.S. taxable income without a corresponding inclusion in U.S. taxable income by the recipient, or to prevent the stripping of earnings from the U.S. tax system.

In contrast, section 163(j) now applies broadly to all business interest expense regardless of whether the related indebtedness is between related parties or incurred by a corporation, and regardless of the taxpayer’s debt-to-equity ratio. Section

163(j) provides an entirely new limitation on the deduction for “business interest expense” of all taxpayers, including, for example, individuals, corporations, partnerships, S corporations, unless a specific exclusion applies under section 163(j). Although certain terms are used in both old section 163(j) and section 163(j), such as “adjusted taxable income,” such terms have been updated in the final regulations to reflect the new limitation under section 163(j).

Section 163(j) generally limits the amount of business interest expense that can be deducted in the current taxable year (also referred to in this preamble as the current year). Under section 163(j)(1), the amount allowed as a deduction for business interest expense is limited to the sum of (1) the taxpayer’s business interest income for the taxable year; (2) 30 percent of the taxpayer’s adjusted taxable income (ATI) for the taxable year (30 percent ATI limitation); and (3) the taxpayer’s floor plan financing interest expense for the taxable year. As further described later in this Background section, section 163(j)(10), as amended by the CARES Act, provides special rules relating to the 30 percent ATI limitation for taxable years beginning in 2019 or 2020. The section 163(j) limitation applies to all taxpayers, except for certain small businesses that meet the gross receipts test in section 448(c) and certain trades or businesses listed in section 163(j)(7).

Section 163(j)(2) provides that the amount of any business interest not allowed as a deduction for any taxable year as a result of the section 163(j) limitation is carried forward and treated as business interest paid or accrued in the next taxable year. In contrast to old section 163(j), section 163(j) does not allow the carryforward of any excess limitation.

Section 163(j)(3) provides that the section 163(j) limitation does not apply to a taxpayer, other than a tax shelter as described in section 448(a)(3), with average annual gross receipts of \$25 million or less, determined under section 448(c) (including any adjustment for inflation under section 448(c)(4)). For taxpayers other than corporations or partnerships, section 163(j)(3) provides that the gross receipts test is determined for purposes of section

163(j) as if the taxpayer were a corporation or partnership.

Section 163(j)(4) provides special rules for applying section 163(j) in the case of partnerships and S corporations. Section 163(j)(4)(A) requires that the limitation on the deduction for business interest expense be applied at the partnership level, and that a partner’s ATI be increased by the partner’s share of the partnership’s excess taxable income, as defined in section 163(j)(4)(C), but not by the partner’s distributive share of the partnership’s income, gain, deduction, or loss. Section 163(j)(4)(B)(i) provides that the amount of partnership business interest expense limited by section 163(j)(1) is carried forward at the partner level. Section 163(j)(4)(B)(ii) provides that excess business interest expense allocated to a partner and carried forward is available to be deducted in a subsequent year only if, and to the extent, the partnership allocates excess taxable income to the partner. As further described later in this Background section, section 163(j)(10)(A)(ii)(II), as amended by the CARES Act, provides a special rule for excess business interest expense allocated to a partner in a taxable year beginning in 2019. Section 163(j)(4)(B)(iii) provides basis adjustment rules for a partner that is allocated excess business interest expense. Section 163(j)(4)(D) provides that rules similar to the rules of section 163(j)(4)(A) and (C) apply to S corporations and S corporation shareholders.

Section 163(j)(5) and (6) defines “business interest” and “business interest income,” respectively, for purposes of section 163(j). Generally, these terms include interest expense and interest includable in gross income that is properly allocable to a trade or business (as defined in section 163(j)(7)) and do not include investment income or investment expense within the meaning of section 163(d). The legislative history states that “a corporation has neither investment interest nor investment income within the meaning of section 163(d). Thus, interest income and interest expense of a corporation is properly allocable to a trade or business, unless such trade or business is otherwise explicitly excluded from the application of the provision.” H. Rept. 115-466, at 386, fn. 688 (2017).

Under section 163(j)(7), the limitation on the deduction for business interest expense in section 163(j)(1) does not apply to certain trades or businesses (excepted trades or businesses). The excepted trades or businesses are the trade or business of providing services as an employee, electing real property businesses, electing farming businesses, and certain regulated utility businesses.

Section 163(j)(8) defines ATI as the taxable income of the taxpayer without regard to the following: items not properly allocable to a trade or business; business interest and business interest income; net operating loss (NOL) deductions; and deductions for qualified business income under section 199A. ATI also generally excludes deductions for depreciation, amortization, and depletion with respect to taxable years beginning before January 1, 2022, and it includes other adjustments provided by the Secretary of the Treasury.

Section 163(j)(9) defines “floor plan financing interest” as interest paid or accrued on “floor plan financing indebtedness.” These provisions allow taxpayers incurring interest expense for the purpose of securing an inventory of motor vehicles held for sale or lease to deduct the full expense without regard to the section 163(j) limitation.

Under section 163(j)(10)(A)(i), the amount of business interest that is deductible under section 163(j)(1) for taxable years beginning in 2019 or 2020 is computed using 50 percent, rather than 30 percent, of the taxpayer’s ATI for the taxable year (50 percent ATI limitation). A taxpayer may elect not to apply the 50 percent ATI limitation to any taxable year beginning in 2019 or 2020, and instead apply the 30 percent ATI limitation. The election must be made separately for each taxable year. Once the taxpayer makes the election, the election may not be revoked without the consent of the Secretary of the Treasury or his delegate. See section 163(j)(10)(A)(iii).

Sections 163(j)(10)(A)(ii)(I) and 163(j)(10)(A)(iii) provide that, in the case of a partnership, the 50 percent ATI limitation does not apply to partnerships for taxable years beginning in 2019, and the election to not apply the 50 percent ATI limitation may be made only for taxable years begin-

ning in 2020. This election may be made only by the partnership and may not be revoked without the consent of the Secretary of the Treasury or his delegate. Under section 163(j)(10)(A)(ii)(II), however, a partner treats 50 percent of its allocable share of a partnership’s excess business interest expense for 2019 as a business interest expense in the partner’s first taxable year beginning in 2020 that is not subject to the section 163(j) limitation (50 percent EBIE rule). The remaining 50 percent of the partner’s allocable share of the partnership’s excess business interest expense remains subject to the section 163(j) limitation applicable to excess business interest expense carried forward at the partner level. A partner may elect out of the 50 percent EBIE rule.

Section 163(j)(10)(B)(i) allows a taxpayer to elect to use its ATI for the last taxable year beginning in 2019 for the taxpayer’s ATI in determining the taxpayer’s section 163(j) limitation for any taxable year beginning in 2020.

Section 163(j)(11) provides cross-references to provisions requiring that electing farming businesses and electing real property businesses excepted from the section 163(j) limitation use the alternative depreciation system (ADS), rather than the general depreciation system for certain types of property. The required use of ADS results in the inability of these electing trades or businesses to use the additional first-year depreciation deduction under section 168(k) for those types of property.

On December 28, 2018, the Treasury Department and the IRS (1) published proposed regulations under section 163(j) in a notice of proposed rulemaking (REG-106089-18) (proposed regulations) in the **Federal Register** (83 FR 67490), and (2) withdrew the notice of proposed rulemaking (1991-2 C.B. 1040) published in the **Federal Register** on June 18, 1991 (56 FR 27907) (as corrected by 56 FR 40285 (August 14, 1991)) to implement rules under old section 163(j) (1991 Proposed Regulations). The proposed regulations were issued following guidance announcing and describing regulations intended to be issued under section 163(j). See Notice 2018-28, 2018-16 I.R.B. 492.

A public hearing was held on February 27, 2019. The Treasury Department

and the IRS received written comments responding to the notice of proposed rulemaking. Comments received before the final regulations were substantially developed, including all comments received on or before the deadline for comments on February 26, 2019, were carefully considered in developing the final regulations.

Copies of the comments received are available for public inspection at <http://www.regulations.gov> or upon request. After consideration of the comments received and the testimony at the public hearing, this Treasury decision adopts the proposed regulations as revised in response to such comments and testimony as described in the Summary of Comments and Explanation of Revisions section. The revisions are discussed in this preamble. Concurrently with the publication of the final regulations, the Treasury Department and the IRS are publishing in the Proposed Rule section of this edition of the **Federal Register** (RIN 1545-B076) a notice of proposed rulemaking providing additional proposed regulations under section 163(j) (REG-107911-18) (Concurrent NPRM). The Concurrent NPRM includes proposed regulations relating to changes made to section 163(j) under the CARES Act.

On September 10, 2019, the Treasury Department and the IRS published proposed regulations under section 382(h) (REG-125710-18) in the **Federal Register** (84 FR 47455) (the September 2019 section 382 proposed regulations). The September 2019 section 382 proposed regulations included a rule to clarify that section 382 disallowed business interest carryforwards are not treated as recognized built-in losses (RBILs). No formal comments were received on this rule during the comment period for the September 2019 section 382 proposed regulations.

On April 10, 2020, the Treasury Department and the IRS released Revenue Procedure 2020-22, 2020-18 I.R.B. 745, to provide the time and manner of making a late election, or withdrawing an election under section 163(j)(7)(B) to be an electing real property trade or business, or under section 163(j)(7)(C) to be an electing farming business, for taxable years beginning in 2018, 2019, or 2020. Reve-

nue Procedure 2020-22 also provides the time and manner of making or revoking elections provided by the CARES Act under section 163(j)(10) for taxable years beginning in 2019 or 2020. As described earlier in this Background section, these elections are: (1) to not apply the 50 percent ATI limitation under section 163(j)(10)(A)(iii); (2) to use the taxpayer's ATI for the last taxable year beginning in 2019 to calculate the taxpayer's section 163(j) limitation in 2020 under section 163(j)(10)(B); and (3) for a partner to elect out of the 50 percent EBIE rule under section 163(j)(10)(A)(ii)(II).

Summary of Comments and Explanation of Revisions

I. Overview

The Treasury Department and the IRS received approximately 120 written comments in response to the notice of proposed rulemaking. Most of the comments addressing the proposed regulations are summarized in this Summary of Comments and Explanation of Revisions section. However, comments merely summarizing or interpreting the proposed regulations or recommending statutory revisions generally are not discussed in this preamble. Additionally, comments outside the scope of this rulemaking are generally not addressed in this Summary of Comments and Explanation of Revisions section.

The Treasury Department and the IRS continue to study comments on certain issues related to section 163(j), including issues that are beyond the scope of the final regulations (or the Concurrent NPRM in the Proposed Rules section of this issue of the **Federal Register**), and may discuss those comments if future guidance on those issues is published.

The final regulations retain the same basic structure as the proposed regulations, with certain revisions.

II. Comments on and Changes to Proposed §1.163(j)-1: Definitions

Section 1.163(j)-1 provides definitions of the terms used in the final regulations. The following discussion addresses comments relating to proposed §1.163(j)-1.

A. Definition and Calculation of Adjusted Taxable Income (ATI) – Proposed §1.163(j)-1(b)(1)

1. Taxable Income and Tentative Taxable Income

Consistent with section 163(j)(8), proposed §1.163(j)-1(b)(1) defines ATI as the “taxable income” of the taxpayer for the taxable year, with certain specified adjustments. Thus, in calculating ATI, the proposed regulations begin with taxable income as the amount to which adjustments are made when calculating ATI. Proposed §1.163(j)-1(b)(37)(i) generally provides that the term “taxable income” has the meaning provided in section 63, but for purposes of section 163(j), is computed without regard to the application of section 163(j) and the section 163(j) regulations. However, in some instances in the section 163(j) regulations the term “taxable income” is used to indicate the amount calculated under section 63 for purposes other than calculating ATI.

To prevent confusion from using the term “taxable income” in different contexts (in determining ATI, and for purposes other than determining ATI), the final regulations use a new term, “tentative taxable income,” to refer to the amount to which adjustments are made in calculating ATI. See §1.163(j)-1(b)(43). Tentative taxable income is generally determined in the same manner as taxable income under section 63, but is computed without regard to the application of the section 163(j) limitation, and without regard to any disallowed business interest expense carryforwards. This definitional change avoids confusion with section 63 taxable income, avoids creating an iterative loop that takes into account the section 163(j) limitation, and ensures that disallowed business interest expense carryforwards are taken into account only once in testing business interest expense against the limitation.

Therefore, “tentative taxable income” is used in the final regulations and, where appropriate, in this Summary of Comments and Explanation of Provisions section, to describe the starting point for the calculation of ATI in the final regulations. See part II(G)(1) of this Summary of Comments and Explanation of Revisions section.

2. Adjustments to ATI for Amounts Incurred as Depreciation, Amortization, and Depletion

Section 163(j)(8)(A)(v) defines ATI as the taxable income of the taxpayer computed without regard to certain items, including any deduction allowable for depreciation, amortization, or depletion for taxable years beginning before January 1, 2022. Consistent with section 163(j)(8)(A)(v), proposed §1.163(j)-1(b)(1)(i) requires an addback to taxable income of deductions for depreciation, amortization, and depletion for taxable years beginning before January 1, 2022. In general, section 263A requires certain taxpayers that manufacture or produce inventory to capitalize all direct costs and certain indirect costs into the basis of the property produced or acquired for resale. Depreciation, amortization or depletion that is capitalized into inventory under section 263A is recovered through cost of goods sold as an offset to gross receipts in computing gross income; cost of goods sold reduces the amount realized upon the sale of goods that is used to calculate gross income and is technically not a deduction that is applied against gross income in determining taxable income. See §§1.61-3(a) and 1.263A-1(e)(3)(ii)(I) and (J). Thus, proposed §1.163(j)-1(b)(1)(iii) provides that depreciation, amortization, or depletion expense capitalized into inventory under section 263A is not a depreciation, amortization, or depletion deduction, that may be added back to taxable income in computing ATI. The preamble to the proposed regulations further noted that an amount that is incurred as depreciation, amortization, or depletion, but that is capitalized to inventory under section 263A and included in costs of goods sold, is not a deduction for depreciation, amortization, or depletion for purposes of section 163(j).

Many commenters raised questions and concerns regarding proposed §1.163(j)-1(b)(1)(iii) and requested that the addback of deductions for depreciation, amortization, and depletion include any amount that is required to be capitalized into inventory under section 263A. First, commenters stated that the provision does not reflect congressional intent, which was to determine ATI using earnings before interest, tax, depreciation, and amortiza-

tion (EBITDA) through taxable year 2021 and using earnings before interest and tax (EBIT) thereafter. Commenters noted that the proposed rule would eliminate this distinction for certain manufacturers or producers of property for sale. Commenters pointed out that capital-intensive businesses that manufacture or produce inventory are at a disadvantage in comparison to other types of businesses because the manufacturers or producers would have to compute ATI without an addback for a substantial amount of their depreciation, and that neither section 163(j) nor its legislative history indicates an intent by Congress to treat manufacturers or producers of inventory differently from other trades or businesses. Commenters also contrasted the language in section 163(j)(8)(A)(iv), which allows an addback of “the amount of any deduction *allowed* under section 199A,” with section 163(j)(8)(A)(v), which allows an addback of “any deduction *allowable* for depreciation, amortization, or depletion” (emphasis added).

The phrase “allowed or allowable” is used in other Code provisions. Section 1016(a)(2) provides that, in calculating tax basis, adjustments are required for depreciation to the extent such amounts are allowed as deductions in computing taxable income but not less than the amounts allowable. Some commenters noted that depreciation allowable as a deduction for purposes of section 1016(a)(2) should be read consistently with depreciation allowable as a deduction for purposes of section 163(j), and that section 1016(a)(2) treats depreciation capitalized into inventory under section 263A as deductions allowable. As provided in section 263A(a)(2) and §1.263A-1(c)(2), an amount is not subject to capitalization under section 263A unless such cost may be taken into account in computing taxable income.

The Treasury Department and the IRS have reconsidered proposed §1.163(j)-1(b)(1)(iii). Accordingly, under the final regulations, the amount of any depreciation, amortization, or depletion that is capitalized into inventory under section 263A during taxable years beginning before January 1, 2022, is added back to tentative taxable income as a deduction for depreciation, amortization, or depletion when calculating ATI for that taxable year, regardless of the period in which the capitalized

amount is recovered through cost of goods sold. For example, if a taxpayer capitalized an amount of depreciation to inventory under section 263A in the 2020 taxable year, but the inventory is not sold until the 2021 taxable year, the entire capitalized amount of depreciation is added back to tentative taxable income in the 2020 taxable year, and such capitalized amount of depreciation is not added back to tentative taxable income when the inventory is sold and recovered through cost of goods sold in the 2021 taxable year. Under such facts, the entire capitalized amount is deemed to be included in the calculation of the taxpayer’s tentative taxable income for the 2020 taxable year, regardless of the period in which the capitalized amount is actually recovered. See §§1.163(j)-1(b)(1)(iii) and 1.163(j)-2(h)(3).

Further, in order to treat similarly situated taxpayers similarly, the final regulations allow taxpayers, and their related parties within the meaning of sections 267(b) and 707(b)(1), otherwise relying on the proposed regulations in their entirety under §1.163(j)-1(c) to alternatively choose to follow §1.163(j)-1(b)(1)(iii) rather than proposed §1.163(j)-1(b)(1)(iii). See §1.163(j)-1(c).

The Treasury Department and the IRS note that neither proposed §1.163(j)-1(b)(1) nor §1.163(j)-1(b)(1) determines the amount of allowed or allowable depreciation, amortization, or depletion for purposes of any other Code section (for example, sections 167(c), 1016(a)(2), 1245, and 1250). Accordingly, no inference should be drawn regarding the determination of the amount of allowed or allowable depreciation, amortization, or depletion under any other Code section based on proposed §1.163(j)-1(b)(1) or §1.163(j)-1(b)(1).

In addition to comments about whether depreciation, amortization, and depletion include amounts recovered through cost of goods sold, a commenter requested clarification that section 179 deductions are depreciation deductions for purposes of section 163(j)(8)(A)(v) and proposed §1.163(j)-1(b)(1)(i)(D). Section 179 deductions are allowed to be added back as amortization under proposed §1.163(j)-1(b)(1)(i)(E), which allows an addback of any deduction for the amortization of intangibles (for example, under section 167 or 197) and other amortized expenditures

(for example, under section 195(b)(1)(B), 248, or 1245(a)(2)(C)), for taxable years beginning before January 1, 2022. Section 1245(a)(2)(C) provides “any deduction allowable under sections 179, 179B, 179C, 179D, 179E, 181, 190, 193, or 194 shall be treated as if it were a deduction allowable for amortization.” Because section 179 deductions are included as amortization under proposed §1.163(j)-1(b)(1)(i)(E), rather than as depreciation under proposed §1.163(j)-1(b)(1)(i)(D), no clarification is necessary in the final regulations. See §1.163(j)-1(b)(1)(i)(E).

3. ATI and Floor Plan Financing Interest

Consistent with section 163(j)(8)(A)(ii), the proposed regulations provide that any business interest expense or business interest income is added back to (in the case of business interest expense) or subtracted from (in the case of business interest income) taxable income in computing ATI. Because business interest expense includes floor plan financing interest expense, ATI is further adjusted by subtracting from it any floor plan financing interest expense under proposed §1.163(j)-1(b)(1)(ii)(B). Floor plan financing interest expense is also separately included in the section 163(j) limitation as provided in section 163(j)(1)(C).

One commenter suggested that floor plan financing interest expense should not be subtracted from ATI because such adjustment is inconsistent with the statute and the ordering implied by section 168(k)(9)(B). The addition of floor plan financing interest expense as business interest in the calculation of ATI is consistent with section 163(j)(8)(A)(ii). The purpose of subtracting floor plan financing interest expense from tentative taxable income to compute ATI is to avoid the double benefit that would result upon separately including floor plan financing interest expense in the computation of the section 163(j) limitation. If floor plan financing interest expense were included in ATI without a corresponding subtraction, thus resulting in an increased ATI, taxpayers with such expense would be able to increase their section 163(j) limitation not only by the separately stated floor plan financing interest under section 163(j)(1)(C), but also by the inclusion of

such amount in ATI, which would permit a deduction of \$1.30 (or \$1.50, if the 50 percent ATI limitation is applicable) of business interest expense for each \$1 of floor plan financing interest expense. Although it is clear that Congress did not intend to limit the deduction for floor plan financing interest expense under section 163(j), there is no indication that Congress also intended to provide the additional benefit of an increased ATI related to floor plan financing interest expense. Therefore, under the authority granted in section 163(j)(8)(B), the final regulations adopt the proposed rule without change to include a subtraction of floor plan financing interest expense from tentative taxable income in computing ATI.

Several commenters also requested clarification and submitted recommendations on the interaction between section 168(k)(9) and section 163(j). Section 168(k)(9)(B) provides that the additional first-year depreciation deduction is not allowed for any property used in a trade or business that has had floor plan financing indebtedness (as defined in section 163(j)(9)), if the floor plan financing interest related to such indebtedness was taken into account under section 163(j)(1)(C).

First, commenters requested that floor plan financing indebtedness not be treated as taken into account if the sum of business interest income and 30 percent of ATI (the sum of section 163(j)(1)(A) and section 163(j)(1)(B)) is greater than the business interest expense paid or accrued in the taxable year. Second, if the sum of business interest income and 30 percent of ATI is less than the business interest expense paid or accrued in the taxable year, commenters requested that taxpayers be given the option to either include floor plan financing interest to increase the section 163(j) limitation, or to forgo the use of floor plan financing interest to increase the section 163(j) limitation (any forgone floor plan financing interest would be included in the disallowed business interest expense carryforward under proposed §1.163(j)-2(c)) in order to utilize the additional first-year depreciation deduction under section 168(k).

Section 163(j) does not provide any guidance on the availability of section 168(k) for taxpayers that have had floor plan financing interest expense. As these

comments relate to the operation of section 168(k)(9), taxpayers should look to Treasury Department or IRS guidance provided under section 168(k) for clarification. On September 24, 2019, the Treasury Department and the IRS published in the **Federal Register** final regulations (TD 9874, 84 FR 50108) and proposed regulations (REG-106808-19, 84 FR 50152) under section 168(k). The rules regarding when floor plan financing interest expense is “taken into account” for purposes of 168(k) are in the proposed regulations under §1.168(k)-2(b)(2)(ii)(G). Accordingly, these final regulations do not address the interaction between section 163(j) and section 168(k)(9) regarding floor plan financing interest expense.

4. Adjustments to Taxable Income in Computing ATI Under Section 163(j)(8)(A)

Section 163(j)(8)(A) provides that ATI means taxable income “computed without regard to” the specified adjustments. The purpose of the adjustments listed in section 163(j)(8)(A) is to keep certain items, such as deductions for depreciation, amortization, depletion, or NOL carryforward amounts, from directly increasing or decreasing the amount of the deduction for business interest expense. Therefore, the Treasury Department and the IRS have determined that the adjustments listed in section 163(j)(8)(A) should adjust tentative taxable income for purposes of calculating ATI under §1.163(j)-1(b)(1) only to the extent that they have been reflected (or deemed reflected, as in the case of certain amounts capitalized into inventory under section 263A as discussed in part II(A)(2) of this Summary of Comments and Explanation of Revisions section) in tentative taxable income under §1.163(j)-1(b)(43).

A commenter requested that the definition of ATI not include some of the adjustments listed in section 163(j)(8)(A), such as the adjustments for NOL deductions and deductions under section 199A. The Treasury Department and the IRS do not have authority to ignore these clear and unambiguous statutory adjustments. Thus, the final regulations do not incorporate the commenter’s suggestion.

5. Certain Adjustments to Tentative Taxable Income in Computing ATI Under Section 163(j)(8)(B)

Under the authority granted in section 163(j)(8)(B), the proposed regulations include several adjustments to taxable income in computing ATI to address certain sales or other dispositions of depreciable property, stock of a consolidated group member, or interests in a partnership. Proposed §1.163(j)-1(b)(1)(ii)(C) provides that, if property is sold or otherwise disposed of, the lesser of the amount of gain on the disposition or the amount of depreciation, amortization, or depletion deductions (collectively, depreciation deductions) with respect to the property for the taxable years beginning after December 31, 2017 and before January 1, 2022 (such years, the EBITDA period) is subtracted from taxable income to determine ATI. Proposed §1.163(j)-1(b)(1)(ii)(D) provides that, with respect to the sale or other disposition of stock of a member of a consolidated group that includes the selling member, the investment adjustments (see §1.1502-32) with respect to such stock that are attributable to deductions described in proposed §1.163(j)-1(b)(1)(ii)(C) are subtracted from taxable income. In turn, proposed §1.163(j)-1(b)(1)(ii)(E) provides that, with respect to the sale or other disposition of an interest in a partnership, the taxpayer’s distributive share of deductions described in proposed §1.163(j)-1(b)(1)(ii)(C) with respect to property held by the partnership at the time of such disposition is subtracted from taxable income to the extent such deductions were allowable under section 704(d).

In general, when a taxpayer takes depreciation deductions with respect to an asset, the taxpayer must reduce its adjusted basis in the asset accordingly. As a result, the taxpayer will realize additional gain (or less loss) upon the subsequent disposition of the asset than the taxpayer would have realized absent depreciation deductions. Thus, except with regard to timing (and, in some cases, character), depreciation deductions should have no net effect on a taxpayer’s taxable income.

In order to mitigate the effects of the section 163(j) limitation during the EBITDA period, Congress provided an adjustment to taxable income for depreciation

deductions. More specifically, as discussed in part II(A)(2) of this Summary of Comments and Explanation of Revisions section, depreciation deductions are added back to taxable income during the EBITDA period, thereby increasing a taxpayer's ATI and its section 163(j) limitation. Congress intended this adjustment to be a timing provision that delays the inclusion of depreciation deductions in calculating a taxpayer's section 163(j) limitation. Stated differently, Congress intended to allow taxpayers to accelerate the recognition of gain attributable to depreciation deductions when computing ATI.

However, if a taxpayer were to sell its depreciable property after making the foregoing adjustment to ATI, the taxpayer would realize additional gain (or less loss) on the disposition as a result of its depreciation deductions, and the taxpayer's ATI would be increased yet again. Similarly, if the depreciable property were held by a member of a consolidated group (S), and if another member of the group were to sell S's stock after making negative adjustments to its basis in S's stock under §1.1502-32 to reflect S's depreciation deductions, the consolidated group's ATI would be increased yet again. A similar double benefit would arise with respect to interests in a partnership if, after the partner's basis in its partnership interest is reduced by depreciation deductions associated with the depreciable property, ATI were to reflect that reduced basis upon a subsequent sale of the partnership interest.

Proposed §1.163(j)-1(b)(1)(ii)(C), (D), and (E) were intended to address these situations and ensure that the positive adjustment for depreciation deductions during the EBITDA period merely defers (rather than permanently excludes) depreciation deductions from a taxpayer's calculation of the section 163(j) limitation.

Commenters submitted various questions and comments about these provisions. First, a commenter questioned whether these proposed subtractions from taxable income are an advisable exercise of the authority granted in section 163(j)(8)(B) in light of congressional silence on the issue. However, the 1991 Proposed Regulations contained similar subtractions from taxable income in computing ATI. The 1991 Proposed Regulations had been outstanding for more than 25 years

when Congress enacted the TCJA. Thus, Congress likely was well aware of these adjustments when it granted the Secretary of the Treasury the authority to make adjustments in new section 163(j)(8)(B). Moreover, there is no indication that Congress intended to preclude the Secretary from making adjustments similar to those in the 1991 Proposed Regulations.

Second, commenters asked why the subtraction from taxable income in proposed §1.163(j)-1(b)(1)(ii)(D) does not include a "lesser of" calculation similar to proposed §1.163(j)-1(b)(1)(ii)(C), and they questioned whether the "lesser of" calculation in proposed §1.163(j)-1(b)(1)(ii)(C) captures the correct amount. For example, if a taxpayer purchased property for \$100x, fully depreciated the property, and then sold the property for \$60x, should the amount that is backed out under proposed §1.163(j)-1(b)(1)(ii)(C) be \$60x or \$100x? Commenters also stated that the presence of a "lesser of" limitation in proposed §1.163(j)-1(b)(1)(ii)(C) and the absence of such a limitation in proposed §1.163(j)-1(b)(1)(ii)(D) can yield discontinuities. For example, if S (a member of P's consolidated group) uses \$50x to purchase an asset that it fully depreciates under section 168(k) (resulting in a \$50x reduction in P's basis in its S stock under §1.1502-32), and if S sells the depreciated asset for \$25x the following year, the P group would have to subtract \$25x from taxable income under proposed §1.163(j)-1(b)(1)(ii)(C), whereas the group would have had to reduce its taxable income by \$50x under proposed §1.163(j)-1(b)(1)(ii)(D) if P had sold its S stock instead. Commenters recommended several solutions to address this discontinuity, including eliminating the "lesser of" test.

Proposed §1.163(j)-1(b)(1)(ii)(D) does not include a "lesser of" calculation because such a calculation would require consolidated groups to value their assets each time there is a sale of member stock. However, the Treasury Department and the IRS recognize the discrepancy in taxable income adjustments between asset dispositions and member stock dispositions under the proposed regulations. To eliminate this discrepancy, the final regulations revise proposed §1.163(j)-1(b)(1)(ii)(C) by eliminating the "lesser of" standard and requiring taxpayers to back

out depreciation deductions that were allowed or allowable during the EBITDA period with respect to sales or dispositions of property. This revised approach is consistent with the adjustment for asset sales in the 1991 Proposed Regulations, is simpler for taxpayers to administer than the "lesser of" approach in the proposed regulations, and renders moot questions as to whether that "lesser of" calculation captures the correct amount. However, the Treasury Department and the IRS also recognize that, in certain cases, a "lesser of" computation would not be difficult to administer. Thus, the Concurrent NPRM provides taxpayers the option to apply the "lesser of" standard, so long as they do so consistently. See proposed §1.163(j)-1(b)(1)(iv)(E) of the Concurrent NPRM.

Third, commenters asked whether the application of proposed §1.163(j)-1(b)(1)(ii)(C) and (D) to the same consolidated group member would result in an inappropriate double inclusion if the asset sale precedes the stock sale, and whether proposed §1.163(j)-1(b)(1)(ii)(C) should continue to apply to a group member if the sale of member stock precedes the asset sale. For example, S (a member of P's consolidated group) takes a \$50x depreciation deduction in 2020 with respect to asset X, P's basis in its S stock is reduced accordingly under §1.1502-32, and \$50x is added back to the P group's tentative taxable income in computing its 2020 ATI. In 2021, S realizes a \$50x gain upon the sale of asset X, P's basis in its S stock is increased accordingly by \$50x under §1.1502-32, and the P group subtracts \$50x from its tentative taxable income under proposed §1.163(j)-1(b)(1)(ii)(C) in computing its 2021 ATI. Then, in 2022, P sells the S stock to an unrelated buyer. Must P subtract another \$50x from its tentative taxable income under proposed §1.163(j)-1(b)(1)(ii)(D)? What if the order of sales were reversed (with P selling its S stock to a member of another consolidated group in 2021 and S selling asset X in 2022)—would both consolidated groups be required to subtract \$50x from tentative taxable income in computing ATI? To prevent duplicative adjustments under proposed §1.163(j)-1(b)(1)(ii)(C) and (D), commenters recommended that these rules "turn off" further subtractions once a subtraction already has been made

under either provision, and that the application of proposed §1.163(j)-1(b)(1)(ii)(C) be limited to the group in which the depreciation deductions accrued.

The Treasury Department and the IRS agree that the application of §1.163(j)-1(b)(1)(ii)(C) and (D) to the same consolidated group member would result in an inappropriate double inclusion, and that proposed §1.163(j)-1(b)(1)(ii)(C) should not apply to a former group member with respect to depreciation deductions claimed by the member in a former group. Thus, §1.163(j)-1(b)(1)(iv)(D) provides anti-duplication rules to ensure that neither §1.163(j)-1(b)(1)(ii)(C) nor §1.163(j)-1(b)(1)(ii)(D) applies if a subtraction for the same economic amount already has been required under either provision.

For example, assume that P wholly owns S1, which wholly owns S2, which owns depreciable asset Q, and that S1 and S2 are members of P's consolidated group. Further assume that S2's depreciation deductions with respect to asset Q have resulted in investment adjustments in S1's stock in S2 and in P's stock in S1. If S1 were to sell its S2 stock to a third party, adjustments to the P group's tentative taxable income would be required under proposed §1.163(j)-1(b)(1)(ii)(D). If P later were to sell its S1 stock to a third party, an additional adjustment under proposed §1.163(j)-1(b)(1)(ii)(D) would not be required with respect to investment adjustments attributable to asset Q.

Fourth, commenters observed that these proposed subtractions from taxable income in computing ATI are required even if the disposition of the depreciable property, member stock, or partnership interest occurs many years after the EBITDA period. Commenters expressed concern that tracking depreciation deductions for purposes of these adjustments could become burdensome, and a commenter questioned the appropriateness in proposed §1.163(j)-1(b)(1)(ii)(C) of treating all gain upon the disposition of property after the EBITDA period as attributable to depreciation deductions during the EBITDA period.

Commenters are correct in observing that these proposed adjustments to taxable income in computing ATI must be

made even if the relevant depreciable asset, member stock, or partnership interest is disposed of after the EBITDA period. However, the Treasury Department and the IRS note that members of consolidated groups already must track depreciation deductions to calculate separate taxable income (see §1.1502-12) and to preserve the location of tax items (see §1.1502-13). Additionally, all taxpayers must track depreciation deductions on an asset-by-asset basis for purposes of section 1245. Thus, the Treasury Department and the IRS have determined that the adjustments proposed in §1.163(j)-1(b)(1)(ii)(C), (D), and (E) should not impose a significant administrative burden in many situations. The Treasury Department and the IRS further note that eliminating the "lesser of" standard in proposed §1.163(j)-1(b)(1)(ii)(C) (see the response to the second comment in this part of the Summary of Comments and Explanation of Revisions section) will render moot the commenter's concern about the calculation of gain.

Fifth, a commenter asked whether the term "sale or other disposition" in proposed §1.163(j)-1(b)(1)(ii)(C), (D), and (E) is intended to apply to the transfer of stock of a consolidated group member in an intercompany transaction (within the meaning of §1.1502-13(b)(1)(i)) or to the transfer of assets in a nonrecognition transaction to which section 381 applies (a section 381 transaction).

As provided in proposed §1.163(j)-4(d)(2), a consolidated group has a single section 163(j) limitation, and intercompany items and corresponding items are disregarded for purposes of calculating the group's ATI to the extent they offset in amount. The Treasury Department and the IRS have determined that regarding intercompany items and corresponding items for purposes of §1.163(j)-1(b)(1)(ii)(C) and (D) would be inconsistent with this general approach. Thus, §1.163(j)-1(b)(1)(iv)(A)(2) provides that an intercompany transaction should not be treated as a "sale or other disposition" for purposes of §1.163(j)-1(b)(1)(ii)(C) and (D).

In turn, the transfer of depreciable assets in a section 381 transaction generally should not be treated as a "sale or other disposition" because the transfer does not affect ATI and because the transferee cor-

poration is the successor to the transferor corporation. Thus, the final regulations generally provide that a transfer of an asset to an acquiring corporation in a transaction to which section 381(a) applies is not treated as a "sale or other disposition" for purposes of §1.163(j)-1(b)(1)(ii)(C), (D), and (E). However, if a member leaves a consolidated group, that transaction generally is treated as a sale or other disposition under the final regulations for purposes of §1.163(j)-1(b)(1)(ii)(C) and (D), regardless of whether the transaction is a section 381 transaction, because the adjustment to ATI under these provisions should be reflected on the tax return of the group that received the benefit of the earlier increase in ATI.

Sixth, a commenter asked for clarification as to when the adjustment in proposed §1.163(j)-1(b)(1)(ii)(D) is required and which investment adjustments under §1.1502-32 are treated as "attributable to" depreciation deductions for purposes of this provision. For example, P wholly and directly owns both S and S1 (members of P's consolidated group). In 2021, S purchases asset X for \$100x and fully depreciates asset X under section 168(k), and P reduces its basis in its S stock by \$100x under §1.1502-32. In 2022, P contributes the stock of S to S1 in an intercompany transaction (which, as noted previously, is not treated as a "sale or other disposition" for purposes of proposed §1.163(j)-1(b)(1)(ii)(C) and (D)). If P later sells the S1 stock, is the adjustment in proposed §1.163(j)-1(b)(1)(ii)(D) required even though no adjustment to P's basis in the S1 stock under §1.1502-32 is "attributable to" the \$100x of depreciation deductions taken with respect to asset X?

The Treasury Department and the IRS have determined that the adjustment to tentative taxable income in proposed §1.163(j)-1(b)(1)(ii)(D) should apply in the foregoing situation. The final regulations have been revised to provide that, for these purposes, P's stock in S1 would be treated as a successor asset (within the meaning of §1.1502-13(j)(1)) to P's stock in S.

Seventh, commenters stated that there should be no adjustments to taxable income under proposed §1.163(j)-1(b)(1)(ii)(C), (D), and (E) if and to the extent that adding back depreciation deductions

pursuant to section 163(j)(8)(A)(v) and proposed §1.163(j)-1(b)(1)(i) did not increase the amount of business interest expense the taxpayer could have deducted in the year the deductions were incurred. For example, in 2021, corporation C has \$500x of ATI (computed by adding back \$50x of depreciation deductions with respect to asset X) and \$100x of business interest expense. Without adding back the depreciation deductions, C's ATI would have been \$450x, C's section 163(j) limitation would have been \$135x (\$450x x 30 percent), and C still could have deducted all \$100x of its business interest expense in that year. In 2022, C has \$90x of business interest expense and \$300x of ATI. C sells asset X for a \$50x gain in that year. If C were required to reduce its ATI by \$50x (from \$300x to \$250x) in 2022 under proposed §1.163(j)-1(b)(1)(ii)(C), its section 163(j) limitation would be reduced to \$75x (\$250x x 30 percent), and C would not be able to deduct all \$90x of its business interest expense in 2022 even though C derived no benefit from adding back its depreciation deductions to taxable income in 2021.

The Treasury Department and the IRS have determined that predicated the application of proposed §1.163(j)-1(b)(1)(ii)(C), (D), and (E) upon whether a taxpayer derived a benefit under section 163(j) from adding back its depreciation deductions to taxable income would involve significant additional complexity. In addition, this approach would have an effect similar to allowing a carryforward of these amounts to the taxable year in which gain on the related items is recognized on a sale or other disposition. Such a carryforward is inconsistent with the general approach of section 163(j), which does not permit a carryforward of excess ATI to later taxable years. As noted earlier in this part II(A)(5) of this Summary of Comments and Explanation of Revisions section, depreciation deductions should have no net effect on the amount of a taxpayer's taxable income (except with respect to timing and, perhaps, character). Thus, if a taxpayer sells an asset with respect to which the taxpayer has taken depreciation deductions, the increase in gain (or decrease in loss) upon the sale should be reversed under proposed §1.163(j)-1(b)(1)(ii)(C).

6. Adjustments to Adjusted Taxable Income in Respect of United States Shareholders of CFCs

Some commenters argued that United States shareholders, as defined in section 951(b) (U.S. shareholders), of controlled foreign corporations, as defined in section 957(a) (CFCs), should be allowed to include in their ATI the amounts included in gross income under section 951(a) (subpart F inclusions), section 951A(a) global intangible low-taxed income (GILTI) inclusions, and section 78 "gross-up" inclusions (collectively, CFC income inclusions) attributable to non-excepted trades or businesses. Because section 163(j) applies to CFCs, the Treasury Department and the IRS have determined that allowing a U.S. shareholder to include its CFC income inclusions in its ATI would not be appropriate. The income of the CFC that gives rise to such income is taken into account in computing the ATI of the CFC for purposes of determining its section 163(j) limitation, and allowing the same income to also be taken into account in computing the ATI of a U.S. shareholder would result in an inappropriate double-counting of income.

Furthermore, the Treasury Department and the IRS question the premise of several comments that, if the business interest expense of a CFC were excluded from the application of section 163(j), including the income of a CFC in a U.S. shareholder's ATI would be appropriate. Even if section 163(j) did not apply to CFCs, CFCs are entities that also may be leveraged. Thus, permitting the income of the CFC that gives rise to CFC income inclusions attributable to non-excepted trades or businesses of CFCs to be included in the ATI of U.S. shareholders would be inconsistent with the principles of section 163(j).

In particular, consider a case in which a CFC has interest expense of \$100x, trade or business gross income of \$300x treated as subpart F income, and no foreign tax liability. In such a case, a U.S. shareholder that wholly owns the CFC would have a subpart F inclusion of \$200x (if section 163(j) did not apply to CFCs). If the \$200x subpart F inclusion were included in the ATI of the U.S. shareholder, the U.S. shareholder could deduct an additional \$60x of business interest expense

(\$200x x 30 percent). As a result, \$300x of gross income could support \$160x of interest expense deductions rather than the \$90x permitted under section 163(j)(1).

Finally, under the final regulations (and consistent with proposed §1.163(j)-7(d)(1)(ii)), if a domestic partnership includes amounts in gross income under sections 951(a) and 951A(a) with respect to an applicable CFC and such amounts are investment income to the partnership, then, a domestic C corporation partner's distributive share of such amounts that are properly allocable to a non-excepted trade or business of the domestic C corporation by reason of §§1.163(j)-4(b)(3) and 1.163(j)-10(c) are excluded from the domestic C corporation partner's ATI.

B. Definition of Business Interest Expense – Proposed §1.163(j)-1(b)(2)

The proposed regulations provide that business interest expense includes interest expense allocable to a non-excepted trade or business, floor plan financing interest expense, and disallowed business interest expense carryforwards. The Treasury Department and the IRS received informal questions about the interaction between section 163(j) and sections 465 and 469, which may operate to disallow a deduction for business interest expense even if such expense was allowable after the application of section 163(j). More specifically, questions have arisen regarding how to treat amounts of business interest expense that are disallowed under section 465 or 469, including which amounts carry forward to subsequent taxable years but keep their character as interest expense, and which amounts, if any, are business interest expense in such subsequent taxable years.

If amounts of business interest expense that are disallowed under section 465 or 469 are treated as business interest expense in subsequent taxable years, the section 163(j) limitation could operate to disallow a deduction even though such amounts were allowable in the prior taxable year after application of the section 163(j) limitation. The Treasury Department and the IRS do not intend such a result. Therefore, the final regulations clarify that amounts allowable as a deduction after application of the section 163(j)

limitation but disallowed by section 465 or 469 are not business interest expense subject to the section 163(j) limitation in subsequent taxable years.

C. Definition of Excepted Regulated Utility Trade or Business – Proposed §1.163(j)-1(b)(13)

Numerous comments were submitted concerning the definition of an “excepted regulated utility trade or business” under proposed §1.163(j)-1(b)(13). Proposed §1.163(j)-1(b)(13), which implements the exception in section 163(j)(7)(A)(iv) to the definition of a “trade or business,” generally provides that an excepted regulated utility trade or business is a trade or business that sells or furnishes the items listed in section 163(j)(7)(A)(iv) at rates that are established or approved by certain regulatory bodies described in proposed §1.163(j)-1(b)(13)(i)(B)(1) and (2).

The proposed regulations provide that utilities that sell or furnish the regulated items at rates that are established or approved by a regulatory body described in proposed §1.163(j)-1(b)(13)(i)(B)(1), other than an electric cooperative, are considered to be excepted only to the extent that such rates are determined on a “cost of service and rate of return” basis. The “cost of service and rate of return” requirement was intended to provide certainty to taxpayers because many utilities are familiar with the definition of “cost of service and rate of return,” which is used to determine whether a public utility company must use a normalization method of accounting under section 168 for certain properties.

However, several commenters questioned whether a “cost of service and rate of return” requirement would be satisfied in specific fact patterns. Commenters questioned whether certain negotiated rates are established or approved on a “cost of service and rate of return” basis if (1) the applicable regulatory body has the authority to impose a cost-based rate instead of the negotiated rate, (2) the rates are computed with reference to cost but discounted from the recourse (or maximum) rate allowed by the regulatory body, or (3) the rates are computed with reference to cost and a set rate of return but are subject to a market-based cap. Commenters also asked whether the inclusion

of certain amounts in determining “cost of service,” specifically the costs of affiliates and some revenues attributable to market-rate sales, would affect the determination of whether rates are established or approved on a “cost of service and rate of return” basis.

One commenter noted that the normalization rules operate logically only in the “cost of service and rate of return” context. The commenter stated that, because section 163(j)(7)(A)(iv) does not reference the normalization rules, there is no need to include the “cost of service and rate of return” requirement in the section 163(j) regulations.

The Treasury Department and the IRS note that, in private letter rulings and informal guidance related to section 168(i)(9) and (10), the IRS has stated that, for purposes of applying the normalization rules, the definition of “public utility property” must contain the requirement that the regulated rates be established or approved on a “rate of return” basis. In this guidance, the IRS explained that the normalization method, which must be used for public utility property to be eligible for the depreciation allowance available under section 168, is defined in terms of the method the taxpayer uses in computing its tax expense in establishing its “cost of service” for ratemaking purposes and reflecting operating results in its regulated books of account. Furthermore, the IRS has issued numerous private letter rulings regarding whether under the specific facts of the taxpayer, the cost of service and rate of return requirement has been met for purposes of section 168(i). Thus, it is clear that, in the context of section 168, the “cost of service and rate of return” requirement is necessary.

Neither the text of section 163(j) nor the legislative history specifically references the normalization rules or the “cost of service and rate of return” requirement under section 168(i)(10). With the omission of such references, the exception in section 163(j) for regulated utility trade or business could be applied broadly without reference to specific requirements applicable in the normalization rules. However, the Treasury Department and the IRS note that under section 168(k)(9), the additional first-year depreciation deduction is not available to any proper-

ty that is primarily used in an excepted regulated utility trade or business. Therefore, to ease the administrative burden of determining whether businesses qualify as excepted regulated utility trades or businesses, and to allow taxpayers the option of claiming the additional first-year depreciation deduction under section 168(k) in lieu of being treated as an excepted regulated utility trade or business, the final regulations retain the “cost of service and rate of return” requirement from the proposed regulations, and also allow taxpayers to make an election to be an excepted regulated utility trade or business to the extent that the rates for the furnishing or sale of the items described in §1.163(j)-1(b)(15)(i)(A)(1) have been established or approved by a regulatory body described in §1.163(j)-1(b)(15)(i)(A)(2), if the rates are not determined on a “cost of service and rate of return” basis. See §1.163(j)-1(b)(15)(i) and (iii).

For purposes of the election, the focus of section 163(j)(7)(A)(iv) is the phrase “established or approved” in section 163(j)(7)(A)(iv), which describes the authority of the regulatory body described in §1.163(j)-1(b)(15)(i)(A)(2). Ratemaking programs similar to those described by commenters and discussed previously in this part II(C) of this Summary of Comments and Explanation of Revisions section, including discounted rates, negotiated rates, and regulatory rate caps, are established or approved by a regulatory body if the taxpayer files a schedule of such rates with a regulatory body that has the power to approve, disapprove, alter the rates, or substitute a rate determined in an alternate manner.

Similar to elections for electing real property trades or businesses and electing farming businesses, the election to be an excepted regulated utility trade or business is irrevocable. Taxpayers making the election to be an excepted regulated utility trade or business are not required to allocate items between regulated utility trades or businesses that are described in §1.163(j)-1(b)(15)(i) and trades or businesses that are described in §1.163(j)-1(b)(15)(iii)(A) as to which the taxpayer makes an election because they are treated as operating an entirely excepted regulated utility trade or business. Electing taxpayers cannot claim the additional first-

year depreciation deduction under section 168(k).

The rules set forth in the final regulations are limited solely to the determination of an “excepted regulated utility trade or business” for purposes of section 163(j)(7)(A)(iv). As a result of this limited application, the rules in the final regulations are not applicable to the determination of “public utility property” or the application of the normalization rules within the meaning of section 46(f), as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990, section 168(i)(9) and (10) and the regulations thereunder, or to the determination of any depreciation allowance available under sections 167 and 168.

Comments also were received on the application of the rules for excepted regulated utility trades or businesses to electric cooperatives. The definition of an “excepted regulated utility trade or business” under proposed §1.163(j)-1(b)(13) includes trades or businesses that sell or furnish the items listed in section 163(j)(7)(A)(iv) at rates established or approved by an electric cooperative. Unlike utility businesses regulated by public authorities, utilities that sell items at rates regulated by a cooperative are not described in section 168(i)(10). However, there is a long-standing body of law regulating the taxation of electric cooperatives. Electric cooperatives described in section 501(c)(12) are generally exempt from income tax but are subject to taxation under section 511. The application of section 163(j) and the section 163(j) regulations with respect to exempt electric cooperatives is governed by proposed §1.163(j)-4(b)(5). Other electric cooperatives are subject to taxation under sections 1381 through 1388 in subchapter T of chapter 1 of subtitle A of the Code (subchapter T), except for certain rural electric cooperatives specifically excluded from subchapter T by section 1381(a)(2)(C).

Generally, the exception in section 163(j)(7)(A)(iv) for the trade or business of selling or furnishing items at rates established or approved by the governing or ratemaking body of an electric cooperative applies both to sales and furnishing by an electric cooperative and to sales and furnishing to an electric cooperative by another utility provider, as long as the

rates for the sale or furnishing have been established or approved in the manner required by section 163(j). Thus, an electric cooperative exempt from Federal income tax under section 501(c)(12) may not be subject to section 163(j) for the sale or furnishing of electricity due to the operation of proposed §1.163(j)-4(b)(5), and another utility provider may be in an excepted regulated utility trade or business to the extent that it sells electricity to the section 501(c)(12) cooperative at rates established or approved by the governing or ratemaking body of the cooperative.

A commenter asked whether proposed §1.163(j)-1(b)(13) requires that, for sales involving electric cooperatives to qualify as an excepted regulated utility trade or business, the rates for the sales be established or approved by the governing or ratemaking body of an electric cooperative on a “cost of service and rate of return” basis, or if all sales made subject to a contract or tariff approved by an electric cooperative’s governing or ratemaking body would qualify. Under the proposed regulations, the specific requirement that rates for the sale or furnishing of items listed in proposed §1.163(j)-1(b)(13)(i)(A) be established or approved on a “cost of service and rate of return” basis did not extend to rates established or approved by the governing or ratemaking body of an electric cooperative. These regulations adopt the proposed rule, and do not impose a requirement that rates for the sale or furnishing of items listed in §1.163(j)-1(b)(15)(i)(A) by an electric cooperative be established or approved on a “cost of service and rate of return” basis.

Comments also were submitted regarding the allocation of tax items between excepted regulated utility trades or businesses and non-excepted trades or businesses. These comments are discussed with other comments on proposed §1.163(j)-10 in part XI of this Summary of Comments and Explanation of Revisions section.

D. Definition of Floor Plan Financing Interest Expense – Proposed §1.163(j)-1(b)(17)

Commenters recommended that interest paid on commercial financing liabilities or trade financing (in which a taxpayer

borrowed to fund the purchase or transport of commodities and then sells the inventory to pay off the debt) should not be subject to section 163(j). Commenters noted that trade financing is different from normal financing because it is short-term and backed by inventory that is monetizable (rather than plant and equipment). Thus, commenters suggested that section 163(j) should not apply to trade financing because there is no depreciation trade-off for inventory purchased with trade financing. Commenters compared trade financing to floor plan financing (because both are used to finance the purchase of inventory), and they noted that the 1991 Proposed Regulations under old section 163(j) excluded commercial financing liabilities from debt taken into account for purposes of applying the debt-equity ratio under old section 163(j). See 1991 Proposed Regulations §1.163(j)-3(b)(2)(ii).

The Treasury Department and the IRS decline to exclude commercial financing liabilities from the section 163(j) limitation. Section 163(j) does not contain a provision analogous to the debt-equity ratio safe harbor that was present in old section 163(j) and for which rules were proposed in the 1991 Proposed Regulations. In addition, because Congress specifically excluded interest paid on floor plan financing from the section 163(j) limitation, but not all commercial financing liabilities and trade financing, Congress does not appear to have intended to exclude all commercial financing liabilities from the section 163(j) limitation.

E. Definition of Interest – Proposed §1.163(j)-1(b)(20)

1. In General

Commenters submitted numerous comments on the definition of “interest” in the proposed regulations. Proposed §1.163(j)-1(b)(20) contains a relatively broad definition of the term “interest” for purposes of section 163(j). This definition was proposed to provide a complete definition of interest that addresses all transactions that are commonly understood to produce interest income and expense, including transactions that otherwise may have been entered into to avoid the application of section 163(j).

Under the proposed regulations, the term “interest” means any amount described in one of four categories. First, proposed §1.163(j)-1(b)(20)(i) generally provides that interest is an amount paid, received, or accrued as compensation for the use or forbearance of money under the terms of an instrument or contractual arrangement, including a series of transactions, that is treated as a debt instrument, or an amount that is treated as interest under other provisions of the Code or the Income Tax Regulations. For example, this category includes qualified stated interest, original issue discount (OID), and accrued market discount. Commenters agree that this definition of interest has long been accepted, is consistent with longstanding precedent, and reduces the risk of inconsistency within the Code and regulations. No commenters requested any changes to this category, and the final regulations adopt this category in the definition of the term “interest” without any substantive changes.

Second, proposed §1.163(j)-1(b)(20)(ii) treats a swap (other than a cleared swap) with significant nonperiodic payments as two separate transactions consisting of an on-market, level payment swap and a loan. Under the proposed regulations, the time value component of the loan is recognized as interest expense to the payor and as interest income to the recipient. Several comments were received on this category in the definition and are described in part II(E)(2) of this Summary of Comments and Explanation of Revisions section.

Third, proposed §1.163(j)-1(b)(20)(iii) treats as interest certain amounts that are closely related to interest and that affect the economic yield or cost of funds of a transaction involving interest, but that may not be compensation for the use or forbearance of money on a stand-alone basis. For example, this category includes substitute interest payments, debt issuance costs, commitment fees, and hedging gains and losses that affect the yield of a debt instrument. Numerous comments were received on this category and are described in part II(E)(3) of this Summary of Comments and Explanation of Revisions section.

Fourth, proposed §1.163(j)-1(b)(20)(iv) provides an anti-avoidance rule.

Under this rule, an expense or loss predominantly incurred in consideration of the time value of money in a transaction or series of integrated or related transactions in which a taxpayer secures the use of funds for a period of time is treated as interest expense for purposes of section 163(j). Numerous comments were received on this category and are described in part II(E)(4) of this Summary of Comments and Explanation of Revisions section.

2. Swaps with Significant Nonperiodic Payments

The proposed regulations treat a non-cleared swap with significant nonperiodic payments as two separate transactions consisting of an on-market, level payment swap and a loan (the embedded loan rule). The embedded loan rule did not apply to a collateralized swap that was cleared by a derivatives clearing organization or by a clearing agency (a cleared swap) because the treatment of cleared swaps was reserved. In the preamble to the proposed regulations, the Treasury Department and the IRS requested comments on the proper treatment of collateralized swaps under the embedded loan rule.

One commenter recommended that the final regulations provide an exception to the embedded loan rule for cleared swaps and for non-cleared swaps that are substantially collateralized. This commenter further suggested that the final regulations not include any specific rules regarding the type of collateral that is required to be posted to qualify for the exception. The commenter also recommended that the final regulations provide objective rules for determining if a nonperiodic payment is “significant” and if a financial instrument is treated as a “swap” for purposes of these rules.

Another commenter agreed with the embedded loan rule, including use of the “significant” standard, and also recommended exceptions to the embedded loan rule for both cleared swaps and non-cleared swaps that are required to be fully collateralized by the terms of the swap contract or by a federal regulator. However, this commenter interpreted the embedded loan rule in the proposed regulations to apply solely for purposes of section

163(j) and recommended that the embedded loan rule, as well as timing and character rules for nonperiodic payments on swaps, be issued under section 446. Until that guidance is issued, the commenter requested that the application of the embedded loan rule for purposes of section 163(j) be delayed. The proposed regulations provide that the time value component of the embedded loan is determined in accordance with §1.446-3(f)(2)(iii)(A). This commenter questioned the reference to §1.446-3(f)(2)(iii)(A) because, under that rule, the time value component is not treated as interest; rather, the time value component is only used to compute the amortization of the nonperiodic payment.

As a result of the cross-reference in proposed §1.446-3(g)(4) to proposed §1.163(j)-1(b)(20)(ii), the embedded loan rule set forth in the proposed regulations applies for purposes of both sections 163(j) and 446. In addition, and as noted in the preamble to the proposed regulations, the embedded loan rule set forth in the proposed regulations applies in the same manner that former §1.446-3(g)(4) applied before it was amended by the now expired temporary regulations in T.D. 9719 (80 FR 26437) (May 8, 2015) (as corrected by 80 FR 61308 (October 13, 2015)). The Treasury Department and the IRS do not adopt commenters’ suggestions to delay finalizing the embedded loan rule or to provide guidance on determining if a nonperiodic payment is “significant” because the same embedded loan rule applied in the context of section 446 for over 20 years from 1993 to 2015. See T.D. 8491 (58 FR 53125) (October 14, 1993). Instead, subject to the exceptions discussed in this part II(E)(2) of this Summary of Comments and Explanation of Revisions section, the final regulations adopt the embedded loan rule without change. The final regulations retain the reference to §1.446-3(f)(2)(iii)(A), which provides a known method for computing the time value component associated with the loan component that is treated as interest under §§1.163(j)-1(b)(22)(ii) and 1.446-3(g)(4).

Further, to eliminate the possibility of confusion regarding the application of the embedded loan rule for purposes of sections 163(j) and 446, the final regulations add the substantive text of the embedded

loan rule and the exceptions to that rule to both §§1.446-3(g)(4) and 1.163(j)-1(b)(22)(ii) instead of merely including a cross-reference in §1.446-3(g)(4) to §1.163(j)-1(b)(22)(ii).

In response to comments, the final regulations add two exceptions to the embedded loan rule. Specifically, the final regulations add exceptions for cleared swaps and for non-cleared swaps that require the parties to meet the margin or collateral requirements of a federal regulator or that provide for margin or collateral requirements that are substantially similar to a cleared swap or a non-cleared swap subject to the margin or collateral requirements of a federal regulator. For purposes of this exception, the term “federal regulator” means the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), or a prudential regulator, as defined in section 1a(39) of the Commodity Exchange Act (7 U.S.C. 1a), as amended by section 721 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law No. 111-203, 124 Stat. 1376, Title VII (the Dodd-Frank Act). Because federal regulators have adopted final requirements for non-cleared swaps that permit netting of swap exposures and specify the types of collateral required to be posted, the final regulations do not address netting or require that the margin or collateral be paid or received in cash.

In addition, §1.163(j)-1(c)(3)(i) delays the applicability date of the embedded loan rule for purposes of section 163(j) to allow taxpayers additional time to develop systems to implement these rules (the delayed applicability date), though taxpayers may choose to apply the rules to swaps entered into before the delayed applicability date. See also §1.446-3(j)(2), which provides applicability date rules similar to those in §1.163(j)-1(c)(3)(i). However, the delayed applicability date does not apply for purposes of the anti-avoidance rules in §1.163(j)-1(b)(22)(iv) (described in part II(E)(4) of this Summary of Comments and Explanation of Revisions section). Instead, the applicability date in §1.163(j)-1(c)(3)(ii) applies. As a result, the anti-avoidance rules in §1.163(j)-1(b)(22)(iv) apply to a notional principal contract entered into on or after September 14, 2020. However, for a no-

tional principal contract entered into before September 14, 2021, the anti-avoidance rules in §1.163(j)-1(b)(22)(iv) apply without regard to the references in those rules to §1.163(j)-1(b)(22)(ii). For example, if a taxpayer enters into a swap with a significant nonperiodic payment that does not meet the exceptions in §1.163(j)-1(b)(22)(ii)(B) or (C) before the delayed applicability date, and a principal purpose of the taxpayer is to reduce the amount that otherwise would be interest expense, the anti-avoidance rules apply and the taxpayer must treat the time value component associated with the loan component of the swap as interest expense.

3. Other Amounts Treated as Interest

i. Items Relating to Premium, Ordinary Income or Loss on Certain Debt Instruments, Section 1258 Gain, and Factoring Income

Proposed §1.163(j)-1(b)(20)(iii)(A) treats any bond issuance premium treated as ordinary income under §1.163-13(d)(4) as interest income of the issuer and any amount deductible as a bond premium deduction under §1.171-2(a)(4)(i)(A) or (C) as interest expense of the holder. Proposed §1.163(j)-1(b)(20)(iii)(B) treats any ordinary income recognized by an issuer of a debt instrument, and any ordinary loss recognized by a holder of a debt instrument, under the rules for a contingent payment debt instrument, a nonfunctional currency contingent payment debt instrument, or an inflation-indexed debt instrument, as interest income of the issuer and as interest expense of the holder, respectively. Proposed §1.163(j)-1(b)(20)(iii)(D) treats any ordinary gain under section 1258 as interest income. Commenters supported treating the amounts in proposed §1.163(j)-1(b)(20)(iii)(A), (B), and (D) as interest income or interest expense for purposes of section 163(j). Accordingly, the final regulations adopt the rules in the proposed regulations for these three items without any substantive changes.

Proposed §1.163(j)-1(b)(20)(iii)(J) treats factoring income as interest income. Several commenters supported treating factoring income as interest income. However, one commenter questioned the differences between the provisions related

to the inclusion of factoring income and §1.954-2(h)(4). The inclusion of factoring income in the definition of interest is generally supported by the commenters, is a taxpayer-favorable rule, is generally consistent with the rules in §1.954-2(h)(4), and is consistent with the treatment of other types of discount, such as acquisition discount and market discount. Accordingly, the final regulations adopt the rules in the proposed regulations for factoring income without any substantive changes. In the case of a factoring transaction with a principal purpose of artificially increasing a taxpayer’s business interest income, the anti-avoidance rules in §1.163(j)-1(b)(22)(iv) (described in part II(E)(4) of this Summary of Comments and Explanation of Revisions section) would not permit the taxpayer to treat factoring income as interest income for purposes of section 163(j).

ii. Substitute Interest Payments

Proposed §1.163(j)-1(b)(20)(iii)(C) generally provides that a substitute interest payment described in §1.861-2(a)(7) and made in connection with a sale-repurchase or securities lending transaction is treated as interest expense to the payor and interest income to the recipient. In general, substitute interest payments are economically equivalent to interest. A few commenters questioned the inclusion of substitute interest payments in the definition of interest in the proposed regulations. Commenters stated that treating these amounts as interest would be contrary to longstanding tax law, including the holding in *Deputy v. Du Pont*, 308 U.S. 488, 498 (1940). However, commenters recommended that, if the Treasury Department and the IRS decide to include substitute interest payments in the definition of interest in the final regulations, the inclusion be limited to the extent the substitute interest payments relate to transactions that are economically similar to a borrowing. Commenters recommended that the following factors be taken into consideration in making this determination: (a) Whether the taxpayer posted (or has received) collateral consisting of cash or liquid assets; (b) whether the borrowed security is due to mature shortly after the scheduled termination date of the securities borrowing; (c) the type of security

being lent (for example, Treasury bonds as compared to riskier corporate bonds); and (d) whether the securities borrowing was entered into in the ordinary course of the taxpayer's trade or business.

The final regulations retain substitute interest payments in the definition of interest because the payments generally are economically equivalent to interest and should be treated as such for purposes of section 163(j). However, in response to comments, the final regulations provide that a substitute interest payment is treated as interest expense to the payor only if the payment relates to a sale-repurchase or securities lending transaction that is not entered into by the payor in the payor's ordinary course of business, and that a substitute interest payment is treated as interest income to the recipient only if the payment relates to a sale-repurchase or securities lending transaction that is not entered into by the recipient in the recipient's ordinary course of business. The final regulations do not adopt the other suggested factors because the Treasury Department and the IRS have determined that the ordinary course rule in the final regulations provides an appropriate and effective limit on the scope of the definition. Specifically, the Treasury Department and the IRS have determined that these transactions are rarely entered into outside the payor's ordinary course of business, and that any such non-ordinary course transactions likely would involve an intention to avoid section 163(j).

iii. Commitment Fees

Proposed §1.163(j)-1(b)(20)(iii)(G)(I) treats any fees in respect of a lender commitment to provide financing as interest if any portion of such financing is actually provided. Commenters recommended that commitment fees and other debt-related fees not be included in the definition of interest until general substantive guidance is provided on the treatment of the fees in the separate fee-related project on the Office of Tax Policy and IRS 2019-2020 Priority Guidance Plan (REG-132517-17). According to the commenters, uncertainty exists as to whether to characterize these fees for Federal income tax purposes as fees for services or property or for compensation

for the use or forbearance of money. In addition, under existing guidance, commitment fees are treated differently by the borrower (similar to an option premium) and the lender (service income). See Rev. Rul. 81-160, 1981-1 C.B. 312, and Rev. Rul. 70-540, 1970-2 C.B. 101, Situation (3). Some taxpayers, however, argue that a commitment fee should be treated as creating or increasing discount on a debt instrument and that the fee should be treated consistently by both the borrower and the lender. If commitment fees are included in the definition of interest in the final regulations, commenters recommended that only the portion of the commitment fee that is proportionate to the amount drawn be treated as interest.

In response to comments, the final regulations do not include commitment fees in the definition of interest. The treatment of commitment fees and other fees paid in connection with lending transactions will be addressed in future guidance that applies for all purposes of the Code.

iv. Debt Issuance Costs

Proposed §1.163(j)-1(b)(20)(iii)(H) treats debt issuance costs as interest expense of the issuer. Commenters argued that debt issuance costs should not be treated as interest expense because these costs are paid to third parties in connection with the issuance of debt and are not paid or incurred for the use or forbearance of money under a debt instrument. For tax purposes, these costs are capitalized by the issuer and are treated as deductible under section 162 over the term of the debt instrument as if the costs adjust the instrument's yield by reducing the instrument's issue price by the amount of the costs. See §1.446-5.

In response to comments, the final regulations exclude debt issuance costs from the definition of interest.

v. Guaranteed Payments

Proposed §1.163(j)-1(b)(20)(iii)(I) provides that any guaranteed payments for the use of capital under section 707(c) are treated as interest. Some commenters stated that a guaranteed payment for the use of capital should not be treated as interest

for purposes of section 163(j) unless the guaranteed payment was structured with a principal purpose of circumventing section 163(j). Other commenters stated that section 163(j) never should apply to guaranteed payments for the use of capital.

In response to comments, the final regulations do not explicitly include guaranteed payments for the use of capital under section 707(c) in the definition of interest. However, consistent with the recommendations of some commenters, the anti-avoidance rules in §1.163(j)-1(b)(22)(iv) (described in part II(E)(4) of this Summary of Comments and Explanation of Revisions section) include an example of a situation in which a guaranteed payment for the use of capital is treated as interest expense and interest income for purposes of section 163(j). See §1.163(j)-1(b)(22)(v)(E), *Example 5*.

vi. Hedging Transactions

Proposed §1.163(j)-1(b)(20)(iii)(E) generally treats income, deduction, gain, or loss from a derivative that alters a taxpayer's effective cost of borrowing with respect to a liability of the taxpayer as an adjustment to the taxpayer's interest expense. Proposed §1.163(j)-1(b)(20)(iii)(F) generally treats income, deduction, gain, or loss from a derivative that alters a taxpayer's effective yield with respect to a debt instrument held by the taxpayer as an adjustment to the taxpayer's interest income. The rules in the two provisions are referred to as the "hedging rules" in this preamble.

Numerous comments were received on the hedging rules. The commenters questioned the administrability of the broad hedging rules, especially if the taxpayer hedges on a macro (that is, on an aggregate) basis. Also, the commenters noted that it is not clear how to apply the rules in certain situations, including a situation in which the hedge relates to non-debt items (for example, if the taxpayer hedges the mismatch or "gap" between its assets and liabilities), the debt instrument is not subject to section 163(j), or the debt instrument is subject to other interest deferral provisions for Federal tax purposes. In addition, the commenters noted that the proposed regulations effectively would require integration, even if the hedge oth-

erwise would not be integrated with the debt instrument for Federal tax purposes and the income, deduction, gain, and loss from the hedge ordinarily would be accounted for separately, which the commenters suggested would require taxpayers to maintain two sets of books. Moreover, the commenters stated that, under the proposed regulations, any gain or loss on the underlying debt instrument (for example, due to changes in interest rates) would not be treated as an adjustment to interest income or expense, whereas the corresponding loss or gain on the hedge would be treated as an adjustment to interest expense or income. Some commenters stated that the yield on third-party borrowings reflects the true cost of the borrowing, and that hedges are not relevant to the cost of the borrowing.

Commenters recommended that, if the hedging rules are retained in the final regulations as a separate item, the final regulations precisely define (a) what standard is used to include a derivative in section 163(j) (for example, a primary purpose or principal motivation standard), and (b) the standard for determining whether the effect of a derivative on the cost of borrowing or effective yield is sufficiently significant for the income, deduction, gain, or loss from the derivative to be included in the computation. Commenters noted that one approach would be to apply the hedging rules only to derivatives that qualify for integration under §1.988-5 or §1.1275-6. Another approach would be to apply the hedging rules to derivatives that have a sufficiently close connection with the liability to qualify as hedging transactions under §§1.446-4 and 1.1221-2. Some commenters indicated that the hedging rules could apply if the derivative is treated as a hedge of a borrowing or liability for financial reporting purposes, and that the hedging rules should not apply to broker-dealers, active traders in derivatives, and financial institutions acting in the ordinary course of business.

One commenter recommended that section 163(j) not alter the timing of taxable items from hedging transactions that are subject to §1.446-4, regardless of whether interest expense on the hedged item is deferred under section 163(j). Other commenters noted that the proposed

regulations do not provide guidance on the interaction between the hedging rules and the straddle rules.

With respect to foreign currency hedging transactions, a commenter noted that foreign currency gain or loss is due to the time value of money only to a limited extent; thus, the commenter recommended that section 163(j) not apply to a taxpayer's foreign currency hedging transactions (other than an integrable transaction under §1.988-5).

In response to comments, the final regulations do not include the hedging rules in the definition of interest. However, in certain circumstances, the anti-avoidance rules in §1.163(j)-1(b)(22)(iv) (described in part II(E)(4) of this Summary of Comments and Explanation of Revisions section) may apply to require income, deduction, gain, or loss from a hedging transaction to be taken into account for purposes of section 163(j).

vii. Other Items

Commenters recommended other items to be included in, or excluded from, the definition of interest as follows:

a. Dividends from Regulated Investment Company (RIC) Shares

Some commenters recommended that dividend income from a RIC be treated as interest income for a shareholder in a RIC, to the extent that the dividend is attributable to interest income earned by the RIC. To address this comment, in the Concurrent NPRM, the Treasury Department and the IRS have proposed rules under which a RIC that earns business interest income may pay section 163(j) interest dividends that certain shareholders may treat as interest income for purposes of section 163(j). See paragraphs (b)(22)(iii) (F) and (b)(35) in proposed §1.163(j)-1 in the Concurrent NPRM.

b. MMF Income

A few commenters recommended that the final regulations allow look-through treatment for earnings from certain foreign entities, such as foreign money market funds (MMFs), so that dividends from foreign MMFs would be treated as

interest income to the extent the underlying income derived by a foreign MMF was interest income. According to the commenters, this treatment would alleviate issues for a CFC that borrows money from related parties and invests in foreign MMFs. In general, the commenters stated that any interest limitation under section 163(j) could lead to unexpected results in this situation, such as section 952(c) recapture accounts solely generated by the section 163(j) interest expense limitation.

The final regulations do not adopt this recommendation because it is beyond the scope of the final regulations and because there are significant differences between the rules governing income inclusions in respect of passive foreign investment companies (PFICs), such as foreign MMFs, and RICs. These differences make it difficult to adopt a rule that would provide for look-through treatment in the context of dividends or inclusions from a PFIC. In particular, the regime for taxing income from a PFIC that shareholders have elected to treat as a qualified electing fund (QEF) under section 1295 generally focuses only on inclusions related to ordinary income or net capital gain income and does not separately report amounts of interest income for Federal income tax purposes. In the case of a PFIC for which a QEF election has not been made, there would be no information about the underlying taxable income of the PFIC and no reason or ability to treat an interest in the PFIC differently from the treatment of stock held in other C corporations.

c. Negative Interest

One commenter requested clarification on the treatment of negative interest (an amount that a depositor may owe a bank in a negative interest rate environment) and inquired whether such payments are more similar to payments for custodial or service fees rather than for interest. The final regulations do not address this issue because it is beyond the scope of the final regulations. However, in certain cases (for example, a Treasury bill acquired with a negative yield), a payment may be treated as bond premium subject to the rules in section 171, including the rules in §1.171-2(a)(4)(i)(C).

d. Leases

A commenter recommended that the Treasury Department and the IRS adopt rules that clearly describe the circumstances in which fleet leases are treated as generating interest for purposes of section 163(j). The commenter noted that there is a time-value-of-money portion of a fleet lease payment similar to the time-value-of-money portion of other items treated as interest under the proposed regulations, such as guaranteed payments, commitment fees, debt issuance costs, and items of income or loss from a derivative instrument that alters a taxpayer's effective yield or effective cost of borrowing. In addition, to the extent that the anti-avoidance rule in the proposed regulations is retained, the commenter asked that the final regulations clearly define the circumstances (if any) in which the anti-avoidance rule would operate to recharacterize any portion of a fleet lease payment as interest expense, and modify the anti-avoidance rule to apply to both interest expense of the fleet lessee and interest income of the fleet lessor.

The Treasury Department and the IRS do not adopt the commenter's suggestions in the final regulations because the suggestions generally are no longer relevant after the revisions made to the definition of interest in the final regulations. For example, as explained in this part II(E)(3) of this Summary of Comments and Explanation of Revisions section, no portion of the items generally cited by the commenter is explicitly treated as interest in the final regulations. Moreover, there are explicit provisions in the Code that determine whether a portion of a lease payment is treated as interest for Federal income tax purposes depending on the terms of a lease, such as sections 467 and 483. In addition, as explained in part II(E)(4) of this Summary of Comments and Explanation of Revisions section, the anti-avoidance rule in the final regulations is revised to include a principal purpose test and to generally align the treatment of income and expense, which should address the commenter's concerns.

4. Anti-Avoidance Rule for Amounts Predominantly Associated with the Time Value of Money

Proposed §1.163(j)-1(b)(20)(iv) provides that any expense or loss, to the ex-

tent deductible, incurred by a taxpayer in a transaction or series of integrated or related transactions in which the taxpayer secures the use of funds for a period of time is treated as interest expense of the taxpayer if such expense or loss is predominantly incurred in consideration of the time value of money. Numerous comments were received on this anti-avoidance rule in the proposed regulations. Most commenters recommended that any anti-avoidance rule in the final regulations contain a requirement that the taxpayer have a principal purpose to avoid section 163(j). Several commenters asserted that the anti-avoidance rule should cover only transactions that are economically equivalent to interest and should set forth examples of transactions that are and are not covered. Most commenters recommended that the anti-avoidance rule be symmetrical and apply to income or gain, as well as to expense or loss. One commenter suggested that, based on section 1258 concepts, the anti-avoidance rule should apply only if, at the time of the relevant transaction or series of transactions that secure the use of funds for a period of time for the taxpayer, substantially all of the expense or loss was expected to be attributable to the time value of money. In addition, commenters noted that it should be clear when a taxpayer should test whether a transaction falls within the anti-avoidance rule. Other commenters requested specific rules coordinating this anti-avoidance rule with the general anti-avoidance rule in proposed §1.163(j)-2(h).

Some commenters stated that an interest anti-avoidance rule should not be included in the final regulations because, for example, the rule would impose substantial compliance costs, the Treasury Department and the IRS have other tools to combat any abuse, and there already is a general anti-avoidance rule in proposed §1.163(j)-2(h). Commenters also noted that the interest anti-avoidance rule in the proposed regulations has the potential to capture ordinary market transactions that possess a time value component but that are not generally treated as financings with disguised interest for tax purposes.

In response to comments, the Treasury Department and the IRS have modified the anti-avoidance rule in the final regulations. Under §1.163(j)-1(b)(22)(iv)(A)

(I), any expense or loss economically equivalent to interest is treated as interest expense for purposes of section 163(j) if a principal purpose of structuring the transaction(s) is to reduce an amount incurred by the taxpayer that otherwise would have been interest expense or treated as interest expense under §1.163(j)-1(b)(22)(i) through (iii). For this purpose, the fact that the taxpayer has a business purpose for obtaining the use of funds does not affect the determination of whether the manner in which the taxpayer structures the transaction(s) is with a principal purpose of reducing the taxpayer's interest expense. In addition, the fact that the taxpayer has obtained funds at a lower pre-tax cost based on the structure of the transaction(s) does not affect the determination of whether the manner in which the taxpayer structures the transaction(s) is with a principal purpose of reducing the taxpayer's interest expense.

For purposes of §1.163(j)-1(b)(22)(iv)(A)(I), any expense or loss is economically equivalent to interest to the extent that the expense or loss is (1) deductible by the taxpayer; (2) incurred by the taxpayer in a transaction or series of integrated or related transactions in which the taxpayer secures the use of funds for a period of time; (3) substantially incurred in consideration of the time value of money; and (4) not described in §1.163(j)-1(b)(22)(i), (ii), or (iii).

Under §1.163(j)-1(b)(22)(iv)(A)(2), if a taxpayer knows that an expense or loss is treated by the payor as interest expense under §1.163(j)-1(b)(22)(iv)(A)(I), the taxpayer provides the use of funds for a period of time in the transaction(s) subject to §1.163(j)-1(b)(22)(iv)(A)(I), the taxpayer earns income or gain with respect to the transaction(s), and such income or gain is substantially earned in consideration of the time value of money provided by the taxpayer, such income or gain is treated as interest income for purposes of section 163(j) to the extent of the expense or loss treated by the payor as interest expense under §1.163(j)-1(b)(22)(iv)(A)(I).

Under §1.163(j)-1(b)(22)(iv)(B), notwithstanding §1.163(j)-1(b)(22)(i) through (iii), any income realized by a taxpayer in a transaction or series of integrated or related transactions is not treated as interest income of the taxpayer for pur-

poses of section 163(j) if and to the extent that a principal purpose for structuring the transaction(s) is to artificially increase the taxpayer's business interest income. For this purpose, the fact that the taxpayer has a business purpose for holding interest-generating assets does not affect the determination of whether the manner in which the taxpayer structures the transaction(s) is with a principal purpose of artificially increasing the taxpayer's business interest income.

For purposes of the foregoing anti-avoidance rules, §1.163(j)-1(b)(22)(iv)(C) provides that whether a transaction or a series of integrated or related transactions is entered into with a principal purpose depends on all the facts and circumstances related to the transaction(s), except that the fact that the taxpayer has obtained funds at a lower pre-tax cost based on the structure of the transaction(s) or the fact that the taxpayer has a business purpose related to the item is ignored for this purpose. A purpose may be a principal purpose even though it is outweighed by other purposes taken together or separately. Factors to be taken into account in determining whether one of the taxpayer's principal purposes for entering into the transaction(s) include the taxpayer's normal borrowing rate in the taxpayer's functional currency, whether the taxpayer would enter into the transaction(s) in the ordinary course of the taxpayer's trade or business, whether the parties to the transaction(s) are related persons (within the meaning of section 267(b) or section 707(b)), whether there is a significant and bona fide business purpose for the structure of the transaction(s), whether the transactions are transitory, for example, due to a circular flow of cash or other property, and the substance of the transaction(s).

In response to comments, §1.163(j)-1(b)(22)(iv)(D) provides that the anti-avoidance rules in §1.163(j)-1(b)(22)(iv), rather than the general anti-avoidance rules in §1.163(j)-2(j), apply to determine whether an item is treated as interest expense or interest income.

Section 1.163(j)-1(b)(22)(v) contains examples illustrating the application of the interest anti-avoidance rules in a number of situations, including examples relating to a hedging transaction involving a foreign currency swap transaction, a forward

contract involving gold, a loan guaranteed by a related party in which the related party receives guarantee fees, and guaranteed payments for the use of capital. However, these examples are not intended to represent the only situations in which the anti-avoidance rules might apply.

The anti-avoidance rules in §1.163(j)-1(b)(22)(iv) apply to transactions entered into on or after September 14, 2020. See §1.163(j)-1(c)(2).

5. Authority Comments

Most of the commenters on the definition of interest in the proposed regulations questioned whether the Treasury Department and the IRS have the authority to expand the definition of interest for purposes of section 163(j) to include "interest equivalents" (the items listed in proposed §1.163(j)-1(b)(20)(iii) and the expenses or losses subject to the anti-avoidance rule in proposed §1.163(j)-1(b)(20)(iv)). The commenters asserted that the term "business interest" in section 163(j)(5) means any interest paid or accrued on indebtedness properly allocable to a trade or business, and that expanding the definition to include interest equivalents would capture amounts that do not fall within the scope of the general rule in section 163(a) that "[t]here shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness." Even though section 163(j)(1) refers to an "amount allowed as a deduction under this chapter for business interest" when describing the amounts limited by section 163(j), the commenters argued that the deduction otherwise allowed must be with respect to "business interest" (which is defined in section 163(j)(5)) and that the phrase "deduction under this chapter" does not and should not modify the definition of "business interest" in section 163(j)(5).

The commenters noted that section 163(j), as amended by the TCJA, does not contain a specific delegation of regulatory authority to expand the definition of interest. The commenters further asserted that the Treasury Department and the IRS may issue only "interpretive regulations" under section 7805, and that any such regulations may not go beyond the stated meaning of the statutory language. The commenters noted that old section 163(j)(9) provided

broad regulatory authority to prescribe regulations, including regulations appropriate to prevent the avoidance of old section 163(j). In addition, the commenters noted that the legislative history for old section 163(j) indicated that the Treasury Department could issue guidance treating "items not denominated as interest but appropriately characterized as equivalent to interest" as interest income or interest expense. The commenters stated that there is no similar regulatory authority or legislative history relating to section 163(j) as amended by the TCJA.

Commenters also noted that, when Congress has chosen to expand the definition of interest in other parts of the Code, Congress has done so explicitly. For example, section 263(g) provides that, "[for purposes of section 263(g)(2)(A)], the term 'interest' includes any amount paid or incurred in connection with personal property used in a short sale." As noted in the preamble to the proposed regulations, most of the rules treating interest equivalent items as interest income or expense in proposed §1.163(j)-1(b)(20)(iii) were developed in §§1.861-9T and 1.954-2. However, commenters argued that the use of the interest equivalent provisions in §§1.861-9T and 1.954-2 by analogy to define interest for purposes of section 163(j) is inappropriate because different policy considerations underlie those sections, there is statutory or regulatory authority to address interest equivalents under those sections (unlike section 163(j)), and those sections apply only for limited purposes (for example, for sourcing purposes).

In addition, because the broad definition of interest in the proposed regulations applies only for purposes of section 163(j), commenters asserted that there will be additional compliance burdens and costs for taxpayers to separately track amounts treated as interest for purposes of section 163(j) and for other purposes. Commenters asserted that the broad definition of interest for purposes of section 163(j) in the proposed regulations may create uncertainty and confusion for taxpayers with respect to other sections of the Code.

Contrary to the assertions made by many of the commenters, the Treasury Department and the IRS have the authority to prescribe rules relating to interest equivalents and an anti-avoidance rule.

As noted in the preamble to the proposed regulations, there are no generally applicable regulations or statutory provisions addressing when financial instruments are treated as indebtedness for Federal income tax purposes or when a payment is “interest.” Therefore, a regulatory definition of interest is needed in order to implement the statutory language of section 163(j).

In addition, it would be inconsistent with the purpose of section 163(j) to allow transactions that are essentially financing transactions to avoid the application of section 163(j). Thus, an anti-avoidance rule is needed to address situations in which a taxpayer’s principal purpose in structuring a transaction or series of transactions is to artificially reduce the taxpayer’s business interest expense or to increase the taxpayer’s business interest income. Moreover, at least one commenter suggested the inclusion of the type of anti-avoidance rule that is included in the final regulations and that the Treasury Department and the IRS have the authority to include such a rule.

Section 7805(a) provides the Treasury Department and the IRS with the authority to prescribe all rules and regulations needed for enforcement of the Code, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue. Providing a regulatory definition of interest for purposes of section 163(j) and the anti-avoidance rule falls within this authority. The statutory language of section 163(j)(1) (“The amount allowed as a deduction *under this chapter* for any taxable year for business interest . . .”) (emphasis added) also supports the application of section 163(j) to more items than merely items traditionally deducted under section 163(a).

Although the Treasury Department and the IRS have the authority to prescribe regulations addressing interest equivalents and anti-avoidance transactions, as noted earlier in parts II(E)(3) and (4) of this Summary of Comments and Explanation of Revisions section, in response to comments, the final regulations nevertheless limit the interest equivalent items to those items commenters agreed should be treated as interest expense or interest income, substitute interest payments made in connection with a sale-repurchase agreement or securities lending transaction that is not

entered into by the taxpayer in the taxpayer’s ordinary course of business, and certain amounts relating to transaction(s) entered into by a taxpayer with a principal purpose of artificially reducing interest expense or increasing interest income.

F. Definition of Motor Vehicle – Proposed §1.163(j)-1(b)(25)

Proposed §1.163(j)-1(b)(25) provides that the term “motor vehicle” means a motor vehicle as defined in section 163(j)(9)(C). Under section 163(j)(9)(C), a motor vehicle means any self-propelled vehicle designed for transporting persons or property on a public street, highway, or road; a boat; and farm machinery or equipment. A few commenters questioned whether towed recreational vehicles and trailers are included in the definition of “motor vehicle.” One commenter requested that the final regulations define motor vehicle to include any trailer or camper that is designed to provide temporary living quarters for recreational, camping, travel, or seasonal use and is designed to be towed by, or affixed to, a motor vehicle. Another commenter recommended allowing motor vehicle dealers to deduct floor plan financing interest on both motor vehicles and trailers that are offered for sale in integrated or related businesses.

Because section 163(j)(9)(C) specifically defines motor vehicles as self-propelled vehicles, the Treasury Department and the IRS do not have the authority to expand the definition of motor vehicles in the final regulations to include vehicles that are not self-propelled, such as towed recreational vehicles and trailers. For this reason, the Treasury Department and the IRS decline to adopt these comments in the final regulations. Therefore, the definition of motor vehicles in the final regulations continues to incorporate the definition in section 163(j)(9)(C) by cross-reference.

G. Definition of Taxable Income – Proposed §1.163(j)-1(b)(37)

1. Calculation of Taxable Income

Proposed §1.163(j)-1(b)(1)(i)(A) provides that business interest expense is added to taxable income to determine

ATI. Some commenters noted that this provision could be construed as distorting ATI if a taxpayer has a disallowed business interest expense carryforward from a prior taxable year. Under such facts, the proposed regulations would not have reduced taxable income by the amount of the carryforward, because proposed §1.163(j)-1(b)(37) disregards the carryforward as part of section 163(j) and the section 163(j) regulations. However, in calculating ATI, taxpayers might argue that taxable income should be increased by the amount of the disallowed business interest expense carryforward because the term “business interest expense” in the proposed regulations includes disallowed business interest expense carryforwards.

The Treasury Department and the IRS did not intend to create a net positive adjustment to ATI for disallowed business interest expense carryforwards. To address this potential distortion, the final regulations clarify that tentative taxable income is computed without regard to the section 163(j) limitation, and that disallowed business interest expense carryforwards are not added to tentative taxable income in computing ATI under §1.163(j)-1(b)(1).

2. Interaction with Section 250

Proposed §1.163(j)-1(b)(37)(ii) provides a rule to coordinate the application of sections 163(j) and 250. Section 250(a)(1) generally provides a deduction based on the amount of a domestic corporation’s foreign-derived intangible income and GILTI. Section 250(a)(2) limits the amount of this deduction based on the taxpayer’s taxable income—the greater the amount of a taxpayer’s taxable income for purposes of section 250(a)(2), the greater the amount of the taxpayer’s allowable deduction under section 250(a)(1).

In particular, proposed §1.163(j)-1(b)(37)(ii) provides that, if a taxpayer is allowed a deduction for a taxable year under section 250(a)(1) that is properly allocable to a non-exceptioned trade or business, then the taxpayer’s taxable income for that year is determined without regard to the limitation in section 250(a)(2). Some commenters observed that this proposed rule results in a lower ATI and section 163(j) limitation for the taxpayer than if the limitation in section 250(a)(2) were taken into

account. Commenters also stated that the rationale for this approach (which does not reflect the taxpayer's actual taxable income) is unclear, and they recommended that this provision be withdrawn or made elective for taxpayers.

The Treasury Department and the IRS have determined that further study is required to determine the appropriate rule for coordinating sections 250(a)(2), 163(j), and other Code provisions (such as sections 170(b)(2) and 172(a)(2)) that limit the availability of deductions based, directly or indirectly, upon a taxpayer's taxable income (taxable income-based provisions). Therefore, the final regulations do not contain the rule in proposed §1.163(j)-1(b)(37)(ii). Until such additional guidance is effective, taxpayers may choose any reasonable approach (which could include an ordering rule or the use of simultaneous equations) for coordinating taxable income-based provisions as long as such approach is applied consistently for all relevant taxable years. For this purpose, the ordering rule contained in proposed §§1.163(j)-1(b)(37)(ii) (83 FR 67490 (Dec. 28, 2018)) and 1.250(a)-1(c)(4) (contained in 84 FR 8188 (March 6, 2019)) is treated as a reasonable approach for coordinating sections 163(j) and 250. Comments are welcome on what rules should be provided, and whether an option to use simultaneous equations in lieu of an ordering rule would be appropriate in order to coordinate taxable income-based provisions.

3. When Disallowed Business Interest Expense is “Paid or Accrued”

As noted in the Background section of this preamble, section 163(j)(2) provides that the amount of any business interest not allowed as a deduction for any taxable year under section 163(j)(1) is treated as business interest “paid or accrued” in the succeeding taxable year. Commenters asked for clarification as to whether disallowed business interest expense should be treated as “paid or accrued” in the taxable year in which such expense is taken into account for Federal income tax purposes (without regard to section 163(j)), or whether such expense instead should be treated as paid or accrued in the succeeding taxable year in which the expense can

be deducted by the taxpayer under section 163(j).

For purposes of section 163(j) and the section 163(j) regulations, the term “paid or accrued” in section 163(j)(2) must be construed in such a way as to further congressional intent. Although the use of this term in section 163(j)(2) provides a mechanism for disallowed business interest expense to be carried forward to and deducted in a subsequent taxable year, it does not mean that a disallowed business interest expense carryforward is treated as paid or accrued in a subsequent year for all purposes. In certain contexts, a disallowed business interest expense must be treated as paid or accrued in the year the expense was paid or accrued without regard to section 163(j) to give effect to congressional intent. For example, if a disallowed business interest expense were treated as paid or accrued only in a future taxable year in which such expense could be deducted after the application of section 163(j), then section 382 never would apply to such expense (because disallowed business interest expense carryforwards never would be pre-change losses). This outcome is clearly contrary to congressional intent (see section 382(d)(3)). Similarly, if a disallowed business interest expense were treated as paid or accrued in a future taxable year for purposes of section 163(j)(8)(A)(ii), then such expense would be added back to tentative taxable income in determining ATI for that taxable year (and for all future taxable years to which such expense is carried forward under section 163(j)(2)), thereby artificially increasing the taxpayer’s section 163(j) limitation. (See part II(A) of this Summary of Comments and Explanation of Revisions section.)

This outcome also is inconsistent with congressional intent. However, in other contexts, a disallowed business interest expense must be treated as paid or accrued in a succeeding taxable year to allow for the deduction of the carryforward in that year.

The definition of “disallowed business interest expense” has been revised in the final regulations to reflect that, solely for purposes of section 163(j) and the section 163(j) regulations, disallowed business interest expense is treated as “paid or accrued” in the taxable year in which the expense is taken into account for Federal

income tax purposes (without regard to section 163(j)), or in a succeeding taxable year in which the expense can be deducted by the taxpayer under section 163(j), as the context may require.

4. Interaction with Sections 461(l), 465, and 469 – Proposed §1.163(j)-1(b)(37)

The Treasury Department and the IRS received questions asking for clarification of the interaction between proposed §1.163(j)-1(b)(37) and the limitations in sections 461(l), 465, and 469. The final regulations clarify that sections 461(l), 465, and 469 are taken into account when determining tentative taxable income. Then, as provided in proposed §1.163(j)-3(b)(4), sections 461(l), 465, and 469 are applied after the application of the section 163(j) limitation. See part II(B) of this Summary of Comments and Explanation of Revisions section.

H. Definition of Trade or Business – Proposed §1.163(j)-1(b)(38)

1. In General

The section 163(j) limitation applies to taxpayers with “business interest,” which is defined in section 163(j)(5) as any interest properly allocable to a trade or business. Neither section 163(j) nor the legislative history defines the term “trade or business.” However, section 163(j)(7) provides that the term “trade or business” does not include the trade or business of performing services as an employee, as well as electing real property, electing farming, and certain utility trades or businesses.

As described in the preamble to the proposed regulations, the proposed regulations define the term “trade or business” by reference to section 162. Section 162(a) permits a deduction for all the ordinary and necessary expenses paid or incurred in carrying on a trade or business. Commenters requested additional guidance in determining whether an activity constitutes a section 162 trade or business.

The rules under section 162 for determining the existence of a trade or business are well-established and illustrated through a large body of case law and administrative guidance. Additionally,

whether an activity is a section 162 trade or business is inherently a factual question. *Higgins v. Commissioner*, 312 U.S. 212, 217 (1941) (determining “whether the activities of a taxpayer are ‘carrying on a business’ requires an examination of the facts in each case”).

The courts have developed two definitional requirements. One, in relation to profit motive, requires the taxpayer to enter into and carry on the activity with a good-faith intention to make a profit or with the belief that a profit can be made from the activity. The second, in relation to the scope of the activities, requires considerable, regular, and continuous activity. See generally *Commissioner v. Groetzinger*, 480 U.S. 23 (1987). In the seminal case of *Groetzinger*, the Supreme Court stated that, “[w]e do not overrule or cut back on the Court’s holding in *Higgins* when we conclude that if one’s gambling activity is pursued full time, in good faith, and with regularity, to the production of income for a livelihood, and is not a mere hobby, it is a trade or business within the meaning of the statutes with which we are here concerned.” Id. at 35.

2. Multiple Trades or Businesses Within an Entity

Commenters also suggested there should be factors to determine how to delineate separate section 162 trades or businesses within an entity and when an entity’s combined activities should be considered a single section 162 trade or business for purposes of section 163(j). One commenter suggested adopting the rules for separate trades or businesses provided in section 446 and the regulations thereunder.

The Treasury Department and the IRS decline to adopt these recommendations because specific guidance under section 162 is beyond the scope of the final regulations. Further, §1.446-1(d) does not provide guidance on when trades or businesses will be considered separate and distinct. Instead, it provides that a taxpayer may use different methods of accounting for separate and distinct trades or businesses, and it specifies two circumstances in which trades or businesses will not be considered separate and distinct. For example, §1.446-1(d)(2) provides that no

trade or business will be considered separate and distinct unless a complete and separable set of books and records is kept for such trade or business.

The Treasury Department and the IRS recognize that an entity can conduct more than one trade or business under section 162. This position is inherent in the allocation rules detailed in proposed §1.163(j)-10(c)(3), which require a taxpayer with an asset used in more than one trade or business to allocate its adjusted basis in the asset to each trade or business using the permissible methodology described therein. In this context, the final regulations provide, consistent with the proposed regulations, that maintaining separate books and records for all excepted and non-excepted trades or businesses is one indication that a particular asset is used in a particular trade or business.

Whether an entity has multiple trades or businesses is a factual determination, and numerous court decisions that define the meaning of “trade or business” also provide taxpayers guidance in determining whether more than one trade or business exists. See *Groetzinger*, 480 U.S. at 35. For example, some court decisions discuss whether the activities have separate books and records, facilities, locations, employees, management, and capital structures, and whether the activities are housed in separate legal entities.

Accordingly, the final regulations define “trade or business” as a trade or business within the meaning of section 162, which should aid taxpayers in the proper allocation of interest expense, interest income, and other tax items to a trade or business and to an excepted or non-excepted trade or business.

3. Rental Real Estate Activities as a Trade or Business

See the discussion of elections for real property trades or businesses that may not qualify as section 162 trades or businesses in part X of this Summary of Comments and Explanation of Revisions section.

4. Separate Entities

One commenter requested clarification that the determination of whether an entity generates interest attributable to

a trade or business within the meaning of section 162 is made at the entity level without regard to the classification of the entity’s owners. Except in the context of a consolidated group, or if §1.163(j)-10 provides otherwise, the determination of whether an entity generates interest and whether such interest is properly allocable to a trade or business is determined at the entity level, without regard to the classification of the entity’s owners. See also the discussion of trading partnerships and CFC groups in the Concurrent NPRM.

I. Applicability Dates

The proposed regulations provide generally that the final regulations would apply to taxable years ending after the date that this Treasury Decision is published in the **Federal Register**. The proposed applicability date has been changed in the final regulations to avoid the application of the changes reflected in the final regulations to a taxpayer at the end of the taxable year, which may result in unexpected effects on the taxpayer under section 163(j). Accordingly, the final regulations generally apply to taxable years beginning on or after the date that is 60 days after the date that this Treasury Decision is published in the **Federal Register**.

III. Comments on and Changes to Proposed §1.163(j)-2: Deduction for Business Interest Expense Limited

Proposed §1.163(j)-2 provides general rules regarding the section 163(j) limitation, including rules on how to calculate the limitation, how to treat disallowed business interest expense carryforwards, and how the small business exemption and the aggregation rules apply with the limitation. The following discussion addresses comments relating to proposed §1.163(j)-2.

A. Whether the Section 163(j) Limitation is a Method of Accounting

A few commenters requested clarification that the section 163(j) limitation is not a method of accounting under section 446 and the regulations thereunder. The commenters requested clarification on whether the application of the section 163(j) limitation is a method of accounting because the rules under section 163(j) appear to

defer, rather than permanently disallow, a deduction for disallowed business interest expense and disallowed disqualified interest (as defined in proposed §1.163(j)-1(b)(10)). Specifically, section 163(j)(2) and proposed §1.163(j)-2(c) allow the carry-forward of disallowed business interest expense, and proposed §1.163(j)-2(c) allows the carryforward of disallowed disqualified interest, to succeeding taxable years.

Section 1.446-1(a)(1) defines the term “method of accounting” to include not only the overall method of accounting of a taxpayer, but also the accounting treatment of any item of gross income or deduction. Under §1.446-1(e)(2)(ii)(a), an accounting method change includes a change in the overall plan of accounting for gross income or deductions or a change in the treatment of any material item used in such overall plan of accounting. Moreover, §1.446-1(e)(2)(ii)(a) provides that a “material item” is any item that involves the proper time for the inclusion of the item in income or the taking of a deduction. The key characteristic of a material item “is that it determines the timing of income or deductions.” *Knight-Ridder Newspapers, Inc. v. United States*, 743 F.2d 781, 798 (11th Cir. 1984). Once a taxpayer has established a method of accounting for an item of income or expense, the taxpayer must obtain the consent of the Commissioner under section 446(e) before changing to a different method of accounting for that item.

For purposes of §1.446-1(e)(2)(ii)(a), if there is a change in the application of the section 163(j) limitation, the item involved is the taxpayer’s deduction for business interest expense. The taxpayer is not changing its treatment of this item; instead, the taxpayer is changing the limitation placed upon that specific item. The effect of removing the section 163(j) limitation is that the taxpayer would be able to recognize the full amount of the interest expense that is otherwise deductible under its accounting method in a given taxable year before it was limited by section 163(j).

The Treasury Department and the IRS do not view the section 163(j) limitation as a method of accounting under section 446(e) and the regulations thereunder.

The determination of whether a taxpayer is subject to the section 163(j) limitation is determined for each taxable year. The carryover rules in section 163(j)(2) and proposed §1.163(j)-2(c) provide that disallowed business interest expense and disallowed disqualified interest may be carried forward to a future taxable year. However, section 163(j) does not provide a mechanism to ensure that, in every situation, a taxpayer will be able to deduct the business interest expense that the taxpayer was not permitted to deduct in one taxable year and was required to carry forward to succeeding taxable years. Thus, the section 163(j) limitation is not a method of accounting under §1.446-1(e)(2)(ii)(a) because the change in practice may result in a permanent change in the taxpayer’s lifetime taxable income. Further, the section 163(j) limitation does not involve an “item” as it is not a recurring element of income or expense.

B. General Gross Receipts Test and Aggregation

As noted in the preamble to the proposed regulations, section 163(j)(3) exempts certain small businesses from the section 163(j) limitation. See proposed §1.163(j)-2(d). Under section 163(j), a small business taxpayer is one that meets the gross receipts test in section 448(c) and is not a tax shelter under section 448(a)(3). The gross receipts test is met if a taxpayer has average annual gross receipts for the three taxable years prior to the current taxable year of \$25 million or less. For taxable years beginning after December 31, 2018, the gross receipts threshold reflects an annual adjustment for inflation as provided for in section 448(c)(4); thus, the gross receipts threshold for taxable years beginning in 2020 is \$26 million. See section 3.31 of Rev. Proc. 2019-44, 2019-47 I.R.B.1093. Section 448(c)(2) aggregates the gross receipts of multiple taxpayers that are treated as a single employer under sections 52(a) and (b) and 414(m) and (o). The gross receipts test under section 448(c) normally applies only to corporations and to partnerships with C corporation partners. However, section 163(j)(3) and proposed §1.163(j)-2(d)(2)(i) provide that, for a taxpayer that is not a corporation or a partnership, the gross receipts

test of section 448(c) applies as if the taxpayer were a corporation or a partnership.

Some commenters noted that the aggregation rules in sections 52(a) and (b) and sections 414(m) and (o) could be difficult to apply in certain instances due to their complexity. Other commenters asked that the final regulations clarify the application of the aggregation rules to the gross receipts test under section 448(c). Addressing the application of the aggregation rules to the gross receipts test is beyond the scope of the final regulations. The section 52(a) and (b) aggregation rules were enacted as part of the work opportunity tax credit, but have also been applied to numerous Code provisions, including sections 45A, 45S, 264, 280C and 448. The affiliated service group rules under section 414(m) were enacted to address certain abuses related to qualified retirement plans, but also have been applied to several other Code provisions, including sections 45R, 162(m), 414(t), 4980H, and 4980I.

However, the Treasury Department and the IRS are aware that the aggregation rules set forth in sections 52(a) and (b) and sections 414(m) and (o) are complex. Therefore, Frequently Asked Questions that explain the basic operation of these rules are provided on <http://irs.gov/newsroom>. See FAQs Regarding the Aggregation Rules Under Section 448(c)(2) that Apply to the Section 163(j) Small Business Exemption. The Treasury Department and the IRS continue to study the application of the aggregation rules to the gross receipts test, and request comments on issues relating to such application, taking into account the application of the aggregation rules beyond the gross receipts test.

The Treasury Department and the IRS continue to review and consider issues relating to the affiliated service group rules under section 414(m), and a guidance project regarding the aggregation rules under section 414(m) is listed on the 2019-2020 Priority Guidance Plan (RIN 1545-BO34). As guidance is published relating to the affiliated service group rules, the FAQs will be updated, taking into account the various Code provisions to which these aggregation rules apply.

In addition, the Treasury Department and the IRS recognize that proposed

§1.163(j)-2(d)(2)(i) may generate confusion with respect to the aggregation rules. Although section 448(c) applies only to corporations and to partnerships with a C corporation partner, sections 52(a), 52(b), 414(m), and 414(o) apply to a broader array of entities. These statutes contain different ownership thresholds for different types of entities that apply in determining whether multiple entities are treated as a single employer. To resolve potential confusion, the final regulations remove the reference to the aggregation rules from proposed §1.163(j)-2(d)(2)(i). Taxpayers that are not a corporation or a partnership with a C corporation partner must apply section 448(c) as if they were a corporation or a partnership in accordance with section 163(j)(3) and proposed §1.163(j)-2(d)(2)(i). However, taxpayers should treat themselves as the type of entity that they actually are in applying sections 52(a), 52(b), 414(m), and 414(o).

C. Small Business Exemption and Single Employer Aggregation Rules – Proposed §§1.163(j)-2(d) and 1.52-1(d)(1)(i)

Section 52(b) treats trades or businesses under common control as a single employer. Section 1.52-1(b) through (d) defines “trades or businesses under common control” to include parent-subsidiary groups and brother-sister groups. Commenters noted that the version of §1.52-1(d)(1)(i) in effect at the time of the proposed regulations defined “brother-sister groups” to include entities a controlling interest in which is owned by the same 5 or fewer people who are individuals, estates, or trusts (directly and with the application of §1.414(c)-4(b)(1)).

Section 1.414(c)-4(b)(1) provides that, if a person has an option to purchase an interest in an organization, the person is deemed to own an interest in that organization. Other provisions under §1.414(c)-4 apply attribution on a broader scale, such as through familial relationships and for closely held partnerships and S corporations.

Commenters questioned whether the cross-reference in §1.52-1(d)(1)(i) was correct, and whether the cross-reference should have been to §1.414(c)-4 instead of §1.414(c)-4(b)(1). The Treasury Department and the IRS agree that there is

no discernible reason why §1.52-1(d)(1)(i) aggregation should be limited solely to options holders. Taxpayers need to know how to aggregate gross receipts properly in order to know if they are subject to section 163(j).

On July 11, 2019, a correcting amendment to T.D. 8179 was published in the **Federal Register** to clarify that the cross-reference in §1.52-1(d)(1)(i) should be to §1.414(c)-4. See 84 FR 33002. This correcting amendment should eliminate uncertainty for taxpayers that need to determine how to aggregate gross receipts in the context of a brother-sister group under common control.

D. Small Business Exemption and Tax Shelters - Proposed §1.163(j)-2(d)(1)

Consistent with section 163(j)(3), proposed §1.163(j)-2(d)(1) provides that the exemption for certain small businesses that meet the gross receipts test of section 448(c) does not apply to a tax shelter as defined in section 448(d)(3). Several commenters requested clarification on the application of the small business exemption under section 163(j)(3) to a tax shelter.

Section 448(d)(3) defines a tax shelter by cross-reference to section 461(i)(3), which defines a tax shelter, in relevant part, as a syndicate within the meaning of section 1256(e)(3)(B). Section 1.448-1T(b)(3) provides, in part, that a syndicate is a partnership or other entity (other than a C corporation) if more than 35 percent of its losses during the taxable year are *allocated* to limited partners or limited entrepreneurs, whereas section 1256(e)(3)(B) refers to losses that are *allocable* to limited partners or limited entrepreneurs. As a result, the scope of the small business exemption in section 163(j)(3) is unclear. Commenters requested that an entity be a syndicate in a taxable year only if it has net losses in that year and more than 35 percent of those net losses are actually *allocated* to limited partners or limited entrepreneurs. To provide a consistent definition of the term “syndicate” for purposes of sections 163(j), 448, and 1256, the Treasury Department and the IRS propose to define the term “syndicate” using the actual allocation rule from the definition in §1.448-1T(b)(3). This definition is also consistent with the definition used in

a number of private letter rulings under section 1256. See proposed §1.1256(e)-2(a) in the Concurrent NPRM.

Commenters also requested specific relief for small business taxpayers from the definition of a syndicate based on the “active management” exception under section 1256(e)(3)(C). Section 1256(e)(3)(C) lists several examples of interests in an entity that “shall not be treated as held by a limited partner or a limited entrepreneur,” thus excluding the entity from the definition of a syndicate. In particular, section 1256(e)(3)(C)(v) allows the Secretary to determine (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.”

The commenters requested that the Treasury Department use its authority under section 1256(e)(3)(C)(v) to provide relief from the definition of a syndicate to small business entities that (1) qualify under the gross receipts test of section 448(c), (2) meet the definition of a syndicate, and (3) do not qualify to make an election as an electing real property business or electing farming business. If a small business satisfies these three conditions, the commenters requested that the Treasury Department and the IRS provide a rule that all interests in the entity are treated as held by partners or owners who actively participate in the management of such entity.

The Treasury Department and the IRS have determined that the request deeming limited partners in small partnerships to be active participants even if those owners would not be treated as active participants under section 1256(e)(3)(C) is contrary to the statutory language and legislative history in section 163(j)(3). Therefore, the Treasury Department and the IRS decline to adopt the comments.

Another commenter asked for clarification on how to compute the amount of loss to be tested under §1.448-1T(b)(3) and section 1256(e)(3)(B). The commenter provided a particular fact pattern in which a small business would be caught in an iterative loop of (a) of having net losses due to a business interest deduction, (b) which would trigger disallowance of the

exemption for small businesses in section 163(j)(3) if more than 35 percent of the losses were allocated to a limited partner, (c) which would trigger the application of the section 163(j)(1) limitation to reduce the amount of the interest deduction, (d) which would then lead to the taxpayer having no net losses and therefore being eligible for the application of the exemption for small businesses under section 163(j)(3). To address this fact pattern, in the Concurrent NPRM, the Treasury Department and the IRS have added an ordering rule providing that, for purposes of section 1256(e)(3)(B) and §1.448-1T(b)(3), losses are determined without regard to section 163(j). See proposed §1.1256(e)-2(b) and the example provided in proposed §1.1256(e)-2(c) in the Concurrent NPRM.

E. Gross Receipts for Partners in Partnerships and Shareholders of S Corporation Stock – Proposed §1.163(j)-2(d)(2)(iii)

Proposed §1.163(j)-2(d)(ii) provides that, in determining whether a taxpayer meets the gross receipts test of section 448(c), each partner in a partnership includes a share of partnership gross receipts in proportion to such partner's distributive share of items of gross income that were taken into account by the partnership under section 703. Similarly, shareholders of S corporations include a pro rata share of the S corporation's gross receipts. See Rev. Rul. 71-455, 1971-2 C.B. 318 (holding that a partner's distributive share of the partnership's gross receipts is used in applying the passive investment income test under section 1372(e)(5)).

This approach would be applicable only in situations in which the partner and the partnership (or a shareholder and the S corporation) are not treated as one person under the aggregation rules of sections 52(a) and (b) and 414(m) and (o). The Treasury Department and the IRS requested comments in the preamble to the proposed regulations on this approach and on whether other approaches to determining the gross receipts of partners and S corporation shareholders for purposes of section 163(j) would measure the gross receipts of such partners and shareholders more accurately.

In response, several commenters suggested different approaches for determining the gross receipts of partners and S corporation shareholders. One commenter recommended that a taxpayer should include gross receipts only from entities eligible for the small business exemption (exempt entities). In other words, the commenter recommended that a taxpayer's gross receipts should not include gross receipts from (1) any electing real property trade or business or electing farming business; (2) any entities utilizing the floor plan financing interest exception under section 163(j)(1)(C); and (3) any other entities subject to section 163(j). The commenter noted that this modification would simplify the computation of gross receipts and prevent the same gross receipts from being double-counted both at the entity level and the partner or S corporation shareholder level. However, the determination of gross receipts generally is not affected by whether any other entity is subject to section 163(j).

One commenter noted that passthrough entities generally do not provide information regarding gross receipts to their partners. As it is difficult for partners to determine the partnership's gross receipts, the commenter suggested various approaches, such as a de minimis rule whereby a less-than-10 percent owner of a passthrough entity may use the taxable income from such entity rather than gross receipts; use the current-year gross receipts as a reasonable estimate of the past three years; or not exclude the gross receipts of the exempt entity in certain situations.

Another commenter recommended that, in situations in which a partner and a partnership are not subject to the aggregation rules of section 448(c), a partner should not be required to include any share of partnership gross receipts when determining its partner-level eligibility for the small business exemption. The commenter noted that section 163(j) is applied at the partnership level. The commenter stated it is inconsistent to take an aggregate view of partnerships for purposes of the small business exemption without a specific rule under section 163(j) requiring such attribution or aggregation. The commenter also stated that requiring a partner to include a share of partnership gross receipts would discourage taxpayers

who operate small businesses from investing in partnerships.

The Treasury Department and the IRS understand that passthrough entities might not have reported gross receipts to their partners or shareholders in the past. However, the statute is clear that a taxpayer must meet the gross receipts test of section 448(c), and that, if the taxpayer is not subject to section 448(c), the section 448(c) rules must be applied in the same manner as if such taxpayer were a corporation or partnership. The alternatives presented either do not have universal application or do not adequately reflect a passthrough entity's gross receipts.

Additionally, there is no authority under section 448 and the regulations thereunder to substitute taxable income for gross receipts or to estimate gross receipts. Accordingly, the Treasury Department and the IRS do not adopt the suggested approaches, and the proposed rules are finalized without any change.

IV. Comments on and Changes to Section Proposed §1.163(j)-3: Relationship of Section 163(j) Limitation to Other Provisions Affecting Interest

Proposed §1.163(j)-3 provides ordering and operating rules that control the interaction of the section 163(j) limitation with other provisions of the Code that defer, capitalize or disallow interest expense. The ordering and operating rules provide that section 163(j) applies before the operation of the loss limitation rules in section 465 and 469, and before the application of section 461(l), and after other provisions of the Code that defer, capitalize, or disallow interest expense. The ordering and operating rules in proposed §1.163(j)-3 apply only in determining the amount of interest expense that could be deducted without regard to the section 163(j) limitation, and not for other purposes, such as the calculation of ATI. The following discussion addresses comments relating to proposed §1.163(j)-3.

A. Capitalized Interest

Proposed §1.163(j)-3(b)(5) provides that provisions that require interest to be capitalized, such as sections 263A and 263(g), apply before section 163(j).

Commenters suggested that this section is too restrictive by referring solely to sections 263(A) and 263(g), and that other provisions could require interest to be capitalized. The Treasury Department and the IRS agree with this comment, and an appropriate revision has been made in the final regulations to account for any possible additional provisions that could require interest to be capitalized.

B. Provisions that Characterize Interest Expense as Something Other Than Business Interest Expense

Proposed §1.163(j)-3(b)(9) generally provides that provisions requiring interest expense to be treated as something other than business interest expense, such as section 163(d) governing investment interest expense, govern the treatment of the interest expense. Commenters expressed confusion with the provision, suggesting that, by virtue of the statute and the proposed regulations, if interest expense is treated as something other than business interest expense, there is no need to consult proposed §1.163(j)-3. The Treasury Department and the IRS generally agree with the comment and have removed this section from the final regulations.

C. Section 108

In the preamble to the proposed regulations, the Treasury Department and the IRS requested comments on the interaction between section 163(j) and the rules addressing income from the discharge of indebtedness under section 108. In response, commenters noted, for example, that it is unclear whether cancellation of indebtedness income under section 61(a)(11) arises when the taxpayer only receives a benefit in the form of a disallowed business interest expense carryforward, or whether any exclusions, such as sections 108(e)(2) or 111, or any tax benefit principles, should apply. In light of the complex and novel issues raised in these comments, the Treasury Department and the IRS have determined that the interaction between section 163(j) and section 108 requires further consideration and may be the subject of future guidance.

D. Sections 461(l), 465, and 469

The proposed regulations provide that sections 461(l), 465, and 469 apply after the application of section 163(j). The Treasury Department and the IRS received informal questions about the effect of these sections on the calculation of ATI. Therefore, the final regulations clarify whether and how sections 461(l), 465, and 469 are applied when determining tentative taxable income. The final regulations also include examples to demonstrate the calculation of ATI if a loss tentatively is suspended in the calculation of tentative taxable income, and if a loss is carried forward from a prior taxable year under section 469.

V. Comments on and Changes to Proposed §1.163(j)-4: General Rules Applicable to C Corporations (Including Real Estate Investment Trusts (REITs), RICs, and Members of Consolidated Groups) and Tax-Exempt Corporations

Section 1.163(j)-4 provides rules regarding the computation of items of income and expense under section 163(j) for taxpayers that are C corporations (including members of a consolidated group, REITs, and RICs) and tax-exempt corporations. The following discussion addresses comments relating to proposed §1.163(j)-4.

A. Aggregating Affiliated but Non-Consolidated Entities

Under the proposed regulations, members of a consolidated group are aggregated for purposes of section 163(j), and the consolidated group has a single section 163(j) limitation. In contrast, partnerships that are wholly owned by members of a consolidated group are not aggregated with the group for purposes of section 163(j), and members of an affiliated group that do not file a consolidated return are not aggregated with each other for purposes of section 163(j).

Several commenters recommended that aggregation rules be applied to related taxpayers other than consolidated group members. For example, one commenter recommended that aggregation rules similar to those provided under section

199A be applied for purposes of the section 163(j) limitation to obviate the need for related entities to shift debt or business assets around to avoid this limitation. Several other commenters noted that the 1991 Proposed Regulations applied section 163(j) to an affiliated group of corporations (including all domestic corporations controlled by the same parent, whether consolidated or not) and recommended that this “super-affiliation rule” be retained so that affiliated but non-consolidated groups are not disadvantaged under the section 163(j) regulations. In contrast, another commenter agreed with the approach taken in the proposed regulations with respect to affiliated but non-consolidated groups, in part because the allocation of the section 163(j) limitation among non-consolidated affiliates can become quite complex.

Commenters also recommended that a partnership owned by members of an affiliated group (controlled partnership) be treated as an aggregate rather than an entity so that the section 163(j) limitation would not apply separately at the partnership level. Instead, each partner would include its allocable share of the controlled partnership’s tax items in determining its own section 163(j) limitation, and transactions between the controlled partnership and its controlling partners would be disregarded. Some commenters would apply this approach to partnerships wholly owned by members of a controlled group of corporations (as defined in section 1563). Others would apply this approach to partnerships wholly owned (or at least 80 percent-owned) by members of a consolidated group in order to reduce compliance complexity, to ensure that similarly situated taxpayers (namely, consolidated groups that conduct business activities directly and those that conduct such activities through a controlled partnership) are treated similarly, and to discourage consolidated groups from creating a controlled partnership to obtain a better result under section 163(j). Commenters observed that the proposed regulations apply an aggregate approach to certain controlled partnerships that own CFCs (see proposed §1.163(j)-7(f)(6)(ii)(B)), and they recommended applying this principle more broadly.

As explained in the preamble to the proposed regulations, the Treasury Department and the IRS have determined that non-consolidated entities generally should not be aggregated for purposes of applying the section 163(j) limitation. Whereas old section 163(j)(6)(C) expressly provided that “[a]ll members of the same affiliated group (within the meaning of section 1504(a)) shall be treated as 1 taxpayer,” section 163(j) no longer contains such language, and nothing in the legislative history of section 163(j) suggests that Congress intended non-consolidated entities to be treated as a single taxpayer for purposes of section 163(j). See the Concurrent NPRM for a discussion of a proposed exception to this general rule for CFCs. Moreover, the Treasury Department and the IRS have determined that controlled partnerships generally should not be treated as aggregates because section 163(j) clearly applies at the partnership level. See section 163(j)(4). In other words, Congress decided that partnerships should be treated as entities rather than aggregates for purposes of section 163(j). Additionally, revising the regulations to treat controlled partnerships as aggregates would not necessarily achieve the objectives sought by commenters because the controlling partners effectively could “elect” entity or aggregate treatment for the partnership simply by selling or acquiring interests therein (thereby causing the partnership to satisfy or fail the ownership requirement for aggregate treatment).

However, the Treasury Department and the IRS are concerned that the application of section 163(j) on an entity-by-entity basis outside the consolidated group context could create the potential for abuse in certain situations by facilitating the separation of excepted and non-excepted trades or businesses. For example, a consolidated group that is engaged in both excepted and non-excepted trades or businesses could transfer its excepted trades or businesses to a controlled partnership, which in turn could borrow funds from a third party and distribute those funds to the consolidated group tax-free under section 731 (unless the debt is recharacterized as debt of the consolidated group in substance; see *Plantation Patterns, Inc. v. Commissioner*, 462 F.2d 712 (5th Cir. 1972)). Similarly, an individual taxpayer that is engaged in both excepted and non-excepted trades

or businesses could transfer its excepted trades or businesses to a controlled corporation, which in turn could borrow funds from a third party and distribute those funds to the individual tax-free under section 301(c)(2) (assuming the corporation has no earnings and profits). Additionally, a partnership with two trades or businesses—one that generates ATI, and another that generates losses—could separate the two trades or businesses into a tiered partnership structure solely for the purpose of borrowing through the partnership that generates ATI and avoiding a section 163(j) limitation.

The anti-avoidance rule in proposed §1.163(j)-2(h) and the anti-abuse rule in proposed §1.163(j)-10(c)(8) would preclude taxpayers from undertaking the foregoing transfers in certain circumstances. The final regulations add an example illustrating the application of the anti-avoidance rule in proposed §1.163(j)-2(h) to the use of a controlled corporation to avoid the section 163(j) limitation, as well as an example illustrating the application of this anti-avoidance rule to the use of a lower-tier partnership to avoid the section 163(j) limitation in a similar manner.

Commenters further requested that the Treasury Department and the IRS simplify the rules applicable to controlled partnerships if the final regulations do not treat such partnerships as aggregates rather than entities. For example, commenters recommended (i) eliminating steps 3 through 10 in proposed §1.163(j)-6(f)(2) for such partnerships, (ii) applying the principles of the §1.469-7 self-charged interest rules to partnership interest expense and income owed to or from consolidated group members by treating all members of the group as a single taxpayer, or (iii) allowing excess taxable income (ETI) that is allocated by a partnership to one consolidated group member to offset excess business interest expense allocated by that partnership to another group member.

The final regulations do not adopt these recommendations. For a discussion of steps 3 through 10 in proposed §1.163(j)-6(f)(2), see part VII(A)(3) of this Summary of Comments and Explanation of Revisions section. For a discussion of the self-charged interest rules, see the Concurrent NPRM. For a discussion of the

proposal to allow ETI allocated by a partnership to one member of a consolidated group to offset excess business interest expense allocated by that partnership to another group member, see part V(D)(4) of this Summary of Comments and Explanation of Revisions section.

B. Intercompany Transactions and Intercompany Obligations

Proposed §1.163(j)-4(d)(2) contains rules governing the calculation of the section 163(j) limitation for members of a consolidated group. These rules provide, in part, that: (i) a consolidated group has a single section 163(j) limitation; (ii) for purposes of calculating the group’s ATI, the relevant taxable income is the consolidated group’s consolidated taxable income, and intercompany items and corresponding items are disregarded to the extent they offset in amount; and (iii) for purposes of calculating the group’s ATI and determining the business interest expense and business interest income of each member, all intercompany obligations (as defined in §1.1502-13(g)(2)(ii)) are disregarded (thus, interest expense and interest income from intercompany obligations are not treated as business interest expense and business interest income for purposes of section 163(j)).

In turn, proposed §1.163(j)-5(b)(3) contains rules governing the treatment of disallowed business interest expense carryforwards for consolidated groups. These rules provide, in part, that if the aggregate amount of members’ business interest expense (including disallowed business interest expense carryforwards) exceeds the group’s section 163(j) limitation, then: (i) each member with current-year business interest expense and either current-year business interest income or floor plan financing interest expense deducts current-year business interest expense to the extent of its current-year business interest income and floor plan financing interest expense; (ii) if the group has any remaining section 163(j) limitation, each member with remaining current-year business interest expense deducts a pro rata portion of its expense; (iii) if the group has any remaining section 163(j) limitation, disallowed business interest expense carryforwards are deducted on a pro rata basis

in the order of the taxable years in which they arose; and (iv) each member whose business interest expense is not fully absorbed by the group in the current taxable year carries the expense forward to the succeeding taxable year as a disallowed business interest expense carryforward.

Commenters posed several questions and comments with regard to these proposed rules. One commenter expressed concern that these provisions would create noneconomic and distortive allocations of disallowed business interest expense within consolidated groups. For example, assume P (the parent of a consolidated group) acts as a group's sole external borrower, and P on-lends the loan proceeds to S (a member of P's consolidated group) for use in S's business operations. Under the proposed regulations, any disallowed business interest expense would be allocated to P even though S is the economic user of the borrowed funds and may generate the income that supports the external debt. The commenter also expressed concern that, under the proposed regulations, consolidated groups effectively may decide which member will carry forward disallowed business interest expense by having that member borrow funds from third parties, regardless of whether that member actually uses the funds. The commenter raised similar concerns about business interest income, noting that a group may choose which member will loan funds outside the group and thereby affect which member's business interest expense is absorbed within the group.

To address the foregoing concerns, the commenter suggested that the final regulations (i) take intercompany interest income and expense into account for purposes of section 163(j), (ii) allocate current-year disallowed business interest expense to members without regard to whether the interest expense results from intercompany obligations or external borrowings, and (iii) de-link disallowed business interest expenses from intercompany interest income for purposes of the rules under §1.1502-13. However, the commenter acknowledged that this approach could introduce unwarranted complexity. Alternatively, the commenter suggested that taxpayers be permitted to apply any reasonable approach (apart from tracing)

consistent with the economics, subject to a narrowly tailored anti-avoidance rule.

In the proposed regulations, the Treasury Department and the IRS determined that intercompany obligations should be disregarded for purposes of section 163(j) for several reasons. First, section 163(j) is concerned with interest expense paid to external lenders, not internal borrowing between divisions of a single corporation (or between members of a consolidated group). In this regard, the Treasury Department and the IRS note that treating a member with intercompany debt but no external debt as having business interest expense could lead to strange results.

Second, the approach taken in the proposed regulations results in application of the section 163(j) limitation at the consolidated group level, consistent with the expressed intent of Congress (see H. Rept. 115-466, at 386 (2017)).

Third, such an approach is simpler for taxpayers to administer than an approach that would require consolidated groups to track disallowed business interest expense with regard to intercompany obligations across taxable years, as further discussed in the following paragraph. Allowing taxpayers to apply any reasonable approach (and to ignore or take into account interest expense on intercompany obligations as they determine to be appropriate) also would further complicate rather than simplify tax administration, particularly with regard to the application of section 163(j) to consolidated groups.

Fourth, as the commenter acknowledged, taking intercompany obligations into account for purposes of section 163(j) would complicate the application of §1.1502-13. Section 1.1502-13 achieves single-entity treatment for a consolidated group by preventing intercompany transactions from creating, accelerating, avoiding, or deferring consolidated taxable income or liability. To this end, §1.1502-13(c) "matches" the tax items of the members that are parties to an intercompany transaction. In the case of intercompany interest, income and deductions do not affect consolidated taxable income or liability because each side of the transaction "nets out" the other in each taxable year. If section 163(j) applied to intercompany payments of business interest expense, and if a consolidated group's

section 163(j) limitation did not permit the deduction of all of the group's intercompany business interest expense, the interest income and expense would not net out each other. Thus, the group would need to separately track both the intercompany borrower's non-deductible expense and the intercompany lender's non-includable income through future taxable years.

The Treasury Department and the IRS acknowledge that disregarding intercompany obligations may lead to results in some circumstances that are less economically accurate than a regime that takes such obligations into account, but the Treasury Department and the IRS considered administrability as well as economic accuracy when promulgating the proposed regulations. Moreover, although disregarding intercompany obligations may grant consolidated groups the latitude to decide which member will incur business interest expense, consolidated groups also would have significant flexibility to allocate business interest expense within a group using intercompany obligations if such obligations were regarded for purposes of section 163(j).

Although the proposed rules in the Concurrent NPRM concerning CFC group elections do regard inter-CFC group net interest expense in allocating CFC group disallowed business interest expense, the CFC group setting is materially different from that of a consolidated group. First, in the context of a CFC group, neither §1.1502-13 nor similar rules apply. Second, the location of disallowed business interest expense may have more effect on tax liability. In particular, disallowed business interest expense may affect the calculation of foreign tax credits and the amount of qualified business asset investment within the meaning of section 951A(d)(1) (QBAI) taken into account in determining a U.S. shareholder's tax liability under section 951A. This effect depends entirely on the particular CFC group member affected by disallowed business interest expense. Although the location of disallowed business interest expense has an effect on consolidated groups, this effect often will be less than in the CFC group context.

For the foregoing reasons, the final regulations do not apply section 163(j) to business interest expense or business in-

terest income incurred on intercompany obligations, with one limited exception related to repurchase premium on obligations that are deemed satisfied and reissued, which is described in part V(C) of this Summary of Comments and Explanation of Revisions section.

Commenters also expressed concern that consolidated groups may have difficulty determining which member is the borrower on external debt if other group members are co-obligors or guarantors on the debt, and that, as a result, each member may have difficulty calculating its business interest expense for each taxable year. Commenters voiced similar concerns about the lack of parameters for determining the appropriate location of business interest income and floor plan financing interest expense within the group.

The Treasury Department and the IRS do not find this comment persuasive. Consolidated groups (and other related parties) are required to determine which member is entitled to a deduction for interest expense. Specifically, a consolidated group must use this information for purposes of computing consolidated taxable income under §§1.1502-11 and 1.1502-12 and making stock basis adjustments in members under §1.1502-32. Moreover, consolidated groups must determine which member has incurred business interest expense for purposes of applying section 382 and the separate return limitation year (SRLY) rules. Consolidated groups must look to existing law to determine which member should be treated as incurring business interest expense or business interest income for purposes of section 163(j).

C. Repurchase Premium on Obligations that are Deemed Satisfied and Reissued

As discussed in part V(B) of this Summary of Comments and Explanation of Revisions section, interest expense on intercompany obligations generally is disregarded for purposes of section 163(j). Thus, commenters asked whether repurchase premium that is treated as interest with respect to intercompany obligations should be subject to the section 163(j) limitation. In general, if debt that is not an intercompany obligation becomes an intercompany obligation (for example, if a member of a consolidated group acquires

another member's debt from a non-member), the debt is treated for all Federal income tax purposes, immediately after it becomes an intercompany obligation, as having been satisfied by the issuer for cash in an amount equal to the holder's basis in the note and as having been reissued as a new intercompany obligation for the same amount of cash. See §1.1502-13(g)(5)(ii) (A). Additionally, 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) generally is deductible as interest for the taxable year in which the repurchase occurs. See §1.163-7(c).

For example, S is a member of P's consolidated group, and S has borrowed \$100x from unrelated X. At a time when S's note has increased in value to \$130x due to a decline in prevailing interest rates, P purchases the note from X for \$130x. Under §1.1502-13(g)(5)(ii), S's note is treated as satisfied for \$130x immediately after it becomes an intercompany obligation. As a result of the deemed satisfaction of the note, P has no gain or loss, and S has \$30x of repurchase premium that is deductible as interest. See §1.1502-13(g)(7)(ii), *Example 10*. Similarly, if S were to repurchase its note from X for \$130x, S would have \$30x of repurchase premium that is deductible as interest.

If S were to repurchase its note from X at a premium, the interest (in the form of repurchase premium) paid on that note would be subject to the section 163(j) limitation. See §1.163(j)-1(b)(22)(i)(H) (treating repurchase premium that is deductible under §1.163-7(c) as interest for purposes of section 163(j)). If section 163(j) does not apply to repurchase premium paid by S to P after P purchases S's note from X, the P group would obtain a different (and better) result than if S were to repurchase its own note. The Treasury Department and the IRS have determined that achieving different results under section 163(j) depending on which member repurchases external debt would be inconsistent with treating a consolidated group as a single entity for purposes of section 163(j) and would undermine the purpose of §1.1502-13. Thus, the final regulations provide that, for purposes of section 163(j), if any member of a consolidated group purchases a member's note from a

third party at a premium, the repurchase premium that is deductible under §1.163-7(c) is treated as interest expense for purposes of section 163(j), regardless of whether the repurchase premium is treated as paid on intercompany indebtedness.

D. Intercompany Transfers of Partnership Interests

1. Overview of Proposed §1.163(j)-4(d)(4)

Proposed §1.163(j)-4(d)(4) provides that the transfer of a partnership interest in an intercompany transaction that does not result in the termination of the partnership is treated as a disposition for purposes of section 163(j)(4)(B)(iii)(II), regardless of whether the transfer is one in which gain or loss is recognized. Thus, the transferor member's excess business interest expense is eliminated rather than transferred to the transferee member. Proposed §1.163(j)-4(d)(4) further provides that neither the allocation of excess business interest expense to a member from a partnership (and the resulting decrease in basis in the partnership interest) nor the elimination of excess business interest expense of a member upon a disposition of the partnership interest (and the resulting increase in basis in the partnership interest) affects basis in the member's stock for purposes of §1.1502-32(b)(3)(ii). Instead, investment adjustments are made under §1.1502-32(b)(3)(i) when the excess business interest expense from the partnership is absorbed by the consolidated group. See §1.1502-32(b).

2. Intercompany Transfers of Partnership Interests Treated as Dispositions; Single-Entity Treatment; Application of §1.1502-13

Commenters posed various questions and comments about the treatment of intercompany transfers of partnership interests as dispositions for purposes of section 163(j). For example, commenters asked why, in applying section 163(j) to consolidated groups, the proposed regulations treat such transfers as dispositions, rather than simply disregard the transfers, given that the proposed regulations generally treat consolidated groups as a single entity

and disregard intercompany transactions for purposes of section 163(j).

The proposed regulations provide that intercompany transfers of partnership interests are treated as dispositions for purposes of section 163(j) because each member's separate ownership of interests in a partnership generally is respected (otherwise, a partnership whose interests are wholly owned by members of a consolidated group would be treated as a disregarded entity), and because the term "disposition" in section 163(j)(4)(B)(iii)(II) has broad application (for example, it applies to nonrecognition transactions). Moreover, if an intercompany transfer of partnership interests were not treated as a disposition (and if, as a result, basis were not restored to the transferor member), the amount of the transferor member's gain or loss on the intercompany transfer would be incorrect. Special rules also would be needed to account for the transfer of excess business interest expense from one member to another in a manner consistent with the purposes of §1.1502-13 and to comply with the directive of section 1502 to clearly reflect the income of each member of the group.

Several commenters also noted problems with the approach in proposed §§1.163(j)-4(d)(4) and 1.1502-13(c)(7)(ii)(R), *Example 18*. These commenters pointed out that the approach in the proposed regulations does not achieve single-entity treatment because one member's transfer of its partnership interest to another member causes the transferor's excess business interest expense to be eliminated; thus, an intercompany transaction may alter the amount of business interest expense that is absorbed by the group. One commenter suggested a different approach under which the transferee could claim deductions for excess business interest expense to the extent the transferee is allocated excess taxable income from the same partnership. However, the commenter acknowledged that this approach would require additional rules under §1.1502-13.

Another commenter suggested that intercompany transfers in which the transferee is the successor to the transferor (for example, in transactions to which section 381(a) applies, or in which the transferee's basis in the partnership interest is deter-

mined by reference to the transferor's basis) should not be treated as dispositions for purposes of section 163(j)(4)(B)(iii)(II). However, this approach would not result in an increase in the transferor member's (S's) basis in its partnership interest immediately before the transfer; thus, this approach would be inconsistent with §1.1502-13, which requires the clear reflection of income at the level of the consolidated group member. This approach also would be inconsistent with section 163(j)(4)(B)(iii)(II), which clearly treats "a transaction in which gain is not recognized in whole or in part" as a disposition for purposes of that section.

Still another commenter observed that the analysis in proposed §1.1502-13(c)(7)(ii)(R), *Example 18*, does not work in certain other fact patterns. In proposed §1.1502-13(c)(7)(ii)(R), *Example 18*, P wholly owns S and B, both of which are members of P's consolidated group. S and A (an unrelated third party) are equal partners in PS1, which allocates \$50x of excess business interest expense to each partner in Year 2. At the end of Year 2, S sells its PS1 interest to B at a \$50x loss (S's excess business interest expense is eliminated, and S's basis in its PS1 interest is increased by \$50x immediately before the sale). In Year 3, PS1 allocates \$25x of excess taxable income to B. At the end of Year 4, B sells its PS1 interest to Z (an unrelated third party) for a \$10x gain. The example concludes that S takes into account \$25x of its loss in Year 3 as an ordinary loss, which matches B's inclusion of \$25x of ordinary income in Year 3. The remaining \$25x of S's \$50x capital loss is taken into account in Year 4. The commenter noted that, although the analysis in proposed §1.1502-13(c)(7)(ii)(R), *Example 18*, works under the facts presented, it would not work if, for example, S were to sell the PS1 interest to B at a gain (because S's gain and B's income could not be offset).

The Treasury Department and the IRS acknowledge the concerns raised by these commenters. The Treasury Department and the IRS are continuing to study the proper treatment of intercompany transfers of partnership interests that do not result in the termination of the partnership (intercompany partnership interest transfers), including whether such transfers

should be treated as dispositions for purposes of section 163(j)(4)(B)(iii)(II). The final regulations reserve on issues relating to intercompany partnership interest transfers, and the Treasury Department and the IRS welcome further comments on such issues.

3. Possible Approach to Intercompany Partnership Interest Transfers

The Treasury Department and the IRS are considering various possible approaches to intercompany partnership interest transfers. Under one possible approach, such a transfer would be treated as a disposition by S; thus, S's excess business interest expense would be eliminated (and its basis in its partnership interest would be increased accordingly immediately before the transfer), as would S's negative section 163(j) expense (within the meaning of §1.163(j)-6(h)(1)). However, unlike the approach in proposed §1.163(j)-4(d)(4), B would be treated as if B had been allocated excess business interest expense or negative section 163(j) interest expense from the partnership in an amount equal to the amount of S's excess business interest expense or negative section 163(j) expense, respectively, immediately before the transfer. B's basis in its partnership interest would be adjusted under section 163(j)(4)(B)(iii)(I) and §1.163(j)-6(h) to reflect the deemed allocation of excess business interest expense from the partnership. Similar rules would apply to intercompany transfers of partnership interests in nonrecognition transactions.

The foregoing approach would attempt to approximate single-entity treatment while treating the intercompany transfer of a partnership interest as a disposition for purposes of section 163(j)(4)(B)(iii)(II). To ensure that B has the same amount of excess business interest expense, negative section 163(j) expense, and disallowed business interest expense carryforwards as if S and B were divisions of a single corporation, this approach also would include special basis rules. For example, if S transfers its partnership interest to B at a gain, the excess of B's basis in the partnership interest at any time after the transfer over S's basis in the partnership interest immediately before the transfer would not

be available to convert negative section 163(j) expense into excess business interest expense in the hands of B or to prevent excess business interest expense from converting into negative section 163(j) expense in the hands of B. Additionally, if adjustments to B's basis in its partnership interest under section 163(j)(4)(B)(iii)(I) and §1.163(j)-6(h) (upon the deemed allocation of excess business interest expense from the partnership) would exceed B's basis, B would be treated as having a suspended negative basis adjustment in the partnership interest (similar to an excess loss account within the meaning of §1.1502-19(a)(2)(i)).

The Treasury Department and the IRS request comments on possible approaches to intercompany partnership interest transfers, including the approach outlined in this part V(D)(3) of this Summary of Comments and Explanation of Revisions section.

4. Offsetting Excess Business Interest Expense and Adjusted Taxable Income Within the Consolidated Group

A commenter also recommended that, if the section 163(j) regulations do not treat partnerships wholly owned by members of the same consolidated group as aggregates rather than as entities (see part V(A) of this Summary of Comments and Explanation of Revisions section), the rules applicable to such partnerships should be simplified. For example, the excess taxable income allocated to one member partner could be made available to offset excess business interest expense allocated to another member partner.

The commenter's recommendation presents several issues. For example, the commenter's recommendation would entail disregarding the location of excess business interest expense and excess taxable income within a consolidated group. Such an approach would not fully respect each member's separate interest in a partnership and would not clearly reflect the taxable income of the members of the group. See section 1502; see also part V(D)(2) of this Summary of Comments and Explanation of Revisions section. Further, to the extent the ownership structure of the group is altered by an intercompany transfer of the partnership interest, sub-

stantial additional rules under §1.1502-13 would be required.

5. Intercompany Nonrecognition Transactions

In proposed §§1.163(j)-4(d)(4) and 1.1502-13(c)(7)(ii)(S), *Example 19*, the intercompany transfer of a partnership interest in a nonrecognition transaction is treated as a disposition for purposes of section 163(j)(4)(B)(iii)(II). In the preamble to the proposed regulations, the Treasury Department and the IRS requested comments as to whether such transfers should constitute dispositions for purposes of section 163(j)(4)(B)(iii)(II) and, if so, how §1.1502-13(c) should apply if there is excess taxable income in a succeeding taxable year. In such a case, S would have no intercompany item from the intercompany transfer, and B would take a carryover basis in the partnership interest (this amount would include any basis increase to reflect S's unused excess business interest expense under section 163(j)(4)(B)(iii)(II)).

One commenter agreed that, based on the plain language of section 163(j)(4)(B)(iii)(II), intercompany transfers that are nonrecognition transactions should be treated as dispositions. Another commenter stated that such transfers generally should not be treated as dispositions (if the transferee is the successor to the transferor, as previously discussed), but that, if such transfers are treated as dispositions, no redeterminations should be made under §1.1502-13(c) with respect to S unless S recognizes gain in the intercompany transfer.

The Treasury Department and the IRS continue to study the proper treatment of intercompany partnership interest transfers and welcome further comments on this issue.

6. Basis Adjustments Under §1.1502-32

A commenter stated that the approach to basis adjustments under §1.1502-32 in the proposed regulations may lead to temporary inside/outside basis disparities. Although the commenter generally described this approach as reasonable and consistent with the application of both section 163(j) and §1.1502-32, the commenter suggest-

ed that it may lead to anomalous results in certain cases. The commenter requested an example to illustrate the application of the matching and acceleration rules in the case of an intercompany transfer of an interest in a partnership with disallowed business interest expense.

When S (a member of a consolidated group that is not the common parent) is allocated excess business interest expense from a partnership, S's basis in the partnership is reduced under section 163(j)(4)(B)(iii)(I). Although S's basis in the partnership is reduced, S has excess business interest expense in the same amount, and S's overall inside attribute amount is unchanged. Because there is no net change to S's inside attribute amount, §1.1502-32 does not apply to reduce other members' basis in S's stock, and there is no inside/outside disparity. Moreover, nothing in the final regulations affects the operation of §1.1502-32(a), which generally requires adjustments to a member's basis in its S stock to reflect S's distributions and S's items of income, gain, deduction, and loss that are taken into account by the group while S is a member. Thus, the final regulations make no changes in response to this comment.

7. Partnership Terminations

In the preamble to the proposed regulations, the Treasury Department and the IRS requested comments on the treatment of the transfer of a partnership interest in an intercompany transaction that results in the termination of the partnership. Some commenters recommended that the transfer be treated as a disposition for purposes of section 163(j)(4)(B)(iii)(II) and proposed §1.163(j)-6(h)(3). Other commenters recommended that, under Revenue Ruling 99-6, 1999-1 C.B. 432, if the transferee member (B) also were a partner in the partnership before the intercompany transfer, B should be viewed as (i) receiving a distribution of assets from the terminating partnership with respect to its partnership interest, and (ii) purchasing the partnership's assets deemed distributed to the transferor member (S).

The Treasury Department and the IRS are continuing to study the proper treatment of intercompany transfers of partnership interests that result in the termination

of the partnership. But see §1.163(j)-6(h)(3) with respect to partnership terminations generally.

E. Application of §1.1502-36 to Excess Business Interest Expense

Under proposed §1.163(j)-4(d)(4), a partner's change in status as a member of a consolidated group is not treated as a disposition for purposes of section 163(j)(4)(B)(iii)(II) and proposed §1.163(j)-6(h)(3). In other words, if a corporation becomes or ceases to be a member of a consolidated group, and if that corporation is a partner in a partnership, that corporation's entry into or departure from a consolidated group does not trigger basis adjustments under section 163(j)(4)(B)(iii)(II). However, in the preamble to the proposed regulations, the Treasury Department and the IRS requested comments as to whether additional rules are needed to prevent loss duplication upon the disposition of stock of a subsidiary member (S) holding partnership interests.

Section 1.1502-36 contains the unified loss rule, which limits the ability of a consolidated group to recognize non-economic or duplicated losses on the transfer of S stock. The rule applies when a group member transfers a loss share of S stock. If §1.1502-36(d) applies to the transfer of a loss share, the attributes of S and its lower-tier subsidiaries generally are reduced as needed to prevent the duplication of any loss recognized on the transferred stock. Such attributes include capital loss carryovers, NOL carryovers, deferred deductions, and basis in assets other than cash and general deposit accounts. See §1.1502-36(d)(4).

As noted in the preamble to the proposed regulations, the Treasury Department and the IRS have determined that disallowed business interest expenses should be treated as deferred deductions for purposes of §1.1502-36 (see proposed §1.1502-36(f)(2)). A commenter recommended that excess business interest expense also be treated as a deferred deduction in determining the net inside attribute amount for purposes of §1.1502-36(c) and (d). Additionally, the commenter recommended that a consolidated group be permitted to elect to reattribute excess business interest expense from S to the

common parent under §1.1502-36(d)(6) if the common parent also is a partner in the partnership that allocated excess business interest expense to S.

The Treasury Department and the IRS agree that excess business interest expense should be treated as an attribute that is taken into account in determining the net inside attribute amount for purposes of §1.1502-36(c) and (d). However, the Treasury Department and the IRS have determined that excess business interest expense is more akin to basis (a Category D attribute) than to deferred deductions (a Category C attribute) (see §1.1502-36(d)(4)(i)). Section 1.163(j)-4(e)(4) reflects this conclusion.

The Treasury Department and the IRS also have determined that excess business interest expense should not be eligible for reattribution under §1.1502-36(d)(6) because the election is not available with respect to Category D attributes. Thus, the final regulations do not adopt this recommendation.

F. Calculating ATI for Cooperatives

Proposed §1.163(j)-1(b)(1) defines ATI as the taxable income of the taxpayer for the taxable year, with certain adjustments. Proposed §1.163(j)-4(b)(4) provides a special rule for calculating the ATI of a RIC or REIT, allowing the RIC or REIT not to reduce its taxable income by the amount of any deduction for dividends paid. The preamble to the proposed regulations also requested comments on whether additional special rules are needed for specific types of taxpayers, including cooperatives.

A commenter asked that the final regulations include a special rule for calculating the ATI of cooperatives subject to taxation under subchapter T of the Code. Under this special rule, taxable income would not be reduced by amounts deducted under section 1382(b)(1) (patronage dividends), section 1382(b)(2) (amounts paid in redemption of nonqualified written notices of allocation distributed as patronage dividends), or section 1382(c) (certain amounts incurred by farm cooperatives described in sections 521 and 1381(a)(1)). The commenter reasoned that such amounts are earnings passed on to members and are therefore analogous to

dividends paid by a RIC or REIT to its investor.

The Treasury Department and the IRS agree that, for purposes of section 163(j), amounts deducted by cooperatives under sections 1382(b)(1), (b)(2), and (c) are similar to amounts deducted by RICs and REITs for dividends paid to their investors. The final regulations adopt a rule providing that, for purposes of calculating ATI, the tentative taxable income of a cooperative subject to taxation under sections 1381 through 1388 is not reduced by such amounts. In order to provide similar treatment to similarly situated taxpayers, the final regulations also provide that, for purposes of calculating ATI, the tentative taxable income of cooperatives not subject to taxation under subchapter T of the Code is not reduced by the amount of deductions equivalent to the amounts deducted by cooperatives under sections 1382(b)(1), (b)(2), and (c).

G. Calculating ATI for a Consolidated Group

Proposed §1.163(j)-1(b)(1) defines ATI as the taxable income of the taxpayer for the taxable year, with certain adjustments. For example, ATI is computed without regard to the amount of any NOL deduction under section 172. See proposed §1.163(j)-1(b)(1)(i)(B).

As noted in part V(B) of this Summary of Comments and Explanation of Revisions section, for purposes of calculating the ATI of a consolidated group, the relevant taxable income is the group's consolidated taxable income, determined under §1.1502-11 without regard to any carryforwards or disallowances under section 163(j). See proposed §1.163(j)-4(d)(2)(iv). Commenters asked for clarification that a consolidated group's ATI does not take into account any NOL deductions available under section 172 and §1.1502-11(a)(2) that result from either the carry-back or carryforward of NOLs.

Proposed §1.163(j)-4(d)(2)(iv) does not expressly mention the adjustments made to ATI in proposed §1.163(j)-1(b)(1) because those adjustments are generally applicable (for example, the adjustment for NOLs applies to all taxpayers to whom section 172 applies, regardless of whether such taxpayers file a consolidated return).

Moreover, there is no exception in proposed §1.163(j)-4(d)(2)(iv) to the adjustment for NOLs in proposed §1.163(j)-1(b)(1)(i)(B). Thus, under these provisions, a consolidated group's ATI would not take into account any NOL deductions resulting from the carryback or carryforward of NOLs. The Treasury Department and the IRS have determined that no change to proposed §1.163(j)-4(d)(2)(iv) is needed to effectuate this result.

H. Application of Section 163(j) to Life-Nonlife Groups

Proposed §1.163(j)-4(d)(2) provides that a consolidated group has a single section 163(j) limitation and that, for purposes of calculating the group's ATI, the relevant taxable income is the group's consolidated taxable income. However, §1.1502-47 requires consolidated groups whose members include life insurance companies and other companies (life-nonlife groups) to adopt a subgroup method to determine consolidated taxable income. (One subgroup is the group's non-life companies; the other subgroup is the group's life insurance companies.) Under the subgroup method, each subgroup initially computes its own consolidated taxable income, and there are limitations on a life-nonlife group's ability to offset one subgroup's income with the other subgroup's loss.

In light of the apparent tension between proposed §1.163(j)-4(d)(2) and the subgroup method in §1.1502-47, one commenter asked for clarification that there are not separate section 163(j) limitations for each subgroup in a life-nonlife group.

The subject matter of this comment is beyond the scope of the final regulations. The Treasury Department and the IRS expect to issue future guidance regarding the interaction of section 163(j) and §1.1502-47 and welcome further comments on this topic.

I. Application of Section 163(j) to Tax-Exempt Entities

Proposed §1.163(j)-1(b)(36) defines a tax-exempt corporation but does not define other types of tax-exempt organizations. Thus, a commenter asked for clarification as to whether section 163(j)

applies solely to tax-exempt corporations or whether it also applies to other entities subject to tax under section 511. The final regulations clarify that section 163(j) applies to all entities that are subject to tax under section 511.

The commenter also suggested that section 163(j) should not apply to state colleges and universities described in section 511(a)(2)(B). The Treasury Department and the IRS have found nothing in the statute or legislative history to suggest that Congress intended special treatment for state colleges and universities to the extent such organizations are subject to tax under section 511. Therefore, the final regulations do not adopt this recommendation.

J. Partnership Investment Income and Corporate Partners

Under the proposed regulations, a partnership's investment interest income and investment expense are allocated to each partner in accordance with section 704(b), and the effect of the allocation is determined at the partner level. In general, any investment interest, investment income, and investment expense allocated by a partnership to a C corporation partner is treated by the partner as allocable to a non-exceptioned trade or business of the partner for purposes of section 163(j). See proposed §§1.163(j)-4(b)(3)(i) and 1.163(j)-10(b)(6).

In light of the statutory restriction against including investment income in a partner's ATI (see section 163(j)(8)(A)(i)), a commenter requested confirmation that a partnership's investment income is treated as properly allocable to a trade or business of (and thus is included in the ATI of) a corporate partner, perhaps by adding an example to illustrate the application of this rule.

Proposed §1.163(j)-10(b)(6) provides that any investment income or investment expenses that a partnership receives, pays, or accrues and that is treated as properly allocable to a trade or business of a C corporation partner under proposed §1.163(j)-4(b)(3)(i) is treated as properly allocable to a non-exceptioned trade or business of the C corporation partner. Thus, if a partnership incurs investment interest expense, any portion of that expense that

is allocable to a C corporation partner is treated as a business interest expense of that partner that is subject to the section 163(j) limitation. However, if the partnership also has investment interest income, any portion thereof that is allocable to a C corporation partner is treated as business interest income of the partner, and any other investment income of the partnership that is allocable to the C corporation partner increases the partner's ATI. See §1.163(j)-4(b)(7)(ii), *Example 2*.

To the extent that an investment item or other item of a partnership is with respect to property for which an election has been made by the partnership to treat as an electing real property trade or business or electing farming business, such item is treated as properly allocable to an excepted trade or business. This rule is necessary because the final regulations permit elections for some assets and activities to be an excepted trade or business even when such assets and activities are not trades or businesses for section 162 purposes. See part X(A) of this Summary of Comments and Explanation of Revisions section.

The final regulations also expand proposed §1.163(j)-4(b)(3)(i) to cover not only a partnership's items of investment interest, investment income, and investment expense, but also a partnership's other separately stated tax items that are subject to neither section 163(j) nor section 163(d). Such items might include tax items allocable to rental activities that do not rise to the level of a section 162 trade or business that otherwise give rise to allowable deductions (such as under section 212 as it existed under prior law) that are subject to section 469. Thus, such items are treated as properly allocable to a trade or business of a C corporation partner as well.

K. Earnings and Profits of a Corporate Partner

Proposed §1.163(j)-4(c)(1) generally provides that the disallowance and carry-forward of a deduction for a C corporation's business interest expense under proposed §1.163(j)-2 does not affect whether or when the business interest expense reduces the corporation's earnings and profits. Some commenters suggested that, if the business interest expense in question

is incurred by a partnership rather than by the C corporation partner, the partner should reduce its earnings and profits twice with respect to that expense—once when the expense is allocated from the partnership to the partner, and again when the partner claims a deduction with respect to that expense (after the excess business interest expense allocated to that partner is treated as business interest expense and deducted by that partner).

The Treasury Department and the IRS have determined that the proposed regulations do not permit a C corporation partner to reduce its earnings and profits twice with respect to business interest expense incurred by a partnership. The final regulations are modified to clarify this point.

Proposed §1.163(j)-4(c)(3) also provides a special earnings and profits rule for C corporations (other than REITs or RICs) with respect to excess business interest expense allocated from a partnership. Under this rule, the C corporation partner must increase its earnings and profits upon the disposition of the partnership interest to reflect the amount of excess business interest expense that the partner did not take into account while it held the partnership interest. The Treasury Department and the IRS have determined that the same rule should apply with respect to negative section 163(j) expense, and the final regulations have been modified accordingly.

VI. Comments on and Changes to Proposed §1.163(j)-5: General Rules Governing Disallowed Business Interest Expense Carryforwards for C Corporations

Section 1.163(j)-5 provides rules regarding disallowed business interest expense carryforwards for taxpayers that are C corporations, including members of a consolidated group. The following discussion addresses comments relating to proposed §1.163(j)-5.

A. Absorption of Disallowed Business Interest Expense Carryforwards Before Use of NOLs in Life-Nonlife Groups

Proposed §1.163(j)-5(b)(3) provides rules regarding the treatment of disal-

lowed business interest expense carryforwards of a consolidated group. Commenters asked for confirmation that, in the context of a life-nonlife group, such carryforwards are factored into taxable income at the subgroup level before NOLs are carried forward and limited under section 1503(c)(1).

In general, a consolidated group must determine the amount of business interest expense (whether current-year or carryforwards) that can be absorbed in a particular taxable year before determining whether NOLs can be carried forward or back to that taxable year. However, the specific subject matter of this comment is beyond the scope of the final regulations. The Treasury Department and the IRS expect to issue future guidance regarding the interaction of section 163(j) and §1.1502-47 and welcome further comments in this regard.

B. Carryforwards from Separate Return Limitation Years

Proposed §1.163(j)-5(d) contains rules for consolidated groups regarding disallowed business interest expense carryforwards from a separate return limitation year (a SRLY; see §1.1502-1(f)). Under these rules, the disallowed business interest expense carryforwards of a member arising in a SRLY that are included in a group's business interest expense deduction for any taxable year may not exceed the group's section 163(j) limitation for that year, determined by reference only to the member's tax items for that year (the section 163(j) SRLY limitation). See proposed §1.163(j)-5(d)(1). Additionally, disallowed business interest expense carryforwards of a member arising in a SRLY would be available for deduction by the consolidated group in the current year only to the extent the group had remaining section 163(j) limitation after deducting current-year business interest expense and disallowed business interest expense carryforwards from earlier taxable years, and only to the extent the section 163(j) SRLY limitation for the current year exceeded the amount of the member's business interest expense already deducted by the group in that year. In addition, SRLY-limited disallowed business interest expense carryforwards must be deducted

on a pro rata basis with non-SRLY limited disallowed business interest expense carryforwards from taxable years ending on the same date. See proposed §1.163(j)-5(d)(2).

Commenters asked several questions about the SRLY rules in proposed §1.163(j)-5(d). In particular, commenters asked why the section 163(j) SRLY limitation is calculated annually rather than on an aggregate or cumulative basis, as is the case for NOLs. (Section 1.1502-21(c)(1)(i) generally limits the amount of a member's NOL carryforwards and carrybacks from a SRLY that may be included in the group's consolidated net operating loss deduction to the member's aggregate contribution to the group's consolidated taxable income for the entire period the member has been a group member, not just for the taxable year in question). More specifically, a commenter noted that the SRLY rules in §1.1502-21(c) were designed to produce a result that roughly approximates the absorption that would have occurred if the SRLY member had not joined a consolidated group. In contrast, the annual section 163(j) limitation in proposed §1.163(j)-5(d) could put the SRLY member in a worse position than if such member had not joined a consolidated group.

For example, if S were a standalone corporation with \$100x of disallowed business interest expense carryforwards at the start of Year 2, and if S's section 163(j) limitation were \$30 in Year 2, S could deduct \$30x of its carryforwards. In comparison, if S joined a consolidated group at the start of Year 2, and if the group's section 163(j) limitation were \$0 in Year 2, S could not deduct any of its \$100x of carryforwards in Year 2 even if S's standalone section 163(j) limitation were \$30x in that year. This result is correct for the P group for Year 2 given Congress's intent that the section 163(j) limitation apply at the consolidated group level. However, under the annual measurement approach in the proposed regulations, S also could not deduct any of its carryforwards in Year 3 if S had a standalone section 163(j) limitation of \$0 in that year, even if the group's section 163(j) limitation were positive in that year. Thus, S would be in a worse position (with respect to the deduction of its disallowed business interest expense

carryforwards) than if S had not joined a consolidated group.

To put S in roughly the same position as if S were a standalone corporation, commenters recommended the creation of a cumulative section 163(j) register under which the amount of a member's SRLY carryforwards that may be absorbed by the consolidated group in a taxable year may not exceed (i) the member's contributions (positive and negative) to the group's section 163(j) limitation in all consolidated return years, less (ii) the member's business interest expense (including carryforwards) absorbed by the group in all consolidated return years. For these purposes, and unlike the general rule in section 163(j)(1) and proposed §1.163(j)-2(b)(2), the adjustment to a member's cumulative section 163(j) SRLY register for any taxable year or its total register for any taxable year could be less than zero.

In the preamble to the proposed regulations, the Treasury Department and the IRS stated that applying an aggregate or cumulative approach to the section 163(j) SRLY limitation would be inconsistent with congressional intent because Congress did not retain the excess limitation carryforward provisions from old section 163(j). One commenter expressed agreement with this conclusion. However, other commenters noted that applying a cumulative section 163(j) SRLY register would not effectuate the carryforward of excess limitation at the level of the consolidated group. In other words, although the SRLY member would be able to deduct its SRLY disallowed business interest expense carryforwards in a taxable year to the extent of that member's cumulative (rather than annual) contribution to the group's section 163(j) limitation, the SRLY member's ability to deduct such carryforwards still would be subject to the group's annual section 163(j) limitation.

After considering the comments received, the Treasury Department and the IRS have determined that a cumulative section 163(j) SRLY register would better approximate the results under section 163(j) if the SRLY member had not joined a consolidated group, and that this approach is not inconsistent with congressional intent. Therefore, the final regula-

tions adopt a cumulative section 163(j) SRLY register.

The cumulative section 163(j) SRLY register operates in a manner similar to, but is separate and distinct from, the cumulative register for NOLs described in §1.1502-21(c). In computing a member's section 163(j) SRLY register, the intercompany transaction rules of §1.1502-13 generally continue to apply; thus, for example, intercompany income items and intercompany deductions and losses (to the extent absorbed by the group) generally are taken into account in computing the section 163(j) SRLY register. However, interest income and expense from intercompany obligations are not taken into account in computing the section 163(j) SRLY register. This approach approximates the SRLY member's capacity to utilize carryforwards on a standalone basis while harmonizing with the single-entity application of section 163(j) to consolidated groups. Under this approach, intercompany interest income and expense items will neither increase nor decrease the SRLY register.

In the preamble to the proposed regulations, the Treasury Department and the IRS requested comments on another alternative to both an annual register and a cumulative register—removing the SRLY limitation from a member's SRLY-limited disallowed business interest expense carryforwards, to the extent of the member's standalone section 163(j) limitation, in taxable years in which the member's standalone section 163(j) limitation exceeds the consolidated group's section 163(j) limitation. A commenter endorsed this approach. However, other commenters expressed concern that this approach would be more distortive than a cumulative register approach. The Treasury Department and the IRS agree that a cumulative register more closely approximates the results on a standalone basis than this alternative approach. Thus, the final regulations adopt a cumulative register approach rather than this alternative approach.

Commenters also expressed concern that proposed §1.163(j)-5(d)(2) would treat SRLY carryforwards as available for deduction only to the extent the amount of the SRLY member's business interest expense already deducted by the

group in the current year does not exceed the member's annual section 163(j) SRLY limitation. The adoption of the cumulative section 163(j) SRLY limitation mechanism, with the associated reduction to reflect all business interest expense of that member that is absorbed by the group, obviates the issues highlighted in the comment. The final regulations retain the other SRLY limitations in proposed §1.163(j)-5(d)(2).

C. Offsetting Business Interest Expense with Business Interest Income and Floor Plan Financing Interest Expense at the Member Level

As described in part V(B) of this Summary of Comments and Explanation of Revisions section, proposed §1.163(j)-5(b)(3) provides, in part, that if the aggregate amount of members' business interest expense (including carryforwards) exceeds the consolidated group's section 163(j) limitation for the current year, then each member with current-year business interest expense and current-year business interest income or floor plan financing interest expense deducts current-year business interest expense to the extent of its current-year business interest income and floor plan financing interest expense. Thereafter, if the group has any remaining section 163(j) limitation, each member with remaining current-year business interest expense deducts a pro rata portion thereof.

A commenter stated that offsetting business interest expense with business interest income or floor plan financing interest expense at the member level seems inconsistent with the single-entity principles adopted by the proposed regulations. Moreover, the commenter expressed concern that a consolidated group could choose where to incur business interest income within a group and thereby affect which member has disallowed business interest expense carryforwards. In addition, the commenter asserted that a group may have difficulty determining which member has incurred business interest income and floor plan financing interest expense (see the discussion in part V(B) of this Summary of Comments and Explanation of Revisions section). Thus, the commenter recommended an alternative approach

that does not require such offsetting at the member level.

The Treasury Department and the IRS acknowledge that netting business interest income and floor plan financing interest expense against business interest expense at the member level deviates from a “pure” single-entity approach. This approach was adopted in the proposed regulations to give effect to section 163(j)(1) (which allows taxpayers to deduct business interest expense to the full extent of business interest income and floor plan financing interest expense) and to ensure that income tax liability is clearly reflected at the member level in accordance with section 1502 and §1.1502-13. Further, because consolidated groups are under common control by definition (see section 1504), a consolidated group largely has control over the location of interest expense, even before the application of section 163(j). With regard to the comment regarding the difficulty of determining which member actually has incurred an interest expense, section 61 provides that interest income is includable in gross income, and section 163 provides rules by which interest expense is deductible in computing the taxable income. Section 1.1502-12 also requires consolidated group members to report interest income and expense at the member level for purposes of computing separate taxable income. Thus, the final regulations do not adopt the commenter’s recommendation.

VII. *Comments on and Changes to Section 1.163(j)-6: Application of the Business Interest Expense Deduction Limitations to Partnerships and Subchapter S Corporations*

As discussed in the preamble to the proposed regulations, §1.163(j)-6 provides general rules regarding the application of section 163(j)(4) to partnerships, S corporations, and their owners, including rules on how to calculate the limitation and how to treat disallowed business interest expense carryforwards. The following discussion addresses comments relating to proposed §1.163(j)-6.

A. Partnership-Level Calculation and Allocation of Section 163(j) Excess Items

1. Nonseparately Stated Taxable Income or Loss of the Partnership

Section 163(j)(4)(A)(ii)(II) states that a partner’s excess taxable income is determined in the same manner as the non-separately stated taxable income or loss of the partnership. Section 163(j)(4)(B)(i)(II) states that excess business interest expense is allocated to each partner in the same manner as the non-separately stated taxable income or loss of the partnership. Similarly, excess business interest income is allocated to each partner in the same manner as the nonseparately stated taxable income or loss of the partnership.

As highlighted in the proposed regulations, the phrase “nonseparately stated taxable income or loss of the partnership” is not defined in section 163(j), and it has not previously been defined by statute or regulations.¹ The phrase “in the same manner as” is also undefined. The proposed regulations interpreted the phrase “nonseparately stated taxable income or loss,” as it is used in sections 163(j)(4)(A)(ii)(II) and 163(j)(4)(B)(i)(II), as meaning the items comprising adjusted taxable income, business interest income, and business interest expense of the partnership. The legislative history and structure of the statute suggest the purpose of the phrase “nonseparately stated taxable income or loss of the partnership” is to help coordinate the section 163(j) limit imposed at the partnership and partner levels.

Section 163(j)(4)(A)(i) uses this phrase when describing business interest expense that already has been tested at the partnership level. In general, an item included in nonseparately stated taxable income or loss of a partnership under section 702(a)(8) loses its tax character in the hands of the partner to whom it is allocated. By providing that such business interest expense is treated as a nonseparately stated item, section 163(j)(4)(A)(i) causes such business interest expense to lose its character as business interest expense, thus preventing it from being subject to retesting at the partner level under sec-

tion 163(j). Although it does not use the same phrase, section 163(j)(4)(A)(ii)(I), in conjunction with section 163(j)(4)(C), similarly provides that, to the extent the partnership’s adjusted taxable income was used in its section 163(j) calculation, such adjusted taxable income is not included in a partner’s section 163(j) calculation. Consistent with this principle, proposed §1.163(j)-6(e)(4) provided similar rules to prevent the double counting of business interest income. Therefore, interpreting the phrase “nonseparately stated taxable income or loss of the partnership,” as it is used in section 163(j)(4) as meaning the items comprising adjusted taxable income, business interest income, and business interest expense of the partnership (hereinafter, “section 163(j) items”) is supported by the statute, which requires each of these items to be taken into account at the partnership level and prohibits the double counting of such items in the partner’s section 163(j) calculation.

To allocate excess taxable income, excess business interest income, and excess business interest expense (hereinafter, “section 163(j) excess items”) “in the same manner” as the “nonseparately stated taxable income or loss of the partnership” (that is, the section 163(j) items), proposed §1.163(j)-6(f)(2) provided an 11-step calculation that, when completed by the partnership, provides the partnership with an allocation of each of its section 163(j) excess items to each of its partners. This resulting array of allocations is consistent with the Treasury Department and the IRS’s resolution of the three descriptive (1 through 3) and two normative (4 through 5) issues outlined in part 6(D)(1) of the Explanation of Provisions section in the proposed regulations: (1) section 163(j) is applied at the partnership level; (2) a partnership cannot have both excess taxable income (or excess business interest income) and excess business interest expense in the same taxable year; (3) parity must be preserved between a partnership’s deductible business interest expense and section 163(j) excess items and the aggregate of each partner’s share of deductible business interest expense and section 163(j) excess items from

¹ Sections 163(j)(4)(A)(i) and (B)(ii)(II) use the word “nonseparately” (no hyphen), but section 163(j)(4)(A)(ii)(II) uses the word “non-separately” (hyphen). For purposes of consistency, these final regulations use “nonseparately” when discussing the phrase at issue.

such partnership; (4) if, in a given year, a partnership has both deductible business interest expense and excess business interest expense, a partnership should not allocate excess business interest expense to a partner to the extent such partner was allocated the items comprising ATI (or business interest income) that supported the partnership's deductible business interest expense; and (5) if, in a given year, a partnership has excess taxable income (or excess business interest income), only partners allocated more items comprising ATI (or business interest income) than necessary to support their allocation of business interest expense should be allocated a share of excess taxable income (or excess business interest income).

In general, the 11-step calculation preserves the entity-level calculation required in section 163(j)(4) while also preserving the economics of the partnership, including respecting any special allocations made in accordance with section 704 and the regulations under section 704 of the Code. Stated otherwise, the allocations of section 163(j) excess items prescribed by the 11-step calculation attempt to reflect the aggregate nature of partnerships under subchapter K of the Code while remaining consistent with the application of section 163(j) at the partnership level.

The Treasury Department and the IRS requested comments on the 11-step calculation in the preamble to the proposed regulations. Specifically, the Treasury Department and the IRS requested comments regarding alternative methods for allocating deductible business interest expense and section 163(j) excess items in a manner that permits partners that bear the taxable income supporting the deductible business interest expense to be allocated a disproportionate share of deductible business interest expense and excess taxable income.

2. Requested Clarifications and Modifications

Commenters requested several clarifications of and modifications to the 11-step calculation. First, commenters requested confirmation that a partnership's allocations of section 163(j) excess items pursuant to the 11-step calculation will be considered to meet the requirements of section

704(b). The final regulations confirm that allocations pursuant to the 11-step calculation meet the requirements of section 704(b). Nothing in the 11-step calculation prohibits a partnership from making an allocation to a partner of any section 163(j) item that is otherwise permitted under section 704 and the regulations thereunder. Accordingly, any calculations in the 11-step calculation are solely for the purpose of determining each partner's section 163(j) excess items, and do not otherwise affect any other provision under the Code, such as section 704(b). Further, the statement in the proposed regulations that the 11-step calculation is solely for section 163(j) purposes and does not apply for any other purposes of the Code does not mean that section 163(j) excess items have no effect on either outside basis or capital accounts. To illustrate this point, §1.163(j)-6(o)(17), *Example 17* has been revised to show the beginning and ending outside basis and capital accounts after applying the 11-step calculation.

To further clarify that the allocation of section 163(j) excess items pursuant to the 11-step calculation will be sustained under section 704, a special rule has been added to §1.704-1(b)(4). The allocation of deductible and nondeductible business interest expense does not have economic effect because classifying a portion of the interest expense as nondeductible merely changes the tax character of the item. Accordingly, §1.704-1(b)(4)(xi) is added to clarify that, if §1.163(j)-6(f) is satisfied, the allocation of section 163(j) excess items will be deemed to be in accordance with the partners' interests in the partnership.

Second, commenters recommended the 11-step calculation take remedial allocations into account. Commenters noted that the exclusion of remedial allocations from the partnership-level computation could frustrate the ability of the 11-step calculation to reach the most equitable result given its purpose. The Treasury Department and the IRS acknowledge that taking remedial allocations into account in the 11-step calculation after 2021 might produce an equitable result. However, because remedial income would not always be offset by remedial losses prior to 2022 for purposes of computing ATI, the Treasury Department and the IRS have de-

termined that taking remedial allocations into account in the 11-step calculation would not achieve appropriate results in all circumstances. Therefore, the Treasury Department and the IRS decline to accept the recommendation.

Third, a commenter recommended that the final regulations allow partnerships to make remedial allocations of excess taxable income. Under this recommended modification to the 11-step calculation, if a partner receives an allocation of taxable income in excess of such partner's allocation of excess taxable income, the partnership could elect to create positive remedial excess taxable income in the amount of the excess and allocate such positive remedial excess taxable income to the affected partner. The partnership also would create an offsetting negative remedial excess taxable income item in an equal amount that would be allocated to the other partners. The Treasury Department and the IRS do not adopt this recommendation in the final regulations in light of the fact that the definition of "excess taxable income" is statutory and the statute does not appear to contemplate negative excess taxable income.

3. Recommended Alternative Methods

Commenters recommended the final regulations retain the 11-step calculation. Additionally, commenters recommended that the final regulations provide alternative methods for allocating section 163(j) excess items in addition to the 11-step calculation. The commenters seeking an alternative method expressed concern about the complexity of the 11-step calculation – specifically, that the required computations and recordkeeping are excessive for many taxpayers. Commenters argued that the attempted precision of the 11-step calculation should be weighed against its complexity and compared to the reduced precision that could be achieved through simpler methods.

As an alternative to the 11-step calculation, commenters recommended the final regulations allow taxpayers to adopt any reasonable method for allocating section 163(j) excess items, provided the method does not produce results inconsistent with the Treasury Department and the IRS's resolution of the five issues articulated in

the preamble to the proposed regulations. See part VII(A)(1) of this Summary of Comments and Explanation of Revisions section. Commenters provided multiple examples of reasonable methods, and they recommended that the final regulations treat section 163(j) excess item allocations as reasonable if the allocations are: (1) reasonably consistent with the allocations of the corresponding items under section 704(b); (2) in proportion to the allocation of the underlying section 163(j) item; (3) in proportion to the manner in which the partners bear liability for the debt or, in the case of non-recourse debt, in proportion to the manner in which profits will be allocated in order to repay the debt; or (4) the result of arms-length bargaining among partners with adverse tax interests.

The Treasury Department and the IRS do not adopt any of these alternatives in the final regulations. Each of the alternatives recommended by commenters requires an application of section 163(j) at the partnership level, a determination of each partner's share of the partnership's section 163(j) items, and a final determination of each partner's section 163(j) excess items that takes into account each partner's share of the partnership's section 163(j) items. These three determinations mirror steps 1, 2, and 11 (respectively) of the 11-step calculation. The Treasury Department and the IRS recognize the complexity of the computations and recordkeeping imposed by the statute on partnerships, but the Treasury Department and the IRS have concluded that the computations and recordkeeping associated with steps 1, 2, and 11 of the 11-step calculation are unavoidable under any approach. As such, the commenters' recommendation is, in effect, that the final regulations allow alternatives to steps 3 through 10 of the 11-step calculation.

With respect to steps 3 through 10, the Treasury Department and the IRS agree that these computations add to the complexity already required by the statute; thus, a worksheet and multiple examples have been provided to aid in the completion of these computations. However, the Treasury Department and the IRS have concluded that these computations are not overly burdensome given that the partnerships required to perform these calculations already are experienced with

handling the complexities associated with special allocations or section 704(c) allocations. In terms of recordkeeping, taxpayers are not required to keep records of steps 3 through 10 because compliance with the 11-step calculation can be determined solely based on the records associated with steps 1, 2, and 11. Moreover, in terms of accuracy, the alternatives fall short of achieving the purpose of steps 3 through 10, which is to align deductible business interest expense with the ATI and business interest income that supported such deduction at the partnership level.

For example, consider the recommended alternative of allocating section 163(j) excess items in proportion to the allocation of the underlying section 163(j) item. If partnership AB's sole items of income, gain, loss, and deduction were \$30 of business interest income, which it allocated solely to A, and \$40 of business interest expense, which it allocated \$20 to each of A and B, then A and B each would have \$15 of deductible business interest expense and \$5 of excess business interest expense. In situations where, as in this case, the partnership does not allocate all of its section 163(j) items pro rata this method could require a partnership to allocate its section 163(j) excess items in a manner inconsistent with the Treasury Department and the IRS's resolution of issues four and five. See part VII(A)(1) of this Summary of Comments and Explanation of Revisions section.

Applying the 11-step calculation to the previous example, A would have \$20 of deductible business interest expense, and B would have \$10 of deductible business interest expense and \$10 of excess business interest expense. This result is consistent with the Treasury Department and the IRS's resolution of the five issues described in part VII(A)(1) of this Summary of Comments and Explanation of Revisions section. Because the alternative of allocating section 163(j) excess items in proportion to the allocation of the underlying section 163(j) item could require a partnership to allocate section 163(j) excess items to its partners in a manner that does not attempt to align deductible business interest expense with the ATI and business interest income that supported it at the partnership level (which is inconsistent with the resolution of the five

issues described in part VII(A)(1) of this Summary of Comments and Explanation of Revisions section), this alternative is not adopted in the final regulations. Other commenters' similar alternatives were considered and were rejected on the same grounds based on the foregoing analysis.

One commenter recommended another alternative method that, in a more general way than the 11-step calculation, attempts to align deductible business interest expense with the ATI and business interest income that supported such deduction at the partnership level. The commenter stated that this objective could be accomplished as follows. For each partner that is allocated business interest expense, determine the portion of the business interest expense allocated to such partner that would be considered deductible business interest expense, taking into account only the business interest income and ATI allocated to such partner. If the aggregate amount determined for all partners is equal to, or less than, the amount of the partnership's deductible business interest expense, then each partner would be allocated deductible business interest expense in the amount determined in the first step. If the first step produced deductible business interest expense in excess of the limitation determined at the partnership level, each partner's allocation of deductible business interest expense would equal the proportion of the partnership's total deductible business interest expense that the deductible amount determined in the first step for such partner constitutes of the deductible amount determined for all partners. Also, any deductible business interest expense as determined at the partnership level that is not allocated through the first step then would be allocated among the partners that have been allocated business interest deductions in proportion to the amount of business interest expense of each partner remaining after the first step.

The Treasury Department and the IRS do not adopt this alternative method in the final regulations. The commenter's approach provides a method for allocating excess business interest expense, but it does not provide any guidance on allocating excess taxable income or excess business interest income. Further, it is not possible to infer a manner for allocating excess taxable income and ex-

cess business interest income from this approach because it fails to distinguish each partner's ATI from its business interest income. By comingling ATI and business interest income in its first step, this method fails to account for the ordering of ATI and business interest income in the partnership context as required by the statute. Section 163(j)(4)(C) provides that partnership ATI does not begin offsetting partnership business interest expense until partnership business interest income has been fully utilized. Because this method is only capable of addressing fact patterns in which there is excess business interest expense, it is not adopted in the final regulations.

Moreover, the Treasury Department and the IRS have concluded that this method for allocating excess business interest expense does not sufficiently reduce taxpayer burden given the trade-off in precision and administrability. To illustrate, the commenter applied its recommended method to the facts of *Example 14* of §1.163(j)-6(o) of the proposed regulations. In that example, partnership PRS has \$140 of business interest expense, \$200 of ATI, and no business interest income. Accordingly, PRS has \$60 of deductible business interest expense. PRS allocates its items of ATI such that A, B, and C have income of \$100, \$100, and \$400 respectively, while D has a loss of \$400. PRS allocates its business interest expense \$40 to B, \$60 to C, and \$40 to D.

Under the suggested method, PRS first would determine for each of B, C, and D the amount of the business interest expense allocated to each partner that would be deductible under section 163(j) taking into account solely the ATI and business interest income allocated to such partner. In this case, the entire \$60 of business interest expense allocated to C would have been deductible, \$30 of the business interest expense allocated to B would have been deductible, and no amount of business interest expense allocable to D would have been deductible. The total amount of business interest expense determined in the first step (or \$90) exceeds the total amount deductible under section 163(j) applied at the partnership level (or \$60). PRS then would determine the proportion of the business interest expense allocated to each partner that is determined to be de-

ductible in the first step and allocate the total deduction in those proportions. Thus, C would be entitled to two-thirds (\$60 / \$90) of the \$60 deduction (\$40 of deductible business interest expense) and B would be entitled to one-third (\$30 / \$90) of the \$60 deduction (\$20 of deductible business interest expense). D would not be entitled to any business interest expense deduction. Accordingly, B would have \$20 of excess business interest expense, C would have \$20 of excess business interest expense, and D would have \$40 of excess business interest expense.

In contrast, applying the 11-step calculation to the same example results in an allocation of more deductible business interest expense to C (\$48) than to B (\$12) because C was allocated more ATI (\$400) from PRS than B (\$100). Unlike the commenter's method, the 11-step calculation increases a partner's amount of deductible business interest expense in response to an increased allocation of ATI and business interest income. The commenter's method allocates deductible business interest expense based on a ratio that does not take into account the fact that C was allocated significantly more ATI from PRS than B. To illustrate this point, consider what would happen in the previous example if the facts were changed so that C was allocated \$1,100 of ATI and D was allocated (\$1,100) of ATI. Applying the 11-step calculation, C would have \$55 of deductible business interest expense. Applying the commenter's method, C's increased allocation of ATI from PRS would have no effect on C's deductible business interest expense—C still would have \$40 of deductible business interest expense and \$20 of excess business interest expense.

The Treasury Department and the IRS have determined that the 11-step calculation produces the result that is most consistent with the normative principle in the statute that the amount of business interest expense a taxpayer is capable of deducting should increase as its ATI and business interest income increase. Further, the Treasury Department and the IRS view methods that do not increase a partner's amount of deductible business interest expense in response to an increased allocation of ATI from the partnership as less intuitive, and therefore more burdensome in application. Therefore, the final regula-

tions do not adopt commenters' suggested alternative methods.

4. Publicly Traded Partnerships

The Treasury Department and the IRS received comments raising concerns about the continued fungibility of publicly traded partnership (PTP) units if PTPs are required to allocate section 163(j) excess items pursuant to the 11-step calculation. The effect of section 163(j) on the fungibility of PTP units is being addressed in the Concurrent NPRM. Therefore, these issues are not addressed in the final regulations.

5. Pro Rata Exception

Multiple commenters recommended that partnerships that allocate all items of income and expense on a pro rata basis (similar to S corporations) be exempt from the 11-step calculation. Commenters stated that these partnerships by nature do not make the kinds of allocations the 11-step calculation is designed to address. Commenters asserted that simplifying the 11-step calculation for these pro-rata partnerships would reduce complexity and reduce their administrative burden.

The Treasury Department and the IRS agree with these comments. Accordingly, the final regulations provide an exception (pro rata exception) from steps 3 through 11 of the 11-step calculation for partnerships that allocate all section 163(j) items in step 2 proportionately. This pro rata exception will not result in allocations of section 163(j) excess items that vary from the array of allocations of section 163(j) excess items that would have resulted had steps 3 through 11 been performed. See §1.163(j)-6(f)(2)(ii) and *Example 1* through *Example 16* of §1.163(j)-6(o).

B. Basis Adjustments

1. Basis and Capital Account Adjustments for Excess Business Interest Expense Allocations

Pursuant to proposed §1.163(j)-6(f)(2), the adjusted basis of a partner's interest in a partnership is reduced, but not below zero, by the amount of excess business interest expense allocated to the

partner. If a partner is subject to a loss limitation under section 704(d) and the partner is allocated losses from a partnership in a taxable year, the limited losses are grouped based on the character of each loss (each grouping of losses based on character, a “section 704(d) loss class”). If there are multiple section 704(d) loss classes in a given year, the partner apportions the limitation to each section 704(d) loss class proportionately. For purposes of applying this proportionate rule, any deductible business interest expense and business interest expense of an exempt entity (whether allocated to the partner in the current taxable year or suspended under section 704(d) in a prior taxable year), any excess business interest expense allocated to the partner in the current taxable year, and any excess business interest expense from a prior taxable year that was suspended under section 704(d) (negative section 163(j) expense) makes up the same section 704(d) loss class (section 163(j) loss class). Moreover, once the partner determines the amount of limitation on losses apportioned to the section 163(j) loss class, any deductible business interest expense is taken into account before any excess business interest expense or negative section 163(j) expense.

Proposed §1.163(j)-6(h)(2) provides that negative section 163(j) expense is not treated as excess business interest expense in any subsequent year until such negative section 163(j) expense is no longer suspended under section 704(d). Consequently, an allocation of excess taxable income or excess business interest income does not result in the negative section 163(j) expense being treated as business interest expense paid or accrued by the partner. Further, unlike excess business interest expense, which prevents a partner from including excess taxable income in its ATI as described in section 163(j)(4)(B)(ii) (flush language), negative section 163(j) expense does not affect, and is not affected by, any allocation of excess taxable income to the partner. Accordingly, any excess taxable income allocated to a partner from a partnership while the partner still has a negative section 163(j) expense will be included in the partner’s ATI. However, once the negative section 163(j) expense

is no longer suspended under section 704(d), it becomes excess business interest expense, which is subject to the general rules in proposed §1.163(j)-6(g).

Commenters noted that the rule in proposed §1.163(j)-6(h)(2) is helpful and should be retained in the final regulations. However, commenters further noted that partners with no business interest expense from other sources generally would prefer to treat their negative section 163(j) expense as deductible business interest expense suspended under section 704(d) and utilize excess taxable income in the current year for that purpose, even though the resulting deductible business interest expense would continue to be non-deductible because of a section 704(d) limit. Thus, commenters recommended allowing a partner to use excess taxable income to treat negative section 163(j) expense as deductible business interest expense suspended under section 704(d) instead of using it to increase partner ATI.

The final regulations do not adopt this recommendation. No precedent exists for allowing items suspended under section 704(d) to preemptively clear limitations that apply after section 704(d) while remaining suspended under section 704(d). For example, in the section 469 context, a non-materially participating partner allocated passive income cannot use such passive income to recharacterize passive losses allocated in a previous year as non-passive while those losses remain suspended under section 704(d).

One commenter also recommended adopting a silo approach under section 704(d). Under this approach, if a partner had a section 704(d) limitation, it could bifurcate its items between non-exceptioned and exceptioned partnership business items. If the non-exceptioned portion was net positive, none of the excess business interest expense allocated from the partnership would be negative section 163(j) expense.

However, this approach would be a significant departure from the current rule under section 704(d), which generally requires the limitation on losses under section 704(d) to be allocated to a partner’s distributive share of each loss proportionately, regardless of whether such loss is from an exceptioned or non-exceptioned trade or business under section 163(j). More-

over, nothing in section 163(j) indicates Congress intended to give excess business interest expense suspended under section 704(d) a better result than any other partnership losses suspended under section 704(d). For that reason, the final regulations do not adopt this recommendation.

2. Basis Adjustments Upon Disposition of Partnership Interests Pursuant to Section 163(j)(4)(B)(iii)(II)

Under the proposed regulations, if a partner disposes of all or substantially all of its partnership interest, the adjusted basis of the partnership interest is increased immediately before the disposition by the entire amount of the remaining excess business interest expense. Following such a disposition, no deduction is permitted to either the transferor or the transferee with respect to the excess business interest expense resulting in the basis increase. If a partner disposes of less than substantially all of its interest in a partnership, the partner cannot increase its basis by any portion of the remaining excess business interest expense. The Treasury Department and the IRS requested comments on this approach in the preamble to the proposed regulations.

Commenters cited multiple concerns with the approach adopted in the proposed regulations. First, commenters claimed that the absence of an excess business interest expense basis addback for a partial disposition of a partnership interest could result in tax gain in excess of economic gain in connection with the sale of a partial interest, while the addition of the entire adjustment to outside basis in connection with a complete disposition could result in economic gain in excess of tax gain. Commenters suggested this timing difference between economic gain and tax gain inappropriately disconnects taxable income from economic income. Second, commenters expressed concern that, because a partial disposition would result in a partner holding a smaller interest in a partnership than it held prior to the partial disposition, the partner would receive smaller allocations of excess taxable income (and excess business interest income) in subsequent years. If none of the excess business interest expense of the partner is affected by the partial dis-

position, this could extend the amount of time needed for a partner to convert its excess business interest expense to business interest expense treated as paid or accrued. Third, commenters noted that, in the event of a partial disposition of a partnership interest, the proposed regulations may cause a discrepancy between the capital accounts of the transferor and the transferee and the excess business interest expense associated with each partner's interest.

Commenters stated that neither the statute nor its policy of limiting business interest expense deductions calls for the potentially harsh results that could be imposed by the approach provided in the proposed regulations. The main purpose of the excess business interest expense carryover rule is to limit the partner's ability to claim a business interest expense deduction that exceeds the statutory threshold under section 163(j)(1). Commenters stated that this statutory purpose can be accomplished by denying the business interest expense deduction and eliminating the carryforward upon a partial disposition of the partnership interest. In other words, to the extent that a partner foregoes its business interest expense deduction, the purpose of the statute is fulfilled. Thus, a proportionate approach would fulfill the purpose of the statute while not subjecting taxpayers to outcomes that are not plainly contemplated by the statute.

As a solution, commenters recommended that a partial disposition of a partnership interest trigger a proportionate excess business interest expense basis addback and corresponding decrease in such partner's excess business interest expense carryover (proportionate approach). Under the proportionate approach, the partner would be required to track its basis in its partnership interest in a manner similar to that set forth in Revenue Ruling 84-53, 1984-1 C.B. 159 (April 9, 1984). Commenters advocating for a proportionate addback rule varied in their recommendations regarding where the addback should occur. In general, commenters suggested three options: (1) increase the basis of the partnership interest retained; (2) apportion the basis increase proportionally between the partnership interest retained and the partnership interest being disposed of; and (3)

increase the basis of the partnership interest being disposed of.

As described in the preamble to the proposed regulations, the Treasury Department and the IRS originally considered and rejected the proportionate approach. One reason the Treasury Department and the IRS adopted the all or substantially all approach in the proposed regulations over the proportionate approach was because the former appeared more taxpayer-favorable in certain circumstances. Under the all or substantially all approach in the proposed regulations, the excess business interest expense basis addback is delayed for the maximum amount of time (until a partner disposes of all or substantially all of its interest), giving taxpayers more time to receive excess taxable income (and excess business interest income) and thus potentially take an ordinary deduction. However, as commenters pointed out, a smaller partnership interest likely will result in a correspondingly smaller allocation of excess taxable income (and excess business interest income) from the partnership. For this reason, commenters did not perceive the proposed approach as taxpayer-favorable for preserving the possibility of a future ordinary deduction, but rather as taxpayer-unfavorable for delaying what likely will be a capital loss.

Accordingly, the Treasury Department and the IRS adopt the recommended proportionate approach in the final regulations. In the preamble to the proposed regulations, the Treasury Department and the IRS indicated that, if final regulations were to adopt a proportionate approach, such approach would increase the basis of the partnership interest being retained by the amount of the excess business interest expense basis addback. However, upon further consideration, the Treasury Department and the IRS agree with commenters that the basis addback should instead increase the basis of the partnership interest being disposed of. Thus, the final regulations adopt a proportionate approach that increases the basis of the partnership interest being disposed of.

For purposes of §1.163(j)-6(h)(3), a disposition includes a distribution of money or other property by the partnership to a partner in complete liquidation of its interest in the partnership. The Treasury Department and the IRS request comments

on whether a current distribution of money or other property by the partnership to a continuing partner as consideration for an interest in the partnership should also trigger an addback and, if so, how to determine the appropriate amount of the addback. Additionally, the final regulations clarify that each partner is considered to have disposed of its partnership interest within the meaning of §1.163(j)-6(h)(3) if the partnership terminates under section 708(b)(1).

The proportionate rule adopted in the final regulations applies the equitable apportionment principles of §1.61-6 (referenced in Revenue Ruling 84-53) to determine the amount of excess business interest expense attributable to the partner's interest sold. In *Example 1* of §1.61-6, basis is apportioned among properties based on the fair market value of the property and is treated as equitably apportioned. Similarly, in Situations 1 and 3 of Revenue Ruling 84-53, the IRS ruled that a selling partner's basis in the transferred portion of the interest generally equals an amount that bears the same relation to the partner's basis in the partner's entire interest as the fair market value of the transferred portion of the interest bears to the fair market value of the entire interest (the pro rata approach to equitable apportionment). However, if a partnership has liabilities, special adjustments must be made to take into account the effect of the liabilities on the basis of the partner's interest. Accordingly, the final regulations adopt the pro rata approach to equitable apportionment and generally provide that the adjusted basis of the partnership interest being disposed of is increased immediately before the disposition by the amount of the excess business interest expense that is proportionate to the interest disposed of in the transaction.

The Treasury Department and the IRS also received comments recommending the final regulations treat a sale of all or substantially all of a partnership's assets as a deemed disposition of each partner's interest in the partnership within the meaning of section 163(j)(4)(B)(iii)(II). Because the statute requires a disposition of a partnership interest to trigger the basis adjustment described in section 163(j)(4)(B)(iii)(II), the final regulations do not adopt this recommendation.

3. Intercompany Transfer of a Partnership Interest

For a discussion of comments received on intercompany transfers of partnership interests, see part V(D) of this Summary of Comments and Explanation of Revisions section.

C. Debt-Financed Distributions

The treatment of interest expense associated with debt incurred by a partnership or S corporation to finance distributions to owners (debt-financed distributions) is being addressed in the Concurrent NPRM. Therefore, these issues are not addressed in the final regulations.

D. Trading Partnerships

The preamble to the proposed regulations stated that the business interest expense of certain passthrough entities, including S corporations, that are engaged in trades or businesses that are per se non-passive activities and in which one or more owners of the entities do not materially participate within the meaning of section 469, as described in section 163(d)(5)(A)(ii) and as illustrated in Revenue Ruling 2008-12, 2008-1 C.B. 520 (March 10, 2008), will be subject to section 163(j) at the entity level (even if the interest expense is also subject to limitation under section 163(d) at the individual partner level). With respect to partnerships, to the extent that such business interest expense is limited under section 163(j)(4) and becomes a carryover item of partners who do not materially participate with respect to such trades or businesses, those items will be treated as items of investment interest expense in the hands of those owners for purposes of section 163(d) once those carryover items are treated as paid or accrued in a succeeding taxable year. This rule does not apply to corporate partners.

The Treasury Department and the IRS received multiple comments questioning this interpretation of section 163(j)(5) and its interaction with section 163(d)(5)(A)(ii). The interaction of section 163(j)(5) with section 163(d)(5)(A)(ii) is being addressed in the Concurrent NPRM. Therefore, this issue is not addressed in the final regulations.

E. Treatment of Excess Business Interest Expense in Tiered Partnerships

The preamble to the proposed regulations requested comments regarding the application of section 163(j) to tiered partnership structures, and the proposed regulations reserved on this topic. Specifically, the preamble requested comments on whether excess business interest expense should be allocated through upper-tier partnerships and how or when an upper-tier partner's basis should be adjusted when a lower-tier partnership is subject to a section 163(j) limitation. This issue is being addressed in the Concurrent NPRM. Therefore, this issue is not addressed in the final regulations.

F. Partnership Mergers and Divisions

The proposed regulations reserve on guidance regarding the application of section 163(j) to partnership mergers and divisions, and the Treasury Department and the IRS requested comments in the preamble to the proposed regulations on the effect of partnership mergers and divisions on excess business interest expense, excess taxable income, and excepted trade or business elections in the context of section 163(j).

In response to this request, one commenter recommended that: (i) the carry-forward rule in proposed §1.163(j)-6(g) apply to partners of a partnership treated as a continuing partnership in a partnership merger or division; (ii) the disposition rule of proposed §1.163(j)-6(h)(3)(i) apply to partnership interests that are treated as liquidated in a partnership merger or division; and (iii) the final regulations confirm, perhaps through examples, the application of the excepted trade or business election and termination rules in proposed §1.163(j)-9 in the context of a partnership merger or division.

The partnership merger and division rules under section 708 may treat a partnership as terminating or continuing, and the regulations under §1.708-1(c) and (d) provide a construct for analyzing the tax effects of a partnership merger or division. The Treasury Department and the IRS have determined that, in most situations, a partnership merger or division can be analyzed appropriately under the rules of

§1.708-1(c) and (d). As a result, the Treasury Department and the IRS are not providing special rules in the final regulations to analyze the consequences of a partnership merger or division in the context of section 163(j) at this time. However, the Treasury Department and the IRS continue to study these issues.

G. Applicability of Section 382 to S Corporations Regarding Disallowed Business Interest Expense Carryforwards

The proposed regulations provide that sections 381(c)(20) and 382(d)(3) and (k)(1) apply to S corporations with respect to disallowed business expense carryforwards. Proposed §1.163(j)-6(l)(5) provides that the amount of any business interest expense not allowed as a deduction for any taxable year by reason of the section 163(j) limitation is carried forward in the succeeding taxable year as a disallowed business interest expense carryforward. Proposed §1.163(j)-6(l)(1) provides that any disallowed business interest expense is not allocated to the S corporation's shareholders until such business interest expense is allowed as a deduction under section 163(j). Similarly, under proposed §1.163(j)-6(l)(6) and (7), an S corporation shareholder's stock basis is reduced, but not below zero, and an S corporation's accumulated adjustments account (AAA) balance is adjusted, when a disallowed business interest expense becomes deductible under section 163(j).

The preamble to the proposed regulations requested comments regarding the proper integration of section 163(j) and section 382 and subchapter S of the Code (subchapter S). In addition, the preamble to the proposed regulations requested comments regarding the treatment of disallowed business interest expense carryforwards as an attribute of the S corporation subject to the section 382 limitation, as opposed to an attribute of the shareholders, and regarding the timing for any adjustments to shareholder basis and the corporation's AAA.

In response, one commenter recommended that the final regulations retain the approach as set forth in the proposed regulations. In particular, the commenter recommended that section 382 (and the comparable provisions of section 383) be

applied only to those attributes that are carried forward and taken into account at the corporate level. The commenter contended that it would be appropriate to treat disallowed business interest expense of an S corporation as a “pre-change loss” such that the corporation would be a loss corporation pursuant to section 382(k)(1).

The Treasury Department and the IRS agree with the commenter. Because disallowed business interest expense is treated as an attribute of the S corporation, the S corporation’s disallowed business interest expense carryforwards will be treated as pre-change losses subject to a section 382 limitation under section 382(d)(3) following an S corporation’s ownership change (within the meaning of section 382(g)). Accordingly, consistent with the treatment of C corporations under section 382, the final regulations provide that a disallowed business interest expense carryforward of an S corporation is treated as pre-change loss and will be subject to a section 382 limitation only if an S corporation undergoes an ownership change within the meaning of section 382(g). For example, under the final regulations, a “qualifying disposition” by a shareholder that results in a 20-percent ownership change of the S corporation, on its own, will not cause section 382 to apply to an S corporation upon such qualifying disposition. See §1.1368-1(g)(2)(i)(A). See also §1.1368-1(g)(2) (defining the term “qualifying disposition”).

A commenter also recommended that section 382 not be applied to any item of deduction, loss, or credit that is allocated to shareholders on a current basis and taken into account at the shareholder level. As expressed in the preamble to the proposed regulations, the Treasury Department and the IRS continue to consider the extent to which section 382 should apply to S corporations for purposes other than section 163(j). The application of section 382 to S corporations for purposes of section 163(j) should not be construed as creating any inference regarding the application of section 382 to S corporations for other purposes. The Treasury Department and the IRS continue to seek comments regarding the proper integration of these two Code sections and subchapter S.

H. Separate Application of Section 163(j) Limitation to Short Taxable Years of S Corporation

An S corporation’s items of income and loss generally are allocated on a pro rata, per-day basis to all shareholders that hold the corporation’s stock during the corporation’s taxable year. See section 1377(a)(1). However, subchapter S provides limited exceptions to that general allocation rule. For example, in the event that a shareholder completely terminates its interest, the S corporation and affected shareholders can elect to treat its taxable year “as if the taxable year consisted of 2 taxable years the first of which ends on the date of the termination” (each, a hypothetical short taxable year). Section 1377(a)(2)(A). In addition, an S corporation may make such an election if a shareholder has made a qualifying disposition. See §1.1368-1(g)(2). With regard to each of these instances, the S corporation may elect to “close the books” even though the corporation will file one Federal income tax return for the taxable year covering both separate taxable periods.

Subchapter S also specifies instances in which an S corporation may elect, or is required, to file a Federal income tax return for a short taxable year (actual short taxable year). For example, an S corporation may elect to determine taxable income or loss based on a closing-of-the-books method with respect to an S termination year. See section 1362(e)(3) (providing an election to have items assigned to each short taxable year under normal Federal income tax accounting rules). However, if a sale or exchange of at least 50 percent of the S corporation’s stock occurs during that S termination year, the S corporation must utilize the closing-of-the-books method. See section 1362(e)(6)(D). See also section 1362(e)(6)(C) (requiring the use of the closing-of-the-books method with respect to any item resulting from the application of section 338).

Based on a request from a commenter, the Treasury Department and the IRS have considered whether the section 163(j) limitation should apply separately with respect to each hypothetical or actual short taxable year. Specifically, the commenter recommended that, if an S corporation (1) has an actual short taxable year, or (2) de-

termines its taxable income or loss as if its taxable year consisted of separate taxable years (that is, hypothetical short taxable years), the final regulations should clarify that a separate section 163(j) limitation should be calculated for, and applied to, each actual or hypothetical short taxable year. To support that recommendation, the commenter emphasized “sound policy reasons” for ensuring that owners of the corporation during the first short taxable period are not affected by the fortunes of the corporation during the second short period, and vice versa.

The Treasury Department and the IRS agree that a separate section 163(j) limitation should be calculated for, and applied to, each actual or hypothetical short taxable year. Section 163(j)(1) limits the amount of business interest expense allowed as a deduction “for any taxable year.” Accordingly, the Treasury Department and the IRS have determined that a separate section 163(j) limitation should apply to each actual short taxable year. See §1.1362-3(c)(3) (setting forth the general rule that “the S and C short years are treated as two separate years for purposes of all provisions of the Internal Revenue Code”). In addition, subchapter S and the regulations in this part under subchapter S explicitly treat hypothetical short taxable years as separate taxable years. See section 1377(a)(2)(A) (providing that an S corporation can treat its taxable year “as if the taxable year consisted of 2 taxable years”) and §1.1368-1(g)(1) (providing that the “section applies as if the taxable year consisted of separate taxable years”). As a result, the Treasury Department and the IRS also have determined that a separate section 163(j) limitation should apply to each hypothetical short taxable year and sections 1.1362-3(c), 1.1368-1(g)(2), and 1.1377-1(b)(3) have been amended accordingly.

I. Partnership or S Corporation Not Subject to Section 163(j)

Under proposed §1.163(j)-6(m)(1), if a partner or S corporation shareholder is allocated business interest expense from an exempt entity, that allocated business interest expense will be subject to the partner’s or S corporation shareholder’s section 163(j) limitations. Commenters rec-

ommended that proposed § 1.163(j)-6(m)(1) be modified so that business interest expense incurred by a partnership that is an exempt entity is not subject to section 163(j) at the partner level. Commenters argued that proposed §1.163(j)-6(m)(1) was inconsistent with section 163(j)(4)(A), which requires the testing of partnership-level business interest expense at the partnership level, not the partner level. The Treasury Department and the IRS agree, and have determined that the same argument naturally should apply to S corporations and their shareholders. See section 163(j)(4)(D) (in relevant part, providing that rules similar to section 163(j)(4)(A) shall apply with respect to any S corporation and its shareholders). Accordingly, the final regulations provide that business interest expense of an exempt partnership, or exempt S corporation, pursuant to section 163(j)(3) does not retain its character as business interest expense and, as a result, is not subject to the section 163(j) limitation at the partner or S corporation shareholder level.

One commenter requested clarification as to whether proposed §1.163(j)-6(m)(3) applies only to exempt entities or also could apply to trades or businesses that become not subject to the requirements of section 163(j) by reason of engaging in excepted trades or businesses. The final regulations clarify that §1.163(j)-6(m)(3) does not apply when a partnership engages in excepted trades or businesses. Accordingly, if a partner is allocated excess business interest expense from a partnership and, in a succeeding taxable year, such partnership engages in excepted trades or businesses, then the partner shall not treat any of its excess business interest expense that was previously allocated from such partnership as business interest expense paid or accrued by the partner in such succeeding taxable year by reason of the partnership engaging in excepted trades or businesses. Rather, such excess business interest expense shall remain as excess business interest expense until such time as it is treated as business interest expense paid or accrued by the partner pursuant to §1.163(j)-6(g)(2) or by reason of the partnership becoming an exempt entity. The final regulations provide a similar clarification for S corporations in §1.163(j)-6(m)(4).

J. Trusts

For purposes of determining ATI for trusts, one commenter noted that the definition of ATI does not contain an addback for deductible trust distributions. Trusts and decedents' estates taxable under section 641 are permitted to deduct under sections 651 and 661 certain distributions made to beneficiaries. The commenter suggested that section 163(j) should apply before a trust takes a deduction for distributions to beneficiaries, and that, if a deductible trust or estate distribution is added back to the trust's ATI and thus is taken into account in determining the amount of interest expense allowable to the trust under section 163(j), such trust or estate distribution should be excluded from the recipient beneficiaries' calculation of ATI. Thus, under the commenter's approach, a beneficiary of a trust or a decedent's estate would not be able to utilize a trust distribution to deduct additional business interest expense at the beneficiary level.

The Treasury Department and the IRS agree with this comment. Proposed Regulation §1.163(j)-2(f) is consistent with this result. However, in order to clarify that trusts and decedents' estates taxable under section 641 compute ATI without regard to deductions under sections 651 and 661, the final regulations explicitly provide for this positive ATI adjustment. Additionally, the Treasury Department and the IRS have determined that a similar rule should apply for charitable deductions of a trust or a decedent's estate under section 642(c).

K. Qualified Expenditures

The ATI of a partnership is generally determined in accordance with proposed §1.163(j)-1(b)(1). Partnership ATI is therefore reduced by deductions claimed under sections 173 (relating to circulation expenditures), 174(a) (relating to research and experimental expenditures), 263(c) (relating to intangible drilling and development expenditures), 616(a) (relating to mine development expenditures), and 617(a) (relating to mining exploration expenditures) (collectively, "qualified expenditures"). As a result, deductions for qualified expenditures will reduce a partnership's section 163(j) limitation pursuant to proposed §1.163(j)-2(b). De-

ductions for those items also will reduce the amount of excess taxable income that may be allocated to the partners and thus reduce the amount by which partner-level ATI may be increased under proposed §1.163(j)-6(e)(1).

A partner may elect to capitalize its distributive share of any qualified expenditures of a partnership under section 59(e)(4)(C) or may be required to capitalize a portion of its distributive share of certain qualified expenditures of a partnership under section 291(b). As a result, the taxable income reported by a partner in a taxable year attributable to the ownership of a partnership interest may exceed the amount of taxable income reported to the partner on a Schedule K-1.

Commenters recommended that a distributive share of partnership deductions capitalized by a partner under section 59(e) or section 291(b) increase the ATI of the partner because qualified expenditures reduce both partnership ATI and excess taxable income but may not reduce the taxable income of a partner. Commenters suggested two different approaches for achieving this result: (1) adjust the excess taxable income of the partnership, resulting in an increase to partner ATI; and (2) increase the ATI of the partner directly, without making any adjustments to partnership excess taxable income. The interaction of qualified expenditures with section 163(j)(4) is being addressed in the Concurrent NPRM. Therefore, this issue is not addressed in the final regulations.

L. CARES Act Partnership Rules

As discussed in the Background section to this preamble, section 163(j)(10), as amended by the CARES Act, provides a special rule for excess business interest expense allocated to a partner in a taxable year beginning in 2019 (50 percent EBIE Rule). See section 163(j)(10)(a)(ii). The 50 percent EBIE rule is addressed in proposed §1.163(j)-6(g)(4) of the Concurrent NPRM. The application of the 2019 ATI rule, as provided in section 163(j)(10)(B), in the partnership context is also addressed in proposed §1.163(j)-6(g)(4) of the Concurrent NPRM. Therefore, the 50 percent EBIE rule and the application of the 2019 ATI rule to partnerships are not addressed in the final regulations.

VIII. Comments on and Changes to Proposed §1.163(j)-7: Application of the Section 163(j) Limitation to Foreign Corporations and United States Shareholders

Section 1.163(j)-7 provides general rules regarding the application of the section 163(j) limitation to foreign corporations and U.S. shareholders. The following discussion addresses comments relating to proposed §1.163(j)-7.

The proposed regulations generally apply section 163(j) and the section 163(j) regulations to determine the deductibility of an applicable CFC's business interest expense in the same manner as these provisions apply to determine the deductibility of a domestic C corporation's business interest expense. See proposed §1.163(j)-7(b)(2). The proposed regulations define an applicable CFC as a CFC in which at least one U.S. shareholder owns stock, within the meaning of section 958(a). However, in certain cases, the proposed regulations limit the amount of an applicable CFC's business interest expense subject to the section 163(j) limitation and modify the computation of an applicable CFC's ATI, respectively. Thus, under the proposed regulations, an applicable CFC with business interest expense applies section 163(j) to determine the extent to which that expense is deductible for purposes of computing subpart F income as defined under section 952, tested income as defined under section 951A(c)(2)(A), and income that is effectively connected with the conduct of a U.S. trade or business (ECI), as applicable. The proposed regulations provide additional guidance for an applicable CFC (and other foreign persons) with ECI in proposed §1.163(j)-8, as discussed in part IX of this Summary of Comments and Explanation of Revisions section.

The Treasury Department and the IRS requested comments in the preamble to the proposed regulations regarding whether it would be appropriate to provide additional modifications to the application of section 163(j) to applicable CFCs and whether there are particular circumstances in which it may be appropriate to exempt an applicable CFC from the application of section 163(j).

Some commenters recommended that section 163(j) generally should not apply to applicable CFCs. Other commenters suggested that section 163(j) should apply to applicable CFCs only to the extent that they have ECI or, if an income tax treaty applies, business profits attributable to a United States permanent establishment, or to the extent that debt was introduced to an applicable CFC with a principal purpose of avoiding U.S. income taxes. Some commenters argued that the Treasury Department and the IRS lack the authority to apply section 163(j) to applicable CFCs because section 163(j) applies to taxpayers and, they argue, applicable CFCs are not taxpayers. Furthermore, some commenters argued that old section 163(j) did not apply to applicable CFCs and that Congress expressed no intent to change that. Some commenters also argued that applying section 163(j) to applicable CFCs creates significant complexity and an administrative burden. Furthermore, some commenters suggested that applying section 163(j) to applicable CFCs may have a limited effect on tax revenue or that applying section 163(j) to applicable CFCs could, in some cases, result in a net tax benefit to U.S. shareholders.

The Treasury Department and the IRS have determined that, under current law, section 163(j) applies to applicable CFCs and other foreign corporations whose income is relevant for U.S. tax purposes. As a general matter, application of U.S. tax principles to a foreign corporation for purposes of determining its income for U.S. tax purposes is within the authority of the Treasury Department and the IRS. For example, a U.S. shareholder of an applicable CFC takes into account its pro rata share of the subpart F income and net tested income of an applicable CFC. Accordingly, in order to determine the U.S. shareholder's pro rata share, the income of the applicable CFC must be determined. Section 1.952-2(a)(1) provides that, “[e]xcept as provided in subparagraph (2) of this paragraph [relating to insurance gross income], the gross income of a foreign corporation for any taxable year shall, subject to the special rules of paragraph (c) of this section, be determined by treating such foreign corporation as a domestic corporation taxable under section 11 and by applying the principles of section 61

and the regulations thereunder.” Neither §1.952-2(a)(2) nor (c) implicates section 163(j). Accordingly, pursuant to §1.952-2, a foreign corporation is treated as a domestic corporation for U.S. tax purposes when calculating its taxable income, including by application of section 163(j).

The exclusion of CFCs from the application of old section 163(j) under the 1991 Proposed Regulations is not determinative as to whether applicable CFCs and other foreign corporations should be excluded from the application of section 163(j). Although both old section 163(j) and section 163(j) limit deductions for business interest expense, the policies of each provision are significantly different. Old section 163(j) was a narrower provision that limited a corporation's ability to use interest expense deductions to move earnings out of the United States tax base. Section 163(j) focuses on limiting the potential tax benefit of overleveraged businesses. Because Congress wholly repealed and replaced old section 163(j), the provisions of old section 163(j) and the 1991 Proposed Regulations are not determinative as to the application of section 163(j).

Furthermore, nothing in the Code or legislative history indicates that Congress intended to exclude applicable CFCs or other foreign corporations from the application of section 163(j). Congress expressly provided that section 163(j) should not apply to certain small businesses or to certain excepted trades or businesses. Congress did not exempt applicable CFCs or other foreign corporations from the application of section 163(j).

Accordingly, the final regulations clarify that section 163(j) applies to foreign corporations whose income is relevant for U.S. tax purposes, other than by reason of section 881 or 882 (relevant foreign corporations). Section 1.163(j)-7(b). Furthermore, no comments were received on the application of §1.952-2 or section 882 for purposes of determining the income, including ECI, of an applicable CFC or on the reduction of an applicable CFC's taxable income by the amount of any dividend received from a related person for purposes of determining ATI. In addition to clarifying that these rules apply to all relevant foreign corporations, the final regulations otherwise adopt these rules unchanged. §1.163(j)-7(g)(1).

The Treasury Department and the IRS acknowledge that the application of section 163(j) to applicable CFCs and other relevant foreign corporations, like many other tax provisions, will increase the complexity of determining the taxable income of a relevant foreign corporation. Similarly, section 163(j) may have a significant effect on the amount of taxable income of some relevant foreign corporations and have limited or no effect on the amount of taxable income of others. The Treasury Department and the IRS do not view the complexity of a provision of the Code or its net effect on tax revenue as determinative as to whether the provision applies to CFCs. Nonetheless, the Treasury Department and the IRS have determined that it is appropriate to reduce the compliance and administrative burdens of applying section 163(j) to certain applicable CFCs.

Accordingly, the Treasury Department and the IRS have developed new rules, taking into account comments received, that substantially modify the rules contained in proposed §1.163(j)-7. The Treasury Department and the IRS anticipate that, in many cases, these modifications will significantly reduce the compliance and administrative burdens of applying section 163(j) to applicable CFCs. However, because the operation of these new rules is sufficiently different from the operation of the rules in proposed §1.163(j)-7, the Treasury Department and the IRS have determined that these rules should be proposed in order to provide taxpayers the opportunity to comment before their finalization. These rules and a discussion of their operation are contained in the Concurrent NPRM.

IX. Comments on and Changes to Section 1.163(j)-8: Application of the Section 163(j) Limitation to Foreign Persons with Effectively Connected Taxable Income.

Proposed §1.163(j)-8 provides rules for applying section 163(j) to a nonresident alien individual or foreign corporation with ECI. Although no comments were received on proposed §1.163(j)-8, the Treasury Department and the IRS continue to study methods of determining the amount of deductible business interest expense and disallowed business interest

expense carryforwards that are allocable to ECI. Accordingly, the final regulations reserve on the application of the business interest expense deduction limitation to foreign persons with ECI.

In the Concurrent NPRM, the Treasury Department and the IRS are proposing rules for determining the amount of deductible business interest expense and disallowed business interest expense carryforward of a nonresident alien, foreign corporation, or partnership that is properly allocable to ECI. The Treasury Department and the IRS request comments on appropriate methods of making this determination. These comments should consider the appropriate method for determining the extent to which business interest expense determined under §1.882-5 should be treated as attributable to a partnership and subject to the section 163(j) limitation at the partnership level.

X. Comments on and Changes to Proposed §1.163(j)-9: Elections for Excepted Trades or Businesses; Safe Harbor for Certain REITs

Section 1.163(j)-9 provides general rules and procedures for making an election for a trade or business to be an electing real property trade or business under section 163(j)(7)(B) and an election for a trade or business to be an electing farming business under section 163(j)(7)(C). The following discussion addresses some of the provisions in §1.163(j)-9 and the comments received.

A. Protective Elections

Section 163(j)(3) provides that the section 163(j) limitation does not apply to taxpayers that meet the gross receipts test of section 448(c). The small business exemption applies automatically if the requirements are met; thus, no election is necessary to ensure that the section 163(j) limitation does not apply. However, for real property trades or businesses under section 163(j)(7)(B), and for farming businesses under section 163(j)(7)(C), the section 163(j) limitation does not apply only if the taxpayer is eligible for and makes an election.

The preamble to the proposed regulations provides that a taxpayer that qual-

ifies for the small business exemption is not eligible to make an election for a trade or business to be an electing real property trade or business or an electing farming business, in part because the taxpayer is already not subject to the section 163(j) limitation, and in part because an electing real property trade or business or an electing farming business is required to use ADS for certain types of property under section 163(j)(10) and cannot claim the additional first-year depreciation deduction under section 168(k) for those types of property. The Treasury Department and the IRS were concerned that certain small business taxpayers might make the election without realizing that the election could have adverse effects on their deduction for depreciation expense and their method of accounting for depreciation.

Commenters suggested that, in some situations, making an annual gross receipts determination, to determine whether a taxpayer should make an election or is already exempt from the limitation, could be burdensome. For example, a taxpayer that has to request the average annual gross receipts of numerous unrelated entities under section 448 aggregation principles in order to make the gross receipts determination may choose to forgo making that determination if the taxpayer knows that its trade or business qualifies to be an electing real property trade or business or an electing farming business. These commenters requested that taxpayers be allowed to make such an election without regard to whether the gross receipts test of section 448(c) has been tested or is met, notwithstanding the potentially adverse depreciation expense implications.

The Treasury Department and the IRS agree with the commenters. Accordingly, the final regulations provide that taxpayers may make an election for a trade or business to be an electing real property trade or business or an electing farming business, provided that they qualify to make such elections, even if the gross receipts test under section 448(c) may be satisfied by the electing trades or businesses in the taxable year in which the election is made. As is the case for all other electing real property trades or businesses and electing farming businesses, the elections are irrevocable and affect depreciation as provided in section 163(j)(11). However, this rule

also benefits taxpayers subject to section 163(j) that are owners of small businesses because treating these small businesses as engaged in an excepted trade or business may result in the allocation of more owner interest expense to excepted trades or businesses under §1.163(j)-10(c).

Commenters also requested a protective election for taxpayers engaged in rental real estate activities if it is unclear whether the activities rise to the level of a trade or business under section 162. The protective election is necessary, according to some commenters, because the definition of an “electing real property trade or business” in section 163(j)(7)(B) and proposed §1.163(j)-1(b)(14) allows a trade or business described in section 469(c)(7)(C) to make the election, and a real property trade or business as defined in section 469(c)(7)(C) can include rental real estate that does not rise to the level of a section 162 trade or business.

Generally, interest expense associated with an activity that does not rise to the level of a section 162 trade or business is not subject to the section 163(j) limitation.

The section 163(j) limitation applies to taxpayers with business interest, which is defined under section 163(j)(5) as any interest properly allocable to a trade or business. Proposed §1.163(j)-1(b)(38) defines a “trade or business” as a trade or business under section 162. In contrast, an electing real property trade or business must be described in section 469(c)(7)(C). Section 1.469-9(b)(1) provides that, for purposes of section 469(c)(7), the term “trade or business” is defined as “any trade or business determined by treating the types of activities in §1.469-4(b)(1) as if they involved the conduct of a trade or business; and any interest in rental real estate, including any interest in rental real estate that gives rise to deductions under section 212.”

Thus, section 469(c)(7)(C) includes all rental real estate (as defined in §1.469-9(b)(3)) and adopts a broader definition of a “trade or business” than section 162. Under this broader definition, taxpayers with rental real estate may be able to qualify as “real estate professionals” through work performed in their rental real estate, even if the rental real estate activities otherwise do not rise to the level of a section 162 trade or business.

For example, for purposes of section 469(c)(7)(C), a taxpayer who owns real property and rents to tenants under a triple net lease arrangement will be treated as engaged in a real property trade or business even though the renting under the terms of a triple net lease arrangement may not rise to the level of a section 162 trade or business. The triple net lease arrangement is included in the broader definition of a trade or business under §1.469-9(b)(1) because the arrangement represents an interest in rental real estate. Accordingly, renting real property under a triple net lease arrangement generally will fall within the definition of a “rental real property trade or business” in section 469(c)(7)(C) and proposed §1.469-9(b)(2). As a result, the taxpayer with such a rental arrangement should be able to make an election to treat this activity as an electing real property trade or business, if the taxpayer so chooses, even though the renting of real property under a triple net lease arrangement might not be a section 162 trade or business. This result is simply a consequence of Congress cross-referencing the broader section 469 definition of a “real property trade or business” for purposes of section 163(j).

Thus, the commenters stated that, although taxpayers who are certain they are not engaged in a section 162 trade or business do not need to make an election out of the section 163(j) limitation because they are not subject to this limitation, taxpayers engaged in rental real estate activities who are not certain whether their rental real estate activities rise to the level of a section 162 trade or business should be given the ability to obtain certainty by making a protective election to treat their rental real estate activities as an electing real property trade or business.

The Treasury Department and the IRS agree with the recommendation for a protective election under these circumstances. Thus, the final regulations provide that an election to treat rental real estate activities as an electing real property trade or business is available regardless of whether the taxpayer making the election is engaged in a trade or business within the meaning of section 162. Under the protective election, a taxpayer engaged in activities described in section 469(c)(7)(C) and §1.469-9(b)(2), as required in proposed §1.163(j)-1(b)

(14)(i), but unsure whether its activities rise to the level of a section 162 trade or business, may make an election for a trade or business to be an electing real property trade or business.

As with all other electing real property trades or businesses, once the election is made, all other consequences of the election outlined in §1.163(j)-9 apply, such as the irrevocability of the election and the required use of the alternative depreciation system for certain assets.

B. One-Time Late Election or Withdrawal of Election Procedures

Commenters requested a one-time automatic extension of time for certain taxpayers to file an election under section 163(j)(7)(B) or section 163(j)(7)(C) due to uncertainty about the effect of a decision to make or not make such an election and about which taxpayers are eligible to make such an election prior to the publication of the final regulations. Additionally, commenters requested a one-time opportunity to withdraw an election made under section 163(j)(7)(B) or section 163(j)(7)(C) prior to the publication of the final regulations. The Treasury Department and the IRS agree with the commenters’ concerns. Thus, in order to address the commenters’ concerns, and to provide immediate transition guidance under section 163(j) for taxpayers affected by the various amendments to the Code made by the CARES Act (including, for example, the technical corrections to section 168(e) of the Code relating to the classification of qualified improvement property), Revenue Procedure 2020-22 was issued to provide an automatic extension of time to make, or an opportunity to withdraw, an election for taxable years beginning in 2018, 2019, or 2020. The revenue procedure also provides the time and manner of making or revoking the three elections provided by the CARES Act under section 163(j)(10) for taxable years beginning in 2019 or 2020.

C. The Anti-Abuse Rule Under Proposed §1.163(j)-9(h)

Numerous comments were received concerning the anti-abuse rule in proposed §1.163(j)-9(h)(1) (proposed -9(h)

anti-abuse rule). The proposed -9(h) anti-abuse rule prohibits an otherwise qualifying real property trade or business from making an election under section 163(j)(7)(B) if at least 80 percent of the business's real property, determined by fair market value, is leased to a trade or business under common control (that is, 50 percent of the direct and indirect ownership of both businesses is held by related parties within the meaning of sections 267(b) and 707(b)) with the real property trade or business. Proposed §1.163(j)-9(h)(2) provides an exception to the proposed -9(h) anti-abuse rule for REITs that lease qualified lodging facilities (defined in section 856(d)(9)(D)) and qualified health care properties (defined in section 856(e)(6)(D)) (REIT exception).

The preamble to the proposed regulations explains that it would be inappropriate to allow an election under section 163(j)(7)(B) to be an excepted real property trade or business for a trade or business that leases substantially all of its real property to the owner of the real property trade or business, or to a related party of the owner: "To permit such an election would encourage a taxpayer to enter into non-economic structures where the real estate components of non-real estate businesses are separated from the rest of such businesses in order to artificially reduce the application of section 163(j) by leasing the real property to the taxpayer or a related party of the taxpayer and electing for this "business" to be an excepted real property trade or business. As a result, these proposed regulations would also contain an anti-abuse rule." The preamble further explains the reasoning for the REIT exception by stating that, because REITs that lease qualified lodging facilities and qualified healthcare properties are generally permitted (pursuant to section 856(d)(8)(B)) to lease these properties to a taxable REIT subsidiary (TRS), this anti-abuse rule does not apply to these types of REITs. The Treasury Department and the IRS requested comments in the preamble to the proposed regulations on whether other exceptions to the anti-abuse rule (such as, for example, an exception for certain fact patterns where real property that is leased from a related party is ultimately sub-leased to a third party) would be appropriate.

Commenters suggested eliminating or modifying the proposed -9(h) anti-abuse rule because of the concern that, as currently written, this rule applies to non-abusive lease arrangements between commonly controlled trades or businesses. Specifically, commenters raised concerns about the applicability of the proposed -9(h) anti-abuse rule to specific types of business structures where the real property is owned by one legal entity (referred to as property company, or PropCo) and leased to a separate but commonly controlled legal entity that operates and manages a business (referred to as operating company, or OpCo). According to commenters, this PropCo/OpCo structure has valid business protection, lending, and regulatory purposes in certain industries. Commenters also claimed that this structure was in existence for many years prior to the enactment of the section 163(j) limitation and was not created in an attempt to circumvent application of the section 163(j) limitation.

For example, the PropCo/OpCo structure is used by some hotels in the following manner: PropCo generally owns the real property subject to significant debt, services such debt, and leases the real property to OpCo, which operates a real property trade or business by licensing the property to unrelated third parties (guests). This structure is used to limit legal liability, manage state and local tax burdens, plan for family wealth transfers, and for other business objectives. One commenter recommended a "look-through" exception to the proposed -9(h) anti-abuse rule where the real property is ultimately leased (or licensed) to unrelated third parties in a PropCo/OpCo structure. This exception would allow a real property trade or business owning real property, or PropCo, to make an election to be an excepting real property trade or business if it leases real property to a commonly controlled real property trade or business, or OpCo, if OpCo subleases (or licenses) the real property to unrelated third parties.

Similarly, commenters noted that the property ownership, mortgage, and resulting interest expense for trades or businesses described as nursing homes, continuing care retirement communities, independent living facilities, assisted living facilities, memory care facilities, and skilled nurs-

ing facilities (collectively, "residential living facilities") is often contained in one legal entity, or PropCo, and the operation and management of the residential living facility is contained in another, commonly controlled legal entity, or OpCo. Commenters explained that the Department of Housing and Urban Development, which is a major lender in the residential living industry, and many other lenders often require the use of single-asset or separate legal entities for lending purposes.

To prevent the application of the proposed -9(h) anti-abuse rule to a PropCo that leases real property to a residential living facility, some commenters suggested that the anti-abuse rule should not apply to a trade or business that leases real property to a residential living facility (1) regardless of whether the lessor and lessee are under common control, or (2) if both the lessor trade or business and the commonly controlled lessee independently qualify as electing real property trades or businesses. Commenters noted that the proposed -9(h) anti-abuse rule should not apply to situations where the entities, if combined or aggregated and without taking the lease into account, would each qualify as real property trades or businesses. Without modification to the proposed -9(h) anti-abuse rule, the PropCo in a PropCo/OpCo structure would be prohibited from making a real property trade or business election even though all of its lease income is derived from a real property trade or business. Commenters suggested that proposed §1.163(j)-9(h)(2), which provides an exception for REITs, should apply to similarly situated taxpayers that are privately owned but use a commonly controlled entity in a PropCo/OpCo structure rather than a REIT.

Other suggestions made by commenters include (1) eliminating the proposed -9(h) anti-abuse rule and instead relying on the more general proposed §1.163(j)-2(h) anti-avoidance rule to disregard or recharacterize the types of non-economic structures targeted by the proposed -9(h) anti-abuse rule, (2) clarifying that the proposed -9(h) anti-abuse rule would apply only if there is a "principal purpose of tax avoidance," (3) providing exceptions to the proposed -9(h) anti-abuse rule if the taxpayer demonstrates a substantial economic purpose for the PropCo/OpCo

structures unrelated to avoiding section 163(j), or if the PropCo/OpCo structure was in place prior to enactment of the TCJA, and (4) expanding the REIT exception to include all real property trades or businesses that lease to residential living facilities.

The operation of two separate, but commonly controlled, legal entities is also common in the cattle and beef industry—one entity owns all of the land and the buildings used by the operating entity, whereas the operating entity owns inventory (cattle or crops) and equipment and operates the farm, ranch, or feed yard. Commenters recommended providing an exception from the proposed -9(h) anti-abuse rule for farming businesses or, alternatively, clarifying that the allocation rules under proposed §1.163(j)-10 do not apply to separate out the real property to real property businesses included under the proposed -9(h) anti-abuse rule.

The Treasury Department and the IRS agree with commenters that certain exceptions should be added to the proposed -9(h) anti-abuse rule. The final regulations provide two additional exceptions to the anti-abuse rule. Under the first exception, if at least 90 percent of a lessor's real property, determined by fair market rental value, is leased to a related party that operates an excepted trade or business and/or to unrelated parties, the lessor is eligible to make an election to be an electing real property trade or business for its entire trade or business (de minimis exception). The de minimis exception accommodates taxpayers that, by law or for valid business reasons, divide their real property holding and leasing activities from their operating trade or business that qualifies as an excepted trade or business, while still maintaining an anti-abuse rule to prevent non-economic business structures designed to circumvent the section 163(j) limitation. See §1.163(j)-9(j).

The second exception is a look-through rule that modifies the proposed -9(h) anti-abuse rule by allowing taxpayers to make an election for a certain portion of their real property trade or business (look-through exception). Under the look-through exception, if a lessor trade or business leases to a trade or business under common control (lessee), the lessor is eligible to make an election to be an electing

real property trade or business to the extent that the lessor leases to an unrelated party or to an electing trade or business under common control with the lessor or lessee, and to the extent that the lessee trade or business under common control subleases (or licenses) to unrelated third parties and/or related parties that operate an excepted trade or business. Accordingly, the lessor can make an election for the portion of its trade or business that is equivalent to the portion of the real property that is ultimately leased to unrelated parties and/or related parties that operate an excepted trade or business. A lessor that makes an election under the look-through exception must allocate the basis of assets used in its trades or businesses under the rules provided in §1.163(j)-10(c)(3)(iii)(D).

D. Residential Living Facilities and Notice with Proposed Revenue Procedure

The PropCo/OpCo structure, discussed previously in part X(C) of this Summary of Comments and Explanation of Revisions section, is used extensively by certain residential living facilities that provide residential housing along with supplemental assistive, nursing, and other routine medical services. The commonly controlled lessees in the PropCo/OpCo structure expressed concern about whether the residential living facility trades or businesses qualify as real property trades or businesses under section 469 and §1.469-9(b)(2), and are thus eligible to make an election under section 163(j)(7)(B), because of the supplemental services that they provide. Accordingly, Notice 2020-59, 2020-[**INSERT CB/IRB GUIDANCE NUMBERS**], released concurrently with these final regulations, provides notice of a proposed revenue procedure detailing a proposed safe harbor under which a taxpayer engaged in a trade or business that manages or operates a residential living facility and that also provides supplemental assistive, nursing, and other routine medical services may elect to treat such trade or business as a real property trade or business within the meaning of section 469(c)(7)(C), solely for purposes of qualifying as an electing real property trade or business under section 163(j)(7)(B). Thus, if a lessor leases real property to a commonly controlled lessee that operates a

residential living facility, which qualifies as and makes an election to be an excepted trade or business under the proposed safe harbor in Notice 2020-59, the lessor may qualify to use the de minimis exception or the look-through exception.

The Treasury Department and the IRS request comments in Notice 2020-59 on the proposed revenue procedure. Interested parties are invited to submit comments on the proposed revenue procedure by September 29, 2020.

The proposed revenue procedure is proposed to apply to taxpayers with taxable years ending after December 31, 2017. Until such time that the proposed revenue procedure is published in final form, taxpayers may use the safe harbor described in the proposed revenue procedure for purposes of determining whether a residential living facility, as defined in the proposed revenue procedure, may be treated as a real property trade or business solely for purposes of section 163(j).

Future guidance might be needed to determine whether a particular trade or business can make an election. Accordingly, the definitions of electing real property trade or business in §1.163(j)-1(b)(14) and electing farming business in §1.163(j)-1(b)(13) include a new provision noting that the Secretary may issue guidance on whether a trade or business can be an electing real property trade or business or electing farming business.

E. Safe Harbor for Certain REITs

Proposed §1.163(j)-9(g) provides a special safe harbor for REITs. The safe harbor provides that, if a REIT holds real property, interests in partnerships holding real property, or shares in other REITs holding real property, the REIT is eligible to make an election to be an electing real property trade or business for all or part of its assets. If a REIT makes an election to be an electing real property trade or business, and if the value of the REIT's real property financing assets (as defined in proposed §1.163(j)-9(g)(5) and (6)) at the close of the taxable year is 10 percent or less of the value of the REIT's total assets at the close of the taxable year, then, under the safe harbor in the proposed regulations, all of the REIT's assets are treated as assets of an excepted trade or

business. If a REIT makes an election to be an electing real property trade or business, and if the value of the REIT's real property financing assets at the close of the taxable year is more than 10 percent of the value of the REIT's total assets, then, under the safe harbor in the proposed regulations, the REIT's business interest income, business interest expense, and other items of expense and gross income are allocated between excepted and non-excepted trades or businesses under the rules set forth in proposed §1.163(j)-10, as modified by proposed §1.163(j)-9(g)(4). The safe harbor also allows REITs to use §1.856-10 for the definition of "real property" in determining which assets are assets of an excepted trade or business. The final regulations generally adopt the safe harbor for REITs in the proposed regulations, with modifications in response to comments discussed in this part X(E) of the Summary of Comments and Explanation of Revisions section.

One commenter recommended that the Treasury Department and the IRS revise proposed §1.163(j)-9(g)(1) to clarify that a REIT may make the safe harbor election if the REIT owns an interest in one or more partnerships holding real property or stock in one or more REITs holding real property. The commenter indicated that the use of the plural "interests in partnerships" and "shares in other REITs" could imply that a REIT cannot make the safe harbor election if the REIT owns an interest in a single partnership or shares in a single REIT. The Treasury Department and the IRS agree that the regulations should not preclude a REIT that owns an interest in a single partnership or shares in a single REIT from applying the safe harbor.

This commenter also recommended that the final regulations clarify that the safe harbor election may be made if the electing REIT owns a direct interest in a partnership or lower-tier REIT that does not directly hold real property, but that holds an interest in another partnership or lower-tier REIT that directly holds real property.

The determination of whether a REIT is eligible to make the safe harbor election under the proposed regulations was intended to mirror the determination of whether the REIT holds real property (as defined under §1.856-10) when testing

the value of the REIT's real estate assets under section 856(c)(4)(A). If a REIT is a partner in a partnership that holds real property (as defined under §1.856-10), the REIT is deemed to own its proportionate share of the partnership's real property for purposes of section 856(c)(4). The Treasury Department and the IRS also recognize that, for purposes of section 856(c)(4), a REIT is deemed to own a share of real property from any partnership interest held through an upper-tier partnership.

Moreover, under section 856(c)(5)(B), shares in other REITs qualify as real estate assets. Although a REIT (shareholder REIT) that holds shares in another REIT would not need to determine whether the other REIT holds real property for purposes of testing the value of the shareholder REIT's real estate assets under section 856(c)(4), the proposed regulations allowed the shareholder REIT to make the safe harbor election as long as it determines that the other REIT holds real property. The Treasury Department and the IRS recognize that the other REIT in this situation may not necessarily hold real property but instead may hold shares in a lower-tier REIT (which is a real estate asset in the hands of the other REIT).

Because the shareholder REIT can hold shares in another REIT that holds shares in a lower-tier REIT that holds real property, the Treasury Department and the IRS have concluded that a shareholder REIT may make the safe harbor election if it determines that it holds an indirect interest in a REIT that holds real property. Accordingly, the final regulations clarify that a REIT may elect to be an electing real property trade or business if the REIT holds real property, interests in one or more partnerships holding real property either directly or indirectly through interests in other partnerships or shares in other REITs, or shares in one or more other REITs holding real property either directly or indirectly through interests in partnerships or shares in other REITs.

Several commenters also requested that certain partnerships with a REIT as a partner be allowed to apply the REIT safe harbor election at the partnership level. Commenters noted that many REITs own interests in partnerships that directly or indirectly hold real property, and these partnerships incur the debt that is secured

by the real property and claim the interest expense deductions. Commenters recommended that the REIT safe harbor election be made available to partnerships if: (1) At least one partner is a REIT that owns, directly or indirectly, at least 50 percent of the partnership's capital or profits; (2) the partnership meets the requirements of section 856(c)(2), (3), and (4) as if the partnership were a REIT; and (3) the partnership satisfies the requirements of proposed §1.163(j)-9(g)(1) as if the partnership were a REIT.

The Treasury Department and the IRS agree that a partnership that is controlled by a REIT or REITs and that would meet the REIT gross income and asset tests in section 856(c)(2), (3), and (4) (as if the partnership were a REIT) is sufficiently similar to a REIT for this purpose. Accordingly, the final regulations provide that a partnership may apply the REIT safe harbor election at the partnership level if one or more REITs own, directly or indirectly, at least 50 percent of the partnership's capital and profits, the partnership meets the requirements of section 856(c)(2), (3), and (4) as if the partnership were a REIT, and the partnership satisfies the requirements described in §1.163(j)-9(h)(1) as if the partnership were a REIT.

A commenter also recommended that the REIT exception to the proposed §1.163(j)-9(h) anti-abuse rule be clarified to apply to any partnership in which a REIT owns a 50 percent or greater direct or indirect capital or profits interest, if the partnership leases a qualified lodging facility or qualified health care property to a TRS or a partnership in which a TRS is a 50 percent or greater direct or indirect partner. The REIT exception was intended to allow REITs that lease qualified lodging facilities and qualified healthcare properties pursuant to the related party rental exception in section 856(d)(8)(B) to make a real property trade or business election because these leases are explicitly authorized by the Code. In response to comments, the final regulations clarify that the REIT exception also applies to partnerships making the REIT safe harbor election that lease qualified lodging facilities and qualified healthcare properties. However, the final regulations do not specify the related party to which the REIT must lease the qualified lodging facility or qual-

ified healthcare property in order to qualify for the REIT exception and, therefore, Treasury and the IRS did not include a provision for partnerships in which a TRS is a partner.

A commenter requested clarification regarding the application of the real property trade or business election to a rental real estate partnership and its REIT partners if the partnership holds real property and is not engaged in a trade or business within the meaning of section 162. Part XVI of this Summary of Comments and Explanation of Revision section clarifies that taxpayers engaged in rental real estate activities that do not necessarily rise to the level of a section 162 trade or business nevertheless are treated as engaged in real property trades or businesses within the meaning of section 469(c)(7)(C) (and for purposes of section 163(j) by reference). As such, a partnership engaged in a rental real estate activity (regardless of whether that activity rises to the level of a section 162 trade or business) will be permitted to make the election under section 163(j)(7)(B) with respect to the rental real estate activity to be an electing real property trade or business for purposes of section 163(j), and any interest expense that is allocable to that rental real estate activity and that is allocable to a REIT partner will not be investment interest (within the meaning of section 163(d)) that is treated as interest expense allocable to a trade or business of a C corporation partner under §1.163(j)-4(b)(3).

For purposes of valuing a REIT's assets, the proposed regulations provide that REIT real property financing assets also include the portion of a shareholder REIT's interest in another REIT attributable to that other REIT's real property financing assets. The final regulations clarify that this rule also applies in the context of tiered-REIT structures.

The proposed regulations provide that no portion of the value of a shareholder REIT's shares in another REIT is included in the value of the shareholder REIT's real property financing assets if all of the other REIT's assets are treated as assets of an excepted trade or business under proposed §1.163-9(g)(2). The proposed regulations provide that if a shareholder REIT does not receive from the other REIT the information necessary to determine whether

and the extent that the assets of the other REIT are investments in real property financing assets, then the shareholder REIT's shares in the other REIT are treated as real property financing assets.

A commenter requested that the final regulations clarify how a shareholder REIT determines whether the value of the other REIT's real property financing assets is 10 percent or less of the other REIT's total asset value for purposes of determining whether the electing shareholder REIT must allocate interest expense between excepted and non-excepted businesses. The commenter recommended that the final regulations provide an example to clarify this point or specify that the shareholder REIT may make this determination based on all of the facts available to the shareholder REIT. The commenter proposed that a shareholder REIT that makes an incorrect determination in good faith that the other REIT qualifies under proposed §1.163-9(g)(2) nevertheless be permitted to treat all of the value of the lower REIT's shares as assets other than real property financing assets.

In response to this comment, the final regulations allow a shareholder REIT to use an applicable financial statement (within the meaning of section 451(b)) of the other REIT to determine whether and the extent that the assets of the other REIT are investments in real property financing assets (rather than having to receive the information directly from the other REIT). However, the final regulations do not permit a shareholder REIT to treat the shares in the other REIT as assets other than real property financing assets when the shareholder REIT's determination is based on information other than an applicable financial statement or information received directly from the other REIT.

In the event that a REIT is required to allocate its interest expense between excepted and non-excepted trades or businesses under §1.163(j)-10, a commenter requested clarification regarding the application of the look-through rules to tiered entities. Under the proposed regulations, if a REIT holds an interest in a partnership, in applying the partnership look-through rule in proposed §1.163(j)-10(c)(5)(ii)(A)(2), the REIT also applies the definition of real property under §1.856-10 to determine whether the partnership's assets are

allocable to an excepted trade or business. In addition, under the proposed regulations, if a shareholder REIT holds shares in another REIT and all of the other REIT's assets are not treated as assets of an excepted trade or business, the proposed regulations provide that the shareholder REIT applies the same partnership look-through rule (as if the other REIT were a partnership) in determining the extent to which the shareholder REIT's adjusted basis in the shares of the other REIT is properly allocable to an excepted trade or business of the shareholder REIT.

In response to comments, the final regulations provide that, when applying the partnership look-through rule in the case of tiered entities, a REIT applies the definition of real property in §1.856-10 to each partnership in the chain to determine whether the partnership's assets are allocable to an excepted trade or business. Furthermore, because shares in other REITs qualify as real estate assets under section 856(c)(5)(B), the final regulations provide that, when applying the look-through rule to REITs within a tiered-entity structure, a shareholder REIT may apply the partnership look-through rule in §1.163(j)-10(c)(5)(ii)(A)(2) to all REITs in the chain.

In response to an informal inquiry, the final regulations also clarify that a REIT or a partnership that is eligible but chooses not to apply the REIT safe harbor election may still elect, under §1.163(j)-9(b)(1), for one or more of its trades or businesses to be an electing real property trade or business, provided that such trade or business is otherwise eligible to elect under §1.163(j)-9(b)(1). A REIT or partnership that makes the election under §1.163(j)-9(b)(1) without utilizing the REIT safe harbor provisions may not rely on any portion of §1.163(j)-9(h)(1) through (7).

F. Real Property Trade or Business

Proposed §1.163(j)-10(a)(1)(i) provides that the amount of a taxpayer's interest expense that is properly allocable to excepted trades or businesses is not subject to the section 163(j) limitation, and the amount of a taxpayer's other items of income, gain, deduction, or loss, including interest income, that is properly allocable to excepted trades or businesses is excluded from the calculation of the taxpayer's section 163(j)

limitation. Commenters suggested that, for purposes of allocating interest between a non-excepted trade or business and an excepted trade or business, a corporate partner in a partnership that conducts a real property trade or business should be allowed to treat its share of the partnership's real property trade or business as an electing real property trade or business even if the partnership does not make the election.

The Treasury Department and the IRS have rejected this comment because an election under section 163(j)(7)(B) has certain consequences—for example, the use of ADS rather than the general depreciation system for certain types of property, which results in the inability of electing real property trades or businesses to claim the additional first-year depreciation deduction under section 168(k) for those types of property. Therefore, the Treasury Department and the IRS have determined that a corporate partner in a partnership that conducts a real property trade or business should be allowed to treat its share of the partnership's real property trade or business as an electing real property trade or business only if the partnership makes the election. However, see part X(A) of this Summary of Comments and Explanation of Revisions section regarding taxpayers that are eligible to make an election to be an electing real property trade or business but are not certain whether they are engaged in a trade or business under section 162.

XI. Comments on and Changes to Proposed §1.163(j)-10: Allocation of Interest Expense, Interest Income, and Other Items of Expense and Gross Income to an Excepted Trade or Business.

Section 1.163(j)-10 provides rules for allocating tax items that are properly allocable to a trade or business between excepted trades or businesses and non-excepted trades or businesses for purposes of section 163(j). The following discussion addresses comments relating to proposed §1.163(j)-10.

A. General Method of Allocation: Asset Basis

Proposed §1.163(j)-10(c) sets forth the general rule for allocating interest expense

and interest income between excepted and non-excepted trades or businesses. Under this general rule, interest expense and interest income is allocated between excepted and non-excepted trades or businesses based upon the relative amounts of the taxpayer's adjusted basis in the assets used in its trades or businesses. As noted in the preamble to the proposed regulations, this general method of allocation reflects the fact that money is fungible and the view that interest expense is attributable to all activities and property, regardless of any specific purpose for incurring an obligation on which interest is paid. Many commenters expressed support for this proposed allocation method.

However, some commenters argued that taxpayers should be permitted to allocate interest expense and income between excepted and non-excepted trades or businesses based on the earnings or gross income of each business, for various reasons. For example, some commenters posited that asset basis may bear little connection to a corporation's borrowing capacity, whereas earnings or revenue are useful indicators of a taxpayer's ability to meet its debt obligations, and earnings are a key factor in determining the amount of debt the taxpayer may borrow and the interest rate the taxpayer will be charged. These commenters also noted that an asset-basis allocation method could yield inconsistent results across industries (for example, industries whose asset mix is heavily skewed towards self-created intangibles will have low asset basis) or within similarly situated industries (if assets are purchased at different times). One commenter also suggested that an earnings-based approach would be easier for the IRS and taxpayers to administer because ATI already must be calculated by each taxpayer that is subject to a section 163(j) limitation.

Although the foregoing arguments have merit, adopting an earnings-based approach would raise many additional considerations, such as taxpayers' ability to time income recognition to affect allocation and create other distortions (as in the case of a trade or business that requires capital investment for a period of years before earning significant gross income). Thus, after further consideration, the Treasury Department and the IRS have decided to retain the asset-basis al-

location approach contained in proposed §1.163(j)-10(c). However, the Treasury Department and the IRS continue to study these comments and may provide future guidance on this issue.

B. Allocation Between Trades or Businesses and Non-Trades or Businesses

Proposed §1.163(j)-10(a)(2)(i) coordinates the rules under proposed §1.163(j)-10 with other Federal income tax rules. For example, proposed §1.163(j)-10(a)(2)(i) provides that, before a taxpayer may determine the amount of interest expense, interest income, or other tax items that is properly allocable to excepted or non-excepted trades or businesses, the taxpayer first must apply §1.163-8T to determine which tax items are allocable to non-trades or businesses rather than to trades or businesses. Some commenters recommended that non-corporate partners be permitted to allocate tax items between a trade or business and a non-trade or business based on an approach that looks to the earnings of the trade or business and non-trade or business. The commenters argued that an earnings-based approach to determining when debt is properly allocable between a trade or business and a non-trade or business is consistent with determining whether the earnings of a taxpayer can support the level of debt incurred.

After further consideration, the Treasury Department and the IRS have decided to retain the §1.163-8T tracing approach contained in proposed §1.163(j)-10(a)(2)(i). However, the Treasury Department and the IRS continue to study these comments and may provide future guidance on this issue. Additionally, the Treasury Department and the IRS are considering issuing additional guidance related to the allocation of interest expense by partnerships or S corporations. See proposed §1.163-14 in the Concurrent NPRM.

Commenters also recommended that no allocation between business and non-business interest expense be required when a partnership is wholly owned by corporate partners because a corporation can have only business interest income and expense and cannot have investment interest income and expense (see proposed §1.163(j)-4(b)(3)(i)). The Treasury Department and the IRS have rejected this

comment because the recommended approach is inconsistent with the entity approach taken with respect to partnerships in section 163(j)(4). Moreover, a separate rule for partnerships that are wholly owned by corporate partners is subject to manipulation because the partnership could alter the rules to which it is subject simply by admitting a non-corporate partner with a small economic interest in the partnership.

C. Consolidated Groups

1. Overview

As provided in proposed §1.163(j)-10(a)(4)(i), the computations required by section 163(j) and the section 163(j) regulations generally are made for a consolidated group on a consolidated basis. Thus, for purposes of applying the allocation rules of proposed §1.163(j)-10, all members of a consolidated group are treated as a single corporation. For example, the group (rather than a particular member) is treated as engaged in excepted or non-excepted trades or businesses. Moreover, intercompany transactions (as defined in §1.1502-13(b)(1)(i)) are disregarded for purposes of these allocation rules, and property is not treated as used in a trade or business to the extent the use of such property in that trade or business derives from an intercompany transaction. Additionally, stock of a member that is owned by another member of the same consolidated group is not treated as an asset for purposes of §1.163(j)-10, and the transfer of any amount of member stock to a non-member is treated by the group as a transfer of the member's assets proportionate to the amount of member stock transferred.

After a consolidated group has determined the percentage of the group's interest expense allocable to excepted trades or businesses for the taxable year, this exempt percentage is applied to the interest paid or accrued by each member during the taxable year to any lender that is not a group member. Thus, except to the extent proposed §1.163(j)-10(d) (providing rules for direct allocation in certain limited circumstances) applies, the same percentage of interest paid or accrued by each member to a lender that is not a member

is treated as allocable to excepted trades or businesses, regardless of whether any particular member actually engaged in an excepted trade or business.

2. Intercompany Transactions

Commenters observed that ignoring all intercompany transactions and intercompany obligations for purposes of proposed §1.163(j)-10 is theoretically simple and generally furthers the single-entity approach adopted elsewhere in the proposed regulations. However, a commenter recommended that taxpayers be permitted to take into account basis from certain intercompany transactions, so long as adequate safeguards are put in place against abuse (for example, to prevent taxpayers from using intercompany transactions to increase the consolidated group's ATI or to shift asset basis to excepted trades or businesses), in order to reduce the administrative burden of tracking asset basis separately for purposes of section 163(j). The commenter also recommended that the Treasury Department and the IRS reconsider whether, in certain circumstances, items from intercompany transactions (other than business interest expense and business interest income) should affect the amount of the consolidated group's ATI.

The Treasury Department and the IRS acknowledge that the approach in proposed §1.163(j)-10(a)(4)(i) creates an administrative burden for members of consolidated groups. However, this approach is consistent with §1.1502-13, the stated purpose of which is to prevent intercompany transactions from creating, accelerating, avoiding, or deferring consolidated taxable income or consolidated tax liability (see §1.1502-13(a)(1)). Allowing tax items from intercompany transactions to affect the calculation of a consolidated group's tentative taxable income and ATI would be inconsistent with the single-entity principles of §1.1502-13(a). Moreover, taxpayers already must track asset basis information for purposes of §1.1502-13. Additionally, giving effect to intercompany transactions for purposes of section 163(j) would create other administrative burdens for consolidated group members. See the discussion in part V(B) of this Summary of Comments and Explanation of Revisions section. Thus, the final regu-

lations continue to disregard intercompany transactions for purposes of the allocation rules in proposed §1.163(j)-10.

3. Use of Property Derives from an Intercompany Transaction

A commenter observed that the meaning of the phrase "property is not treated as used in a trade or business to the extent the use of such property derives from an intercompany transaction" is unclear. For example, one member of a consolidated group (S) leases property to another member of the group (B), which uses the property in its trade or business. B's lease with S entitles B to use the property. Should B's use of the property in its trade or business be disregarded for purposes of proposed §1.163(j)-10 because such use "derives from an intercompany transaction"?

The Treasury Department and the IRS did not intend for B's use of the property in the foregoing scenario to be disregarded for purposes of the allocation rules in proposed §1.163(j)-10. If S and B were treated as disregarded entities owned by the same corporation, the lease would be ignored, and the leased property would be treated as an asset used in B's trade or business. The final regulations clarify proposed §1.163(j)-10(a)(4)(i) to better reflect this intended result.

The commenter also requested confirmation that the same allocation principle applies to third-party costs incurred by members of the group (in other words, that such costs are allocated based on the use of assets in excepted or non-excepted trades or businesses). However, proposed §1.163(j)-10(b)(5) already provides special rules for the allocation of expenses other than interest expenses. Thus, the final regulations do not adopt this recommendation.

4. Purchase of Member Stock from a Nonmember

A commenter recommended that a purchase by one consolidated group member (S) of stock of another member (or of an entity that becomes a member as a result of the purchase) (in either case, T) from a non-member (X) be treated as a purchase of a proportionate amount of T's assets for purposes of proposed §1.163(j)-10.

Although the proposed regulations treat the transfer of the stock of a member to a non-member as a transfer of a proportionate amount of the member's assets, the proposed regulations do not expressly address the acquisition of the stock of a member (or of a corporation that becomes a member as a result of the acquisition). The commenter noted that, if such acquisitions are not treated as asset purchases, the amount of adjusted basis allocated to an excepted or non-excepted trade or business may differ significantly depending on whether S and T file a consolidated return.

For example, T (which is engaged solely in an excepted trade or business) has assets with a fair market value of \$100x and \$0 adjusted basis, and \$0 liabilities. S (which is engaged solely in a non-excepted trade or business) has \$100x adjusted basis in its assets. S purchases 100 percent of T's stock from X for \$100x, and S and T do not file a consolidated tax return. As a result, S's stock in T is treated as an asset (under proposed §1.163(j)-10(c)(5)(ii)(B)) with a basis of \$100x. In contrast, if S and T were to file a consolidated return, S's stock in T would not be treated as an asset under proposed §1.163(j)-10(a)(4). Moreover, it is unclear how much adjusted basis the group could take into account for purposes of the allocation rules. Would the group's adjusted basis in T's assets equal T's basis in its assets immediately before the acquisition (here, \$0)? Or would all or some portion of the amount paid by S to acquire T's stock be taken into account? The commenter argued that S should have the same amount of adjusted basis in T's assets regardless of whether S and T file a consolidated return, and that there is no legislative history revealing congressional intent to treat members of a consolidated group and non-consolidated corporations differently in this regard. Thus, according to the commenter, S should be able to take into account the amount paid for its T stock for purposes of the allocation rules in proposed §1.163(j)-10.

Although Congress did not expressly address this issue, Congress did make clear that the section 163(j) limitation applies at the consolidated group level (see H. Rept. 115-466, at 386 (2017)). Moreover, section 1502 provides broad authority for the Secretary of the Treasury to prescribe regulations to determine the

tax liability of a consolidated group in a manner that clearly reflects the income tax liability of the group and that prevents the avoidance of tax liability. Consistent with legislative intent regarding section 163(j) and with the broad grant of authority under section 1502, the proposed regulations treat a consolidated group as a single corporation for purposes of the allocation rules of §1.163(j)-10, and they disregard the stock of members for purposes of this section.

Additionally, the Treasury Department and the IRS have questions and concerns about treating the acquisition of stock of a member (or of an entity that becomes a member) as an asset sale. How would the purchase price be added to the group's basis in the member's assets, and how would the additional basis added to these assets be depreciated? Would this approach deem the transaction to be an asset acquisition for all Federal income tax purposes or just for purposes of section 163(j), and what complications would arise from treating the transaction as an asset purchase for purposes of section 163(j) but as a stock purchase for other purposes?

Due to concerns about these and other issues, the final regulations do not adopt the commenter's recommendation. However, the Treasury Department and the IRS continue to study the issue raised by the commenter and may address the issue in future guidance.

5. Inclusion of Income from Excepted Trades or Businesses in Consolidated ATI

A commenter noted that, because every member of a consolidated group is treated as engaged in every trade or business of the group for purposes of proposed §1.163(j)-10, a member engaged solely in an excepted regulated utility trade or business that incurs interest expense related to its business activities will be subject to the section 163(j) limitation if other group members are engaged in non-excepted trades or businesses. The commenter suggested that this outcome is contrary to the policy rationale for the exception for regulated utility trades or businesses. The commenter further noted that the gross income of the excepted trade or business is not included in the group's ATI calculation, and that this outcome could produce

anomalous results. The commenter thus recommended that a proportionate share of the gross income of the excepted trade or business be included as an adjustment to consolidated ATI.

The Treasury Department and the IRS do not agree that the results under proposed §1.163(j)-10(a)(4) are inconsistent with congressional intent or lead to anomalous results. As noted in part XI(C)(4) of this Summary of Comments and Explanation of Revisions section, Congress expressly stated that the section 163(j) limitation applies at the consolidated group level. Thus, the treatment of a consolidated group as a single corporation, and the treatment of every member as engaged in every trade or business of the group, is consistent with congressional intent. Moreover, if the section 163(j) limitation were inapplicable to group members engaged in excepted trades or businesses, consolidated groups could readily avoid the section 163(j) limitation by concentrating their external borrowing in such members. Furthermore, although a portion of the interest expense of a member engaged solely in an excepted trade or business will be subject to the section 163(j) limitation if the group is otherwise engaged in non-excepted trades or businesses, a portion of the interest expense of a member engaged solely in a non-excepted trade or business will not be subject to the section 163(j) limitation if the group is otherwise engaged in excepted trades or businesses—and all of that member's income will factor into the group's ATI calculation. Finally, as the commenter acknowledged, section 163(j)(8)(A)(i) specifically excludes from the determination of ATI any item of income, gain, deduction, or loss that is allocable to an excepted trade or business.

For the foregoing reasons, the Treasury Department and the IRS have determined that no changes to the final regulations are needed with respect to this comment.

6. Engaging in Excepted or Non-Excepted Trades or Businesses as a "Special Status"

One commenter suggested that the Treasury Department and the IRS consider whether engaging in an excepted trade or business should be treated as a "special status" under §1.1502-13(c)(5) for pur-

poses of applying the intercompany transaction rules of §1.1502-13.

The intercompany transaction rules apply for purposes of redetermining and allocating attributes under §1.1502-13(c)(1)(i) in order to reach a “single entity” answer under the matching rule of §1.1502-13(c). For example, one member of a consolidated group is a dealer in securities under section 475 (dealer) and sells a security to a second member that is not a dealer; that second member then sells the security to a nonmember in a later year. The matching rule can apply to ensure that the taxable items of the two members harmonize with regard to timing and character in order to reach the same overall tax treatment that would be given to a single corporation whose two operating divisions engaged in those transactions. See §1.1502-13(c)(7)(i), *Example 11*.

However, if one member has “special status” under §1.1502-13(c)(5) but the other does not, then attributes of the item would not be redetermined under the matching rule. For example, if S (a bank to which section 582(c) applies) and B (a nonbank) are members of a consolidated group, and if S sells debt securities at a gain to B, the character of S’s intercompany gain is ordinary (as required under section 582(c)), but the character of B’s corresponding item is determined under §1.1502-13(c)(1)(i) without the application of section 582(c). See §1.1502-13(c)(5).

The “special status” rules of §1.1502-13(c)(5) are applicable to entities, such as banks or insurance companies, that are subject to a separate set of Federal income tax rules. Although there are special tax rules for farming, real estate, and utilities, an entity engaged in such trades or businesses also may be engaged in other trades or businesses to which such special tax rules would not apply. Further, the entity’s farming, real estate, or utility trade or business need not be its primary trade or business. Moreover, the treatment of excepted trades or businesses as a special status effectively would result in additional tracing of specific items for purposes of §1.1502-13. As noted in the preamble to the proposed regulations, the Treasury Department and the IRS have decided not to apply a tracing regime to allocate interest expense and income between excepted

and non-excepted trades or businesses. Thus, the final regulations do not treat engaging in an excepted trade or business as a special status.

D. Quarterly Asset Testing

Under proposed §1.163(j)-10(c)(6), a taxpayer must determine the adjusted basis in its assets on a quarterly basis and average those amounts to determine the relative amounts of asset basis for its excepted and non-excepted trades or businesses for a taxable year. In the preamble to the proposed regulations, the Treasury Department and the IRS requested comments on the frequency of asset basis determinations required under proposed §1.163(j)-10(c).

In response, commenters stated that this quarterly determination requirement is administratively burdensome, and that such a burden is unwarranted because, in many circumstances, measuring asset basis less frequently would produce similar results. Thus, commenters recommended that taxpayers be permitted to allocate asset basis for a taxable year based on the average of adjusted asset basis at the beginning and end of the year. As a result, the “determination date” would be the last day of the taxpayer’s taxable year, and the “determination period” would begin on the first day of the taxpayer’s taxable year and end on the last day of the year.

Several commenters recommended that this approach be modeled on the interest valuation provisions in §1.861-9T(g)(2)(i). Under these rules, taxpayers generally must compute the value of assets based on an average of asset values at the beginning and end of the year. However, if a “substantial distortion” of asset values would result from this approach (for example, if there is a major acquisition or disposition), the taxpayer must use a different method of asset valuation that more clearly reflects the average value of assets.

Other commenters suggested that their proposed approach could be limited to cases in which there is no more than a de minimis change in asset basis between the beginning and end of the taxable year. For example, this approach could be available for a taxable year only if the taxpayer demonstrates that its total adjusted basis (as measured in accordance with the rules

in proposed §1.163(j)-10(c)(5)) at the end of the year in its assets used in its excepted trades or businesses, as a percentage of the taxpayer’s total adjusted basis at the end of such year in all of its assets used in a trade or business, does not differ by more than 10 percent from such percentage at the beginning of the year.

The Treasury Department and the IRS acknowledge that determining asset basis on a quarterly basis would impose an administrative burden. The Treasury Department and the IRS also agree with commenters that a safeguard is needed to account for episodic events, such as acquisitions, dispositions, or changes in business, that could affect average values. Thus, the final regulations permit a taxpayer to compute asset basis in its excepted and non-excepted trades or businesses by averaging asset basis at the beginning and end of the year, so long as the taxpayer falls under a 20 percent de minimis threshold.

E. De Minimis Rules

1. Overview

The proposed regulations provide a number of de minimis rules to simplify the application of §1.163(j)-10. For example, proposed §1.163(j)-10(c)(3)(iii)(C)(3) provides that a utility trade or business is treated entirely as an excepted regulated utility trade or business if more than 90 percent of the items described in proposed §1.163(j)-1(b)(15) are furnished or sold at rates qualifying for the excepted regulated utility trade or business exception. Proposed §1.163(j)-10(c)(3)(iii)(B)(2) provides that, if 90 percent or more of the basis in an asset would be allocated under proposed §1.163(j)-10(c)(3) to either excepted or non-excepted trades or businesses, then the entire basis in the asset is allocated to either excepted or non-excepted trades or businesses, respectively. In turn, proposed §1.163(j)-10(c)(1)(ii) provides that, if 90 percent or more of a taxpayer’s basis in its assets is allocated under proposed §1.163(j)-10(c) to either excepted or non-excepted trades or businesses, then all of the taxpayer’s interest expense and interest income are allocated to either excepted or non-excepted trades or businesses, respectively.

2. Order in Which the De Minimis Rules Apply

A commenter recommended that these de minimis rules be applied in the order in which they are listed in the foregoing paragraph. In other words, a taxpayer first should determine the extent to which its utility businesses are excepted regulated utility trades or businesses. The taxpayer then should determine the extent to which the basis of any assets used in both excepted and non-excepted trades or businesses should be wholly allocated to either excepted or non-excepted trades or businesses. Only then should the taxpayer determine whether all of its interest expense and interest income should be wholly allocated to either excepted or non-excepted trades or businesses. The Treasury Department and the IRS agree that the order recommended by the commenter is the most reasonable application of these de minimis rules, and the final regulations adopt language confirming this ordering.

3. Mandatory Application of De Minimis Rules

Commenters also requested that the final regulations continue to mandate the application of the foregoing de minimis rules rather than make such de minimis rules elective. The commenters expressed concern that creating an election to use the de minimis rules in §1.163(j)-10(c)(1) and (3) would create uncertainty for taxpayers, and they argued that mandatory application of the de minimis rules would simplify the rules for taxpayers. The Treasury Department and the IRS agree that mandatory application of the de minimis rules simplifies the application of §1.163(j)-10 and eases the burdens of compliance and administration. Therefore, the final regulations continue to mandate the application of the de minimis rules in §1.163(j)-10(c)(1) and (3).

4. De Minimis Threshold for Electric Cooperatives

A commenter requested that the de minimis threshold for utilities in proposed §1.163(j)-10(c)(3)(iii)(C)(3) be lowered from 90 percent to 85 percent for electric cooperatives. The commenter argued

that a different threshold is appropriate for electric cooperatives because, under section 501(c)(12), 85 percent or more of an electric cooperative's income (with adjustments) must consist of amounts collected from members for the sole purpose of meeting losses and expenses in order for the cooperative to be exempt from Federal income tax.

The Treasury Department and the IRS have determined that the final regulations should provide the same de minimis threshold for electric cooperatives as for other utility trades or businesses. The 85 percent threshold under section 501(c)(12) measures a cooperative's income, with adjustments that are specific to section 501. Moreover, an electric cooperative is not required to qualify for tax exemption under section 501(c)(12) to be engaged in an excepted regulated utility trade or business. Therefore, the Treasury Department and the IRS have determined that the nexus between section 501(c)(12) and proposed §1.163(j)-10 is insufficient to justify lowering the utility de minimis threshold to 85 percent for electric cooperatives, and the final regulations do not incorporate the commenter's suggestion.

5. Standardization of 90 Percent De Minimis Tests

The terminology used in the 90 percent de minimis tests in proposed §1.163(j)-10 is not consistent. For example, proposed §1.163(j)-10(c)(3)(iii)(C)(3) uses a "more than 90 percent" standard, whereas proposed §1.163(j)-10(c)(3)(iii)(B)(2) uses a "90 percent or more" standard. For the sake of consistency, and in order to minimize confusion, the final regulations standardize the language used in these tests.

6. Overlapping De Minimis Tests

In addition to the de minimis tests previously described in this part XI(E) of the Summary of Comments and Explanation of Revisions section, proposed §1.163(j)-10(c)(3)(iii)(B)(1) also contains another de minimis rule. Under this rule, if at least 90 percent of gross income generated by an asset during a determination period is with respect to either excepted or non-excepted trades or businesses, then the entire basis in the asset is allocated to either ex-

cepted or non-excepted trades or businesses, respectively.

The Treasury Department and the IRS have determined that this rule not only overlaps with, but also may yield results inconsistent with, the de minimis rule in §1.163(j)-10(c)(3)(iii)(B)(2). Thus, the final regulations eliminate the de minimis rule in proposed §1.163(j)-10(c)(3)(iii)(B)(1).

F. Assets Used in More than One Trade or Business

1. Overview

Proposed §1.163(j)-10(c)(3) contains special rules for allocating basis in assets used in more than one trade or business. In general, if an asset is used in more than one trade or business during a determination period, the taxpayer's adjusted basis in the asset must be allocated to each trade or business using one of three permissible methodologies, depending on which methodology most reasonably reflects the use of the asset in each trade or business during that determination period. These three methodologies are: (i) The relative amounts of gross income that an asset generates, has generated, or may reasonably be expected to generate, within the meaning of §1.861-9T(g)(3), with respect to the trades or businesses; (ii) if the asset is land or an inherently permanent structure, the relative amounts of physical space used by the trades or businesses; and (iii) if the trades or businesses generate the same unit of output, the relative amounts of output of those trades or businesses. However, taxpayers must use the relative output methodology to allocate the basis of assets used in both excepted and non-excepted utility trades or businesses.

As described in part XI(E)(1) of this Summary of Comments and Explanation of Revisions section, a taxpayer's allocation of basis in assets used in more than one trade or business is subject to several de minimis rules (see proposed §1.163(j)-10(c)(3)(iii)).

2. Consistency Requirement

A commenter requested clarification that the consistency requirement in proposed §1.163(j)-10(c)(3)(iii)(A) does not

require a taxpayer to use a single methodology for different categories of assets, because a methodology that is reasonable for one type of asset (for example, office buildings) may not be reasonable for another (for example, intangibles). The Treasury Department and the IRS agree with this comment, and the final regulations have been clarified accordingly.

3. Changing a Taxpayer's Allocation Methodology

The Treasury Department and the IRS have determined that requiring taxpayers to obtain consent from the Commissioner to change their allocation methodology would impose an undue burden. Thus, the final regulations permit a taxpayer to change its allocation methodology after a period of five taxable years without obtaining consent from the Commissioner. A taxpayer that seeks to change its allocation methodology more frequently must obtain consent from the Commissioner.

The Treasury Department and the IRS also have determined that an allocation methodology is not a method of accounting because there is no guarantee that a taxpayer will be able to deduct a disallowed business interest expense carryforward in future taxable years (as a result, there could be a permanent disallowance). See the discussion in part III(A) of this Summary of Comments and Explanation of Revisions section.

4. Mandatory Use of Relative Output for Utility Trades or Businesses

A commenter requested that the final regulations allow electric cooperatives to use methodologies other than relative output to allocate the basis of assets used in both excepted and non-excepted utility trades or businesses. The commenter noted that alternative methods, such as allocations based on dollars of sales (or sales less the cost of sales), have been allowed by the IRS in the context of allocating expenses between patronage and non-patronage sales. The commenter also stated that economic realities facing electric cooperatives operating on a not-for-profit basis would not be accurately reflected by a relative output methodology.

The Treasury Department and the IRS have concluded that relative output most reasonably reflects the use of assets in excepted and non-excepted utility trades or businesses because §1.163(j)-1(b)(15)(i)(A) divides utility businesses into excepted regulated utility trades or businesses and non-excepted utility businesses on the same basis. To the extent that items described in §1.163(j)-1(b)(15)(i)(A) are sold at rates described in §1.163(j)-1(b)(15)(i)(B), and to the extent that the trade or business is an electing regulated utility trade or business under §1.163(j)-1(b)(15)(iii), a utility trade or business is an excepted trade or business. The Treasury Department and the IRS do not agree that the final regulations should apply one methodology for differentiating excepted and non-excepted utility trades or businesses under §1.163(j)-1 and a different methodology to determine the allocation of an asset's basis between such businesses. Therefore, the final regulations do not incorporate the commenter's suggestion.

Another commenter recommended that the rule mandating the use of relative output for the allocation of asset basis under proposed §1.163(j)-10(c)(3)(iii)(C)(2) not be used either to allocate assets used exclusively in excepted or non-excepted utility trades or businesses or to apply the de minimis test of proposed §1.163(j)-10(c)(1)(ii).

The special rule in proposed §1.163(j)-10(c)(3)(iii)(C)(2) mandates the use of relative output only for the purpose of allocating the basis of assets used in both excepted and non-excepted utility trades or businesses. Therefore, the rule does not mandate the use of relative output to allocate the basis of an asset that is used solely in either an excepted regulated utility trade or business or a non-excepted utility trade or business, except to the extent the de minimis rule in proposed §1.163(j)-10(c)(3)(iii)(C)(3) treats a taxpayer's entire trade or business as either an excepted trade or business or a non-excepted trade or business. The language proposed by the commenter still subjects assets to the de minimis rule in proposed §1.163(j)-10(c)(3)(iii)(C)(3). Because the proposed regulations achieve the result requested by the commenter, the final regulations do not adopt the recommended change.

The de minimis rule in proposed §1.163(j)-10(c)(1)(ii) applies only after the basis of assets has been allocated between excepted and non-excepted trades or businesses. This de minimis rule treats all of a taxpayer's trades or businesses as either excepted or non-excepted trades or businesses based on such allocation. Because the rule of proposed §1.163(j)-10(c)(1)(ii) does not apply the methodologies listed in proposed §1.163(j)-10(c)(3), including the relative output methodology, no change to the proposed regulations is necessary to achieve the result requested by the commenter with respect to proposed §1.163(j)-10(c)(1)(ii).

G. Exclusions from Basis Calculations

For purposes of allocating interest expense and interest income under the asset-basis allocation method in proposed §1.163(j)-10(c), a taxpayer's basis in certain types of assets generally is not taken into account. These assets include cash and cash equivalents (see proposed §1.163(j)-10(c)(5)(iii)). As noted in the preamble to the proposed regulations, this rule is intended to discourage taxpayers from moving cash to excepted trades or businesses to increase the amount of asset basis therein. In the preamble to the proposed regulations, the Treasury Department and the IRS requested comments on this special rule, including whether any exceptions should apply (such as for working capital).

In response, commenters recommended that working capital be included in the basis allocation determination, along with collateral that secures derivatives that hedge business assets and liabilities within the meaning of §1.1221-2.

The Treasury Department and the IRS have concluded that the inclusion of working capital in the basis allocation determination could lead to frequent disputes between taxpayers and the IRS over the amount of cash that comprises "working capital" and the allocation of such amount between and among a taxpayer's excepted and non-excepted trades or businesses. Thus, the final regulations do not adopt this recommendation.

The Treasury Department and the IRS also have concluded that the inclusion of collateral that secures derivatives that

hedge business assets and liabilities within the meaning of §1.1221-2 could lead to frequent disputes between taxpayers and the IRS for reasons similar to those for working capital. For example, it is not always clear which business asset or liability is being hedged, especially in the case of an aggregate hedging transaction. In addition, taxpayers could use this rule as a planning opportunity for purposes of allocating the collateral to excepted trades or businesses. Thus, the final regulations also do not adopt this recommendation.

H. Look-Through Rules

1. Ownership Thresholds; Direct and Indirect Ownership Interests

Proposed §1.163(j)-10(c)(5)(ii) provides, in part, that if a taxpayer owns an interest in a partnership or stock in a corporation that is not a member of the taxpayer's consolidated group, the partnership interest or stock is treated as an asset of the taxpayer for purposes of the allocation rules of proposed §1.163(j)-10.

For purposes of allocating a partner's basis in its partnership interest between excepted and non-excepted trades or businesses under proposed §1.163(j)-10, the partner generally may look through to its share of the partnership's basis in the partnership's assets (with certain modifications and limitations) regardless of the extent of the partner's ownership interest in the partnership. However, the partner must apply this look-through rule if its direct and indirect interest in the partnership is greater than or equal to 80 percent. Similar rules apply to shareholders of S corporations. See proposed §1.163(j)-10(c)(5)(ii)(A)(2)(i) and (c)(5)(ii)(B)(3)(ii).

For purposes of allocating a shareholder's stock basis between excepted and non-excepted trades or businesses, a shareholder of a domestic non-consolidated C corporation or a CFC also must look through to the assets of the corporation if the shareholder's direct and indirect interest therein satisfies the ownership requirements of section 1504(a)(2). Shareholders of domestic non-consolidated C corporations and CFCs may not look through their stock in such corporations if they do not satisfy this ownership threshold. See pro-

posed §1.163(j)-10(c)(5)(ii)(B)(2)(i) and (c)(7)(i)(A).

If a shareholder receives a dividend that is not investment income, and if the shareholder looks through to the assets of the payor corporation under proposed §1.163(j)-10(c)(5)(ii) for the taxable year, the shareholder also must look through to the activities of the payor corporation to allocate the dividend between the shareholder's excepted and non-excepted trades or businesses. See proposed §1.163(j)-10(b)(3) and (c)(7)(i)(B).

Commenters recommended that taxpayers be afforded greater flexibility to look through their stock in domestic non-consolidated C corporations and CFCs. For example, one commenter suggested that the look-through threshold for CFCs be lowered to 50 percent (analogous to the look-through threshold for related CFCs in section 954(c)(6)). Another commenter recommended that a taxpayer be allowed to look through its stock in a domestic non-consolidated C corporation if the taxpayer owns at least 80 percent of such stock by value, regardless of whether the taxpayer also owns 80 percent of such stock by vote. Yet another commenter recommended that a taxpayer be allowed to look through its stock in a domestic non-consolidated C corporation (or be allowed to allocate its entire basis in such stock to an excepted trade or business) if (i) the taxpayer and the C corporation are engaged in the same excepted trade or business, and (ii) the taxpayer either (A) owns at least 50 percent of the stock of the C corporation, or (B) owns at least 20 percent of the stock of the C corporation and exercises a significant degree of control over the corporation's trade or business. Another commenter recommended that the ownership threshold for looking through domestic non-consolidated C corporations and CFCs be eliminated entirely so that interest expense paid or accrued on debt incurred to finance the acquisition of a real estate business is exempt from the section 163(j) limitation (if the business qualifies for and makes an election under proposed §1.163(j)-9), regardless of whether that business is held directly or through a subsidiary.

The Treasury Department and the IRS have determined that a de minimis own-

ership threshold is appropriate for domestic non-consolidated C corporations and CFCs because, unlike a partnership, a corporation generally is respected as an entity separate from its owner(s) for tax purposes. See, for example, *Moline Properties v. Commissioner*, 319 U.S. 436 (1943). The look-through rule for non-consolidated C corporations provides a limited exception to this general rule. Moreover, unlike S corporations, domestic C corporations are not taxed as flow-through entities. Thus, the final regulations retain an 80 percent ownership threshold for looking through a domestic non-consolidated C corporation or a CFC.

However, the final regulations permit a taxpayer to look through its stock in a domestic non-consolidated C corporation or a CFC if the taxpayer owns at least 80 percent of such stock by value, regardless of whether the taxpayer also owns at least 80 percent of such stock by vote. Corresponding changes have been made to the look-through rule for dividends.

Additionally, the final regulations permit a shareholder that meets the ownership requirements for looking through the stock of a domestic non-consolidated C corporation (determined without applying the constructive ownership rules of section 318(a)) to look through to such shareholder's pro rata share of the C corporation's basis in its assets for purposes of §1.163(j)-10(c) (asset basis look-through approach). If a shareholder applies the asset basis look-through approach, it must do so for all domestic non-consolidated C corporations for which the shareholder is eligible to use this approach, and it must continue to use the asset basis look-through approach in all future taxable years in which the shareholder is eligible to use this approach.

Commenters also asked for clarification as to the meaning of an "indirect" interest for purposes of these look-through rules. For example, commenters asked what the term "indirect" means in the context of the look-through rule for dividends. Commenters further noted that, because section 1504(a)(2) does not contain constructive ownership rules, there is uncertainty as to when a shareholder's indirect ownership in a corporation is counted for purposes of the ownership requirement in the look-through rule. Commenters also

requested specific constructive ownership rules, as well as examples to illustrate the application of the “direct or indirect” ownership threshold.

The Treasury Department and the IRS have determined that, for purposes of applying the ownership thresholds in §1.163(j)-10(c)(5)(ii)(B)(2)(i), (c)(5)(ii)(B)(3)(ii), and (c)(7)(i)(A) to shareholders of domestic non-consolidated C corporations, CFCs, and S corporations, as applicable, the constructive ownership rules of section 318(a) should apply. For example, assume A, B, and C are all non-consolidated C corporations; A wholly and directly owns B; A and B each directly own 50 percent of C; A and B both conduct a non-excepted trade or business; and C conducts an excepted trade or business. Under section 318(a)(2)(C), A is considered to own the stock owned by B. As a result, A is considered to own 100 percent of the stock of C, and the look-through rule of proposed §1.163(j)-10(c)(5)(ii)(B)(2)(i) and (c)(7)(i)(A) applies to A’s stock in C. Thus, although the Treasury Department and the IRS have determined that the ownership threshold for non-consolidated C corporations should remain at 80 percent, the constructive ownership rules of section 318 will broaden the availability of the look-through rules to shareholders of such corporations.

In contrast, the Treasury Department and the IRS have determined that the constructive ownership rules of section 318(a) should not apply for purposes of applying the ownership threshold in proposed §1.163(j)-10(b)(3) and (c)(7)(i)(B) to the receipt of dividends from domestic C corporations and CFCs because dividends are not paid to indirect shareholders. To avoid confusion in this regard, the final regulations remove the word “indirect” from the ownership threshold for the dividend look-through rule.

2. Application of Look-Through Rules to Partnerships

i. In General

For purposes of proposed §1.163(j)-10(c), a partnership interest is treated as an asset of the partner. Pursuant to proposed §1.163(j)-10(c)(5)(ii)(A)(I), the

partner’s adjusted basis in its partnership interest is reduced, but not below zero, by the partner’s share of partnership liabilities as determined under section 752 (section 752 basis reduction rule). Pursuant to proposed §1.163(j)-10(c)(5)(ii)(A)(2)(iii), a partner other than a C corporation or tax-exempt corporation must further reduce its adjusted basis in its partnership interest by its share of the tax basis of partnership assets that is not properly allocable to a trade or business (investment asset basis reduction rule).

As noted in part XI(H)(1) of this Summary of Comments and Explanation of Revisions section, a partner may determine what portion of its adjusted tax basis in a partnership interest is attributable to an excepted or non-excepted trade or business by reference to its share of the partnership’s basis in the partnership’s assets (look-through rule). Under proposed §1.163(j)-10(c)(5)(ii)(A)(2)(i), a partner generally may choose whether to apply the look-through rule without regard to its ownership percentage, with two exceptions. First, if a partner’s direct or indirect interest in a partnership is greater than or equal to 80 percent of the partnership’s capital or profits, the partner must apply the look-through rule. Second, if the partnership is eligible for the small business exemption under section 163(j)(3) and proposed §1.163(j)-2(d)(1), a partner may not apply the look-through rule.

Proposed §1.163(j)-10(c)(5)(ii)(A)(2)(ii) provides that if, after applying the investment asset basis reduction rule, at least 90 percent of a partner’s share of a partnership’s basis in its assets (including adjustments under sections 734(b) and 743(b)) is allocable to either excepted or non-excepted trades or businesses, the partner’s entire basis in its partnership interest is treated as allocable to such excepted or non-excepted trades or businesses.

Pursuant to proposed §1.163(j)-10(c)(5)(ii)(A)(2)(iv), if a partner, other than a C corporation or a tax-exempt corporation, does not apply the look-through rule, the partner generally will treat its basis in the partnership interest as either an asset held for investment or a non-excepted trade or business asset as determined under section 163(d).

ii. Coordination of Look-Through Rule and Basis Determination Rules

Outside of the partnership context, proposed §1.163(j)-10(c)(5)(i) provides rules regarding the computation of adjusted basis for purposes of allocating business interest expense between excepted and non-excepted trades or businesses (collectively, the “basis determination rules”). For example, proposed §1.163(j)-10(c)(5)(i)(A) generally provides that the adjusted basis of non-depreciable property other than land is the adjusted basis of the asset used for determining gain or loss from the sale or other disposition of that asset as provided in §1.1011-1, and proposed §1.163(j)-10(c)(5)(i)(C) generally provides that the adjusted basis of land and inherently permanent structures is its unadjusted basis. For purposes of applying the look-through rule, the Treasury Department and the IRS intended the basis determination rules to require adjustments to the partnership’s basis in its assets and the partner’s basis in its partnership interest to the extent of the partner’s share of any adjustments to the basis of the partnership’s assets. Accordingly, the final regulations explicitly provide that such is the case.

Multiple commenters noted that the proposed regulations do not specify whether a partner that does not apply the look-through rule should use the adjusted tax basis in its partnership interest or should adjust its tax basis to reflect what its basis would be if the partnership applied the basis determination rules to its assets. Because all partnerships are not subject to section 163(j) and cannot provide all partners with the information necessary to adjust the tax basis of their partnership interests consistent with the basis determination rules, the Treasury Department and the IRS have determined that the basis determination rules should not apply to the basis of a partnership interest if a partner does not apply the look-through rule.

iii. Applying the Look-Through Rule and Determining Share of Partnership Basis

Proposed §1.163(j)-10(c)(5)(ii)(A)(2)(i) provides that, for purposes of the look-through rule, a partner’s share of a

partnership's assets is determined using a reasonable method, taking into account special allocations under section 704(b), adjustments under sections 734(b) and 743(b), and direct adjustments relating to assets subject to qualified nonrecourse indebtedness under proposed §1.163(j)-10(d)(4). Commenters argued that this language does not provide adequate guidance regarding how a partner should determine its share of the tax basis of a specific partnership asset when applying the look-through rule. The commenters stated that, by indicating that sections 743(b) and 704(b) should be taken into account, the proposed regulations imply that a partner's share of the partnership's basis in an asset is determined by reference to the future depreciation deductions that a partner would be allocated with regard to such asset or the amount of basis to be taken into account by that partner in determining its allocable share of gain or loss on the partnership's disposition of the asset. The commenters also requested that final regulations address whether and how allocations under section 704(c) affect a partner's share of the partnership's basis in its assets. After further consideration, the Treasury Department and the IRS have decided to retain the rule in proposed §1.163(j)-10(c)(5)(ii)(A)(2)(i).

iv. Investment Asset Basis Reduction Rule

Under proposed §1.163(j)-10(c)(5)(ii)(A)(2)(iii), for purposes of applying the investment asset basis reduction rule, a partner's share of a partnership's assets is determined under a reasonable method, taking into account special allocations under section 704(b). A commenter recommended clarifying whether the investment asset basis reduction should be made in accordance with a partner's share of the partnership's actual adjusted basis in an asset or in accordance with the partner's share of the partnership's basis in an asset as determined pursuant to the basis determination rules. The commenter further recommended that the approach adopted on this issue should be consistent with the approach adopted for purposes of determining a partner's adjusted basis in its partnership interest.

The Treasury Department and the IRS agree that these two rules should be applied consistently. After further consideration, the Treasury Department and the IRS have decided to retain the rule that allows a partner's share of a partnership's investment assets to be determined using a reasonable method, taking into account special allocations under section 704(b). However, if a partner elects to apply the look-through rule, then the partner also must apply the basis determination rules. If a partner elects not to apply, or is precluded from applying, the look-through rule, then the approach the partner uses for purposes of the investment asset basis reduction rule must be consistent with the approach the partner uses to determine the partner's adjusted basis in its partnership interest.

v. Coordination of Section 752 Basis Reduction Rule and Investment Asset Basis Reduction Rule

Multiple commenters noted that the combined effect of the section 752 basis reduction rule and the investment asset basis reduction rule could require a partner, other than a C corporation or a tax-exempt corporation, in a partnership that holds investment assets funded by partnership liabilities to reduce the adjusted tax basis of its partnership interest twice—once for the partnership's basis in its investment assets, and a second time for the liabilities that funded their purchase. The Treasury Department and the IRS have determined that this result would be inappropriate. Accordingly, the final regulations amend the investment asset basis reduction rule by providing that, with respect to a partner other than a C corporation or tax-exempt corporation, the partner's adjusted basis in its partnership interest is decreased by the partner's share of the excess of (a) the partnership's asset basis with respect to those assets over (b) the partnership's debt that is traced to such assets in accordance with §1.163-8T. In order to neutralize the effect of any cost recovery deductions associated with a partnership's investment assets funded by partnership liabilities (for example, non-trade or business property held for the production of income), the final regulations also amend the investment asset basis reduction rule by

providing that, with respect to a partner other than a C corporation or tax-exempt corporation, the partner's adjusted basis in its partnership interest is increased by the partner's share of the excess of (a) the partnership's debt that is traced to such assets in accordance with §1.163-8T over (b) the partnership's asset basis with respect to those assets.

vi. Allocating Basis in a Partnership Interest Between Excepted and Non-Excepted Trades or Businesses

A commenter requested explicit confirmation that, under the look-through rule, a partner allocates the basis of its partnership interest between excepted and non-excepted trades or businesses in the same proportion as the partner's share of the partnership's adjusted tax basis in its trade or business assets is allocated between excepted and non-excepted trades or businesses. The final regulations explicitly state that this is the rule.

Commenters also stated that the proposed regulations do not address how a partner should allocate business interest expense and business interest income under proposed §1.163(j)-10(c) to the extent the partner (i) has zero basis in all partnership interests for purposes of section 163(j), and (ii) owns no other trade or business assets. The Treasury Department and the IRS have determined that these facts would be rare, particularly given the adjustments to partnership basis provided for in §1.163(j)-10. Therefore, the final regulations do not include a rule addressing this fact pattern. However, the Treasury Department and the IRS request comments on how frequently this fact pattern would occur and how best to address such a situation.

3. Additional Limitation on Application of Look-Through Rules to C Corporations

A commenter noted that the look-through rules may be distortive if an individual (A) that is directly engaged in a trade or business also owns stock in a C corporation (with its own trade or business) that satisfies the section 1504(a)(2) ownership requirements. A's interest expense that is attributable to A's investment

in the C corporation under §1.163-8T retains its character as investment interest expense. Moreover, if A also has business interest expense, the allocation of that expense between excepted and non-excepted trades or businesses would appear to take into account A's investment in the C corporation on a look-through basis as well. Thus, A's shares in the C corporation may be double-counted insofar as they affect the character of both the directly attributable investment interest expense and the unrelated business interest expense.

To address the possible distortive effects of the look-through rules when applied to stock of a non-consolidated C corporation that is held as an investment, the final regulations provide that the look-through rule in §1.163(j)-10(c)(5)(ii)(B)(2)(i) is available only if dividends paid on the stock would not be included in the taxpayer's investment income under section 163(d)(4)(B). Because corporations cannot have investment income under section 163(d)(4)(B), this additional requirement does not otherwise affect their ability to look-through the stock of a non-consolidated C corporation.

4. Dispositions of Stock in Non-Consolidated C Corporations

Under proposed §1.163(j)-10(b)(4)(i), if a shareholder recognizes gain or loss upon the disposition of its stock in a non-consolidated C corporation, if such stock is not property held for investment, and if the taxpayer looks through to the assets of the C corporation under proposed §1.163(j)-10(c)(5)(ii)(B), then the taxpayer must allocate gain or loss from the stock disposition to excepted or non-excepted trades or businesses based upon the relative amounts of the corporation's adjusted basis in the assets used in its trades or businesses. This rule is analogous to the look-through rule for dividends in proposed §1.163(j)-10(b)(3).

However, the dividend look-through rule also provides that, if at least 90 percent of the payor corporation's adjusted basis in its assets during the taxable year is allocable to either excepted or non-excepted trades or businesses, then all of the taxpayer's dividend income from the payor corporation for the taxable year is treated as allocable to excepted or non-ex-

cepted trades or businesses, respectively. Commenters asked why the rule regarding the disposition of non-consolidated C corporation stock is not subject to a 90 percent de minimis rule analogous to the rule for dividends.

The Treasury Department and the IRS have determined that the rule regarding the disposition of stock in a non-consolidated C corporation (including a CFC) should be subject to a 90 percent de minimis rule. The final regulations have modified proposed §1.163(j)-10(b)(4)(i) accordingly.

5. Application of Look-through Rules to Small Businesses

Under proposed §1.163(j)-10(c)(5)(ii)(D), a taxpayer may not apply the look-through rules in proposed §1.163(j)-10(b)(3) and (c)(5)(ii)(A), (B), and (C) to an entity that is eligible for the small business exemption. As described in the preamble to the proposed regulations, the Treasury Department and the IRS determined that these look-through rules should not be available in these cases because of the administrative burden that would be imposed on small businesses from collecting and providing information to their shareholders or partners regarding inside asset basis when those small businesses are themselves exempt from the application of section 163(j). The preamble to the proposed regulations also provides that a taxpayer that is eligible for the small business exemption may not make an election under proposed §1.163(j)-9.

Commenters requested that entities that qualify for the small business exemption be allowed to make an election under proposed §1.163(j)-9, and that such an electing entity's shareholders or partners be permitted to apply the look-through rules. Absent such a rule, shareholders and partners of a small business entity that conducts an excepted trade or business could be worse off than shareholders and partners of a larger entity (ineligible for the small business exemption) that conducts an excepted trade or business.

As noted in part X(A) of this Summary of Comments and Explanation of Revisions section, the Treasury Department and the IRS have determined that entities eligible for the small business exemption should be permitted to make a protective

election under proposed §1.163(j)-9. Accordingly, the final regulations also allow taxpayers to apply the look-through rules to entities that qualify for the small business exemption and that make a protective election under proposed §1.163(j)-9.

6. Application of the Look-Through Rules to Foreign Utilities

Section 163(j)(7)(A)(iv) does not treat utilities that are exclusively regulated by foreign regulators (and not by a State government, a political subdivision of a State government, an agency or instrumentality of the United States, or the governing or ratemaking body of a domestic electric cooperative) (foreign-regulated utility) as excepted trades or businesses. As a result, under the interest allocation rules of proposed §1.163(j)-10(c), a U.S. corporation that looks through to the assets of a CFC that operates a foreign-regulated utility must allocate its entire basis in its CFC stock to a non-excepted trade or business, even if all of the CFC's operating assets are used in a foreign-regulated utility business. Moreover, if the U.S. corporation has significant basis in its CFC stock, a significant portion of the U.S. corporation's business interest expense will be subject to the section 163(j) limitation, even if the U.S. corporation is solely or primarily engaged in an excepted utility trade or business.

A commenter noted that, if the U.S. corporation does not have sufficient income from non-excepted trades or businesses, the corporation might never be able to deduct its disallowed business interest expense. The commenter thus recommended that stock in a CFC engaged in a foreign-regulated utility trade or business be treated as having zero basis for purposes of the interest allocation rules in proposed §1.163(j)-10(c).

The final regulations do not adopt the commenter's recommendation. However, the Treasury Department and the IRS have determined that, if a taxpayer applies the look-through rule to a CFC, the taxpayer may allocate its basis in its CFC stock to an excepted trade or business to the extent the CFC is engaged in either (i) an excepted trade or business, or (ii) a foreign-regulated utility trade or business that would be treated as an excepted trade or business

if the utility meets certain requirements related to regulation by a foreign government. The final regulations have been modified accordingly. See §1.163(j)-10(c)(5)(ii)(C)(2).

I. Deemed Asset Sale

Proposed §1.163(j)-10(c)(5)(iv) provides that, solely for purposes of determining the amount of basis allocable to excepted and non-excepted trades or businesses under proposed §1.163(j)-10(c), an election under section 336, 338, or 754, as applicable, is deemed to have been made for any acquisition of corporate stock or partnership interests with respect to which the taxpayer demonstrates to the satisfaction of the Commissioner that the taxpayer was eligible to make an election but was actually or effectively precluded from doing so by a regulatory agency with respect to an excepted regulated utility trade or business. As explained in the preamble to the proposed regulations, this deemed asset sale rule is intended to place taxpayers that are actually or effectively precluded from making an election under section 336, section 338, or section 754 on the same footing for purposes of the basis allocation rules in proposed §1.163(j)-10(c) as taxpayers that are not subject to such limitations.

Commenters pointed out that, as a practical matter, a basis step-up election generally cannot be made if the acquired entity has a regulatory liability for deferred taxes on its books because, in that case, the election may cause customer bills to increase. In other words, deferred tax liabilities typically lower a utility's rate base (which is used to compute the rates charged to customers). An election under section 336, section 338, or section 754 would eliminate this deferred tax liability, thereby increasing the rate base and potentially increasing the rates charged to customers. As a result, regulatory agencies frequently do not approve a basis step-up election made in connection with the sale or purchase of a regulated utility. Commenters argued that even broaching the possibility of such a basis step-up could create concerns for the regulatory agency regarding a proposed acquisition. Commenters also queried how taxpayers that do not raise this issue with the regulatory agency can

"demonstrate" that they were "effectively precluded" by the agency from making the election. In short, commenters claimed that the "demonstration" requirement in proposed §1.163(j)-10(c)(5)(iv) would be impractical, result in unnecessary requests to regulatory agencies, lead to controversy, create uncertainty, and limit the effectiveness of this provision.

To address the foregoing concerns, the final regulations provide that a taxpayer that acquired or acquires an interest in a regulated entity should be deemed to have made an election to step up the tax basis of the assets of the acquired entity if the taxpayer can demonstrate that (a) the acquisition qualified for an election under section 336, 338, or 754, and (b) immediately before the acquisition, the acquired entity had a regulatory liability for deferred taxes on its books with respect to property predominantly used in an excepted regulated utility trade or business.

J. Carryforwards of Disallowed Disqualified Interest

Proposed §1.163(j)-1(b)(10) defines the term "disallowed disqualified interest" to mean interest expense, including carryforwards, for which a deduction was disallowed under old section 163(j) in the taxpayer's last taxable year beginning before January 1, 2018, and that was carried forward under old section 163(j). Under the proposed regulations, disallowed disqualified interest that is properly allocable to a non-excepted trade or business is subject to the section 163(j) limitation as a disallowed business interest expense carryforward. See proposed §§1.163(j)-2(c)(1) and 1.163(j)-11(b)(1). In the preamble to the proposed regulations, the Treasury Department and the IRS requested comments as to how the allocation rules in proposed §1.163(j)-10 should apply to disallowed disqualified interest.

Commenters recommended several possible approaches to allocating disallowed disqualified interest between excepted and non-excepted trades or businesses. Under one approach (historical approach), a taxpayer would apply the allocation rules of proposed §1.163(j)-10 to disallowed disqualified interest in the taxable year in which such interest expense was incurred. Although this approach

would be consistent with the allocation rules for other business interest expense, it likely would be administratively burdensome for many taxpayers because such interest expense may have been incurred years (if not decades) ago.

Under another approach (effective date approach), a taxpayer would apply the allocation rules of proposed §1.163(j)-10 to disallowed disqualified interest in the taxpayer's first taxable year beginning after December 31, 2017, as if the disallowed disqualified interest expense were incurred in that year. Although this approach would be less administratively burdensome than the historical approach, it might not accurately represent the taxpayer's circumstances in the year(s) in which the disallowed disqualified interest actually was incurred.

Under a third approach, taxpayers would be permitted to use any reasonable method to allocate disallowed disqualified interest between excepted and non-excepted trades or businesses, provided the method is applied consistently to disallowed disqualified interest that arose in the same taxable year. This approach also might include the effective date approach as a safe harbor. However, this approach could prove to be administratively burdensome for the IRS.

To reduce the administrative burden for both taxpayers and the IRS, the final regulations permit taxpayers to use either the historical approach or the effective date approach.

A commenter also pointed out that proposed §1.163(j)-11(b)(1) could be construed as permitting only disallowed disqualified interest that is properly allocable to a non-excepted trade or business to be carried forward to the taxpayer's first taxable year beginning after December 31, 2017. The commenter requested confirmation that disallowed disqualified interest that is properly allocable to an excepted trade or business also is carried forward. The final regulations confirm this point. See §1.163(j)-11(c)(1).

K. Anti-Abuse Rule

Proposed §1.163(j)-10(c)(8) provides an anti-abuse rule to discourage taxpayers from manipulating the allocation of business interest expense and business in-

terest income between non-excepted and excepted trades or businesses. Pursuant to this provision, if a principal purpose for the acquisition, disposition, or change in use of an asset was to artificially shift the amount of basis allocable to excepted or non-excepted trades or businesses on a determination date, the additional basis or change in use is not taken into account for purposes of §1.163(j)-10.

A commenter expressed support for this rule but suggested that the final regulations eliminate the “principal purpose” standard and rely instead on a rule based on asset acquisitions, dispositions, or changes in use that do not have “a substantial business purpose.”

The Treasury Department and the IRS have determined that using “a substantial business purpose” as the threshold for applying the anti-abuse rule would limit the effectiveness of this rule because taxpayers generally would be able to provide an ostensible business purpose for the acquisition, disposition, or transfer of an asset. Thus, the anti-abuse rule in the final regulations retains the “principal purpose” standard.

L. Direct Allocation

1. Overview

As previously noted, proposed §1.163(j)-10(c) generally requires interest expense and interest income to be allocated between excepted and non-excepted trades or businesses according to the relative amounts of basis in the assets used in such trades or businesses. However, proposed §1.163(j)-10(d) contains several exceptions to this general rule.

First, a taxpayer with qualified nonrecourse indebtedness is required to directly allocate interest expense from such indebtedness to the taxpayer’s assets in the manner and to the extent provided in §1.861-10T(b) (see proposed §1.163(j)-10(d)(1)). Section 1.861-10T(b) defines the term “qualified nonrecourse indebtedness” to mean any borrowing (other than borrowings excluded by §1.861-10T(b)(4)) that satisfies certain requirements, including the requirements that (i) the creditor can look only to the identified property (or any lease or other interest therein) as security for payment of the principal

and interest on the loan, and (ii) the cash flow from the property is reasonably expected to be sufficient to fulfill the terms and conditions of the loan agreement. For these purposes, the term “cash flow from the property” does not include revenue if a significant portion thereof is derived from activities such as sales or the use of other property. Thus, revenue derived from the sale or lease of inventory or similar property, including plant or equipment used in the manufacture and sale or lease, or purchase and sale or lease, of such inventory or similar property, does not constitute cash flow from the property. See §1.861-10T(b)(3)(i).

Second, a taxpayer that is engaged in the trade or business of banking, insurance, financing, or a similar business is required to directly allocate interest expense and interest income from such business to the taxpayer’s assets used in that business (see proposed §1.163(j)-10(d)(2)).

Additionally, for purposes of the general allocation rule in proposed §1.163(j)-10(c), taxpayers are required to reduce their asset basis by the entire amount of the basis in the assets to which interest expense is directly allocated pursuant to proposed §1.163(j)-10(d)(1) or (2). See proposed §1.163(j)-10(d)(4).

2. Expansion of the Direct Allocation Rule

Some commenters recommended that the direct allocation rule in proposed §1.163(j)-10(d) be applied in circumstances other than those set forth in proposed §1.163(j)-10(d)(1) and (2). For example, a commenter queried whether a borrowing could be considered qualified nonrecourse indebtedness for purposes of proposed §1.163(j)-10(d) even if the loan document doesn’t require the creditor to look exclusively to an asset as security for payment of principal and interest on a loan (as required by §1.861-10T(b)(2)(iii)). Other commenters asked that direct allocation be applied to debt directly incurred by an excepted regulated utility trade or business. These commenters argued that, because such debt must be approved by a regulatory agency and relates directly to the underlying needs of that trade or business, such debt should be viewed as “properly allocable” to that trade or busi-

ness. Moreover, they claimed that the definition of “qualified nonrecourse indebtedness” in §1.861-10T(b) is too narrow to include either debt directly incurred by an excepted regulated utility trade or business or debt incurred to purchase stock of a corporation or interests in a partnership primarily engaged in an excepted regulated utility trade or business.

In contrast, other commenters supported the decision to limit the availability of tracing to the limited circumstances in proposed §1.163(j)-10(d).

As noted in part XI(L)(1) of this Summary of Comments and Explanation of Revisions section, a borrowing is not considered qualified nonrecourse indebtedness under §1.861-10T(b) unless the creditor can look only to the identified property (or any interest therein) as security for the loan. By definition, the creditor on a non-recourse loan may not seek to recover the borrower’s other assets; in other words, the creditor has no further recourse. The Treasury Department and the IRS decline to expand the exception in proposed §1.163(j)-10(d)(1) to include unsecured debt because, by definition, such debt is supported by all of the assets of the borrower.

The Treasury Department and the IRS also have determined that the definition of qualified nonrecourse indebtedness should not be expanded to encompass indebtedness incurred to acquire stock or partnership interests in an entity primarily engaged in an excepted trade or business because such an approach is akin to tracing. As noted in the preamble to the proposed regulations, money is fungible, and the Treasury Department and the IRS have determined that a tracing regime would be inappropriate, with limited exceptions. The Treasury Department and the IRS have determined that the definition of qualified nonrecourse indebtedness should not be expanded to encompass all indebtedness directly incurred by regulated utility trades or businesses, for similar reasons.

However, the Treasury Department and the IRS appreciate that it is difficult for utility trades or businesses to avail themselves of the direct allocation rule in proposed §1.163(j)-10(d)(1) given the definition of qualified nonrecourse debt in §1.861-10T(b). In particular, the Treas-

sury Department and the IRS understand that the exclusion of inventory revenue from the calculation of “cash flow from the property” effectively precludes many utilities from using direct allocation under proposed §1.163(j)-10(d)(1). Thus, solely for purposes of the allocation rules in proposed §1.163(j)-10, the final regulations create an exception to the definition of qualified nonrecourse indebtedness in §1.861-10T(b) to allow for the inclusion of revenue from the sale or lease of inventory for utility trades or businesses.

Another commenter recommended that, for taxpayers engaged in excepted regulated utility trades or businesses, the basis in certain grants and contributions in aid of construction should be directly allocated to non-excepted trades or businesses if the costs have not been taken into account by a regulatory body in determining the cost of the utility’s service for ratemaking purposes. As discussed in part II of this Summary of Comments and Explanation of Revisions section, the final regulations do not require the rates for the sale or furnishing of utility items to be established or approved on a cost of service and rate of return basis in order for a utility trade or business to qualify as an excepted regulated utility trade or business. Without such a requirement, the Treasury Department and the IRS do not find a significant nexus between a regulatory body’s determination of a utility trade or business’s cost of service and the allocation of the basis in grants and contributions in aid of construction. Therefore, the final regulations do not adopt the commenter’s recommendation.

3. Basis Reduction Requirement for Qualified Nonrecourse Indebtedness

Commenters noted that, as drafted, the basis reduction requirement in proposed §1.163(j)-10(d)(4) would lead to inappropriate results for assets that are acquired using both equity financing and qualified nonrecourse indebtedness (or using both recourse and nonrecourse indebtedness) because this requirement would remove asset basis that was not financed by qualified nonrecourse indebtedness.

Commenters also observed that this requirement could lead to significant distortions because a small amount of qualified

nonrecourse indebtedness would cause an entire property to be removed from a taxpayer’s basis allocation computation. For example, assume a taxpayer has (i) \$500,000 of unsecured debt, (ii) property used in an excepted trade or business with a basis of \$10 million and \$100,000 of qualified nonrecourse indebtedness (Asset A), and (iii) a non-excepted trade or business whose assets have a basis of \$1 million. Under proposed §1.163(j)-10(d)(4), Asset A would be entirely excluded from the basis allocation computation in proposed §1.163(j)-10(c). As a result, all interest expense on the \$500,000 of unsecured debt would be subject to the section 163(j) limitation.

Commenters further noted that taxpayers could take advantage of this basis adjustment rule to minimize the application of section 163(j). In other words, taxpayers could incur a relatively small amount of nonrecourse debt to acquire assets used in non-excepted trades or businesses, thereby reducing the amount of asset basis allocated to such trades or businesses for purposes of the general allocation rule in proposed §1.163(j)-10(c).

To eliminate these distortions and inappropriate results, commenters recommended that basis in the assets securing qualified nonrecourse indebtedness be reduced (but not below zero) for purposes of the general allocation rule solely by the amount of such qualified nonrecourse indebtedness. The Treasury Department and the IRS agree with this recommendation, and the final regulations have been modified accordingly.

4. Direct Allocation Rule for Financial Services Businesses

Commenters asked for clarification of the direct allocation rule for financial services entities in proposed §1.163(j)-10(d)(2). For example, commenters noted that, because the definition in §1.904-4(e)(2) includes income from certain services (including investment advisory services), this rule may apply to taxpayers that are not doing much actual financing, and commenters queried whether the direct allocation rule should apply to such taxpayers. Commenters also asked whether proposed §1.163(j)-10(d)(2) is intended to cover all of a bank’s activities or only part of them

and, if the answer is the latter, whether a bank must bifurcate its activities for purposes of proposed §1.163(j)-10.

Commenters also questioned the basis reduction rule in proposed §1.163(j)-10(d)(4) for financial services businesses. Commenters noted that, unlike the case of qualified nonrecourse indebtedness, it may not be possible to trace all interest expense related to a financial services business to specific assets. Moreover, requiring a taxpayer to fully eliminate its basis in the assets of a financial services business under proposed §1.163(j)-10(d)(4) could be distortive because the taxpayer’s general debt obligations likely support at least some portion of the taxpayer’s financial services business assets.

Given the uncertainty surrounding the proper scope of the direct allocation rule for financial services businesses in proposed §1.163(j)-10(d)(2) and the proper application of the basis reduction rule to such businesses in proposed §1.163(j)-10(d)(4), the Treasury Department and the IRS have decided to remove proposed §1.163(j)-10(d)(2). To ensure that financial services entities are not unduly affected by the rule (in proposed §1.163(j)-10(c)(5)(iii)) that excludes cash and cash equivalents from the general asset basis allocation rule in proposed §1.163(j)-10(c), the final regulations have retained the exception in proposed §1.163(j)-10(c)(5)(iii) for financial services entities.

XII. *Comments on Proposed Changes to §1.382-2: General Rules for Ownership Change*

As described in the preamble to the proposed regulations, section 382(k)(1) provides that, for purposes of section 382, the term “loss corporation” includes a corporation entitled to use a carryforward of disallowed interest described in section 381(c)(20), which refers to carryovers of disallowed business interest described in section 163(j)(2). Section 163(j)(2) permits business interest expense for which a deduction is disallowed under section 163(j)(1) to be carried forward to the succeeding taxable year.

In turn, section 382(d)(3) provides that the term “pre-change loss” includes disallowed business interest expense carryforwards “under rules similar to the rules” in

section 382(d)(1). Section 382(d)(1) treats as a “pre-change loss” both (i) net operating loss carryforwards to the taxable year in which the change date occurs (change year), and (ii) the net operating loss carry-forward for the change year to the extent such loss is allocable to the pre-change period.

Proposed changes to §1.382-2 clarified that a “pre-change loss” includes the portion of any disallowed business interest expense of the old loss corporation paid or accrued in the taxable year of the testing date that is attributable to the pre-change period, and that a “loss corporation” includes a corporation that is entitled to use a carryforward of such a disallowed business interest expense.

Commenters noted that, viewed in isolation, section 382(k)(1) would not appear to apply to a corporation that has only a current-year disallowed business interest expense. Some commenters also claimed that the inclusion of current-year disallowed business interest expense in the definition of a “loss corporation” is inconsistent with the statutory language of section 382(k)(1).

The Treasury Department and the IRS have determined that section 382 should apply to current-year disallowed business interest expense (to the extent such expense is allocable to the pre-change period) because this approach is consistent with the statutory treatment of NOLs. See section 382(k)(1) (providing, in part, that the term “loss corporation” means a corporation “having a net operating loss for the taxable year in which the ownership change occurs”). Moreover, as a policy matter, current-year attributes that relate to the period before an ownership change should be subject to section 382. The exclusion of these items would permit trafficking in losses, which is contrary to the stated policy underlying section 382 of preventing “[exploit]ation by persons other than those who incurred the loss.” H. Rept. 83-1337, at 42 (1954). Thus, no changes to the final regulations have been made in response to these comments. However, the final regulations revise the definition of a “section 382 disallowed business interest carryforward” (which includes both disallowed business interest expense carryforwards and current-year disallowed business interest expense allo-

cable to the pre-change period) in §1.382-2(a)(7) to reflect changes to the allocation rules discussed in part XIII of this Summary of Comments and Explanation of Revisions section.

XIII. Comments on Proposed Changes to §1.382-6: Allocation of Income and Loss to Periods Before and After the Change Date for Purposes of Section 382

Section 1.382-6 provides rules for the allocation of income and loss to periods before and after the change date for purposes of section 382. Section 1.382-6(a) generally provides that a loss corporation must allocate its net operating loss or taxable income, and its net capital loss or modified capital gain net income, for the change year between the pre-change and post-change periods by ratably allocating an equal portion to each day in the year. Section 1.382-6(b), which contains an exception to this general rule, permits a loss corporation to elect to allocate the foregoing items for the change year between the pre-change and post-change periods as if the loss corporation’s books were closed on the change date. Such an election does not terminate the loss corporation’s taxable year as of the change date (in other words, the change year is still treated as a single tax year for Federal income tax purposes).

The proposed regulations revise §1.382-6 to address the treatment of business interest expense. More specifically, the proposed regulations provide that, regardless of whether a loss corporation has made a closing-of-the-books election under §1.382-6(b), the amount of the corporation’s deduction for current-year business interest expense is calculated based on ratable allocation for purposes of calculating the corporation’s taxable income attributable to the pre-change period.

Commenters objected to the mandatory use of ratable allocation for business interest expense in §1.382-6. For example, commenters argued that this approach is distortive (and taxpayer-unfavorable) in situations in which the loss corporation incurs minimal interest expense in the pre-change period but makes highly leveraged acquisitions in the post-change period. Another commenter noted that this approach is distortive (and taxpayer-favor-

able) in situations in which the loss corporation incurs significant business interest expense in the pre-change period and allocates a portion of that expense to the post-change period. To avoid these distortions and complications, commenters recommended that a closing-of-the-books election also be allowed for business interest expense.

The Treasury Department and the IRS acknowledge that a ratable allocation approach may lead to distortions and administrative burdens in certain situations. Thus, the final regulations permit a loss corporation to allocate current-year business interest expense between the pre-change and post-change periods using the closing-of-the-books method set forth in §1.382-6(b)(4) if the loss corporation makes a closing-of-the-books election under §1.382-6(b). Section 1.382-6(b)(4) also provides correlative rules for the allocation of disallowed business interest expense carryforwards to the pre-change and post-change periods when a closing-of-the-books election is made. In turn, section 1.382-6(a)(2) clarifies the amount of business interest expense, disallowed business interest expense, and disallowed business interest expense carryforwards that are allocable to the pre-change and post-change periods if no closing-of-the-books election is made.

XIV. Comments on and Changes to Proposed §1.383-1: Special Limitations on Certain Capital Losses and Excess Credits

Section 1.383-1(d) provides ordering rules for the utilization of pre-change losses and pre-change credits and for the absorption of the section 382 limitation and the section 383 credit limitation. Under proposed changes to §1.383-1(d), a taxpayer’s section 382 limitation would be absorbed by disallowed business interest expense carryforwards before being absorbed by NOLs. As described in the preamble to the proposed regulations, the Treasury Department and the IRS prioritized the use of disallowed business interest expense carryforwards over NOLs because “taxpayers must calculate their current-year income or loss in order to determine whether and to what extent they can use an NOL in that year, and deduc-

tions for business interest expense, including carryforwards from prior taxable years, factor into the calculation of current-year income or loss.”

Although commenters described the foregoing ordering rule as understandable and fairly simple to administer, they noted that pre-2018 NOLs (unlike disallowed business interest expense carryforwards) have a limited carryforward period, and that such NOLs may expire without use as a result of this ordering rule. Commenters thus recommended allowing taxpayers to elect an alternative ordering rule with respect to pre-2018 NOLs.

The Treasury Department and the IRS have decided not to adopt this recommended approach, for several reasons. First, as commenters also noted, such an approach would add complexity. Second, as stated in the preamble to the proposed regulations, deductions for business interest expense (including disallowed business interest expense carryforwards) factor into the determination whether and to what extent a taxpayer can use an NOL in a taxable year. Thus, no changes have been made to proposed §1.383-1(d) in the final regulations.

XV. Other Comments about Section 382

A. Application of Section 382(l)(5)

Section 382(l)(5) provides an exception to the general loss limitation rule under section 382(a) for an old loss corporation in Title 11 proceedings or in similar cases if the historic shareholders and creditors of such corporation own at least 50 percent of the stock of the new loss corporation as a result of being shareholders or creditors immediately before the ownership change. If this exception applies, the corporation’s pre-change losses and excess credits that may be carried over to a post-change year must be “computed as if no deduction was allowable under this chapter for the interest paid or accrued” on debt converted into stock under Title 11 (or in a similar case) during the 3-year period preceding the year of the ownership change (change year) or during the pre-change period in the change year. Section 382(l)(5)(B). In other words, because the old loss corporation gets the benefit of treating certain

creditors as shareholders for purposes of determining whether the corporation has undergone an ownership change within the meaning of section 382(g), the corporation must treat the debt held by such creditors as equity for Federal income tax purposes. As a result, the corporation must treat the interest payments as non-deductible distributions on equity.

As provided in proposed §1.382-2, section 382 disallowed business interest carryforwards are pre-change losses. Because a deduction for such carryforwards is “allowable” in a future year, commenters asked whether such carryforwards must be recomputed under section 382(l)(5)(B).

The Treasury Department and the IRS have determined that no clarification of the rule is necessary. Because section 382 disallowed business interest carryforwards are pre-change losses, if a corporation has such a carryforward from any taxable year ending during the 3-year period preceding the change year (or during the pre-change period in the change year), and if section 382(l)(5) applies to an ownership change, the corporation must recompute the amount of such carryforwards as if the business interest expense that generated such carryforwards were not interest.

B. Application of Section 382(e)(3)

A commenter also recommended that the final regulations address the application of section 382(e)(3) to foreign corporations with section 382 disallowed business interest carryforwards. Section 382(e)(3) provides that, except as otherwise provided in regulations, only items treated as connected with the conduct of a U.S. trade or business are taken into account in determining the value of an old loss corporation that is a foreign corporation if an ownership change occurs. Thus, if a foreign corporation is not engaged in a U.S. trade or business, that corporation’s section 382 limitation is zero. As a result, if a foreign corporation with no U.S. trade or business undergoes a section 382 ownership change, section 382(e)(3) appears to limit the corporation’s section 382 disallowed business interest carryforwards to \$0. The commenter described this result as onerous

and unintended and recommended that, for purposes of applying section 382 to such carryforwards, a foreign corporation’s value be treated as the total value of its stock.

The Treasury Department and the IRS are aware of this issue and other issues relating to the application of section 382 to CFCs. The Treasury Department and the IRS continue to study the application of section 382 to CFCs and may address this issue in future guidance. The Treasury Department and the IRS welcome further comments on the application of section 382 to CFCs.

C. Application of Section 382(h)(6)

As noted in the Background section, the September 2019 section 382 proposed regulations included a rule expressly providing that section 382 disallowed business interest carryforwards are not treated as RBILs, thus precluding a double detriment under section 382 with respect to such carryforwards. This conclusion might have been reached by application of the general anti-duplication principles reflected in the current regulations under section 382. See, for example, §1.382-8(d) (regarding duplicative reductions in value of loss corporations). However, because of the complexity of this area, the Treasury Department and the IRS included the clarification to prevent possible confusion and to provide certainty to taxpayers that there is no double detriment with respect to section 382 disallowed business interest carryforwards. Although no formal comments were received on this rule during the comment period for the September 2019 section 382 proposed regulations, informal comments from practitioners active in the field have been uniformly positive and have confirmed that this rule is a welcome, taxpayer-beneficial addition to the regulations under section 382.

Due to the uncontroversial nature of this rule, the Treasury Department and the IRS have determined that finalization of this portion of the September 2019 section 382 proposed regulations is warranted at this time. The Treasury Department and the IRS continue to actively study the remainder of the rules in the September 2019 section 382 proposed regulations.

XVI. Definition of Real Property Trade or Business

Commenters suggested that the definition of a “real property trade or business” should be clarified to include all rental real estate, even if the rental real estate does not rise to the level of a section 162 trade or business. The Treasury Department and the IRS have determined that modifications to the rules in the proposed regulations are not necessary to make this point clear. Section 1.469-9(b)(1) provides that the definition of a “trade or business” (for purposes of section 469(c)(7)(C)) includes interests in rental real estate even if the rental real estate gives rise to deductions under section 212. The definition of real property trade or business in §1.469-9(b)(2) (for purposes of section 469(c)(7)(C)) necessarily would encompass or include the definition of a trade or business as provided in §1.469-9(b)(1). Accordingly, taxpayers engaged in rental real estate activities that do not necessarily rise to the level of a section 162 trade or business nevertheless will be treated as engaged in real property trades or businesses for purposes of section 469(c)(7)(C) (and section 163(j) by reference), and such taxpayers will be permitted to make the election for a trade or business to be an electing real property trade or business for purposes of section 163(j).

Commenters also requested clarification that a trade or business should not be required to have a direct nexus or relationship to rental real estate in order to qualify as a real property trade or business under section 469(c)(7)(C). The Treasury Department and the IRS agree that businesses involving real property construction, reconstruction, development, redevelopment, conversion, acquisition, or brokerage should not necessarily be required to have a direct nexus or relationship to rental real estate to be treated as a real property trade or business under section 469(c)(7)(C). The proposed regulations provide definitions for the terms “real property management” and “real property operations” while reserving the remaining nine terms in section 469(c)(7)(C) as undefined. The statement in the preamble to the proposed regulations regarding a nexus or relationship to rental real estate was intended as the rationale for the

decision to limit the definition of the two terms to the management and operation of rental real estate. Without these limiting definitions, the Treasury Department and the IRS were concerned that these two terms could be read so broadly as to allow virtually any type of business to qualify as a real property trade or business. The other nine terms in section 469(c)(7)(C) currently remain undefined, although the Treasury Department and the IRS intend to issue additional guidance in the future to provide definitions for these terms.

The Treasury Department and the IRS generally agree with the observation that real property construction, reconstruction, development, redevelopment, conversion, acquisition, or brokerage businesses should not necessarily be required to have a direct nexus or relationship to rental real estate in order to be treated as real property trades or businesses. However, the expectation nevertheless remains that the end products or final objectives of such businesses should at least have the potential to be used as rental real estate or as integral components in rental real estate activities.

Several commenters requested clarification regarding whether timberlands will qualify as real property trades or businesses. The Treasury Department and the IRS have concluded that unharvested or unsevered timber clearly fall within the definition of “real property” as provided in the proposed regulations. The question is whether the activity of holding of timberlands falls within the definition of a “real property trade or business.” The Treasury Department and the IRS have concluded that the maintenance and management of timberlands generally does not meet the intended meaning of any of the eleven terms in section 469(c)(7)(C), and that the owners of timberlands were not intended recipients for relief from the per se passive rule for rental real estate when section 469(c)(7) originally was enacted. However, as set forth in the Concurrent NPRM, such activities might constitute the development of real estate within the meaning of section 469(c)(7)(C). See proposed §1.469-9(b)(2)(ii)(A) and (B) contained in the Concurrent NPRM.

One commenter requested an example illustrating that the management or operation of a pipeline or transmission line will

meet the definition of a real property trade or business. In addition, another commenter requested an example illustrating that the operation of a bridge, tunnel, toll road, or airport qualifies as a real property trade or business.

Although the Treasury Department and the IRS generally agree that the operation of a pipeline, bridge, tunnel, toll road, or airport may meet the definition of a real property trade or business under certain and specific facts and circumstances, the answers to these questions will remain dependent on the facts and circumstances of each case. The Treasury Department and the IRS expect that such examples generally will provide very limited guidance to most taxpayers because any such examples likely will be viewed as inapplicable for taxpayers with any differing facts and circumstances.

Additionally, one commenter recommended removing the reference to the term “customers” from the definitions of the terms “real property management” and “real property operation” because, in certain situations, the party paying for the use of the property or for other services may be a governmental agency providing services to the general public or for the public good. The Treasury Department and the IRS have determined that this modification is unnecessary because the term “customer” for this purpose is broad enough to include governmental entities.

One commenter also requested that the definition of a real property trade or business be revised to include broadband, street lighting, telephone poles, parking meters, and rolling stock. The Treasury Department and the IRS decline to revise the definition of real property trade or business in section 469(c)(7)(C) in this manner because the maintenance and management of these types of assets generally do not meet the intended meaning of any of the eleven terms in section 469(c)(7)(C), and the owners of such assets were not intended recipients for relief from the per se passive rule for rental real estate when section 469(c)(7) originally was enacted.

One commenter requested that the final regulations remove the last sentence in the definition of each of the terms “real property management” and “real property operation.” The commenter stated that

these sentences create confusion regarding whether incidental services provided along with rental real estate will cause the business to fail to qualify as a real property trade or business. In response to this comment, the Treasury Department and the IRS have revised these sentences to clarify that incidental services, even if significant, do not disqualify a business as a real property trade or business.

Statement of Availability of IRS Documents

The IRS Notices, Revenue Rulings, and Revenue Procedures cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <http://www.irs.gov>.

Special Analyses

I. Regulatory Planning and Review – Economic Analysis

Executive Orders 13771, 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The final regulations have been designated as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations. OMB has designated this final regulation as economically significant under section 1(c) of the Memorandum of Agreement. Accordingly, the final regulations have been reviewed by OMB's Office of Information and Regulatory Affairs. For purposes of E.O. 13771 this rule is regulatory.

A. Need for the Final Regulations

The Tax Cuts and Jobs Act (TCJA) substantially modified the statutory rules of section 163(j) to limit the amount of net business interest expense that can be deducted in the current taxable year. As a result of those changes, a number of the relevant terms and necessary calculations that taxpayers are required to apply under the statute can benefit from greater specificity. The Treasury Department and the IRS issued proposed regulations related to section 163(j) on December 28, 2018 (proposed regulations). The comments to the proposed regulations demonstrate a variety of opinions on how to define terms and on how section 163(j) interacts with other sections of the Code and corresponding regulations.

Based on these considerations, the final regulations are needed to bring clarity to instances where the meaning of the statute was unclear and to respond to comments received on the proposed regulations. Among other benefits, the clarity provided by the final regulations generally helps ensure that all taxpayers calculate the business interest expense limitation in a similar manner.

B. Background and Overview

The TCJA substantially modified the statutory rules of section 163(j) to limit the amount of net business interest expense that can be deducted in the current taxable year of any taxpayer, with limited exceptions. As described in the preamble to the proposed regulations (83 FR 67490), section 163(j) prior to TCJA generally applied to domestic corporations with interest paid or accrued to related persons that were not subject to Federal income tax. With the enactment of TCJA, the amount allowed under section 163(j)(1) as a deduction for business interest expense is limited to the sum of (1) the taxpayer's business interest income for the taxable year; (2) 30 percent of the taxpayer's adjusted taxable income (ATI) for the taxable year; and (3) the taxpayer's floor plan financing interest expense for the taxable year. As described in the Background section earlier, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) amended section 163(j) to provide special

rules relating to the ATI limitation for taxable years beginning in 2019 or 2020. The section 163(j) limitation applies to all taxpayers, except for certain small businesses with average annual gross receipts of \$25 million or less (adjusted for inflation) and certain trades or businesses. The excepted trades or businesses are the trade or business of providing services as an employee, electing real property businesses, electing farming businesses, and certain regulated utility businesses. Any amount of business interest not allowed as a deduction for any taxable year as a result of the limitation under section 163(j)(1) is carried forward and treated as business interest paid or accrued in the next taxable year under section 163(j)(2).

Congress modified section 163(j) under the TCJA, in part, out of concern that prior law treated debt-financed investment more favorably than equity-financed investment. According to Congress, this debt bias generally encouraged taxpayers to utilize more leverage than they would in the absence of the Code. Limiting the deduction of business interest is meant to reduce the relative favorability of debt and hence encourage a more efficient capital structure for firms. Congress also believed it necessary to apply the limit broadly across different types of taxpayers so as not to distort the choice of entity (see H.R. Rep. No. 115-409, at 247 (2017)).

C. Economic Analysis

1. Baseline

The Treasury Department and the IRS have assessed the economic effects of the final regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these final regulations.

2. Summary of Economic Effects

The final regulations provide certainty and clarity to taxpayers regarding terms and calculations that are contained in section 163(j), which was substantially modified by TCJA. In the absence of this clarity, the likelihood that different taxpayers would interpret the rules regarding the deductibility of business interest expense differently would be exacerbat-

ed. In general, overall economic performance is enhanced when businesses face more uniform signals about tax treatment. Certainty and clarity over tax treatment also reduce compliance costs for taxpayers. For those situations where taxpayers would generally adopt similar interpretations of the statute even in the absence of guidance, the final regulations provide value by helping to ensure that those interpretations are consistent with the intent and purpose of the statute. For example, the final regulations may specify a tax treatment that few or no taxpayers would adopt in the absence of specific guidance but that nonetheless advances Congressional intent.

The Treasury Department and the IRS project that the final regulations will have an annual economic effect greater than \$100 million (\$2020). This determination is based on the substantial volume of business interest payments in the economy² and the general responsiveness of business investment to effective tax rates,³ one component of which is the deductibility of interest expense. Based on these two magnitudes, even modest changes in the deductibility of interest payments (and in the certainty of that deductibility) provided by the final regulations, relative to the no-action baseline, can be expected to have annual effects greater than \$100 million. This claim is particularly likely to hold for the first set of general 163(j) guidance that is promulgated following major legislation, such as TCJA.

The Treasury Department and the IRS have not undertaken more precise estimates of the economic effects of changes in business activity stemming from these final regulations. The Treasury Department and the IRS do not have readily available data or models that predict with reasonable precision the decisions that taxpayers would make under the final regulations versus alternative regulatory approaches, including the no-action baseline. Nor do they have readily available data or models that would measure with reasonable precision the loss or gain in economic surplus resulting from those business decisions relative to the decisions that would be made under an alternative regulatory

approach. Such estimates would be necessary to quantify the economic effects of the final regulations versus alternative approaches.

In the absence of such quantitative estimates, the Treasury Department and the IRS have undertaken a qualitative analysis of the economic effects of the final regulations relative to the no-action baseline and relative to alternative regulatory approaches. This analysis is presented in the next two sections of this Special Analyses.

3. Economic Effects of Provisions Substantially Revised from the Proposed Regulations

a. *Calculation of ATI*

Similar to the proposed regulations, the final regulations prescribe various adjustments to the calculation of ATI to prevent double counting of deductions and to provide relief for particular types of taxpayers or taxpayers in particular circumstances to ensure that all taxpayers are treated equitably when calculating ATI. One of these adjustments prevents the double counting of depreciation deductions when a depreciable asset is sold (only relevant for depreciation deductions in taxable years beginning after December 31, 2017, and before January 1, 2022). Other adjustments apply to particular types of taxpayers, such as regulated investment companies (RICs), real estate investment trusts (REITs), or consolidated groups.

As an alternative, the Treasury Department and the IRS considered not providing such adjustments. Without such adjustments, however, certain taxpayers may be disadvantaged relative to otherwise similar taxpayers. For example, if RICs and REITs included the dividends paid deduction when calculating ATI, then these entities would almost always have ATI of zero or close to zero. This outcome would limit the ability of such taxpayers to ever deduct business interest expense for Federal income tax purposes even when their financing profile was similar to other entities that could deduct similar net business interest expense.

Based on calculations using the IRS's Statistics of Income (SOI) sample of corporate taxpayers for 2017, the Treasury Department and the IRS estimate that approximately \$13.5 billion of net business interest expense is potentially affected by the dividends paid deduction adjustment to ATI provided to RICs and REITs in the final regulations. This net business interest expense is the amount of interest expense that is greater than interest income for RICs and REITs with gross receipts greater than \$25 million.

The final regulations make one notable change compared to the proposed regulations regarding the ATI calculation for taxpayers that manufacture or produce inventory. Under the proposed regulations, the amount of any depreciation, amortization, or depletion that is capitalized into inventory under section 263A during a taxable year beginning before January 1, 2022 was not added back to taxable income when calculating ATI for that taxable year. Under the final regulations, such amounts are added back to tentative taxable income, regardless of the period in which the capitalized amount is recovered through cost of goods sold.

Without the final regulations, a taxpayer with depreciation, amortization, or depletion expense that is subject to capitalization would have lower ATI (and potentially a higher tax liability due to smaller net interest deductions) than a similarly situated taxpayer with depreciation, amortization, or depletion expense that is not subject to capitalization. Thus, the effect of the final regulations for the calculation of ATI is to prevent economic distortions by having the net interest limitation apply more stringently for certain types of taxpayers than others. The final regulations achieve this outcome more effectively than alternative regulatory approaches, including the proposed regulations and the no-action baseline.

Number of Affected Taxpayers. The Treasury Department and the IRS estimate that roughly 61,000 entities are both (i) subject to calculating their section 163(j) net interest limitation and (ii) required by the Code to capitalize any expenses, including depreciation, amortization, or

² Interest deductions in tax year 2013 for corporations, partnerships, and sole proprietorships were approximately \$800 billion.

³ See E. Zwick and J. Mahon, "Tax Policy and Heterogeneous Investment Behavior," at *American Economic Review* 2017, 107(1): 217-48 and articles cited therein.

depletion expenses. This estimate is an upper bound estimate of the number of taxpayers potentially affected by the definition of ATI prescribed under the regulations because capitalized depreciation, amortization, or depletion expenses are not separately reported and this tax return item includes other types of capitalized expenses.

b. Definition of interest

The statute limits the amount of deductible interest expense for a taxpayer but, as described in the Explanation of Provisions section of the proposed regulations, there are no generally applicable statutory provisions or regulations addressing when financial instruments are treated as debt for Federal income tax purposes or when a payment is counted as interest. While there are several places in the Code and regulations where interest expense or interest income is defined, such as in the regulations that allocate and apportion interest expense ($\$1.861\text{-}9T$) and in the Subpart F regulations ($\$1.954\text{-}2$), these rules only apply to particular taxpayers in particular situations.

The proposed regulations defined interest for the purpose of the section 163(j) limitation as (1) amounts associated with conventional debt instruments and amounts already treated as interest for all purposes under existing statutory provisions or regulations; (2) additional amounts that are functionally similar to interest but not currently labeled as interest under the Code, or amounts treated as interest for certain purposes, such as amounts described in §§1.861-9T and 1.954-2; and (3) any deductible expense or loss predominantly incurred in consideration of the time value of money as part of an anti-avoidance rule. Thus, the proposed regulations applied to interest associated with conventional debt instruments as well as generally to transactions that are indebtedness in substance even if not in form.

The Treasury Department and the IRS proposed this definition of interest, rather than leaving the term interest undefined for purposes of section 163(j). In the absence of this clarity, the likelihood that

different taxpayers would reach different conclusions over whether a particular business expense was deductible business interest expense would be exacerbated. In general, overall economic performance is enhanced when businesses face more uniform signals about tax treatment. Another concern about not defining the term at all is that taxpayer uncertainty over whether certain transactions are considered interest could increase burdens to the IRS and taxpayers including with respect to disputes and litigation about whether particular payments are interest for section 163(j) purposes.

A further concern, over providing a narrower definition of interest, is that it could encourage taxpayers to engage in transactions that provide financing while generating deductions economically similar to interest but that were not defined as interest for the purposes of section 163(j). There are several reasons why curbing such taxpayer behavior would be beneficial. First, the ability of taxpayers to engage in such transactions is correlated with the size of the trade or business, with large businesses more likely to benefit from such avoidance strategies than small businesses. Second, when the deciding factor for using such transactions is the tax benefit of avoiding a section 163(j) limitation, then such transactions would impose more cost or risk on the taxpayer than using a traditional debt instrument. Engaging in such transactions is an inefficient use of resources. Third, such avoidance strategies may discourage taxpayers from shifting to a less leveraged capital structure, and thus would counteract the intention of the statute to reduce the prevalence of highly-leveraged firms and the probability of systemic financial distress. Fourth, greater use of financing outside of conventional debt instruments may make it more difficult for financial institutions to determine the overall level of leverage and credit risk of firms seeking financing, which may distort the allocation of capital across businesses away from firms and investments with less credit risk.

The final regulations prescribe a definition of interest that is similar to the definition of interest in the proposed regulations although with changes made in response

to comments.⁴ There are three general types of changes: (1) Changes are made to the proposed regulations that modify, and generally limit, to what extent certain amounts are included under the definition of interest for the purposes of section 163(j). (2) Several items deemed to be interest for the purpose of section 163(j) under proposed §1.163(j)-1(b)(20)(iii) are not included in the final regulations. (3) The anti-avoidance rule in proposed §1.163-1(b)(20)(iv) is modified to include a principal purpose test and now also applies to situations where a taxpayer seeks to artificially increase the amount of interest income.

To the extent that these changes narrow the definition of interest that is subject to the section 163(j) limitation relative to the proposed regulations, they are expected to (i) reduce the cost of financing for taxpayers, an effect that is expected to increase investment by these taxpayers, and (ii) increase the proportion of that financing that might generally be considered debt-financed. The first effect occurs because taxpayers can deduct without limitation costs from a larger set of financial instruments under the final regulations, relative to the proposed regulations. They will choose these instruments only if the cost of obtaining funds through those instruments is lower than what would have been available under the proposed regulations. By extension, this change lowers the overall cost of financing for taxpayers. A lower cost of financing is associated with greater investment by taxpayers, all other things equal. The second effect occurs because the larger set of financial instruments for which taxpayers can deduct expense without limitation (under the final regulations, relative to the proposed regulations) generally consists of instruments that have a greater share of debt characteristics, rather than equity characteristics. To the extent that taxpayers use these instruments to a greater degree under the final regulations relative to the proposed regulations, the share of debt-financing will increase. Congress has generally expressed the view that excessive debt-financing may be a less efficient capital structure for firms. See Senate Budget Explanation of the Bill at 165.

⁴The proposed regulations represent the regulatory alternative to which the final regulations are compared in the following analysis.

Because the final regulations define interest based on the intent and purpose of the statute and generally treat similar taxpayers similarly and similar economic activity similarly, the Treasury Department and the IRS have determined that the net result under these final regulations is a more efficient allocation of capital across taxpayers relative to regulatory alternatives, within the context of the intent and purpose of the statute.

The Treasury Department and the IRS have not undertaken quantitative estimates of the change in the level or nature of economic activity arising from the final regulations relative to the proposed regulations due to limitations on available data, but to the extent possible has provided further below an estimate of the quantity of potentially affected taxpayers and volume of transactions. Consider, for example, the treatment of guaranteed payments for the use of capital provided by a partner to a partnership, a financial arrangement that has both equity and debt characteristics. The proposed regulations included guaranteed payments to capital in the definition of interest while the final regulations do not, except to the extent that they are covered by other provisions of the final regulations. The Treasury Department and the IRS have not undertaken quantitative estimates of this regulatory decision because we do not have readily available data or models to measure with sufficient precision: (i) the volume and nature of guaranteed payments to capital and other financial instruments that taxpayers might use if the final regulations were in effect; (ii) the volume and nature of guaranteed payments and other financial instruments that taxpayers might have used if the proposed regulations were in effect; and (iii) the types of economic activities that partnerships might undertake under these two financial portfolios. Regarding item (iii), the Treasury Department and the IRS do not have readily available data or models to predict how economic activity might differ under debt-financed versus equity-financed investment for the sets of instruments affected by these final regulations.

Compliance costs are also expected to be lower for those transactions that are not subject to the section 163(j) limitation under the final regulations and that would be subject to the limitation under the proposed regulations. Generally, this is because taxpayers would be less likely to need to calculate the section 163(j) limitation and less likely to need to track unused interest deductions that are carried forward to future tax years. For most taxpayers, this impact on compliance costs is expected to be relatively small. However, for certain taxpayers using hedging transactions, calculating the amount of interest associated with the transactions would be burdensome and not including such transactions in the definition of interest lowers compliance costs to a greater degree. The Treasury Department and the IRS have not estimated the reduction in compliance costs for these taxpayers (under the final regulations, relative to the proposed regulations) because we do not have data or models that are suitable for this estimation.

The specific changes made with regard to items (1), (2), and (3) are discussed in further detail here.

(1) The final regulations change (relative to the proposed regulations) how amounts from certain transactions will be considered interest for the purposes of section 163(j). There are two main forms of transactions that are affected:

Treatment of swaps. The proposed regulations treated a non-cleared swap with significant non-periodic payments as two separate transactions consisting of an on-market, level payment swap and a loan (the embedded loan rule).⁵ The time value component associated with the embedded loan is recognized as interest expense to the payor and interest income to the recipient. The treatment of cleared swaps was not specified in the proposed regulations. The final regulations add two exceptions to the embedded loan rule. Specifically, the final regulations add exceptions for cleared swaps and for those non-cleared swaps that require the parties to meet the margin or collateral requirements of a federal regulator (or requirements that are

substantially similar to a federal regulator). Relative to the proposed regulations this treatment will discourage taxpayers from using swaps that are unregulated and dissimilar to regulated swaps, because under the final regulations only such swaps will require the time value component associated with the embedded loan to be treated as interest. One reason for excepting both regulated and non-regulated collateralized swaps from the definition of interest is that the repayment risk of using such transactions is small, while the non-collateralized swaps are more risky as individual transactions and would be likely to contribute to the overall riskiness of the financial system.

Substitute interest payments. The proposed regulations provided that certain substitute interest payments will be treated as interest for the purposes of section 163(j).⁶ The final regulations modify the treatment of substitute interest payments by only including such transactions as interest when the transaction is not part of the ordinary course of business of the taxpayer. The Treasury Department and the IRS have determined that the ordinary course rule in the final regulations provides an appropriate and effective limit on the treatment of substitute interest as interest for section 163(j) purposes. This change has the effect of reducing the amount of substitute interest payments that will be deemed interest for the purpose of section 163(j) relative to the proposed regulations.

For taxpayers that use substitute interest payments in the ordinary course of business, the final regulations may lower the after-tax cost of such transactions and such taxpayers are more likely to use transactions with substitute interest payments relative to the proposed regulations. The Treasury Department and the IRS do not have readily available data or models to estimate either (i) the change in financing arrangements, including both substitute interest payments and other financial instruments, that will be used by taxpayers under this provision of the final regulations relative to the proposed regulations, or (ii) the change in the volume or nature

⁵ A cleared swap is a collateralized swap that was cleared by a derivatives clearing organization or by a clearing agency. A non-cleared swap is a swap that has not been so cleared.

⁶ A substitute interest payment is a payment, made to the transferor of a security in a securities lending transaction or a sale-repurchase transaction, of an amount equivalent to an interest payment which the owner of the transferred security is entitled to receive during the term of the transaction. This provision applies to substitute interest payments as described in §1.861-2(a)(7).

of economic activity by these taxpayers given these financing arrangements.

(2) The items removed by the final regulations from the definition of interest in the proposed regulations include debt issuance costs, guaranteed payments for the use of capital provided by a partner to a partnership, and hedging transactions.⁷ Under the final regulations, these items can still be considered interest under the anti-avoidance rule. These items share some characteristics with interest, but comments received on the proposed regulations indicate there is not a consensus that such items should always be defined as interest. Removing these items from the definition of interest lowers compliance costs for taxpayers in some cases relative to the proposed regulations. However, not including these items in the definition of interest increases uncertainty regarding whether amounts from certain transactions will be treated as interest under the anti-avoidance rule, and more disputes are likely to arise between taxpayers and the IRS.

The final regulations do not include debt issuance costs, such as legal fees for document preparation, in the definition of interest. Debt issuance costs are usually small relative to total interest payments in a lending transaction and often the payments are made to a third-party who is not the lender. Hence, there is limited ability for taxpayers to be able to disguise interest payments as debt issuance costs. The primary effect of not including debt issuance costs in the definition of interest is to decrease the after-tax cost of debt financing.

The final regulations do not include hedging transactions in the definition of interest. Taxpayers could have multiple reasons for engaging in hedging transactions other than just to lower the amount of interest expense, such as a reduction in risk. Not including hedging transactions in the definition of interest should decrease administration and compliance costs compared to the treatment in the proposed regulations since it can be difficult to separate the time value component from the insurance aspects of a hedging transaction. Under the final regulations,

taxpayers are more likely to use hedging relative to the proposed regulations due to the decline in compliance costs and due to the reduced after-tax cost of using hedges.

The final regulations do not include guaranteed payments in the definition of interest. Guaranteed payments for the use of capital provided by a partner to a partnership have both equity and debt characteristics. The partner who provided the capital is an owner of the business, but also receives payments that are similar to interest. Removing guaranteed payments from the definition of interest lowers the after-tax cost of such financing for some taxpayers and may lead these taxpayers to increase the fraction of financing through capital with guaranteed payments relative to other financial instruments. The Treasury Department and the IRS do not have readily available data or models to project the change in the volume or nature of businesses' economic activities that would arise as a consequence of this change in the tax treatment of guaranteed payments to capital, relative to the proposed regulations.

(3) The final regulations also modify the anti-avoidance rule found in proposed §1.163-1(b)(20)(iv) relative to the proposed rule. One change is that the anti-avoidance rule not only applies to financing transactions used to avoid the classification of financing expense as interest expense, but also excludes transactions that artificially increase the taxpayer's interest income from being included as interest income. The final regulations also add a principal purpose condition to the anti-avoidance rule. That is, the anti-avoidance rule in the final regulations only applies to amounts where a principal purpose of the taxpayer for engaging in a transaction is to artificially reduce the amount of net business interest expense, whether this stems from a decrease in the amounts reported as interest expense or an increase in the amounts reported as interest income. This symmetric anti-avoidance rule adopted under the final regulations, applying to both interest income and interest expense, increases the number of transactions to which the rule could po-

tentially apply compared to the proposed regulations. However, including a principal purpose test in the anti-avoidance rule will decrease how often the rule would potentially apply to transactions relative to the proposed rule.

The anti-avoidance rule is an important component of the definition of interest because it is difficult for the Treasury Department and the IRS to specifically categorize every type of transaction already in practice or to anticipate future innovations in financial transactions. Relative to regulatory alternatives, the anti-avoidance rule will help limit the ability of taxpayers to structure transactions in such a way that would allow deductible expenses that are economically similar to interest and frustrate the application of the statute. In summary, the definition of interest in the final regulations provides clarity to taxpayers and the IRS regarding which specific transactions and types of transactions generate interest subject to the section 163(j) limitation, which should lower compliance and administrative costs relative to providing no definition or a narrower definition of interest. The Treasury Department and the IRS further have determined that the definition of interest specified under the final regulations will encourage a more efficient allocation of capital and use of financing across taxpayers relative to the no-action baseline, within the context of the intent and purpose of the statute.

Number of Affected Taxpayers. The Treasury Department and the IRS estimate that the number of partnerships potentially affected by the change in treatment to guaranteed payments for the use of capital provided by a partner to a partnership is 6,000. This is the number of partnerships in tax year 2017 with more than \$25 million in gross receipts that also report paying deductible guaranteed payments. The amount of total guaranteed payments reported by these partnerships is approximately \$30 billion. However, it is not known to what extent these guaranteed payments are made to capital or labor, as the tax form for that tax year did not distinguish between the two types of guaranteed

⁷Commitment fees are also not included in the definition of interest in the final regulations, but may be addressed as part of another guidance project on the treatment of fees relating to debt instruments and other securities in the future.

payments. Beginning in 2019, Form 1065 will separately report those two types of guaranteed payments.

It is not possible to provide a meaningful estimate of the number of taxpayers potentially affected by the final regulations that have deductible debt issuance costs, substitute interest payments, or amounts from swaps or hedging transactions, because those amounts are not reported separately on a tax return.

4. Economic Effects of Provisions not Substantially Revised from the Proposed Regulations

a. *Calculation of excess business interest expense, excess business interest income, and excess taxable income for partnerships and S corporations*

The statute applies broadly to different types of entities, including passthrough entities, such as partnerships and S corporations. The statute specifies that the section 163(j) limitation applies at the entity level for a partnership but that items such as excess business interest expense and excess taxable income must be allocated to partners for a variety of reasons including to compute their own 163(j) limitation. The statute further specifies that the items should be allocated in the same manner as “nonseparately stated taxable income or loss of the partnership”; however, this concept had not previously been defined by statute or regulations prior to the proposed regulations. In the absence of guidance, partnerships would have significant uncertainty in determining which partners receive excess items. This uncertainty could lead one partnership to undertake an activity that another partnership might decline to take based solely on different expectations about tax treatment of interest income rather than underlying productivity differences or economic signals.

The final regulations provide guidance on how to allocate partnership excess business interest expense, excess business interest income, and excess taxable income to partners. The allocation method detailed in the final regulations follows a number of principles. First, it ensures that the sum of the excess items at the partner level is equal to the total at the partner-

ship level. Second, it ensures that the partnership does not allocate excess business interest expense to a partner that was allocated items that include ATI and business interest income that supported the partnership’s deductible business interest expense (unless the partner was allocated more interest expense than its share of deductible business interest expense). Finally, it ensures that the partnership allocates any excess taxable income or excess business interest income to partners that are allocated more items comprising ATI or business interest income than necessary to support their allocation of business interest expense.

The final regulations thus provide a method to ensure that all partnerships allocate these items consistently and in a way that matches income and interest expense, thus promoting economically efficient investment decisions across taxpayers and across financing options, relative to the no-action baseline.

b. *Interest income inclusion for owners of partnerships and S corporations*

The final regulations ensure that, for owners of partnerships and S corporations, business interest income is used only once, at the entity level, in offsetting business interest expenses. It thereby avoids exacerbating the incentive to seek out interest income relative to other forms of less economically productive income in order to avoid the section 163(j) limitation, relative to the no-action baseline.

c. *Rules related to excepted businesses*

For purposes of section 163(j), the statute states in section 163(j)(7) that the term “trade or business” does not include certain regulated utilities, or an electing real property trade or business or an electing farming business. The final regulations clarify whether a trade or business could elect as a farming business or a real property trade or business and thus be excepted from section 163(j). Specifically, §1.163(j)-9 provides guidance in applying the rules for farming and real property trade or business elections. For an electing real property trade or business and electing farming business, the statute

specifies that “any such election shall be made at such time and in such manner as the Secretary shall prescribe, and once made, shall be irrevocable.” Therefore §1.163(j)-9 provides taxpayers with the time and manner for electing real property trades or businesses and electing farming businesses. In addition, the final regulations define the conditions under which an election terminates.

In the absence of specific guidance, taxpayers may engage in behavior that counteracts the intent and purpose of the statute and would not otherwise be taken except to avoid the irrevocable nature of the election the statute specified. The final regulations increase the likelihood that taxpayers interpret the ‘irrevocable’ designation similarly and do not engage in tax-motivated behavior by appearing to cease operations in an effort to change an irrevocable designation.

In addition, §1.163(j)-9(h) provides a safe harbor for certain REITs to elect to be electing real property trades or businesses. A special rule applies to REITs for which 10 percent or less of the value of the REIT’s assets are real property financing assets. Under this rule, all of the assets of the REIT are treated as real property trade or business assets. The benefit of the safe harbor is to provide REITs the same tax treatment and apply the same general rules as apply to other taxpayers, an economically efficient approach. The special rule threshold of 10 percent for real property financing assets has the benefit of maintaining consistency with section 856(c)(4), which uses the same values for the REIT asset test at the close of the REIT’s taxable year. Taxpayers will benefit in reduced compliance time and cost in applying new rules if the rules are consistent with other rules that they must comply with under the Code. An estimate of the compliance cost savings that would be due to this cross-code consistency, relative to regulatory alternatives, is beyond the capabilities of the IRS’s compliance model.

In addition, the final regulations provide a rule that stipulates that if at least 80 percent of a trade or business’s real property (by fair market value) is leased to a trade or business under common control with the real property trade or business, the trade or business cannot make an elec-

tion to be an electing real trade or business. In the absence of such a rule, taxpayers could restructure their business such that real estate components of non-real estate businesses are separated from the rest of their business to artificially reduce the application of section 163(j) by leasing the real property to the taxpayer and electing this “business” to be an excepted real property trade or business. Therefore, the prime benefit of this rule is to preserve the intent of the statute of allowing elections in the real property sector without incentivizing other sectors of the economy to restructure their business for the sole intent of avoiding the section 163(j) limitation.

The Treasury Department and the IRS received no comments requesting that the percentage amounts be changed.

Number of Affected Taxpayers. The Treasury Department and the IRS project that nearly 3,500 REITs are potentially affected by the provision in the final regulations that allows REITs for which 10 percent or less of the value of the REIT’s assets are real property financing assets to elect to treat all of its assets as allocable to an excepted real property trade or business. This estimate is based the number of REITs in the SOI sample of corporate taxpayers for 2017 that identify as an Equity REIT. An Equity REIT is identified by a check-box on form 1120-REIT where the choice is Equity REIT or Mortgage REIT. The Mortgage REIT category should be chosen by the taxpayer if the primary source of gross receipts is derived from mortgage interest and fees. These Equity REITs reported \$1.7 trillion in total assets.

The Treasury Department and the IRS project that roughly 2.8 million filers are potentially affected by provisions of the final regulations that affect electing real property trades or businesses or electing farm businesses. This estimate is based on a count of all filers with NAICS codes starting with 111 or 112 (farming), and 531 (real property) with at least \$10 million in gross receipts in taxable year 2017.

d. Allocation rules between excepted and non-excepted trades or businesses

The statute is silent over how ATI, interest income, and expense should be

allocated between excepted and non-excepted trades or businesses. Thus, the Treasury Department and the IRS decided to provide taxpayers with an allocation method. Because allocation, by whatever method, is costly for taxpayers, the final regulations further provide that allocation is only required when the share of the asset tax basis in both the excepted and the non-excepted trades or businesses exceeds 10 percent. In other words, if the share for either excepted or non-excepted trades or businesses is 10 percent or less, allocation is not required. The Treasury Department and the IRS received no comments that addressed the 10 percent threshold provided in this provision.

In terms of the allocation method, the Treasury Department and the IRS decided in the final regulations to require taxpayers to allocate interest expense and interest income between related excepted and non-excepted trades or businesses based on the relative amounts of the taxpayer’s adjusted tax basis in the assets used in its excepted and non-excepted trades or businesses. As discussed in the Explanation of Provisions section of the proposed regulations, this general method of allocation reflects the fact that money is fungible and the view that interest expense is attributable to all activities and property, regardless of any specific purpose for incurring an obligation on which interest is paid. This asset basis approach is consistent with the regulations under section 861. Because this approach is familiar to taxpayers and consistent with other parts of the Code, taxpayers benefit in reduced time and cost spent learning and applying the rules, relative to alternative regulatory approaches. An estimate of the compliance cost savings that would be due to this familiarity and cross-code consistency, relative to regulatory alternatives, is beyond the capabilities of the IRS’s compliance model.

The Treasury Department and the IRS considered several alternatives to this asset basis approach for allocating interest income and expense. First, a tracing approach was considered whereby taxpayers would be required to trace disbursements of debt proceeds to specific expenditures. However, tracing would impose a significant compliance burden on taxpayers due to the complexity of matching interest in-

come and expense among related companies. Further, it is not clear how taxpayers would retroactively apply a tracing regime to existing debt. In particular, because C corporations would have had no reason to trace the proceeds of any existing indebtedness, imposing a tracing regime on existing indebtedness would require corporations to reconstruct the use of funds within their treasury operations at the time such indebtedness was issued, even if the issuance occurred many years ago, and even if the funds were used for a myriad of purposes across a large number of entities. Such an approach would impose substantial compliance costs and may be impractical or even impossible for indebtedness issued years ago.

Moreover, because money is fungible, a tracing regime would be distortive and subject to manipulation. Although taxpayers are impacted from both a commercial and tax perspective by the amount of capital raised through the issuance of equity and indebtedness, any trade or business conducted by a taxpayer is generally indifferent to the source of funds. As a result, if taxpayers were allowed to use a tracing regime to allocate indebtedness to excepted trades or businesses, there would be an incentive to treat excepted trades or businesses as funded largely from indebtedness, and to treat non-excepted trades or businesses as funded largely from other types of funding, such as equity funding, despite the fact that, as an economic matter, all of a taxpayer’s trades or businesses are funded based on the taxpayer’s overall capital structure.

The Treasury Department and the IRS rejected a tracing approach because the complexity of such an approach could be more difficult for taxpayers and the IRS to administer and would create too great an incentive to structure financing with the sole purpose of avoiding the application of the statute, relative to the final regulations. The assumption that a trade or business is indifferent to its source of funds may not be appropriate in cases in which certain indebtedness is secured by the assets of the trade or business and cash flow from those assets is expected to support the payments required on the indebtedness. The final regulations provide for a limited tracing rule in those cases.

The Treasury Department and the IRS also considered allocating interest expense based on the relative fair market value of the assets used in excepted and non-excepted trades or businesses. However, determinations of fair market value frequently are burdensome for taxpayers, which may have numerous assets without a readily established market price. For this reason, disputes between taxpayers and the IRS over the fair market value of an asset are a common and costly occurrence. In the TCJA, Congress repealed the use of fair market value in the apportionment of interest expense under section 864 of the Code (see section 14502(a) of the TCJA) and claimed that the ability to elect to allocate interest expense under section 864 on the basis of fair market value of assets has led to inappropriate results and needless complexity. See Senate Budget Explanation of the Bill at 400. Thus, the Treasury Department and the IRS have determined that allocating interest expense based on relative amounts of asset basis is more appropriate than a regime based on the relative fair market value of assets.

The Treasury Department and the IRS also considered allocating interest expense to excepted and non-excepted trades or businesses based on the relative amounts of gross income generated by such trades or businesses. However, gross income is more variable and volatile than asset basis, in part because it is based on an annual measurement. Methods could be developed to look at multiple years of gross income through an averaging or other smoothing methodology, but any such approach would necessarily create a number of difficult technical questions because the income of different trades or businesses may be subject to differing business cycles and the taxpayers may exert control over the timing of income items, which may lead taxpayers to make tax-driven business decisions with no accompanying general economic benefit. In the TCJA, Congress also repealed the use of gross income in the apportionment of interest expense under section 864 of the Code (see section 14502(a) of the TCJA). Thus, the Treasury Department and the IRS have determined that allocating interest expense based on relative amounts of asset basis is more appropriate than a

regime based on the relative amounts of gross income.

Number of Affected Taxpayers. The Treasury Department and the IRS estimate that roughly 83,000 firms had allocated interest income and expenses among multiple trades or businesses in tax year 2015 and thus are potentially affected by provisions of the final regulations that affect the annual allocation statement. This estimate is based on a count of all Forms 1120, 1120S, and 1065 in tax year 2015 in real estate, farming, and public utilities industries that had over \$25 million in gross receipts.

II. Paperwork Reduction Act

The collections of information contained in the final regulations have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

A. Collections of Information Imposed by the Regulations

The collections of information imposed directly by these regulations are contained in §§1.163(j)-1(b)(15)(iii), 1.163(j)-2(b)(2)(ii), 1.163(j)-2(b)(3), 1.163(j)-9 and 1.163(j)-10.

The collection of information in §§1.163(j)-1(b)(15)(iii) and 1.163(j)-9, the election statement, is required for taxpayers to make a one-time election to treat their regulated utility trade or business, real property trade or business or farming trade or business as an electing excepted regulated utility trade or business, electing real property trade or business under section 163(j)(7)(B) or an electing farming business under section 163(j)(7)(C). The election to be an excepted regulated

utility trade or business was not in the proposed regulations. The scope of taxpayers eligible to make an election to be an excepted real property or farming trade or business has changed from the proposed regulations. As discussed in part X of the Summary of Comments and Explanation of Revisions section, under the proposed regulations, taxpayers that met the small business exemption test under section 448(c) were not able to make an election for their trade or business to be an electing real property trade or business or an electing farming business because they were already not subject to the limitation. Under the final regulations, those taxpayers are eligible to make a protective election. Additionally, under the proposed regulations, it was unclear whether taxpayers that were unsure of whether their activity constitutes a trade or business under section 162 could make an election. The final regulations clarify that a taxpayer that is unsure whether its activity constitutes a trade or business under section 162 is eligible to make an election.

The collections of information in §§1.163(j)-2(b)(2)(ii) and 1.163(j)-2(b)(3) are required to make two elections relating to changes made to section 163(j)(10) by the CARES Act. The election under §1.163(j)-2(b)(2)(ii) is for a taxpayer to use the 30 percent ATI limitation instead of the 50 percent ATI limitation when calculating the taxpayer's section 163(j) limitation for a 2019 or 2020 taxable year, as provided in section 163(j)(10)(A)(i) and (iii). The election under §1.163(j)-2(b)(2) is for a taxpayer to use the taxpayer's ATI for the last taxable beginning in 2019 as its ATI for any taxable year beginning in 2020, as provided in section 163(j)(10)(B). Revenue Procedure 2020-22 describes the time and manner for making these elections. See also §1.163(j)-2(b)(4).

Taxpayers make the elections by timely filing a Federal income tax return or Form 1065, including extensions, an amended Federal income tax return, amended Form 1065, or administrative adjustment request, as applicable. More specifically, taxpayers complete the Form 8990, Limitation on Business Interest Expense under Section 163(j), using the 30 percent ATI limitation and/ or using the taxpayer's 2019 ATI, as appli-

cable. No formal statements are required to make these elections. Accordingly, for Paperwork Reduction Act purposes, the reporting burden associated with the collections of information in §§1.163(j)-2(b)(2)(ii) and 1.163(j)-2(b)(3) will be reflected in the IRS Form 8990 Paperwork Reduction Act Submissions (OMB control number 1545-0123).

The collection of information in §1.163(j)-10, the allocation statement, is required for taxpayers to demonstrate how they allocated their interest expense, interest income, and other items of income and deduction between excepted and non-excepted trades or businesses. The mechanics of the allocation statement, and the scope of taxpayers required to file the allocation statement, have not changed from the proposed regulations.

Section 1.163(j)-10 in the final regulations contains another collection of information, an allocation methodology change request, requiring taxpayers to request the Commissioner's permission to change a methodology for allocating the basis in an asset that is used in multiple trades or businesses if the request is being made within five years of any prior change. This requirement does not create a new burden because the allocation methodology change request is made by following the procedures for requesting a letter ruling in section 7.01 of Revenue Procedure 2020-1, 2020-1 IRB 1. Revenue Procedure 2020-1 was approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545-0123.

In 2018, the Treasury Department and the IRS considered developing a form election and allocation statement under §§1.163(j)-9 and 1.163(j)-10 for taxpayers to make the one-time election and to demonstrate their interest allocation. To minimize taxpayer burden, the Treasury Department and the IRS decided that, for now, taxpayers should be allowed to use their own election form and allocation statement. In the future, if the Treasury Department and the IRS develop election or allocation form, the draft versions of the forms will be posted for comment at <https://apps.irs.gov/app/picklist/list/draftTaxForms.html>.

Certain forms have been modified with simple questions to signal whether the taxpayer is subject to section 163(j). The Treasury Department and the IRS are considering modifying certain forms with a checkbox to note that a taxpayer has made an election for a trade or business to be an electing real property trade or business or electing farming business.

For the allocation methodology change request in §1.163(j)-10, the Treasury Department and the IRS initially determined that taxpayers should file a change request any time there is a change in methodology. However, a change in allocation methodology presents a burden for taxpayers. The disadvantages of changing an allocation methodology regularly, including the administrative and accounting costs associated with any such change, outweigh the advantages of changing an allocation methodology regularly. Accordingly, the Treasury Department and the IRS do not anticipate taxpayers using the allocation methodology change request regularly. The final regulations require the request to be made only if a change has not been made in the past 5 years. To minimize any compliance burden, the procedures in Revenue Procedure 2020-1, which are familiar to taxpayers, apply for the allocation methodology change request.

B. Burden Estimates

The following burden estimates are based on the information that is available to the IRS, and have been updated from the proposed regulations to take into account the new election for certain regulated utility trades or businesses, the increased scope of potential filers for the election statement and to use 2017 Statistics of Income (SOI) tax data where available.

The most recently available 2017 SOI tax data indicates that approximately 8,208 filers are possible for the one-time election to opt out of the section 163(j) limitation as an electing excepted regulated utility trade or business. This estimate was based on a count of Form 1065, 1065B, 1120 and 1120-S filers with NAICS codes starting with 2211 (elec-

tric power generation, transmission and distribution), 2212 (natural gas distribution), and 2213 (water, sewage and other systems).

The 2017 SOI tax data indicates that approximately 2,838,981 filers are possible for the one-time election to opt out of the section 163(j) limitation as an electing real property trade or business or as an electing farming business were the statute then in effect. This estimate is based on a count of all filers with NAICS codes starting with 111 or 112 (farming), and 531 (real property) with at least \$10 million in gross receipts in taxable year 2017. The increase in potential filers from the number provided in the proposed regulations is due exclusively to the fact that the final regulations provide that taxpayers that satisfy the small business exemption are eligible to file an election.

For the election to use the 30 percent ATI limitation for a 2019 or 2020 taxable year under §1.163(j)-2(b)(ii), while any taxpayer subject to the section 163(j) limitation is eligible to make the election, the Treasury Department and the IRS estimate that only taxpayers that actively want to reduce their deductions will make this election. The application of the base erosion minimum tax under section 59A depends, in part, on the amount of a taxpayer's deductions. Accordingly, the Treasury Department and the IRS estimate that taxpayers that are subject to both the base erosion minimum tax under section 59A and section 163(j) are the potential filers of this election. Using the 2017 SOI tax data, the Treasury Department estimate that 3,376 firms will make the election. This estimate was determined by examining the number of C corporations with at least \$500,000,000 in gross receipts, that do not have an NAICS code associated with a trade or business that is generally not subject to the section 163(j) limitation (2211 (electric power generation, transmission and distribution), 2212 (natural gas distribution), 2213 (water, sewage and other systems), 111 or 112 (farming), 531 (real property)).

For the election to use the taxpayer's 2019 ATI in 2020 under §1.163(j)-2(b)(3), the Treasury Department and the IRS

estimate that 72,608 firms will make the election. This figure was determined, using 2017 SOI tax data, by examining Form 1040, Form 1120, Form 1120S, and Form 1065 filers with more than \$26M in gross receipts, that have reported interest expense, and do not have an NAICS code associated with any trade or business that is generally not subject to the section 163(j) limitation.

The Treasury Department and the IRS continue to estimate the same number of filers, 82,755, for the annual allocation statement as was projected in the proposed regulations. Using the 2015 SOI tax data, the Treasury Department and the IRS estimate that 82,755 firms will have allocated interest income and expenses among multiple trades or businesses, some of which are excepted from the section 163(j) limitation and some that are not. This estimate is a count of all tax Forms 1120, 1120S, and

1065 in real estate, farming, and public utilities industries that had over \$25 million in gross receipts. While the number of affected taxpayers will increase with growth in the economy, the Treasury Department and the IRS expect that the portion of affected taxpayers will remain approximately the same over the foreseeable future.

The time and dollar compliance burden are derived from the Business Taxpayers Burden model provided by the IRS's Office of Research, Applied Analytics, and Statistics (RAAS). This model relates the time and out-of-pocket costs of business tax preparation, derived from survey data, to assets and receipts of affected taxpayers along with other relevant variables. See "Tax Compliance Burden" (John Guyton et al, July 2018) at <https://www.irs.gov/pub/irs-soi/d13315.pdf>. A respondent may require more or less time

than the estimated burden, depending on the circumstances.

The burden estimates listed in the below table attempt to capture only those discretionary changes made in these proposed regulations, and may not include burden estimates for forms associated with the statute. Changes made by the Act or through new information collections are captured separately in forthcoming published "Supporting Statements" for each of these forms and will be aggregated with the estimates provided below to summarize the total burden estimates for each information collection listed below. Those total burden estimates will be available for review and public comment at <https://www.reginfo.gov/public/Forward?SearchTarget=PRA&textfield>. The Treasury Department and the IRS request comment on these estimates.

	Likely Respondents	Estimated number of respondents	Estimated average annual burden hours per respondent	Estimated total annual reporting burden (hours)	Estimated monetized burden @ \$95/hour (\$millions)	Estimated frequency of responses
<i>Section 1.163(j)-1(b)(15)(iii) (one-time election statement (2017 Levels))</i>	Corporations and partnerships with regulated utility trades or businesses	8,028 business respondents (including Forms 1120, 1120-S, and 1065 filers)	0 to 30 minutes (estimated average: 15 minutes)	2,007	\$190,665	One-time
<i>Section 1.163(j)-2(b)(ii) (election to apply the 30 percent ATI percentage)</i>	C corporations with more than \$500M in gross receipts	3,376 business respondents (Form 1120 filers)	See Form 8990	See Form 8990	See Form 8990	See Form 8990
<i>Section 1.163(j)-2(b)(3) (election to use 2019 ATI as 2020 ATI)</i>	Individuals, corporations, and partnerships with more than \$26M in gross receipts and not part of an excepted trade or business	72,608 business respondents (including Form 1120, Form 1120-S, and Form 1065 filers)	See Form 8990	See Form 8990	See Form 8990	See Form 8990
<i>Section 1.163(j)-9 (one-time election statement) (2017 Levels)</i>	Individuals, corporations, and partnerships with real property or farming trades or businesses with gross receipts exceeding \$10 million	2,838,981 business respondents (all filers)	0 to 30 minutes (estimated average:15 minutes)	70,746	\$67.4	One-time

	Likely Respondents	Estimated number of respondents	Estimated average annual burden hours per respondent	Estimated total annual reporting burden (hours)	Estimated monetized burden @ \$95/hour (\$millions)	Estimated frequency of responses
Section 1.163(j)-10 (annual allocation statement) (2015 Levels)	Individuals, corporations, and partnerships (1) with more than one trade or business (at least one of which is a real property or farming trade or business), and (2) public utilities, with gross receipts exceeding the statutory threshold of \$25 million	82,755 business respondents (including Forms 1120, 1120-S, and 1065 filers)	15 minutes to 2 hours (estimated average: 1 hour)	82,755	\$7.9	Annually
Section 1.163(j)-10 (change in allocation methodology request)	Individuals, corporations, and partnerships that want to change their methodology for allocating basis among two or more trades or businesses, and (1) with more than one trade or business (at least one of which is a real property or farming trade or business), and (2) public utilities, with gross receipts exceeding the statutory threshold of \$25 million	See Rev. Proc. 2020-1	See Rev. Proc. 2020-1	See Rev. Proc. 2020-1	See Rev. Proc. 2020-1	On occasion
Section 1.163(j)-10 (one-time start-up cost to develop procedures for filing an annual allocation statement) (2017 Levels)	Same as above	82,755	4 hours (start-up burden)	331,020	\$31.4	One-time
Three year monetized burden estimate					\$40.8	Three year annual average

The three-year annual average of the monetized burden for the information collection and resulting from discretionary requirements contained in this rulemaking is estimated to be 40.9 million (\$2017) [(\$190,665) + (\$67.4 million + \$31.4 million) + (\$7.9 million x 3)]/3). To ensure more accuracy and consistency across its information collections, the IRS is currently in the process of revising the methodology it uses to estimate burden and costs. Once this methodology is complete, the IRS will provide this information to reflect a more precise estimate of burdens and costs.

C. Forms

The IRS has developed Form 8990, “Limitation on Business Interest Expense Under Section 163(j),” to facilitate reporting of the limitation. The form is posted at https://www.irs.gov/pub/irs-access/f8990_accessible.pdf. The Form 8990 instructions are posted at <https://www.irs.gov/pub/irs-pdf/f8990.pdf>. The Form 1120 series and the Form 1065 have been revised to include a question to alert taxpayers of the need to file a Form 8990. The instructions to those and other forms

have been revised to include information about the Form 8990.

As described previously, the reporting burdens associated with the information collections in the proposed regulations are included in the aggregated burden estimates for OMB control number 1545-0123 (in the case of filers of Form 1120, Form 1065 and Form 8990), 1545-0074 (in the case of individual filers), and 1545-0123 (in the case of filers under Revenue Procedure 2020-1).

The Treasury Department and the IRS request comment on all aspects of informa-

tion collection burdens related to these regulations, including estimates for how much time it would take to comply with the pa-

perwork burdens described previously for each relevant form and ways for the IRS to minimize the paperwork burden. In ad-

dition, when available, drafts of IRS forms are posted for comment at <https://apps.irs.gov/app/picklist/list/draftTaxForms.htm>.

Form/ Revenue Procedure	Type of Filer	OMB Number(s)	Status
	Business (NEW Model)	1545-0123	Published in the Federal Register on 10/8/18. Public comment period closed on 12/10/18. Link: https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd
	Individual (NEW Model)	1545-0074	Limited scope submission (1040 only) on 10/11/18 at OIRA for review. Full ICR submission for all forms in 2019. Link: https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201808-1545-031
Revenue Procedure 20201	IRS Research estimates	1545-0123	Published in the Internal Revenue Bulletin on January 2, 2020. Link: https://www.irs.gov/irb/2020-01_IRB

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that the final regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (small entities). This certification can be made because the Treasury Department and the IRS have determined that the regulations may affect a substantial number of small entities but have also concluded that the economic effect on small entities as a result of these regulations is not expected to be significant.

When enacted, the section 163(j) limitation generally applied to taxpayers with average annual gross receipts exceeding \$25 million. The gross receipts threshold for general applicability of the section 163(j) limitation increased to \$26 million in 2020. The threshold will be adjusted annually for inflation. However, under the final regulations, small taxpayers operating regulated utility trades or businesses, real property trades or businesses and farming trades or businesses are now eligible to protectively elect out of the election. Accordingly, the regulations in §§1.163(j)-1 and -9 may apply to small business filers that operate regulated utility trades or businesses, real property trades or businesses or farming trades or businesses.

Those taxpayers may choose to make a protective election, such that they are not subject to the limitation if their average annual gross receipts for the three prior tax years eventually exceeds \$26 million (for 2020). Although the exact number of small entities that will make an election is unknown, an upper bound on the number of potentially affected entities is 10.5 million. This number was determined by looking at, for the 2017 taxable year, the number of Form 1120, 1120-S, 1120-REIT, 1065, and individual business filers with more than \$10M in gross receipts that have NAICS codes commonly associated with real property trades or businesses or farming businesses.

If a taxpayer chooses to make the election for its trades or businesses, the taxpayer must attach to its tax return a statement identifying and describing the trade or business for which the election is being made, and must provide other information as the Commissioner may require in forms, instructions, or other published guidance. The election is not required. The election is potentially beneficial to businesses with business interest, but is detrimental to businesses that have assets for which bonus depreciation is desired.

The reporting burden is estimated at 0-30 minutes, depending on individual circumstances, with an estimated average of 0.25 hours for all affected entities, regardless of size. The burden on small en-

tities is expected to be the same as other entities because the requirements to make the election apply equally to all taxpayers. Using the IRS's taxpayer compliance cost estimates, the monetization rate is \$95 per hour. Thus, the average annual burden is \$23.75 per business.

For the section 163(j)(10) elections under §§1.163(j)-2(b)(ii) or 1.163(j)-2(b)(3), most small business taxpayers do not need the elections because, as discussed earlier, they are not subject to the section 163(j) limitation. For small taxpayers that are subject to the limitation, the cost to implement the elections is low. Pursuant to Revenue Procedure 2020-22, these taxpayers simply complete the Form 8990 as if the election has been made. Accordingly, the burden of complying with the elections, if needed, is no different than for taxpayers that do not make the elections.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its effect on small business, and no comments were received.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain actions before is-

suing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private section, of \$100 million in 1995 dollars, update annually for inflation. This rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private section in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

VI. Congressional Review Act

The Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget has determined that this is a major rule for purposes of the Congressional Review Act (5 U.S.C. 801 et seq.) (CRA). Under section 801(3) of the CRA, a major rule takes effect 60 days after the rule is published in the Federal Register. Notwithstanding this requirement, section 808(2) of the CRA allows agencies to dispense with the requirements of 801 when the agency for good cause finds that such procedure would be impracticable, unnecessary, or contrary to the public interest and the rule shall take effect at such time as the agency promulgating the rule determines.

The Treasury Department and the IRS have determined that the rules in this Treasury decision shall take effect for taxable years beginning on or after November 13, 2020. Pursuant to section 808(2) of the CRA, however, the Treasury Department and the IRS find, for good cause, that a 60-day delay in the effective and the applicability date for the anti-avoidance rules

in §1.163(j)-1(b)(22)(iv) is unnecessary and contrary to the public interest. Section 1.163(j)-1(b)(22)(iv) serves an anti-abuse function and, because §1.163(j)-1(b)(22)(iv) provides a clear scope of abusive transactions that could otherwise be executed prior to the effective date of the section, immediate application of §1.163(j)-1(b)(22)(iv) is necessary as of the publication of this final regulation.

Drafting Information

The principal authors of these regulations are Susie Bird, Charles Gorham, Justin Grill, Zachary King, Jaime Park, Kathy Reed, Joanna Trebat and Sophia Wang, Office of the Associate Chief Counsel (Income Tax and Accounting); Kevin M. Jacobs, Russell Jones, John Lovelace, Marie Milnes-Vasquez, Aglaia Ovtchinnikova, and Julie Wang, Office of the Associate Chief Counsel (Corporate); William Kostak, Anthony McQuillen, and Adrienne Mikolashek, Office of the Associate Chief Counsel (Passthroughs and Special Industries); Azeka Abramoff, Angela Holland, and Steve Jensen, Office of the Associate Chief Counsel (International); William E. Blanchard, Michael Chin, Steven Harrison, Andrea Hoffenson, and Diana Imholtz, Office of the Associate Chief Counsel (Financial Institutions and Products). Other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and record-keeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by:

1. Adding entries in numerical order for §§1.163(j)-1 through 1.163(j)-11;
2. Revising the entries for §§1.263A-8 through 1.263A-15;
3. Adding entries in numerical order for §§1.382-1 and 1.383-0;

4. Revising the entry for §1.383-1; and
5. Adding entries in numerical order for §§1.860C-2 and 1.1502-90.

The additions and revisions read as follows:

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

Section 1.163(j)-1 also issued under 26 U.S.C. 163(j)(8)(B) and 26 U.S.C. 1502.

Section 1.163(j)-2 also issued under 26 U.S.C. 1502.

Section 1.163(j)-3 also issued under 26 U.S.C. 1502.

Section 1.163(j)-4 also issued under 26 U.S.C. 163(j)(8)(B) and 26 U.S.C. 1502.

Section 1.163(j)-5 also issued under 26 U.S.C. 1502.

Section 1.163(j)-6 also issued under 26 U.S.C. 163(j)(8)(B) and 26 U.S.C. 1502.

Section 1.163(j)-7 also issued under 26 U.S.C. 163(j)(8)(B) and 26 U.S.C. 1502.

Section 1.163(j)-8 also issued under 26 U.S.C. 163(j)(8)(B).

Section 1.163(j)-9 also issued under 26 U.S.C. 163(j)(7)(B) and (C) and 26 U.S.C. 1502.

Section 1.163(j)-10 also issued under 26 U.S.C. 163(j)(8)(B) and 26 U.S.C. 1502.

Section 1.163(j)-11 also issued under 26 U.S.C. 1502.

Sections 1.263A-8 through 1.263A-15 also issued under 26 U.S.C. 263A(j).

Section 1.382-1 also issued under 26 U.S.C. 382(m).

Section 1.383-0 also issued under 26 U.S.C. 382(m) and 26 U.S.C. 383.

Section 1.383-1 also issued under 26 U.S.C. 382(m) and 26 U.S.C. 383.

Section 1.860C-2 also issued under 26 U.S.C. 860C(b)(1) and 860G(e).

Section 1.1502-90 also issued under 26 U.S.C. 382(m) and 26 U.S.C. 1502.

Par. 2. Section 1.163(j)-0 is added to read as follows:

§1.163(j)-0 Table of contents.

This section lists the table of contents for §§1.163(j)-1 through 1.163(j)-11.

§1.163(j)-1 Definitions.

- (a) In general.
- (b) Definitions.
 - (1) Adjusted taxable income.
 - (i) Additions.
 - (ii) Subtractions.
 - (iii) Depreciation, amortization, or depletion capitalized under section 263A.
 - (iv) Application of §1.163(j)-1(b)(1)
- (ii)(C), (D), and (E).
 - (A) Sale or other disposition.
 - (1) In general.
 - (2) Intercompany transactions.
 - (3) Deconsolidations.
 - (B) Deductions by members of a consolidated group.
 - (C) Successor assets.
 - (D) Anti-duplication rule.
 - (1) In general.
 - (2) Adjustments following deconsolidation.
 - (v) Other adjustments.
 - (vi) Additional rules relating to adjusted taxable income in other sections.
 - (vii) ATI cannot be less than zero.
 - (viii) Examples.
- (2) Applicable CFC.
- (3) Business interest expense.
 - (i) In general.
 - (ii) Special rules.
 - (4) Business interest income.
 - (i) In general.
 - (ii) Special rules.
 - (5) C corporation.
 - (6) Cleared swap.
 - (7) Consolidated group.
 - (8) Consolidated return year.
 - (9) Current-year business interest expense.
 - (10) Disallowed business interest expense.
 - (11) Disallowed business interest expense carryforward.
 - (12) Disallowed disqualified interest.
 - (13) Electing farming business.
 - (14) Electing real property trade or business.
 - (15) Excepted regulated utility trade or business.
 - (i) In general.
 - (A) Automatically excepted regulated utility trades or businesses.
 - (B) Electing regulated utility trades or businesses.
 - (C) Designated excepted regulated utility trades or businesses.

- (ii) Depreciation and excepted and non-excepted utility trades or businesses.
 - (A) Depreciation.
 - (B) Allocation of items.
 - (iii) Election to be an excepted regulated utility trade or business.
 - (A) In general.
 - (B) Scope and effect of election.
 - (1) In general.
 - (2) Irrevocability.
 - (C) Time and manner of making election.
 - (1) In general.
 - (2) Election statement contents.
 - (3) Consolidated group's or partnership's trade or business.
 - (4) Termination of election.
 - (5) Additional guidance.
 - (16) Excess business interest expense.
 - (17) Excess taxable income.
 - (18) Floor plan financing indebtedness.
 - (19) Floor plan financing interest expense.
 - (20) Group.
 - (21) Intercompany transaction.
 - (22) Interest.
 - (i) In general.
 - (ii) Swaps with significant nonperiodic payments.
 - (A) In general.
 - (B) Exception for cleared swaps.
 - (C) Exception for non-cleared swaps subject to margin or collateral requirements.
 - (iii) Other amounts treated as interest.
 - (A) Treatment of premium.
 - (1) Issuer.
 - (2) Holder.
 - (B) Treatment of ordinary income or loss on certain debt instruments.
 - (C) Substitute interest payments.
 - (D) Section 1258 gain.
 - (E) Factoring income.
 - (F) [Reserved]
 - (iv) Anti-avoidance rules.
 - (A) Principal purpose to reduce interest expense.
 - (1) Treatment as interest expense.
 - (2) Corresponding treatment of amounts as interest income.
 - (B) Interest income artificially increased.
 - (C) Principal purpose.
 - (D) Coordination with anti-avoidance rule in §1.163(j)-2(j).
 - (v) Examples.
 - (23) Interest expense.

- (24) Interest income.
- (25) Member.
- (26) Motor vehicle.
- (27) Old section 163(j).
- (28) Ownership change.
- (29) Ownership date.
- (30) Real estate investment trust.
- (31) Real property.
- (32) Regulated investment company.
- (33) Relevant foreign corporation.
- (34) S corporation.
- (35) [Reserved]
- (36) Section 163(j) limitation.
- (37) Section 163(j) regulations.
- (38) Separate return limitation year.
- (39) Separate return year.
- (40) Separate tentative taxable income.
- (41) Tax-exempt corporation.
- (42) Tax-exempt organization.
- (43) Tentative taxable income.
 - (i) In general.
 - (ii) [Reserved]
 - (iii) Special rules for defining tentative taxable income.
- (44) Trade or business.
 - (i) In general.
 - (ii) Excepted trade or business.
 - (iii) Non-excepted trade or business.
- (45) Unadjusted basis.
- (46) United States shareholder.
- (c) Applicability date.
 - (1) In general.
 - (2) Anti-avoidance rules.
 - (3) Swaps with significant nonperiodic payments.
 - (i) In general.
 - (ii) Anti-avoidance rule.

§1.163(j)-2 Deduction for business interest expense limited.

- (a) Overview.
- (b) General rule.
 - (1) In general.
 - (2) 50 percent ATI limitation for taxable years beginning in 2019 or 2020.
 - (3) Election to use 2019 ATI in 2020.
 - (4) Time and manner of making or revoking the elections.
 - (c) Disallowed business interest expense carryforward.
 - (1) In general.
 - (2) Coordination with small business exemption.
 - (3) Cross-references.
 - (d) Small business exemption.
 - (1) Exemption.

- (2) Application of the gross receipts test.
 - (i) In general.
 - (ii) Gross receipts of individuals.
 - (iii) Partners and S corporation shareholders.
 - (iv) Tax-exempt organizations.
 - (e) REMICs.
 - (f) Trusts.
 - (i) Calculation of ATI with respect to certain trusts and estates.
 - (ii) Calculation of ATI with respect to certain beneficiaries.
 - (g) Tax-exempt organizations.
 - (h) Examples.
 - (i) [Reserved]
 - (j) Anti-avoidance rule.
 - (1) In general.
 - (2) Examples.
 - (k) Applicability date.

§1.163(j)-3 Relationship of the section 163(j) limitation to other provisions affecting interest.

- (a) Overview.
- (b) Coordination of section 163(j) with certain other provisions.
 - (1) In general.
 - (2) Disallowed interest provisions.
 - (3) Deferred interest provisions.
 - (4) At risk rules, passive activity loss provisions, and limitation on excess business losses of noncorporate taxpayers.
 - (5) Capitalized interest expenses.
 - (6) Reductions under section 246A.
 - (7) Section 381.
 - (8) Section 382.
 - (c) Examples.
 - (d) Applicability date.

§1.163(j)-4 General rules applicable to C corporations (including REITs, RICs, and members of consolidated groups) and tax-exempt corporations.

- (a) Scope.
- (b) Characterization of items of income, gain, deduction, or loss.
 - (1) Interest expense and interest income.
 - (2) Adjusted taxable income.
 - (3) Investment interest, investment income, investment expenses, and certain other tax items of a partnership with a C corporation partner.
 - (i) Characterization as expense or income properly allocable to a trade or business.

- (ii) Effect of characterization on partnership.
- (iii) Separately stated interest expense and interest income of a partnership not treated as excess business interest expense or excess taxable income of a C corporation partner.
- (iv) Treatment of deemed inclusions of a domestic partnership that are not allocable to any trade or business.
- (4) Application to RICs and REITs.
 - (i) In general.
 - (ii) Tentative taxable income of RICs and REITs.
 - (iii) Other adjustments to adjusted taxable income for RICs and REITs.
- (5) Application to tax-exempt corporations.
- (6) Adjusted taxable income of cooperatives.
- (7) Examples.
- (c) Effect on earnings and profits.
 - (1) In general.
 - (2) Special rule for RICs and REITs.
 - (3) Special rule for partners that are C corporations.
 - (4) Examples.
 - (d) Special rules for consolidated groups.
 - (1) Scope.
 - (2) Calculation of the section 163(j) limitation for members of a consolidated group.
 - (i) In general.
 - (ii) Interest.
 - (iii) Calculation of business interest expense and business interest income for a consolidated group.
 - (iv) Calculation of adjusted taxable income.
 - (v) Treatment of intercompany obligations.
 - (A) In general.
 - (B) Repurchase premium.
 - (3) Investment adjustments.
 - (4) Examples.
 - (e) Ownership of partnership interests by members of a consolidated group.
 - (1) [Reserved]
 - (2) Change in status of a member.
 - (3) Basis adjustments under §1.1502-32.
 - (4) Excess business interest expense and §1.1502-36.
 - (f) Cross-references.
 - (g) Applicability date.
 - (1) In general.
 - (2) [Reserved]

§1.163(j)-5 General rules governing disallowed business interest expense carryforwards for C corporations.

- (a) Scope and definitions.
 - (1) Scope.
 - (2) Definitions.
 - (i) Allocable share of the consolidated group's remaining section 163(j) limitation.
 - (ii) Consolidated group's remaining section 163(j) limitation.
 - (iii) Remaining current-year interest ratio.
- (b) Treatment of disallowed business interest expense carryforwards.
 - (1) In general.
 - (2) Deduction of business interest expense.
 - (3) Consolidated groups.
 - (i) In general.
 - (ii) Deduction of business interest expense.
 - (A) General rule.
 - (B) Section 163(j) limitation equals or exceeds the current-year business interest expense and disallowed business interest expense carryforwards from prior taxable years.
 - (C) Current-year business interest expense and disallowed business interest expense carryforwards exceed section 163(j) limitation.
 - (iii) Departure from group.
 - (iv) Example: Deduction of interest expense.
 - (c) Disallowed business interest expense carryforwards in transactions to which section 381(a) applies.
 - (d) Limitations on disallowed business interest expense carryforwards from separate return limitation years.
 - (1) General rule.
 - (A) Cumulative section 163(j) SRLY limitation.
 - (B) Subgrouping.
 - (2) Deduction of disallowed business interest expense carryforwards arising in a SRLY.
 - (3) Examples.
 - (e) Application of section 382.
 - (1) Pre-change loss.
 - (2) Loss corporation.
 - (3) Ordering rules for utilization of pre-change losses and for absorption of the section 382 limitation.

(4) Disallowed business interest expense from the pre-change period in the year of a testing date.

(5) Recognized built-in loss.

(f) Overlap of SRLY limitation with section 382.

(g) Additional limitations.

(h) Applicability date.

§1.163(j)-6 Application of the section 163(j) limitation to partnerships and subchapter S corporations.

(a) Overview.

(b) Definitions.

(1) Section 163(j) items.

(2) Partner basis items.

(3) Remedial items.

(4) Excess business interest income.

(5) Deductible business interest expense.

(6) Section 163(j) excess items.

(7) Non-exceptioned assets.

(8) Exceptioned assets.

(c) Business interest income and business interest expense of the partnership.

(1)-(2) [Reserved]

(3) Character of business interest expense.

(d) Adjusted taxable income of a partnership.

(1) Tentative taxable income of a partnership.

(2) Section 734(b), partner basis items, and remedial items.

(e) Adjusted taxable income and business interest income of partners.

(1) Modification of adjusted taxable income for partners.

(2) Partner basis items and remedial items.

(3) Disposition of partnership interests.

(4) Double counting of business interest income and floor plan financing interest expense prohibited.

(f) Allocation and determination of section 163(j) excess items made in the same manner as nonseparately stated taxable income or loss of the partnership.

(1) Overview.

(i) In general.

(ii) Relevance solely for purposes of section 163(j).

(2) Steps for allocating deductible business interest expense and section 163(j) excess items.

(i) Partnership-level calculation required by section 163(j)(4)(A).

(ii) Determination of each partner's relevant section 163(j) items.

(iii) Partner-level comparison of business interest income and business interest expense.

(iv) Matching partnership and aggregate partner excess business interest income.

(v) Remaining business interest expense determination.

(vi) Determination of final allocable ATI.

(A) Positive allocable ATI.

(B) Negative allocable ATI.

(C) Final allocable ATI.

(vii) Partner-level comparison of 30 percent of adjusted taxable income and remaining business interest expense.

(viii) Partner priority right to ATI capacity excess determination.

(ix) Matching partnership and aggregate partner excess taxable income.

(x) Matching partnership and aggregate partner excess business interest expense.

(xi) Final section 163(j) excess item and deductible business interest expense allocation.

(g) Carryforwards.

(1) In general.

(2) Treatment of excess business interest expense allocated to partners.

(3) Excess taxable income and excess business interest income ordering rule.

(h) Basis adjustments.

(1) Section 704(d) ordering.

(2) Excess business interest expense basis adjustments.

(3) Partner basis adjustment upon disposition of partnership interest.

(4)-(5) [Reserved]

(i)-(j) [Reserved]

(k) Investment items and certain other items.

(l) S corporations.

(1) In general.

(i) Corporate level limitation.

(ii) Short taxable periods.

(2) Character of deductible business interest expense.

(3) Adjusted taxable income of an S corporation.

(4) Adjusted taxable income and business interest income of S corporation shareholders.

(i) Adjusted taxable income of S corporation shareholders.

(ii) Disposition of S corporation stock.

(iii) Double counting of business interest income and floor plan financing interest expense prohibited.

(5) Carryforwards.

(6) Basis adjustments and disallowed business interest expense carryforwards.

(7) Accumulated adjustment accounts.

(8) Termination of qualified subchapter S subsidiary election.

(9) Investment items.

(10) Application of section 382.

(m) Partnerships and S corporations not subject to section 163(j).

(1) Exempt partnerships and S corporations.

(2) Partnerships and S corporations engaged in excepted trades or businesses.

(3) Treatment of excess business interest expense from partnerships that are exempt entities in a succeeding taxable year.

(4) S corporations with disallowed business interest expense carryforwards prior to becoming exempt entities.

(n) [Reserved]

(o) Examples.

(p) Applicability date.

§1.163(j)-7 Application of the section 163(j) limitation to foreign corporations and United States shareholders.

(a) Overview.

(b) General rule regarding the application of section 163(j) to relevant foreign corporations.

(c)-(f) [Reserved]

(g) Rules concerning the computation of adjusted taxable income of a relevant foreign corporation.

(1) Tentative taxable income.

(2) Treatment of certain dividends.

(h)-(l) [Reserved]

(m) Applicability date.

§1.163(j)-8 [Reserved]

§1.163(j)-9 Elections for excepted trades or businesses; safe harbor for certain REITs.

(a) Overview.

(b) Availability of election.

(1) In general.

(2) Special rules.

- (i) Exempt small businesses.
- (ii) Section 162 trade or business not required for electing real property trade or business.
- (c) Scope and effect of election.
- (1) In general.
- (2) Irrevocability.
- (3) Depreciation.
- (d) Time and manner of making election.
- (1) In general.
- (2) Election statement contents.
- (3) Consolidated group's trade or business.
- (4) Partnership's trade or business.
- (e) Termination of election.
- (1) In general.
- (2) Taxable asset transfer defined.
- (3) Related party defined.
- (4) Anti-abuse rule.
- (f) Additional guidance.
- (g) Examples.
- (h) Safe harbor for REITs.
- (1) In general.
- (2) REITs that do not significantly invest in real property financing assets.
- (3) REITs that significantly invest in real property financing assets.
- (4) REIT real property assets, interests in partnerships, and shares in other REITs.
- (i) Real property assets.
- (ii) Partnership interests.
- (iii) Shares in other REITs.
- (A) In general.
- (B) Information necessary.
- (iv) Tiered entities.
- (5) Value of shares in other REITs.
- (i) In general.
- (ii) Information necessary.
- (iii) Tiered REITs.
- (6) Real property financing assets.
- (7) Application of safe harbor for partnerships controlled by REITs.
- (8) REITs or partnerships controlled by REITs that do not apply the safe harbor.
- (i) [Reserved]
- (j) Special anti-abuse rule for certain real property trades or businesses.
- (1) In general.
- (2) Exceptions.
- (i) De minimis exception.
- (ii) Look-through exception.
- (iii) Inapplicability of exceptions to consolidated groups.
- (iv) Exception for certain REITs.
- (3) Allocations.
- (4) Examples.
- (k) Applicability date.
- §1.163(j)-10 Allocation of interest expense, interest income, and other items of expense and gross income to an excepted trade or business.*
- (a) Overview.
- (1) In general.
- (i) Purposes.
- (ii) Application of section.
- (2) Coordination with other rules.
- (i) In general.
- (ii) Treatment of investment interest, investment income, investment expenses, and certain other tax items of a partnership with a C corporation or tax-exempt corporation as a partner.
- (3) Application of allocation rules to foreign corporations and foreign partnerships.
- (4) Application of allocation rules to members of a consolidated group.
- (i) In general.
- (ii) Application of excepted business percentage to members of a consolidated group.
- (iii) Basis in assets transferred in an intercompany transaction.
- (5) Tax-exempt organizations.
- (6) Application of allocation rules to disallowed disqualified interest.
- (7) Examples.
- (b) Allocation of tax items other than interest expense and interest income.
- (1) In general.
- (2) Gross income other than dividends and interest income.
- (3) Dividends.
- (i) Look-through rule.
- (ii) Inapplicability of the look-through rule.
- (4) Gain or loss from the disposition of non-consolidated C corporation stock, partnership interests, or S corporation stock.
- (i) Non-consolidated C corporations.
- (ii) Partnerships and S corporations.
- (5) Expenses, losses, and other deductions.
- (i) Expenses, losses, and other deductions that are definitely related to a trade or business.
- (ii) Other deductions.
- (6) Treatment of investment items and certain other items of a partnership with a C corporation partner.
- (7) Examples: Allocation of income and expense.
- (c) Allocating interest expense and interest income that is properly allocable to a trade or business.
- (1) General rule.
- (i) In general.
- (ii) De minimis exception.
- (2) Example.
- (3) Asset used in more than one trade or business.
- (i) General rule.
- (ii) Permissible methodologies for allocating asset basis between or among two or more trades or businesses.
- (iii) Special rules.
- (A) Consistent allocation methodologies.
- (1) In general.
- (2) Consent to change allocation methodology.
- (B) De minimis exception.
- (C) Allocations of excepted regulated utility trades or businesses.
- (1) In general.
- (2) Permissible method for allocating asset basis for utility trades or businesses.
- (3) De minimis rule for excepted utility trades or businesses.
- (4) Example.
- (D) Special allocation rule for real property trades or business subject to special anti-abuse rule.
- (1) In general.
- (2) Allocation methodology for real property.
- (3) Example.
- (4) Disallowed business interest expense carryforwards; floor plan financing interest expense.
- (5) Additional rules relating to basis.
- (i) Calculation of adjusted basis.
- (A) Non-depreciable property other than land.
- (B) Depreciable property other than inherently permanent structures.
- (C) Special rule for land and inherently permanent structures.
- (D) Depreciable or amortizable intangible property and depreciable income forecast method property.
- (E) Assets not yet used in a trade or business.
- (F) Trusts established to fund specific liabilities.
- (G) Inherently permanent structure.

- (ii) Partnership interests; stock in non-consolidated C corporations.
- (A) Partnership interests.
- (I) Calculation of asset basis.
 - (2) Allocation of asset basis.
 - (i) In general.
 - (ii) De minimis rule.
 - (iii) Partnership assets not properly allocable to a trade or business.
 - (iv) Inapplicability of partnership look-through rule.
- (B) Stock in domestic non-consolidated corporations.
- (I) In general.
 - (2) Domestic non-consolidated C corporations.
 - (i) Allocation of asset basis.
 - (ii) De minimis rule.
 - (iii) Inapplicability of corporate look-through rule.
 - (iv) Use of inside basis for purposes of C corporation look-through rule.
- (3) S corporations.
- (i) Calculation of asset basis.
 - (ii) Allocation of asset basis.
 - (iii) De minimis rule.
 - (iv) Inapplicability of S corporation look-through rule.
- (C) Stock in relevant foreign corporations.
- (I) In general.
 - (2) Special rule for CFC utilities.
- (D) Inapplicability of look-through rule to partnerships or non-consolidated C corporations to which the small business exemption applies.
- (E) Tiered entities.
- (iii) Cash and cash equivalents and customer receivables.
- (iv) Deemed asset sale.
- (v) Other adjustments.
- (6) Determination dates; determination periods; reporting requirements.
- (i) Determination dates and determination periods.
- (A) Quarterly determination periods.
- (B) Annual determination periods.
- (ii) Application of look-through rules.
- (iii) Reporting requirements.
- (A) Books and records.
- (B) Information statement.
- (iv) Failure to file statement.
- (7) Ownership threshold for look-through rules.
- (i) Corporations.
- (A) Asset basis.
- (B) Dividends.
- (ii) Partnerships.
- (iii) Inapplicability of look-through rule.
- (8) Anti-abuse rule.
 - (d) Direct allocations.
 - (1) In general.
 - (2) Qualified nonrecourse indebtedness.
 - (3) Assets used in more than one trade or business.
 - (4) Adjustments to basis of assets to account for direct allocations.
 - (5) Example: Direct allocation of interest expense.
 - (e) Examples.
 - (f) Applicability date.
- §1.163(j)-11 Transition rules.*
- (a) Overview.
- (b) Application of section 163(j) limitation if a corporation joins a consolidated group during a taxable year of the group beginning before January 1, 2018.
- (1) In general.
 - (2) Example
 - (c) Treatment of disallowed disqualified interest.
 - (1) In general.
 - (2) Earnings and profits.
 - (3) Disallowed disqualified interest of members of an affiliated group.
 - (i) Scope.
 - (ii) Allocation of disallowed disqualified interest to members of the affiliated group.
- (A) In general.
- (B) Definitions.
- (1) Allocable share of the affiliated group's disallowed disqualified interest.
- (2) Disallowed disqualified interest ratio.
- (3) Exempt related person interest expense.
- (iii) Treatment of carryforwards.
- (4) Application of section 382.
- (i) Ownership change occurring before November 13, 2020.
- (A) Pre-change loss.
- (B) Loss corporation.
- (ii) Ownership change occurring on or after November 13, 2020.
- (A) Pre-change loss.
- (B) Loss corporation.
- (5) Treatment of excess limitation from taxable years beginning before January 1, 2018.
- (6) Example: Members of an affiliated group.
- (d) Applicability date.
- Par. 3. Sections 1.163(j)-1 through 1.163(j)-11 are added to read as follows:
- Sec.
- * * * * *
- 1.163(j)-1 Definitions.
- 1.163(j)-2 Deduction for business interest expense limited.
- 1.163(j)-3 Relationship of the section 163(j) limitation to other provisions affecting interest.
- 1.163(j)-4 General rules applicable to C corporations (including REITs, RICs, and members of consolidated groups) and tax-exempt corporations.
- 1.163(j)-5 General rules governing disallowed business interest expense carryforwards for C corporations.
- 1.163(j)-6 Application of the section 163(j) limitation to partnerships and subchapter S corporations.
- 1.163(j)-7 Application of the section 163(j) limitation to foreign corporations and United States shareholders.
- 1.163(j)-8 [Reserved]
- 1.163(j)-9 Elections for excepted trades or businesses; safe harbor for certain REITs.
- 1.163(j)-10 Allocation of interest expense, interest income, and other items of expense and gross income to an excepted trade or business.
- 1.163(j)-11 Transition rules.
- * * * * *
- §1.163(j)-1 Definitions.*
- (a) *In general.* The definitions provided in this section apply for purposes of the section 163(j) regulations. For purposes of the rules set forth in §§1.163(j)-2 through 1.163(j)-11, additional definitions for certain terms are provided in those sections.
- (b) *Definitions—(1) Adjusted taxable income.* The term *adjusted taxable income* (ATI) means the tentative taxable income of the taxpayer for the taxable year, with the adjustments in this paragraph (b)(1).
- (i) *Additions.* The amounts of the following items that were included in the computation of the taxpayer's tentative taxable income (if any) are added to tentative taxable income to determine ATI—

(A) Any business interest expense, other than disallowed business interest expense carryforwards;

(B) Any net operating loss deduction under section 172;

(C) Any deduction under section 199A;

(D) Subject to paragraph (b)(1)(iii) of this section, for taxable years beginning before January 1, 2022, any depreciation under section 167, section 168, or section 168 of the Internal Revenue Code (Code) of 1954 (former section 168);

(E) Subject to paragraph (b)(1)(iii) of this section, for taxable years beginning before January 1, 2022, any amortization of intangibles (for example, under section 167 or 197) and other amortized expenditures (for example, under section 174(b), 195(b)(1)(B), 248, or 1245(a)(2)(C));

(F) Subject to paragraph (b)(1)(iii) of this section, for taxable years beginning before January 1, 2022, any depletion under section 611;

(G) Any deduction for a capital loss carryback or carryover; and

(H) Any deduction or loss that is not properly allocable to a non-exceptioned trade or business (for rules governing the allocation of items to an exceptioned trade or business, see §§1.163(j)-1(b)(44) and 1.163(j)-10).

(ii) *Subtractions.* The amounts of the following items (if any) are subtracted from the taxpayer's tentative taxable income to determine ATI —

(A) Any business interest income that was included in the computation of the taxpayer's tentative taxable income;

(B) Any floor plan financing interest expense for the taxable year that was included in the computation of the taxpayer's tentative taxable income;

(C) With respect to the sale or other disposition of property, the greater of the allowed or allowable depreciation, amortization, or depletion of the property, as provided under section 1016(a)(2), for the taxpayer (or, if the taxpayer is a member of a consolidated group, the consolidated group) for the taxable years beginning after December 31, 2017, and before January 1, 2022, with respect to such property;

(D) With respect to the sale or other disposition of stock of a member of a consolidated group by another member, the investment adjustments under §1.1502-32 with respect to such stock that are attribut-

able to deductions described in paragraph (b)(1)(ii)(C) of this section;

(E) With respect to the sale or other disposition of an interest in a partnership, the taxpayer's distributive share of deductions described in paragraph (b)(1)(ii)(C) of this section with respect to property held by the partnership at the time of such sale or other disposition to the extent such deductions were allowable under section 704(d);

(F) Any income or gain that is not properly allocable to a non-exceptioned trade or business (for rules governing the allocation of items to an exceptioned trade or business, see §§1.163(j)-1(b)(44) and 1.163(j)-10)) and that was included in the computation of the taxpayer's tentative taxable income; and

(G) An amount equal to the sum of any specified deemed inclusions that were included in the computation of the taxpayer's tentative taxable income, reduced by the portion of the deduction allowed under section 250(a) by reason of the specified deemed inclusions. For this purpose, a *specified deemed inclusion* is the inclusion of an amount by a United States shareholder (as defined in section 951(b)) in gross income under section 78, 951(a), or 951A(a) with respect to an applicable CFC (as defined in §1.163(j)-1(b)(2)) that is properly allocable to a non-exceptioned trade or business. Furthermore, a specified deemed inclusion includes any amounts included in a domestic partnership's gross income under section 951(a) or 951A(a) with respect to an applicable CFC to the extent such amounts are attributable to investment income of the partnership and are allocated to a domestic C corporation that is a direct (or indirect partner) and treated as properly allocable to a non-exceptioned trade or business of the domestic C corporation under §§1.163(j)-4(b)(3) and 1.163(j)-10.

To determine the amount of a specified deemed inclusion described in this paragraph (b)(1)(ii)(G), the portion of a United States shareholder's inclusion under section 951A(a) treated as being with respect to an applicable CFC is determined under section 951A(f)(2) and §1.951A-6(b)(2).

(iii) *Depreciation, amortization, or depletion capitalized under section 263A.* For purposes of paragraph (b)(1)(i) of this section, amounts of depreciation, amor-

tization, or depletion that are capitalized under section 263A during the taxable year are deemed to be included in the computation of the taxpayer's tentative taxable income for such taxable year, regardless of the period in which the capitalized amount is recovered. See *Example 3* in §1.163(j)-2(h)(3).

(iv) *Application of §1.163(j)-1(b)(1)(ii)(C), (D), and (E)—(A) Sale or other disposition—(I) In general.* For purposes of paragraphs (b)(1)(ii)(C), (D), and (E) of this section, except as otherwise provided in this paragraph (b)(1)(iv)(A), the term *sale or other disposition* does not include a transfer of an asset to an acquiring corporation in a transaction to which section 381(a) applies.

(2) *Intercompany transactions.* For purposes of paragraphs (b)(1)(ii)(C) and (D) of this section, the term *sale or other disposition* excludes all intercompany transactions, within the meaning of §1.1502-13(b)(1)(i).

(3) *Deconsolidations.* Notwithstanding any other rule in this paragraph (b)(1)(iv)(A), any transaction in which a member leaves a consolidated group is treated as a sale or other disposition for purposes of paragraphs (b)(1)(ii)(C) and (D) of this section unless the transaction is described in §1.1502-13(j)(5)(i)(A).

(B) *Deductions by members of a consolidated group.* If paragraph (b)(1)(ii)(C), (D), or (E) of this section applies to adjust the tentative taxable income of a taxpayer, the amount of the adjustment under paragraph (b)(1)(ii)(C) of this section equals the greater of the allowed or allowable depreciation, amortization, or depletion of the property, as provided under section 1016(a)(2), for any member of the consolidated group for the taxable years beginning after December 31, 2017, and before January 1, 2022, with respect to such property.

(C) *Successor assets.* This paragraph (b)(1)(iv)(C) applies if deductions described in paragraph (b)(1)(ii)(C) of this section are allowed or allowable to a consolidated group member (S) and either the depreciable property or S's stock is subsequently transferred to another member (S1) in an intercompany transaction in which the transferor receives S1 stock. If this paragraph (b)(1)(iv)(C) applies, and if the transferor's basis in the S1 stock

received in the intercompany transaction is determined, in whole or in part, by reference to its basis in the S stock, the S1 stock received in the intercompany transaction is treated as a successor asset to S's stock for purposes of paragraph (b)(1)(ii)(D) of this section. Thus, except as otherwise provided in paragraph (b)(1)(iv)(D) of this section, the subsequent disposition of either the S1 stock or the S stock gives rise to an adjustment under paragraph (b)(1)(ii)(D) of this section.

(D) *Anti-duplication rule—(1) In general.* The aggregate of the subtractions from tentative taxable income of a consolidated group under paragraphs (b)(1)(ii)(C) and (D) of this section with respect to an item of property (including with regard to dispositions of successor assets described in paragraph (b)(1)(iv)(C) of this section) cannot exceed the aggregate amount of the consolidated group members' deductions described in paragraph (b)(1)(ii)(C) of this section with respect to such item of property. For example, if an adjustment to the tentative taxable income of a consolidated group is made under paragraph (b)(1)(ii)(C) of this section with respect to the sale or other disposition of property by a consolidated group member (S) to an unrelated person, and if a member of the group subsequently sells or otherwise disposes of S's stock, no further adjustment to the group's tentative taxable income is made under paragraph (b)(1)(ii)(D) of this section in relation to the same property with respect to that stock disposition.

(2) *Adjustments following deconsolidation.* Depreciation, amortization, or depletion deductions allowed or allowable for a corporation for a consolidated return year of a group are disregarded in applying this paragraph (b)(1)(iv)(D) to any year that constitutes a separate return year (as defined in §1.1502-1(e)) of that corporation. For example, assume that S deconsolidates from a group (Group 1) after holding property for which depreciation, amortization, or depletion deductions were allowed or allowable in Group 1. On the deconsolidation, S and Group 1 would adjust tentative taxable income with regard to that property under paragraphs (b)(1)(ii)(D) and (b)(1)(iv)(A)(3) of this section. If, following the deconsolidation, S sells the property referred to in the pre-

vious sentence, no subtraction from tentative taxable income is made under paragraph (b)(1)(ii)(C) of this section during S's separate return year with regard to the amounts included in Group 1 under paragraphs (b)(1)(ii)(C) and (b)(1)(iv)(A)(3) of this section.

(v) *Other adjustments.* ATI is computed with the other adjustments provided in §§1.163(j)-2 through 1.163(j)-11.

(vi) *Additional rules relating to adjusted taxable income in other sections.* (A) For rules governing the ATI of C corporations, see §§1.163(j)-4(b)(2) and (3) and 1.163(j)-10(a)(2)(ii).

(B) For rules governing the ATI of RICs and REITs, see §1.163(j)-4(b)(4).

(C) For rules governing the ATI of tax-exempt corporations, see §1.163(j)-4(b)(5).

(D) For rules governing the ATI of consolidated groups, see §1.163(j)-4(d)(2)(iv) and (v).

(E) For rules governing the ATI of partnerships, see §1.163(j)-6(d).

(F) For rules governing the ATI of partners, see §§1.163(j)-6(e) and 1.163(j)-6(m)(1) and (2).

(G) For rules governing partnership basis adjustments affecting ATI, see §1.163(j)-6(h)(2).

(H) For rules governing the ATI of S corporations, see §1.163(j)-6(l)(3).

(I) For rules governing the ATI of S corporation shareholders, see §1.163(j)-6(l)(4).

(J) For rules governing the ATI of certain beneficiaries of trusts and estates, see §1.163(j)-2(f).

(vii) *ATI cannot be less than zero.* If the ATI of a taxpayer would be less than zero, the ATI of the taxpayer is zero.

(viii) *Examples.* The examples in this paragraph (b)(1)(viii) illustrate the application of paragraphs (b)(1)(ii), (iii), and (iv) of this section. Unless otherwise indicated, A, B, P, S, and T are calendar-year domestic C corporations; P is the parent of a consolidated group of which S and T are members; the exemption for certain small businesses in §1.163(j)-2(d) does not apply; no entity is engaged in an excepted trade or business; no entity has business interest income or floor plan financing interest expense; and all amounts of interest expense are deductible except for the potential application of section 163(j).

(A) *Example 1—(1) Facts.* In 2021, A purchases a depreciable asset (Asset X) for \$100x and fully depreciates Asset X under section 168(k). For the 2021 taxable year, A's ATI (after adding back A's depreciation deductions with respect to Asset X under paragraph (b)(1)(i)(D) of this section) is \$150x. A incurs \$45x of business interest expense in 2021. In 2024, A sells Asset X to an unrelated third party.

(2) *Analysis.* A's section 163(j) limitation for 2021 is \$45x (\$150x x 30 percent). Thus, all \$45x of A's business interest expense incurred in 2021 is deductible in that year. However, under paragraph (b)(1)(ii)(C) of this section, A must subtract \$100x from its tentative taxable income in computing its ATI for its 2024 taxable year. A would be required to subtract \$100x from its tentative taxable income in computing its ATI for its 2024 taxable year even if A's ATI in 2021 was \$150x before adding back A's depreciation deductions with respect to Asset X.

(3) *Transfer of assets in a nonrecognition transaction to which section 381 applies.* The facts are the same as in paragraph (b)(1)(viii)(A)(1) of this section, except that, rather than sell Asset X to an unrelated third party in 2024, A merges with and into an unrelated third party in 2024 in a transaction described in section 368(a)(1)(A) in which no gain is recognized. As provided in paragraph (b)(1)(iv)(A) of this section, the merger transaction is not treated as a "sale or other disposition" for purposes of paragraph (b)(1)(ii)(C) of this section. Thus, no adjustment to tentative taxable income is required in 2024 under paragraph (b)(1)(ii)(C) of this section.

(4) *Transfer of assets in a nonrecognition transaction to which section 351 applies.* The facts are the same as in paragraph (b)(1)(viii)(A)(1) of this section, except that, rather than sell Asset X to an unrelated third party in 2024, A transfers Asset X to B (A's wholly owned subsidiary) in 2024 in a transaction to which section 351 applies. The section 351 transaction is treated as a "sale or other disposition" for purposes of paragraph (b)(1)(ii)(C) of this section. Thus, A must subtract \$100x from its tentative taxable income in computing its ATI for its 2024 taxable year.

(B) *Example 2—(1) Facts.* In 2021, S purchases a depreciable asset (Asset Y) for \$100x and fully depreciates Asset Y under section 168(k). P reduces its basis in its S stock by \$100x under §1.1502-32 to reflect S's depreciation deductions. For the 2021 taxable year, the P group's ATI (after adding back S's depreciation deductions with respect to Asset Y under paragraph (b)(1)(i)(D) of this section) is \$150x. The P group incurs \$45x of business interest expense in 2021. In 2024, P sells all of its S stock to an unrelated third party.

(2) *Analysis.* The P group's section 163(j) limitation for 2021 is \$45x (\$150x x 30 percent). Thus, all \$45x of the P group's business interest expense incurred in 2021 is deductible in that year. However, under paragraph (b)(1)(ii)(D) of this section, the P group must subtract \$100x from its tentative taxable income in computing its ATI for its 2024 taxable year. The answer would be the same if the P group's ATI in 2021 were \$150x before adding back S's depreciation deductions with respect to Asset Y.

(3) *Disposition of less than all member stock.* The facts are the same as in paragraph (b)(1)(viii)(B)(1) of this section, except that, in 2024, P sells

half of its S stock to an unrelated third party. Pursuant to paragraph (b)(1)(ii)(D) of this section, the P group must subtract \$100x from its tentative taxable income in computing its ATI for its 2024 taxable year.

(4) *Transfer in an intercompany transaction.* The facts are the same as in paragraph (b)(1)(viii)(B)(1) of this section, except that, rather than sell S's stock to an unrelated third party in 2024, P transfers S's stock to another member of the P group in an intercompany transaction (as defined in §1.1502-13(b)(1)(i)) in 2024. As provided in paragraph (b)(1)(iv)(A) of this section, the intercompany transaction is not treated as a "sale or other disposition" for purposes of paragraph (b)(1)(ii)(D) of this section. Thus, no adjustment to tentative taxable income is required in 2024 under paragraph (b)(1)(ii)(D) of this section.

(5) *Disposition of successor assets.* The facts are the same as in paragraph (b)(1)(viii)(B)(1) of this section, except that, rather than sell S's stock to an unrelated third party in 2024, P transfers S's stock to T in 2024 in a transaction to which section 351 applies and, in 2025, P sells all of its T stock to an unrelated third party. Pursuant to paragraph (b)(1)(iv)(A) of this section, P's intercompany transfer of S's stock to T is not a "sale or other disposition" for purposes of paragraph (b)(1)(ii)(D) of this section. However, pursuant to paragraph (b)(1)(iv)(C) of this section, P's stock in T is treated as a successor asset for purposes of paragraph (b)(1)(ii)(D) of this section. Thus, the P group must subtract \$100x from its tentative taxable income in computing its ATI for its 2025 taxable year.

(C) *Example 3—(I) Facts.* In 2021, S purchases a depreciable asset (Asset Z) for \$100x and fully depreciates Asset Z under section 168(k). P reduces its basis in its S stock by \$100x under §1.1502-32 to reflect S's depreciation deductions. For the 2021 taxable year, the P group's ATI (after adding back S's depreciation deductions with respect to Asset Z under paragraph (b)(1)(i)(D) of this section) is \$150x. The P group incurs \$45x of business interest expense in 2021. In 2024, S sells Asset Z to an unrelated third party. In 2025, P sells all of its S stock to a member of another consolidated group.

(2) *Analysis.* Under paragraph (b)(1)(ii)(C) of this section, the P group must subtract \$100x from its tentative taxable income in computing its ATI for its 2024 taxable year. The answer would be the same if the P group's ATI in 2021 were \$150x before adding back S's depreciation deductions with respect to Asset Z. P's sale of all of its S stock in 2025 is a "sale or other disposition" for purposes of paragraph (b)(1)(ii)(D) of this section. However, pursuant to paragraph (b)(1)(iv)(D)(1) of this section, no further adjustment to the P group's tentative taxable income is required in 2025 under paragraph (b)(1)(ii)(D) of this section.

(3) *Disposition of S stock prior to S's asset disposition.* The facts are the same as in paragraph (b)(1)(viii)(C)(1) of this section, except that, in 2024, P sells all of its S stock to a member of another consolidated group and, in 2025, S sells Asset Z to an unrelated third party. Pursuant to paragraph (b)(1)(ii)(D) of this section, the P group must subtract \$100x from its tentative taxable income in computing its ATI for its 2024 taxable year. Pursuant to

paragraph (b)(1)(iv)(D)(2) of this section, no adjustment to the acquiring group's tentative taxable income is required in 2025 under paragraph (b)(1)(ii)(C) of this section.

(4) *Transfer of S stock in nonrecognition transaction.* The facts are the same as in paragraph (b)(1)(vii)(C)(3) of this section, except that, rather than sell all of S's stock to a member of another consolidated group, P causes S to merge with and into a member of another consolidated group in a transaction described in section 368(a)(1)(A). As provided in paragraph (b)(1)(iv)(A) of this section, the merger transaction is treated as a "sale or other disposition" for purposes of paragraph (b)(1)(ii)(D) of this section because S leaves the P group. Thus, the results are the same as in paragraph (b)(1)(vii)(C)(3) of this section.

(D) *Example 4—(I) Facts.* P wholly owns T, which wholly owns S. In 2021, S purchases a depreciable asset (Asset AA) for \$100x and fully depreciates Asset AA under section 168(k). T reduces its basis in its S stock, and P reduces its basis in its T stock, by \$100x under §1.1502-32 to reflect S's depreciation deductions. For the 2021 taxable year, the P group's ATI (after adding back S's depreciation deductions with respect to Asset AA under paragraph (b)(1)(i)(D) of this section) is \$150x. The P group incurs \$45x of business interest expense in 2021. In 2024, T sells all of its S stock to a member of another consolidated group. In 2025, P sells all of its T stock to a member of another consolidated group.

(2) *Analysis.* Pursuant to paragraph (b)(1)(ii)(D) of this section, the P group must subtract \$100x from its tentative taxable income in computing its ATI for its 2024 taxable year. Pursuant to paragraph (b)(1)(iv)(D)(1) of this section, no adjustment to the P group's tentative taxable income is required in 2025 under paragraph (b)(1)(ii)(D) of this section.

(2) *Applicable CFC.* The term *applicable CFC* means a foreign corporation described in section 957, but only if the foreign corporation has at least one United States shareholder that owns, within the meaning of section 958(a), stock of the foreign corporation.

(3) *Business interest expense—(i) In general.* The term *business interest expense* means interest expense that is properly allocable to a non-exempted trade or business or that is floor plan financing interest expense. Business interest expense also includes disallowed business interest expense carryforwards (as defined in paragraph (b)(11) of this section). However, business interest expense does not include amounts of interest expense carried forward to the taxable year from a prior taxable year due to the application of section 465 or section 469, which apply after the application of section 163(j). For the treatment of investment interest, see section 163(d); and for the treatment of personal interest, see section 163(h).

(ii) *Special rules.* For special rules for defining business interest expense in certain circumstances, see §§1.163(j)-3(b)(2) (regarding disallowed interest expense), 1.163(j)-4(b) (regarding C corporations) and 1.163(j)-4(d)(2)(iii) (regarding consolidated groups), 1.163(j)-1(b)(9) (regarding current-year business interest expense), and 1.163(j)-6(c) (regarding partnerships and S corporations).

(4) *Business interest income—(i) In general.* The term *business interest income* means interest income includable in the gross income of a taxpayer for the taxable year which is properly allocable to a non-exempted trade or business. For the treatment of investment income, see section 163(d).

(ii) *Special rules.* For special rules defining business interest income in certain circumstances, see §§1.163(j)-4(b) (regarding C corporations), 1.163(j)-4(d)(2)(iii) (regarding consolidated groups), and 1.163(j)-6(c) (regarding partnerships and S corporations).

(5) *C corporation.* The term *C corporation* has the meaning provided in section 1361(a)(2).

(6) *Cleared swap.* The term *cleared swap* means a swap that is cleared by a derivatives clearing organization, as such term is defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a), or by a clearing agency, as such term is defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), that is registered as a derivatives clearing organization under the Commodity Exchange Act or as a clearing agency under the Securities Exchange Act of 1934, respectively, if the derivatives clearing organization or clearing agency requires the parties to the swap to post and collect margin or collateral.

(7) *Consolidated group.* The term *consolidated group* has the meaning provided in §1.1502-1(h).

(8) *Consolidated return year.* The term *consolidated return year* has the meaning provided in §1.1502-1(d).

(9) *Current-year business interest expense.* The term *current-year business interest expense* means business interest expense that would be deductible in the current taxable year without regard to section 163(j) and that is not a disallowed

business interest expense carryforward from a prior taxable year.

(10) *Disallowed business interest expense.* The term *disallowed business interest expense* means the amount of business interest expense for a taxable year in excess of the amount allowed as a deduction for the taxable year under section 163(j)(1) and §1.163(j)-2(b). For purposes of section 163(j) and the regulations in this part under section 163(j) of the Internal Revenue Code (Code) disallowed business interest expense is treated as “paid or accrued” in the taxable year in which the expense is deductible for Federal income tax purposes (without regard to section 163(j)) or in the taxable year in which a deduction for the business interest expense is permitted under section 163(j), as the context may require.

(11) *Disallowed business interest expense carryforward.* The term *disallowed business interest expense carryforward* means any business interest expense described in §1.163(j)-2(c).

(12) *Disallowed disqualified interest.* The term *disallowed disqualified interest* means interest expense, including carryforwards, for which a deduction was disallowed under old section 163(j) (as defined in paragraph (b)(27) of this section) in the taxpayer’s last taxable year beginning before January 1, 2018, and that was carried forward pursuant to old section 163(j).

(13) *Electing farming business.* The term *electing farming business* means a trade or business that makes an election as provided in §1.163(j)-9 or other published guidance and that is—

(i) A farming business, as defined in section 263A(e)(4) or §1.263A-4(a)(4);
(ii) Any trade or business of a specified agricultural or horticultural cooperative, as defined in section 199A(g)(4); or
(iii) Specifically designated by the Secretary in guidance published in the Federal Register or the Internal Revenue Bulletin (see §601.601(d) of this chapter) as a farming business for purposes of section 163(j).

(14) *Electing real property trade or business.* The term *electing real property trade or business* means a trade or business that makes an election as provided in §1.163(j)-9 or other published guidance and that is—

(i) A real property trade or business described in section 469(c)(7)(C) and §1.469-9(b)(2); or

(ii) A REIT that qualifies for the safe harbor described in §1.163(j)-9(h); or

(iii) A trade or business specifically designated by the Secretary in guidance published in the Federal Register or the Internal Revenue Bulletin (see §601.601(d) of this chapter) as a real property trade or business for purposes of section 163(j).

(15) *Excepted regulated utility trade or business—(i) In general.* The term *excepted regulated utility trade or business* means:

(A) *Automatically excepted regulated utility trades or businesses.* A trade or business—

(I) That furnishes or sells—

(i) Electrical energy, water, or sewage disposal services;

(ii) Gas or steam through a local distribution system; or

(iii) Transportation of gas or steam by pipeline; but only

(2) To the extent that the rates for the furnishing or sale of the items in paragraph (b)(15)(i)(A)(1) of this section—

(i) Have been established or approved by a State or political subdivision thereof, by any agency or instrumentality of the United States, or by a public service or public utility commission or other similar body of any State or political subdivision thereof and are determined on a cost of service and rate of return basis; or

(ii) Have been established or approved by the governing or ratemaking body of an electric cooperative; or

(B) *Electing regulated utility trades or businesses.* A trade or business that makes a valid election under paragraph (b)(15)(iii) of this section; or

(C) *Designated excepted regulated utility trades or businesses.* A trade or business that is specifically designated by the Secretary in guidance published in the Federal Register or the Internal Revenue Bulletin as an excepted regulated utility trade or business (see §601.601(d) of this chapter) for section 163(j) purposes.

(ii) *Depreciation and excepted and non-excepted utility trades or businesses.*

(A) *Depreciation.* Taxpayers engaged in an excepted trade or business described in paragraph (b)(15)(i) of this section cannot claim the additional first-year depreci-

ation deduction under section 168(k) for any property that is primarily used in the excepted regulated utility trade or business.

(B) *Allocation of items.* If a taxpayer is engaged in one or more excepted trades or businesses, as described in paragraph (b)(15)(i) of this section, and one or more non-excepted trades or businesses, the taxpayer must allocate items between the excepted and non-excepted utility trades or businesses. See §§1.163(j)-1(b)(44) and 1.163(j)-10(c)(3)(iii)(C). Some trades or businesses with de minimis furnishing or sales of items described in paragraph (b)(15)(i)(A)(1) of this section that are not sold pursuant to rates that are determined on a cost of service and rate of return basis or established or approved by the governing or ratemaking body of an electric cooperative, and are not subject to an election in paragraph (b)(15)(iii), are treated as excepted trades or businesses. See §1.163(j)-10(c)(3)(iii)(C)(3). For look-through rules applicable to certain CFCs that furnish or sell items described in paragraph (b)(15)(i)(A)(1) of this section that are not sold pursuant to rates that are determined on a cost of service and rate of return basis or established or approved by the governing or ratemaking body of an electric cooperative as described in paragraph (b)(15)(i)(A)(2) of this section, see §1.163(j)-10(c)(5)(ii)(C).

(iii) *Election to be an excepted regulated utility trade or business.* (A) *In general.* A trade or business that is not an excepted regulated utility trade or business described in paragraph (b)(15)(i)(A) or (C) of this section and that furnishes or sells items described in paragraph (b)(15)(i)(A)(1) of this section is eligible to make an election to be an excepted regulated utility trade or business to the extent that the rates for furnishing or selling the items described in paragraph (b)(15)(i)(A)(1) of this section have been established or approved by a regulatory body described in paragraph (b)(15)(i)(A)(2)(i) of this section.

(B) *Scope and effect of election—(i) In general.* An election under paragraph (b)(15)(iii) of this section is made with respect to each eligible trade or business of the taxpayer and applies only to the trade or business for which the election is made.

An election under paragraph (b)(15)(iii) of this section applies to the taxable year in which the election is made and to all subsequent taxable years.

(2) *Irrevocability*. An election under paragraph (b)(15)(iii) of this section is irrevocable.

(C) *Time and manner of making election—(1) In general*. Subject to paragraph (b)(15)(iii)(C)(5) of this section, a taxpayer makes an election under paragraph (b)(15)(iii) by attaching an election statement to the taxpayer's timely filed original Federal income tax return, including extensions. A taxpayer may make elections for multiple trades or businesses on a single election statement.

(2) *Election statement contents*. The election statement should be titled “Section 1.163(j)-1(b)(15)(iii) Election” and must contain the following information for each trade or business:

(i) The taxpayer's name;

(ii) The taxpayer's address;

(iii) The taxpayer's social security number (SSN) or employer identification number (EIN);

(iv) A description of the taxpayer's electing trade or business sufficient to demonstrate qualification for an election under this section, including the principal business activity code; and

(v) A statement that the taxpayer is making an election under section 1.163(j)-1(b)(15)(iii).

(3) *Consolidated group's or partnership's trade or business*. The rules in §1.163(j)-9(d)(3) and (4) apply with respect to an election under paragraph (b)(15)(iii) of this section for a consolidated group's or partnership's trade or business.

(4) *Termination of election*. The rules in §1.163(j)-9(e) apply to determine when an election under paragraph (b)(15)(iii) of this section terminates.

(5) *Additional guidance*. The rules and procedures regarding the time and manner of making an election under paragraph (b)(15)(iii) of this section and the election statement contents in paragraph (b)(15)(iii)(C)(2) of this section may be modified through other guidance (see §§601.601(d) and 601.602 of this chapter). Additional situations in which an election may terminate under paragraph (b)(15)(iii)(C)(4) of this section may be provided through guidance published in the Federal Regis-

ter or in the Internal Revenue Bulletin (see §601.601(d) of this chapter).

(16) *Excess business interest expense*. For any partnership, the term *excess business interest expense* means the amount of disallowed business interest expense of the partnership for a taxable year under section §1.163(j)-2(b). With respect to a partner, see §1.163(j)-6(g) and (h).

(17) *Excess taxable income*. With respect to any partnership or S corporation, the term *excess taxable income* means the amount which bears the same ratio to the partnership's ATI as—

(i) The excess (if any) of—

(A) The amount determined for the partnership or S corporation under section 163(j)(1)(B); over

(B) The amount (if any) by which the business interest expense of the partnership, reduced by the floor plan financing interest expense, exceeds the business interest income of the partnership or S corporation; bears to

(ii) The amount determined for the partnership or S corporation under section 163(j)(1)(B).

(18) *Floor plan financing indebtedness*. The term *floor plan financing indebtedness* means indebtedness—

(i) Used to finance the acquisition of motor vehicles held for sale or lease; and

(ii) Secured by the motor vehicles so acquired.

(19) *Floor plan financing interest expense*. The term *floor plan financing interest expense* means interest paid or accrued on floor plan financing indebtedness. For purposes of the section 163(j) regulations, all floor plan financing interest expense is treated as business interest expense. See paragraph (b)(3) of this section.

(20) *Group*. The term *group* has the meaning provided in §1.1502-1(a).

(21) *Intercompany transaction*. The term *intercompany transaction* has the meaning provided in §1.1502-13(b)(1)(i).

(22) *Interest*. The term *interest* means any amount described in paragraph (b)(22)(i), (ii), (iii), or (iv) of this section.

(i) *In general*. Interest is an amount paid, received, or accrued as compensation for the use or forbearance of money under the terms of an instrument or contractual arrangement, including a series of transactions, that is treated as a debt instrument for purposes of section 1275(a)

and §1.1275-1(d), and not treated as stock under §1.385-3, or an amount that is treated as interest under other provisions of the Code or the Income Tax Regulations. Thus, interest includes, but is not limited to, the following:

(A) Original issue discount (OID), as adjusted by the holder for any acquisition premium or amortizable bond premium;

(B) Qualified stated interest, as adjusted by the holder for any amortizable bond premium or by the issuer for any bond issuance premium;

(C) Acquisition discount;

(D) Amounts treated as taxable OID under section 1286 (relating to stripped bonds and stripped coupons);

(E) Accrued market discount on a market discount bond to the extent includible in income by the holder under either section 1276(a) or 1278(b);

(F) OID includible in income by a holder that has made an election under §1.1272-3 to treat all interest on a debt instrument as OID;

(G) OID on a synthetic debt instrument arising from an integrated transaction under §1.1275-6;

(H) Repurchase premium to the extent deductible by the issuer under §1.163-7(c) (determined without regard to section 163(j));

(I) Deferred payments treated as interest under section 483;

(J) Amounts treated as interest under a section 467 rental agreement;

(K) Amounts treated as interest under section 988;

(L) Forgone interest under section 7872;

(M) De minimis OID taken into account by the issuer;

(N) Amounts paid or received in connection with a sale-repurchase agreement treated as indebtedness under Federal tax principles; however, in the case of a sale-repurchase agreement relating to tax-exempt bonds, the amount is not tax-exempt interest;

(O) Redeemable ground rent treated as interest under section 163(c); and

(P) Amounts treated as interest under section 636.

(ii) *Swaps with significant nonperiodic payments*—(A) *In general*. Except as provided in paragraphs (b)(22)(ii)(B) and (C) of this section, a swap with sig-

nificant nonperiodic payments is treated as two separate transactions consisting of an on-market, level payment swap and a loan. The loan must be accounted for by the parties to the contract independently of the swap. The time value component associated with the loan, determined in accordance with §1.446-3(f)(2)(iii)(A), is recognized as interest expense to the payor and interest income to the recipient.

(B) *Exception for cleared swaps.* Paragraph (b)(22)(ii)(A) of this section does not apply to a cleared swap (as defined in paragraph (b)(6) of this section).

(C) *Exception for non-cleared swaps subject to margin or collateral requirements.* Paragraph (b)(22)(ii)(A) of this section does not apply to a non-cleared swap that requires the parties to meet the margin or collateral requirements of a federal regulator or that provides for margin or collateral requirements that are substantially similar to a cleared swap or a non-cleared swap subject to the margin or collateral requirements of a federal regulator. For purposes of this paragraph (b)(22)(ii)(C), the term *federal regulator* means the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), or a prudential regulator, as defined in section 1a(39) of the Commodity Exchange Act (7 U.S.C. 1a), as amended by section 721 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law No. 111-203, 124 Stat. 1376, Title VII.

(iii) *Other amounts treated as interest—(A) Treatment of premium—(I) Issuer.* If a debt instrument is issued at a premium within the meaning of §1.163-13, any ordinary income under §1.163-13(d)(4) is treated as interest income of the issuer.

(2) *Holder.* If a taxable debt instrument is acquired at a premium within the meaning of §1.171-1 and the holder elects to amortize the premium, any amount deductible as a bond premium deduction under section 171(a)(1) and §1.171-2(a)(4)(i)(A) or (C) is treated as interest expense of the holder.

(B) *Treatment of ordinary income or loss on certain debt instruments.* If an issuer of a contingent payment debt instrument subject to §1.1275-4(b), a non-functional currency contingent payment debt instrument subject to §1.988-6, or an

inflation-indexed debt instrument subject to §1.1275-7 recognizes ordinary income on the debt instrument in accordance with the rules in §1.1275-4(b), §1.988-6(b)(2), or §1.1275-7(f), whichever is applicable, the ordinary income is treated as interest income of the issuer. If a holder of a contingent payment debt instrument subject to §1.1275-4(b), a nonfunctional currency contingent payment debt instrument subject to §1.988-6, or an inflation-indexed debt instrument subject to §1.1275-7 recognizes an ordinary loss on the debt instrument in accordance with the rules in §1.1275-4(b), §1.988-6(b)(2), or §1.1275-7(f), whichever is applicable, the ordinary loss is treated as interest expense of the holder.

(C) *Substitute interest payments.* A substitute interest payment described in §1.861-2(a)(7) is treated as interest expense to the payor only if the payment relates to a sale-repurchase agreement or a securities lending transaction that is not entered into by the payor in the ordinary course of the payor's business. A substitute interest payment described in §1.861-2(a)(7) is treated as interest income to the recipient only if the payment relates to a sale-repurchase agreement or a securities lending transaction that is not entered into by the recipient in the ordinary course of the recipient's business; however, in the case of a sale-repurchase agreement or a securities lending transaction relating to tax-exempt bonds, the recipient of a substitute payment does not receive tax-exempt interest income. This paragraph (b)(22)(iii)(C) does not apply to an amount described in paragraph (b)(22)(i)(N) of this section.

(D) *Section 1258 gain.* Any gain treated as ordinary gain under section 1258 is treated as interest income.

(E) *Factoring income.* The excess of the amount that a taxpayer collects on a factored receivable (or realizes upon the sale or other disposition of the factored receivable) over the amount paid for the factored receivable by the taxpayer is treated as interest income. For purposes of this paragraph (b)(22)(iii)(E), the term *factored receivable* includes any account receivable or other evidence of indebtedness, whether or not issued at a discount and whether or not bearing stated interest, arising out of the disposition of proper-

ty or the performance of services by any person, if such account receivable or evidence of indebtedness is acquired by a person other than the person who disposed of the property or provided the services that gave rise to the account receivable or evidence of indebtedness. This paragraph (b)(22)(iii)(E) does not apply to an amount described in paragraph (b)(22)(i)(C) or (E) of this section.

(F) [Reserved]

(iv) *Anti-avoidance rules—(A) Principal purpose to reduce interest expense—(I) Treatment as interest expense.*

Any expense or loss economically equivalent to interest is treated as interest expense if a principal purpose of structuring the transaction(s) is to reduce an amount incurred by the taxpayer that otherwise would have been described in paragraph (b)(22)(i), (ii), or (iii) of this section. For this purpose, the fact that the taxpayer has a business purpose for obtaining the use of funds does not affect the determination of whether the manner in which the taxpayer structures the transaction(s) is with a principal purpose of reducing the taxpayer's interest expense. In addition, the fact that the taxpayer has obtained funds at a lower pre-tax cost based on the structure of the transaction(s) does not affect the determination of whether the manner in which the taxpayer structures the transaction(s) is with a principal purpose of reducing the taxpayer's interest expense. For purposes of this paragraph (b)(22)(iv)(A)(I), any expense or loss is economically equivalent to interest to the extent that the expense or loss is—

(i) Deductible by the taxpayer;

(ii) Incurred by the taxpayer in a transaction or series of integrated or related transactions in which the taxpayer secures the use of funds for a period of time;

(iii) Substantially incurred in consideration of the time value of money; and

(iv) Not described in paragraph (b)(22)(i), (ii), or (iii) of this section.

(2) *Corresponding treatment of amounts as interest income.* If a taxpayer knows that an expense or loss is treated by the payor as interest expense under paragraph (b)(22)(iv)(A)(I) of this section, the taxpayer provides the use of funds for a period of time in the transaction(s) subject to paragraph (b)(22)(iv)(A)(I) of this section, the taxpayer

earns income or gain with respect to the transaction(s), and such income or gain is substantially earned in consideration of the time value of money provided by the taxpayer, such income or gain is treated as interest income to the extent of the expense or loss treated by the payor as interest expense under paragraph (b)(22)(iv)(A)(I) of this section.

(B) *Interest income artificially increased.* Notwithstanding paragraphs (b)(22)(i) through (iii) of this section, any income realized by a taxpayer in a transaction or series of integrated or related transactions is not treated as interest income of the taxpayer if and to the extent that a principal purpose for structuring the transaction(s) is to artificially increase the taxpayer's business interest income. For this purpose, the fact that the taxpayer has a business purpose for holding interest generating assets does not affect the determination of whether the manner in which the taxpayer structures the transaction(s) is with a principal purpose of artificially increasing the taxpayer's business interest income.

(C) *Principal purpose.* Whether a transaction or a series of integrated or related transactions is entered into with a principal purpose described in paragraph (b)(22)(iv)(A) or (B) of this section depends on all the facts and circumstances related to the transaction(s), except for those facts described in paragraph (b)(22)(iv)(A) or (B) of this section. A purpose may be a principal purpose even though it is outweighed by other purposes (taken together or separately). Factors to be taken into account in determining whether one of the taxpayer's principal purposes for entering into the transaction(s) include the taxpayer's normal borrowing rate in the taxpayer's functional currency, whether the taxpayer would enter into the transaction(s) in the ordinary course of the taxpayer's trade or business, whether the parties to the transaction(s) are related persons (within the meaning of section 267(b) or section 707(b)), whether there is a significant and bona fide business purpose for the structure of the transaction(s), whether the transactions are transitory, for example, due to a circular flow of cash or other property, and the substance of the transaction(s).

(D) *Coordination with anti-avoidance rule in §1.163(j)-2(j).* The anti-avoidance rules in paragraphs (b)(22)(iv)(A) through (C) of this section, rather than the anti-avoidance rules in §1.163(j)-2(j), apply to determine whether an item is treated as interest expense or interest income.

(v) *Examples.* The examples in this paragraph (b)(22)(v) illustrate the application of paragraph (b)(22)(iv) of this section. Unless otherwise indicated, A, B, C, D, and Bank are domestic C corporations that are publicly traded; the exemption for certain small businesses in §1.163(j)-2(d) does not apply; A is not engaged in an excepted trade or business; and all amounts of interest expense are deductible except for the potential application of section 163(j).

(A) *Example 1—(I) Facts.* A is engaged in a manufacturing business and uses the calendar year as its annual accounting period. A's functional currency is the U.S. dollar and A conducts virtually all of its business in the U.S. dollar. A has no connection to Japan or the Japanese yen in the ordinary course of business. A projects that it will have business interest expense of \$100x on an existing loan obligation with a stated principal amount of \$2,000x (Loan 1) and no business interest income in its taxable year ending December 31, 2021. In early 2021, A enters into the following transactions, which A would not have entered into in the ordinary course of A's trade or business:

(i) A enters into a loan obligation in which A borrows Japanese yen from Bank in an amount equivalent to \$2,000x with an interest rate of 1 percent (Loan 2) (at the time of the loan, the U.S. dollar equivalent interest rate on a loan of \$2,000x is 5 percent);

(ii) A enters into a foreign currency swap transaction (FX Swap) with Bank with a notional principal amount of \$2,000x under which A receives Japanese yen at 1 percent multiplied by the amount of Japanese yen borrowed from Bank (which for 2021 equals \$20x) and pays U.S. dollars at 5 percent multiplied by a notional amount of \$2,000x (\$100x per year);

(iii) The FX Swap is not integrated with Loan 2 under §1.988-5; and

(iv) A enters into a spot transaction with Bank to convert the proceeds of Loan 2 into \$2,000x U.S. dollars and A uses the U.S. dollars to repay Loan 1.

(2) *Analysis.* A principal purpose of A entering into the transactions with Bank was to try to reduce the amount incurred by A that otherwise would be interest expense; in effect, A sought to alter A's cost of borrowing by converting a substantial portion of its interest expense deductions on Loan 1 into section 165 deductions on the FX Swap (\$100x interest expense related to Loan 1 compared to \$20x interest expense related to Loan 2 and \$80x section 165 deduction). A's functional currency is the U.S. dollar and A conducts virtually all of its business in the U.S. dollar. A has no connection to Japan or the Japanese yen and would not have entered into the transactions

in the ordinary course of A's trade or business. The section 165 deductions related to the FX Swap were incurred by A in a series of transactions in which A secured the use of funds for a period of time and were substantially incurred in consideration of the time value of money. As a result, under paragraph (b)(22)(iv)(A)(I) of this section, for purposes of section 163(j), the \$80x paid by A to Bank on the FX Swap is treated by A as interest expense.

(B) *Example 2—(I) Facts.* A is engaged in a manufacturing business and uses the calendar year as its annual accounting period. A does not use gold in its manufacturing business. In 2021, A expects to borrow \$1,000x for six months. In January 2021, A borrows from B two ounces of gold at a time when the spot price for gold is \$500x per ounce. A agrees to return the two ounces of gold in six months. A sells the two ounces of gold to C for \$1,000x. A then enters into a contract with D to purchase two ounces of gold six months in the future for \$1,013x. In exchange for the use of \$1,000x in cash for six months, A has sustained a loss of \$13x in connection with these related transactions. A would not have entered into the gold transactions in the ordinary course of A's trade or business.

(2) *Analysis.* In a series of related transactions, A has obtained the use of \$1,000x for six months and created a loss of \$13x substantially incurred in consideration of the time value of money. A would not have entered into the gold transactions in the ordinary course of A's trade or business. A entered into the transactions with a principal purpose of structuring the transactions to reduce its interest expense (in effect, A sought to convert what otherwise would be interest expense into a loss through the transactions). As a result, under paragraph (b)(22)(iv)(A)(I) of this section, for purposes of section 163(j), the loss of \$13x is treated by A as interest expense.

(C) *Example 3—(I) Facts.* A is engaged in a manufacturing business and uses the calendar year as its annual accounting period. A's functional currency is the U.S. dollar and A conducts virtually all of its business in the U.S. dollar. A has no connection to Argentina or the Argentine peso as part of its ordinary course of business. As of January 1, 2021, A expects to have adjusted taxable income (as defined in paragraph (b)(1) of this section) of \$200x in the taxable year ending December 31, 2021. A also projects that it will have business interest expense of \$70x on an existing loan in 2021. A has cash equivalents of \$100x on which A expects to earn \$5x of business interest income. In early 2021, A enters into the following transactions, which A would not have entered into in the ordinary course of A's trade or business:

(i) A enters into a spot transaction with Bank to convert the \$100x of cash equivalents into an amount in Argentine pesos equivalent to \$100x and A uses the Argentine pesos to purchase an Argentine peso note (Note) issued by a subsidiary of Bank for the Argentine peso equivalent of \$100x; the Note pays interest at a 10 percent rate; and

(ii) A enters into a foreign currency swap transaction (FX Swap) with Bank with a notional principal amount of \$100x under which A pays Argentine pesos at 10 percent multiplied by the amount of Argentine peso principal amount on the Note (which for 2021 equals \$10x) and receives U.S. dollars at 5 percent multiplied by a notional amount of \$100x (\$5x per year).

(2) *Analysis.* A principal purpose of A entering into the transactions was to increase the amount of business interest income received by A; in effect, A increased its business interest income by separately accounting for its net deduction of \$5x per year on the FX Swap. A's functional currency is the U.S. dollar and A conducts virtually all of its business in the U.S. dollar. A has no connection to Argentina or the Argentine peso and would not have entered into the transactions in the ordinary course of A's trade or business. The FX Swap was incurred by A as a part of a transaction that A entered into with a principal purpose of artificially increasing its business interest income. As a result, under paragraph (b)(22)(iv)(B) of this section, for purposes of section 163(j), the \$10x business interest income earned on the Note by A is reduced by \$5x (the net \$5x paid by A on the FX Swap).

(D) *Example 4—(1) Facts.* A is wholly owned by FC, a foreign corporation organized in foreign country X. A uses the calendar year for its annual accounting period. FC has a better credit rating than A. A needs to borrow \$2,000x in the taxable year ending December 31, 2021, to fund its business operations. A also projects that, if it borrows \$2,000x on January 1, 2021, and pays a market rate of interest, it will have business interest expense of \$100x in its taxable year ending December 31, 2021. In early 2021, A enters into the following transactions:

(i) A enters into a loan obligation in which A borrows \$2,000x from Bank with an interest rate of 3 percent (Loan 1);

(ii) FC and Bank enter into a guarantee arrangement (Guarantee) under which FC agrees to guarantee Bank that Bank will be timely paid all of the amounts due on Loan 1; and

(iii) A enters into a guarantee fee agreement with FC (Guarantee Fee Agreement) under which A agrees to pay FC \$40x in return for FC entering into the Guarantee, which was not an agreement that A would have entered into in the ordinary course of A's trade or business.

(2) *Analysis.* A principal purpose of A entering into the transactions was to reduce the amount incurred by A that otherwise would be interest expense; in effect, A sought to convert a substantial portion of its interest expense deductions on Loan 1 into section 162 deductions on the Guarantee Fee Agreement (\$100x interest expense had A borrowed without the Guarantee compared to \$60x interest expense related to Loan 1 and \$40x section 162 deduction). A would not have entered into the Guarantee Fee Agreement in the ordinary course of A's trade or business. The \$40x section 162 deductions related to the Guarantee Fee Agreement were incurred by A in a series of transactions in which A secured the use of funds for a period of time and were substantially incurred in consideration of the time value of money. As a result, under paragraph (b)(22)(iv)(A)(1) of this section, for purposes of section 163(j), the \$40x paid by A to FC on the Guarantee Fee Agreement is treated by A as interest expense.

(E) *Example 5—(1) Facts.* A, B, and C are equal partners in ABC partnership. ABC is considering acquiring an additional loan from a third-party lender to expand its business operations. However, ABC already has significant debt and interest expense. For the purpose of reducing the amount of additional interest expense ABC would have otherwise incurred

by borrowing, A agrees to make an additional contribution to ABC for use in its business operations in exchange for a guaranteed payment for the use of capital under section 707(c).

(2) *Analysis.* The guaranteed payment is deductible by ABC, incurred by ABC in a transaction in which ABC secures the use of funds for a period of time, substantially incurred in consideration of the time value of money, and not described in paragraph (b)(22)(i), (ii), or (iii) of this section. As a result, the guaranteed payment to A is economically equivalent to the interest that ABC would have incurred on an additional loan from a third-party lender. A principal purpose of A making a contribution in exchange for a guaranteed payment for the use of capital was to reduce the amount incurred by ABC that otherwise would be interest expense. As a result, under paragraph (b)(22)(iv)(A)(1) of this section, for purposes of section 163(j), such guaranteed payment is treated as interest expense of ABC for purposes of section 163(j). In addition, under paragraph (b)(22)(iv)(A)(2) of this section, if A knows that the guaranteed payment is treated as interest expense of ABC, because A provides the use of funds for a period of time in a transaction subject to paragraph (b)(22)(iv)(A)(1) of this section, A earns income or gain with respect to the transaction, and such income or gain is substantially earned in consideration of the time value of money provided by A, the guaranteed payment is treated as interest income of A for purposes of section 163(j).

(23) *Interest expense.* The term *interest expense* means interest that is paid or accrued, or treated as paid or accrued, for the taxable year.

(24) *Interest income.* The term *interest income* means interest that is included in gross income for the taxable year.

(25) *Member.* The term *member* has the meaning provided in §1.1502-1(b).

(26) *Motor vehicle.* The term *motor vehicle* means a motor vehicle as defined in section 163(j)(9)(C).

(27) *Old section 163(j).* The term *old section 163(j)* means section 163(j) immediately prior to its amendment by Public Law No. 115-97, 131 Stat. 2054 (2017).

(28) *Ownership change.* The term *ownership change* has the meaning provided in section 382 and the regulations in this part under section 382 of the Code.

(29) *Ownership date.* The term *ownership date* has the meaning provided in section 382 and the regulations in this part under section 382 of the Code.

(30) *Real estate investment trust.* The term *real estate investment trust (REIT)* has the meaning provided in section 856.

(31) *Real property.* The term *real property* includes—

(i) Real property as defined in §1.469-9(b)(2); and

(ii) Any direct or indirect right, including a license or other contractual right, to share in the appreciation in value of, or the gross or net proceeds or profits generated by, an interest in real property, including net proceeds or profits associated with tolls, rents or other similar fees.

(32) *Regulated investment company.* The term *regulated investment company (RIC)* has the meaning provided in section 851.

(33) *Relevant foreign corporation.* The term *relevant foreign corporation* means any foreign corporation whose classification is relevant under §301.7701-3(d)(1) for a taxable year, other than solely pursuant to section 881 or 882.

(34) *S corporation.* The term *S corporation* has the meaning provided in section 1361(a)(1).

(35) [Reserved]

(36) *Section 163(j) limitation.* The term *section 163(j) limitation* means the limit on the amount of business interest expense that a taxpayer may deduct in a taxable year under section 163(j) and §1.163(j)-2(b).

(37) *Section 163(j) regulations.* The term *section 163(j) regulations* means this section and §§1.163(j)-2 through 1.163(j)-11.

(38) *Separate return limitation year.* The term *separate return limitation year (SRLY)* has the meaning provided in §1.1502-1(f).

(39) *Separate return year.* The term *separate return year* has the meaning provided in §1.1502-1(e).

(40) *Separate tentative taxable income.* The term *separate tentative taxable income* with respect to a taxpayer and a taxable year has the meaning provided in §1.1502-12, but for this purpose computed without regard to the application of the section 163(j) limitation and with the addition of the adjustments made in paragraph (b)(43)(ii) of this section and §1.163(j)-4(d)(2)(iv).

(41) *Tax-exempt corporation.* The term *tax-exempt corporation* means any tax-exempt organization that is organized as a corporation.

(42) *Tax-exempt organization.* The term *tax-exempt organization* means any entity subject to tax under section 511.

(43) *Tentative taxable income—(i) In general.* The term *tentative taxable in-*

come, with respect to a taxpayer and a taxable year, generally is determined in the same manner as taxable income under section 63 but for this purpose computed without regard to the application of the section 163(j) limitation. Tentative taxable income is computed without regard to any disallowed business interest expense carryforwards.

(ii) [Reserved]

(iii) *Special rules for defining tentative taxable income.* (A) For special rules defining the tentative taxable income of a RIC or REIT, see §1.163(j)-4(b)(4)(ii).

(B) For special rules defining the tentative taxable income of consolidated groups, see §1.163(j)-4(d)(2)(iv).

(C) For special rules defining the tentative taxable income of a partnership, see §1.163(j)-6(d)(1).

(D) For special rules defining the tentative taxable income of an S corporation, see §1.163(j)-6(l)(3).

(E) For special rules clarifying that tentative taxable income takes sections 461(l), 465, and 469 into account, see §1.163(j)-3(b)(4).

(F) For special rules clarifying that tentative taxable income takes sections 461(l), 465, and 469 into account, see §1.163(j)-3(b)(4).

(G) For special rules clarifying that tentative taxable income takes sections 461(l), 465, and 469 into account, see §1.163(j)-3(b)(4).

(44) *Trade or business*—(i) *In general.* The term *trade or business* means a trade or business within the meaning of section 162.

(ii) *Excepted trade or business.* The term *excepted trade or business* means the trade or business of performing services as an employee, an electing real property trade or business, an electing farming business, or an excepted regulated utility trade or business. For additional rules related to excepted trades or businesses, including elections made under section 163(j)(7)(B) and (C), see §1.163(j)-9.

(iii) *Non-excepted trade or business.* The term *non-excepted trade or business* means any trade or business that is not an excepted trade or business.

(45) *Unadjusted basis.* The term *unadjusted basis* means the basis as determined under section 1012 or other applicable sections of chapter 1 of subtitle A of the

Code, including subchapters O (relating to gain or loss on dispositions of property), C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses) of the Code. Unadjusted basis is determined without regard to any adjustments described in section 1016(a) (2) or (3), any adjustments for tax credits claimed by the taxpayer (for example, under section 50(c)), or any adjustments for any portion of the basis that the taxpayer has elected to treat as an expense (for example, under section 179, 179B, or 179C).

(46) *United States shareholder.* The term *United States shareholder* has the meaning provided in section 951(b).

(c) *Applicability date*—(1) *In general.* Except as provided in paragraphs (c) (2) and (3) of this section, this section applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, and before November 13, 2020 so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year. Additionally, taxpayers and their related parties within the meaning of sections 267(b) and 707(b)(1), otherwise relying on the notice of proposed rulemaking that was published on December 28, 2018, in the Federal Register (83 FR 67490) in its entirety under §1.163(j)-1(c), may alternatively choose to follow §1.163(j)-1(b)(1)(iii), rather than proposed §1.163(j)-1(b)(1)(iii).

(2) *Anti-avoidance rules.* The anti-avoidance rules in paragraph (b)(22)(iv) of this section apply to transactions entered into on or after September 14, 2020.

(3) *Swaps with significant nonperiodic payments*—(i) *In general.* Except as provided in paragraph (c)(3)(ii) of this section, the rules provided in paragraph (b)

(22)(ii) of this section apply to notional principal contracts entered into on or after September 14, 2021. However, taxpayers may choose to apply the rules provided in paragraph (b)(22)(ii) of this section to notional principal contracts entered into before September 14, 2021.

(ii) *Anti-avoidance rule.* The anti-avoidance rules in paragraph (b)(22)(iv) of this section (applied without regard to the references to paragraph (b)(22)(ii) of this section) apply to a notional principal contract entered into on or after September 14, 2020.

§1.163(j)-2 Deduction for business interest expense limited.

(a) *Overview.* This section provides general rules regarding the section 163(j) limitation. Paragraph (b) of this section provides rules regarding the basic computation of the section 163(j) limitation. Paragraph (c) of this section provides rules for disallowed business interest expense carryforwards. Paragraph (d) of this section provides rules regarding the small business exemption from the section 163(j) limitation. Paragraph (e) of this section that is part of provides rules regarding real estate mortgage investment conduits (REMICs). Paragraph (f) of this section provides rules regarding the calculation of ATI with respect to certain beneficiaries. Paragraph (g) of this section provides rules regarding tax-exempt organizations. Paragraph (h) of this section provides examples illustrating the application of this section. Paragraph (i) of this section is reserved. Paragraph (j) of this section provides an anti-avoidance rule.

(b) *General rule*—(1) *In general.* Except as otherwise provided in this section or in §§1.163(j)-3 through 1.163(j)-11, the amount allowed as a deduction for business interest expense for the taxable year cannot exceed the sum of—

(i) The taxpayer's business interest income for the taxable year;

(ii) 30 percent of the taxpayer's ATI for the taxable year, or zero if the taxpayer's ATI for the taxable year is less than zero; and

(iii) The taxpayer's floor plan financing interest expense for the taxable year.

(2) *50 percent ATI limitation for taxable years beginning in 2019 or 2020*—(i)

In general. Except as otherwise provided in section 163(j)(10) and paragraph (b) (2) of this section, for any taxable year beginning in 2019 or 2020, paragraph (b) (1)(ii) of this section is applied by substituting 50 percent for 30 percent. The 50 percent ATI limitation does not apply to partnerships for taxable years beginning in 2019. Further, for a partnership taxable year beginning in 2020 for which an election out of section 163(j)(10)(A)(i) has not been made, §1.163(j)-6(f)(2)(xi) is applied by substituting two for ten-thirds when grossing up each partner's final ATI capacity excess amount.

(ii) *Election out of the 50 percent ATI limitation.* A taxpayer may elect to not have paragraph (b)(2)(i) of this section apply for any taxable year beginning in 2019 or 2020. In the case of a partnership, the election must be made by the partnership and may be made only for taxable years beginning in 2020.

(3) *Election to use 2019 ATI in 2020—*(i) *In general.* Subject to paragraph (b)(3)(ii), a taxpayer may elect to use the taxpayer's ATI for the last taxable year beginning in 2019 (2019 ATI) as the ATI for any taxable year beginning in 2020.

(ii) *Short taxable years.* If an election is made under paragraph (b)(3)(i) of this section for a taxable year beginning in 2020 that is a short taxable year, the ATI for such taxable year is equal to the amount that bears the same ratio to 2019 ATI as the number of months in the short taxable year bears to 12.

(4) *Time and manner of making or revoking the elections.* The rules and procedures regarding the time and manner of making, or revoking, an election under paragraphs (b)(2) and (3) of this section are provided in Revenue Procedure 2020-22, 2020-18 I.R.B. 745, or in other guidance that may be issued (see §§601.601(d) and 601.602 of this chapter).

(c) *Disallowed business interest expense carryforward—*(1) *In general.* Any business interest expense disallowed under paragraph (b) of this section, or any disallowed disqualified interest that is properly allocable to a non-excepted trade or business under §1.163(j)-10, is carried forward to the succeeding taxable year as a disallowed business interest expense carryforward, and is therefore business interest expense that is subject

to paragraph (b) of this section in such succeeding taxable year. Disallowed business interest expense carryforwards are not re-allocated between non-excepted and excepted trades or businesses in a succeeding taxable year. Instead, the carryforwards continue to be treated as allocable to a non-excepted trade or business. See §1.163(j)-10(c)(4).

(2) *Coordination with small business exemption.* If disallowed business interest expense is carried forward under the rules of paragraph (c)(1) of this section to a taxable year in which the small business exemption in paragraph (d) of this section applies to the taxpayer, then the general rule in paragraph (b) of this section does not apply to limit the deduction of the disallowed business interest expense carryforward of the taxpayer in that taxable year. See §1.163(j)-6(m)(3) for rules applicable to the treatment of excess business interest expense from a partnership that is not subject to section 163(j) in a succeeding taxable year, and see §1.163(j)-6(m)(4) for rules applicable to S corporations with disallowed business interest expense carryforwards that are not subject to section 163(j) in a succeeding taxable year.

(3) *Cross-references—*(i) For special rules regarding disallowed business interest expense carryforwards for taxpayers that are C corporations, including members of a consolidated group, see §1.163(j)-5.

(ii) For special rules regarding disallowed business interest expense carryforwards of S corporations, see §§1.163(j)-5(b)(2) and 1.163(j)-6(l)(5).

(iii) For special rules regarding disallowed business interest expense carryforwards from partnerships, see §1.163(j)-6.

(iv)-(v) [Reserved]

(d) *Small business exemption—*(1) *Exemption.* The general rule in paragraph (b) of this section does not apply to any taxpayer, other than a tax shelter as defined in section 448(d)(3), in any taxable year in which the taxpayer meets the gross receipts test of section 448(c) and the regulations in this part under section 448 of the Code for the taxable year. See §1.163(j)-9(b) for elections available under section 163(j)(7)(B) and 163(j)(7)(C) for real property trades or businesses or farming businesses that also may be exempt small businesses. See §1.163(j)-6(m) for rules

applicable to partnerships and S corporations not subject to section 163(j).

(2) *Application of the gross receipts test—*(i) *In general.* In the case of any taxpayer that is not a corporation or a partnership, and except as provided in paragraphs (d)(2)(ii), (iii), and (iv) of this section, the gross receipts test of section 448(c) and the regulations in this part under section 448 of the Code are applied in the same manner as if such taxpayer were a corporation or partnership.

(ii) *Gross receipts of individuals.* Except as provided in paragraph (d)(2)(iii) of this section (regarding partnership and S corporation interests), an individual taxpayer's gross receipts include all items specified as gross receipts in regulations under section 448(c), whether or not derived in the ordinary course of the taxpayer's trade or business. For purposes of section 163(j), an individual taxpayer's gross receipts do not include inherently personal amounts, including, but not limited to, personal injury awards or settlements with respect to an injury of the individual taxpayer, disability benefits, Social Security benefits received by the taxpayer during the taxable year, and wages received as an employee that are reported on Form W-2.

(iii) *Partners and S corporation shareholders.* Except when the aggregation rules of section 448(c) apply, each partner in a partnership includes a share of partnership gross receipts in proportion to such partner's distributive share (as determined under section 704) of items of gross income that were taken into account by the partnership under section 703. Additionally, each shareholder in an S corporation includes a pro rata share of S corporation gross receipts.

(iv) *Tax-exempt organizations.* For purposes of section 163(j), the gross receipts of a tax-exempt organization include only gross receipts taken into account in determining its unrelated business taxable income.

(e) *REMICs.* For the treatment of interest expense by a REMIC as defined in section 860D, see §1.860C-2(b)(2)(ii).

(f) *Trusts—*(i) *Calculation of ATI with respect to certain trusts and estates.* The ATI of a trust or a decedent's estate taxable under section 641 is computed without regard to deductions under sections 642(c), 651, and 661.

(ii) *Calculation of ATI with respect to certain beneficiaries.* The ATI of a beneficiary (including a tax-exempt beneficiary) of a trust or a decedent's estate is reduced by any income (including any distributable net income) received from the trust or estate by the beneficiary to the extent such income was necessary to permit a deduction under section 163(j)(1)(B) and §1.163(j)-2(b) for any business interest expense of the trust or estate that was in excess of any business interest income of the trust or estate.

(g) *Tax-exempt organizations.* Except as provided in paragraph (d) of this section, the section 163(j) limitation applies to tax-exempt organizations for purposes of computing their unrelated business taxable income under section 512. For rules on determining the gross receipts of a tax-exempt organization for purposes of the small business exemption, see paragraph (d)(2)(iv) of this section. For special rules applicable to tax-exempt beneficiaries of a trust or a decedent's estate, see §1.163(j)-2(f). For special rules applicable to tax-exempt corporations, see §1.163(j)-4. For special allocation rules applicable to tax-exempt organizations, see §1.163(j)-10(a)(5).

(h) *Examples.* The examples in this paragraph (h) illustrate the application of section 163(j) and the provisions of this section. Unless otherwise indicated, X and Y are domestic C corporations; C and D are U.S. resident individuals not subject to any foreign income tax; PRS is a domestic partnership with partners who are all individuals; all taxpayers use a calendar taxable year; the exemption for certain small businesses in section 163(j)(3) and paragraph (d) of this section does not apply; and the interest expense would be deductible but for section 163(j).

(1) *Example 1: Limitation on business interest expense deduction—(i) Facts.* During its taxable year ending December 31, 2021, X has ATI of \$100x. X has business interest expense of \$50x, which includes \$10x of floor plan financing interest expense, and business interest income of \$20x.

(ii) *Analysis.* For the 2021 taxable year, X's section 163(j) limitation is \$60x, which is the sum of its business interest income (\$20x), plus 30 percent of its ATI (\$100x x 30 percent = \$30x), plus its floor plan financing interest expense (\$10x). See §1.163(j)-2(b). Because X's business interest expense (\$50x) does not exceed X's section 163(j) limitation (\$60x), X can deduct all \$50x of its business interest expense for the 2021 taxable year.

(2) *Example 2: Carryforward of business interest expense—(i) Facts.* The facts are the same as in Example 1 in paragraph (h)(1)(i) of this section, except that X has \$80x of business interest expense, which includes \$10x of floor plan financing interest expense.

(ii) *Analysis.* As in Example 1 in paragraph (h)(1)(ii) of this section, X's section 163(j) limitation is \$60x. Because X's business interest expense (\$80x) exceeds X's section 163(j) limitation (\$60x), X may only deduct \$60x of its business interest expense for the 2021 taxable year, and the remaining \$20x of its business interest expense will be carried forward to the succeeding taxable year as a disallowed business interest expense carryforward. See §1.163(j)-2(c).

(3) *Example 3: ATI computation—(i) Facts.* During the 2020 taxable year, Y has tentative taxable income of \$30x, which is determined without regard to the application of the section 163(j) limitation on business interest expense. Y's tentative taxable income includes the following: \$20x of business interest income; \$50x of business interest expense, which includes \$10x of floor plan financing interest expense; \$25x of net operating loss deduction under section 172; and \$15x of depreciation under section 167, of which \$10x is capitalized to inventory under section 263A. Of the \$10x capitalized to inventory, only \$7x is recovered through cost of goods sold during the 2020 taxable year and \$3x remains in ending inventory at the end of the 2020 taxable year. The \$3x of ending inventory is recovered through cost of goods sold during the 2021 taxable year. Y also has a disallowed business interest expense carryforward from the prior year of \$8x.

(ii) *Analysis.* (A) For purposes of determining the section 163(j) limitation for 2020, Y's disallowed business interest expense carryforward is not taken into account in determining tentative taxable income or ATI. Y's ATI is \$90x, calculated as follows:

Table 1 to paragraph (h)(3)(ii)(A)

Tentative taxable income:	\$30x
Less:	
Floor plan financing interest	10x
Business interest income	20x
	0x

(B) Plus:

Table 2 to paragraph (h)(3)(ii)(B)

Business interest expense	\$50x
Net operating loss deduction	25x
Depreciation	15x
ATI	\$90x

(C) For Y's 2021 taxable year, the \$3x of ending inventory that is recovered through cost of goods sold in 2021 is not added back to tentative taxable income (TTI) in determining ATI because it was already included as an addback in ATI in Y's 2020 taxable year. See §1.163(j)-1(b)(1)(iii).

(4) *Example 4: Floor plan financing interest expense—(i) Facts.* C is the sole proprietor of an

automobile dealership that uses a cash method of accounting. In the 2021 taxable year, C paid \$30x of interest on a loan that was obtained to purchase sedans for sale by the dealership. The indebtedness is secured by the sedans purchased with the loan proceeds. In addition, C paid \$20x of interest on a loan, secured by the dealership's office equipment, which C obtained to purchase convertibles for sale by the dealership.

(ii) *Analysis.* For the purpose of calculating C's section 163(j) limitation, only the \$30x of interest paid on the loan to purchase the sedans is floor plan financing interest expense. The \$20x paid on the loan to purchase the convertibles is not floor plan financing interest expense for purposes of section 163(j) because the indebtedness was not secured by the inventory of convertibles. However, because under §1.163(j)-10 the interest paid on the loan to purchase the convertibles is properly allocable to C's dealership trade or business, and because floor plan financing interest expense is also business interest expense, C has \$50x of business interest expense for the 2021 taxable year.

(5) *Example 5: Interest not properly allocable to non-exempted trade or business—(i) Facts.* The facts are the same as in Example 4 in paragraph (h)(4)(i) of this section, except that the \$20x of interest C pays is on acquisition indebtedness obtained to purchase C's personal residence and not to purchase convertibles for C's dealership trade or business.

(ii) *Analysis.* Because the \$20x of interest expense is not properly allocable to a non-exempted trade or business, and therefore is not business interest expense, C's only business interest expense is the \$30x that C pays on the loan used to purchase sedans for sale in C's dealership trade or business. C deducts the \$20x of interest related to his residence under the rules of section 163(h), without regard to section 163(j).

(6) *Example 6: Small business exemption—(i) Facts.* During the 2021 taxable year, D, the sole proprietor of a trade or business reported on Schedule C, has interest expense properly allocable to that trade or business. D does not conduct an electing real property trade or business or an electing farming business. D also earns gross income from providing services as an employee that is reported on a Form W-2. Under section 448(c) and the regulations in this part under section 448, D has average annual gross receipts of \$21 million, including \$1 million of wages in each of the three prior taxable years and \$2 million of income from investments not related to a trade or business in each of the three prior taxable years. Also, in each of the three prior taxable years, D received \$5 million in periodic payments of compensatory damages awarded in a personal injury lawsuit.

(ii) *Analysis.* Section 163(j) does not apply to D for the taxable year, because D qualifies for the small business exemption under §1.163(j)-2(d). The wages that D receives as an employee and the compensatory damages that D received from D's personal injury lawsuit are not gross receipts, as provided in §1.163(j)-2(d)(2)(ii). D may deduct all of its business interest expense for the 2021 taxable year without regard to section 163(j).

(7) *Example 7: Partnership with excess business interest expense qualifies for the small business exemption in a succeeding taxable year—(i) Facts.* X and Y are equal partners in partnership

PRS. In addition to being partners in PRS, X and Y each operate their own sole proprietorships. For the taxable year ending December 31, 2021, PRS is subject to section 163(j) and has excess business interest expense of \$10x. For the taxable year ending December 31, 2022, PRS has \$40x of business interest expense, and X and Y have \$20x of business interest expense from their respective sole proprietorships. For the taxable year ending December 31, 2022, PRS and Y qualify for the small business exemption under §1.163(j)-2(d), while X is subject to section 163(j) and has a section 163(j) limitation of \$22x.

(ii) *Partnership-level analysis.* For the 2021 taxable year, PRS allocates the \$10x of excess business interest expense equally to X and Y (\$5x each). See §1.163(j)-6(f)(2). For the 2022 taxable year, section 163(j) does not apply to PRS because PRS qualifies for the small business exemption. As a result, none of PRS's \$40x of business interest expense for the 2022 taxable year is subject to the section 163(j) limitation at the partnership level.

(iii) *Partner-level analysis.* For the 2022 taxable year, each partner treats its \$5x of excess business interest expense from PRS as paid or accrued in that year. See §1.163(j)-6(m)(3). This amount becomes business interest expense that each partner must subject to its own section 163(j) limitation, if any. With this \$5x, each partner has \$25x of business interest expense for the 2022 taxable year (\$20x from its sole proprietorship, plus \$5x of excess business interest expense treated as paid or accrued in the 2020 taxable year). X deducts \$22x of its business interest expense pursuant to its section 163(j) limitation and carries forward the remainder (\$3x) as a disallowed business interest expense carryforward to the taxable year ending December 31, 2023. Y is not subject to section 163(j) because Y qualifies for the small business exemption. Y therefore deducts all \$25x of its business interest expense for the 2022 taxable year.

(8) *Example 8: Aggregation of gross receipts—(i) Facts.* X and Y are domestic C corporations under common control, within the meaning of section 52(a) and §1.52-1(b). X's only trade or business is a farming business described in §1.263A-4(a)(4). During the taxable year ending December 31, 2020, X has average annual gross receipts under section 448(c) of \$6 million. During the same taxable year, Y has average annual gross receipts under section 448(c) of \$21 million.

(ii) *Analysis.* Because X and Y are under common control, they must aggregate gross receipts for purposes of section 448(c) and the small business exemption in §1.163(j)-2(d). See section 448(c)(2). Therefore, X and Y are both considered to have \$27 million in average annual gross receipts for 2020. X and Y must separately apply section 163(j) to determine any limitation on the deduction for business interest expense. Assuming X otherwise meets the requirements in §1.163(j)-9 in 2020, X may elect for its farming business to be an excepted trade or business.

(i) [Reserved]

(j) *Anti-avoidance rule—(1) In general.* Arrangements entered into with a principal purpose of avoiding the rules of section 163(j) or the section 163(j) regula-

tions, including the use of multiple entities to avoid the gross receipts test of section 448(c), may be disregarded or recharacterized by the Commissioner of the IRS to the extent necessary to carry out the purposes of section 163(j).

(2) *Examples.* The examples in this paragraph (j)(2) illustrate the application of this section.

(i) *Example 1—(A) Facts.* Individual A operates an excepted trade or business (Business X) and a non-excepted trade or business (Business Y). With a principal purpose of avoiding the rules of section 163(j) or the regulations in this part under section 163(j) of the Code, A contributes Business X to newly-formed C corporation B in exchange for stock; A then causes B to borrow funds from a third party and distributes a portion of the borrowed funds to A for use in Business Y. B takes the position that its interest payments on the debt are not subject to the section 163(j) limitation because B is engaged solely in an excepted trade or business.

(B) *Analysis.* A has entered into an arrangement with a principal purpose of avoiding the rules of section 163(j) or the regulations in this part under section 163(j). Thus, under paragraph (j)(1) of this section, the Commissioner of the IRS may disregard or recharacterize this transaction to the extent necessary to carry out the purposes of section 163(j). In this case, payments of interest on the debt may be recharacterized as payments of interest properly allocable to a non-excepted trade or business subject to the section 163(j) limitation.

(ii) *Example 2—(A) Facts.* Partnership UTP has two non-excepted trades or businesses. Business A has gross income of \$1000x and gross deductions of \$200x. Business B has gross income of \$100x and gross deductions of \$600x. With a principal purpose of avoiding the rules in section 163(j) or the regulations in this part under section 163(j), UTP and a partner of UTP form partnership LTP and UTP contributes Business B to LTP prior to borrowing funds. UTP takes the position that it does not take its share of LTP gross deductions into account when computing its ATI.

(B) *Analysis.* UTP has entered into an arrangement with a principal purpose of avoiding the rules of section 163(j) or the regulations in this part under section 163(j). Thus, under paragraph (j)(1) of this section, the Commissioner of the IRS may disregard or recharacterize this transaction to the extent necessary to carry out the purposes of section 163(j). In this case, UTP's share of gross deductions from LTP may be recharacterized as gross deductions incurred directly by UTP solely for purposes of computing UTP's ATI.

(k) *Applicability date.* This section applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the

rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.

§1.163(j)-3 Relationship of the section 163(j) limitation to other provisions affecting interest.

(a) *Overview.* This section contains rules regarding the relationship between section 163(j) and certain other provisions of the Code. Paragraph (b) of this section provides the general rules concerning the relationship between section 163(j) and certain other provisions of the Code. Paragraph (c) of this section provides examples illustrating the application of this section. For rules regarding the relationship between sections 163(j) and 704(d), see §1.163(j)-6(h)(1) and (2).

(b) *Coordination of section 163(j) with certain other provisions—(1) In general.* Section 163(j) and the regulations in this part under section 163(j) of the Code generally apply only to business interest expense that would be deductible in the current taxable year without regard to section 163(j). Thus, for example, a taxpayer must apply §1.163-8T, if applicable, to determine which items of interest expense are investment interest under section 163(d) before applying the rules in this section to interest expense. Except as otherwise provided in this section, section 163(j) applies after the application of provisions that subject interest expense to disallowance, deferral, capitalization, or other limitation. For the rules that must be applied in determining whether excess business interest is paid or accrued by a partner, see section 163(j)(4)(B)(ii) and §1.163(j)-6.

(2) *Disallowed interest provisions.* For purposes of section 163(j), business interest expense does not include interest expense that is permanently disallowed as a deduction under another provision of the Code, such as in section 163(e)(5)(A) (i), (f), (l), or (m), or section 264(a), 265, 267A, or 279.

(3) *Deferred interest provisions.* Other than sections 461(l), 465, and 469, Code provisions that defer the deductibility of interest expense, such as section 163(e)(3) and (e)(5)(A)(ii), 267(a)(2) and (3), 1277, or 1282, apply before the application of section 163(j).

(4) *At risk rules, passive activity loss provisions, and limitation on excess business losses of noncorporate taxpayers.* Section 163(j) generally applies to limit the deduction for business interest expense before the application of sections 461(l), 465, and 469. However, in determining tentative taxable income for purposes of computing ATI, sections 461(l), 465, and 469 are taken into account.

(5) *Capitalized interest expenses.* Section 163(j) applies after the application of provisions that require the capitalization of interest, such as sections 263A and 263(g). Capitalized interest expense under those sections is not treated as business interest expense for purposes of section 163(j). For ordering rules that determine whether interest expense is capitalized under section 263A(f), see the regulations under section 263A(f), including §1.263A-9(g).

(6) *Reductions under section 246A.* Section 246A applies before section 163(j). Any reduction in the dividends received deduction under section 246A reduces the amount of interest expense taken into account under section 163(j).

(7) *Section 381.* Disallowed business interest expense carryforwards are items to which an acquiring corporation succeeds under section 381(a). See section 381(c)(20) and §§1.163(j)-5(c) and 1.381(c)(20)-1.

(8) *Section 382.* For rules governing the interaction of sections 163(j) and 382, see section 382(d)(3) and (k)(1), §§1.163(j)-5(e) and 1.163(j)-11(c), the regulations in this part under sections 382 and 383 of the Code, and §§1.1502-91 through 1.1502-99.

(c) *Examples.* The examples in this paragraph (c) illustrate the application of section 163(j) and the provisions of this section. Unless otherwise indicated, X and Y are calendar-year domestic C corporations; D is a U.S. resident individual not subject to any foreign income tax; none of the taxpayers have floor plan financing interest expense; and the exemption for

certain small businesses in §1.163(j)-2(d) does not apply.

(1) *Example 1: Disallowed interest expense—(i) Facts.* In 2021, X has \$30x of interest expense. Of X's interest expense, \$10x is permanently disallowed under section 265. X's business interest income is \$3x and X's ATI is \$90x.

(ii) *Analysis.* Under paragraph (b)(2) of this section, the \$10x interest expense that is permanently disallowed under section 265 cannot be taken into consideration for purposes of section 163(j) in the 2021 taxable year. X's section 163(j) limitation, or the amount of business interest expense that X may deduct is limited to \$30x under §1.163(j)-2(b), determined by adding X's business interest income (\$3x) and 30 percent of X's 2019 ATI (\$27x). Therefore, in the 2021 taxable year, none of the \$20x of X's deduction for its business interest expense is disallowed under section 163(j).

(2) *Example 2: Deferred interest expense—(i) Facts.* In 2021, Y has no business interest income, \$120x of ATI, and \$70x of interest expense. Of Y's interest expense, \$30x is not currently deductible under section 267(a)(2). The \$30x expense is allowed as a deduction under section 267(a)(2) in 2022.

(ii) *Analysis.* Under paragraph (b)(3) of this section, section 267(a)(2) is applied before section 163(j). Accordingly, \$30x of Y's interest expense cannot be taken into consideration for purposes of section 163(j) in 2021 because it is not currently deductible under section 267(a)(2). Accordingly, in 2021, if the interest expense is properly allocable to a non-excepted trade or business, Y will have \$4x of disallowed business interest expense because the \$40x of business interest expense in 2021 (\$70x - \$30x) exceeds 30 percent of its ATI for the taxable year (\$36x). The \$30x of interest expense not allowed as a deduction in the 2021 taxable year under section 267(a)(2) will be taken into account in determining the business interest expense deduction under section 163(j) in 2022, the taxable year in which it is allowed as a deduction under section 267(a)(2), if it is allocable to a trade or business. Additionally, the \$4x of disallowed business interest expense in 2021 will be carried forward to 2022 as a disallowed business interest expense carryforward. See §1.163(j)-2(c).

(3) *Example 3: Passive activity loss—(i) Facts.* D is engaged in a rental activity treated as a passive activity within the meaning of section 469. For the 2021 taxable year, D receives \$200x of rental income and incurs \$300x of expenses all properly allocable to the rental activity, consisting of \$150x of interest expense, \$60x of maintenance expenses, and \$90x of depreciation expense. D's ATI is \$400x.

(ii) *Analysis.* Under paragraph (b)(4) of this section, section 163(j) is applied before the section 469 passive loss rules apply, except that section 469 is taken into account in the determination of tentative taxable income for purposes of computing ATI. D's section 163(j) limitation is \$120x, determined by adding to D's business interest income (\$0), floor plan financing (\$0), and 30 percent of D's ATI (\$120x). See §1.163(j)-2(b). Because D's business interest expense of \$150x exceeds D's section 163(j) limitation for 2021, \$30x of D's business interest expense is disallowed under section 163(j) and will be carried forward as a disallowed business interest

expense carryforward. See §1.163(j)-2(c). Because the section 163(j) limitation is applied before the limitation under section 469, only \$120x of the business interest expense allowable under section 163(j) is included in determining D's passive activity loss limitation for the 2021 tax year under section 469. The \$30x of disallowed business interest expense is not an allowable deduction under section 163(j) and, therefore, is not a deduction under section 469 in the current taxable year. See §1.469-2(d)(8).

(4) *Example 4: Passive activity loss by taxpayer that also participates in a non-passive activity—(i) Facts.* For 2021, D has no business interest income and ATI of \$1,000x, entirely attributable to a passive activity within the meaning of section 469. D has business interest expense of \$1,000x, \$900x of which is properly allocable to a passive activity and \$100x of which is properly allocable to a non-passive activity in which D materially participates. D has other business deductions that are not subject to section 469 of \$600x, and a section 469 passive loss from the previous year of \$250x.

(ii) *Analysis.* Under paragraph (b)(4) of this section, section 163(j) is applied before the section 469 passive loss rules apply. D's section 163(j) limitation is \$300x, determined by adding D's business interest income (\$0), floor plan financing (\$0), and 30 percent of D's ATI (\$300x). Next, applying the limitation under section 469 to the \$300x business interest expense deduction allowable under section 163(a) and (j), \$270x (a proportionate amount of the \$300x (0.90 x \$300x)) is business interest expense included in determining D's passive activity loss limitation under section 469, and \$30x (a proportionate amount of the \$300x (0.10 x \$300)) is business interest expense not included in determining D's passive activity loss limitation under section 469. Because D's interest expense of \$1,000x exceeds 30 percent of its ATI for 2021, \$700x of D's interest expense is disallowed under section 163(j) and will be carried forward as a disallowed business interest expense carryforward. Section 469 does not apply to any portion of the \$700x disallowed business interest expense because that business interest expense is not an allowable deduction under section 163(j) and, therefore, is not an allowable deduction under section 469 in the current taxable year. See §1.469-2(d)(8).

(5) *Example 5: ATI calculation with passive activity loss—(i) Facts.* D is an individual who engages in a trade or business, V, as a sole proprietorship. D relies on employees to perform most of the work and, as a result, D does not materially participate in V. Therefore, V is a passive activity of D. V is not an excepted trade or business. In Year 1, V generates \$500x of passive income, \$400x of business interest expense, and \$600x of ordinary and necessary expenses deductible under section 162 (not including any interest described in §1.163(j)-1(b)(22)). No disallowed business interest expense carryforward has been carried to Year 1 from a prior year, and no amounts have been carried over to Year 1 from a prior year under either section 465(a)(2) or section 469(b).

(ii) *Tentative taxable income.* Under §1.163(j)-1(b)(43), tentative taxable income is determined as though all business interest expense was not subject to the section 163(j) limitation. Sections 461(l), 465, and 469 apply in the determination of tentative

taxable income. For year 1, D has \$500x of allowable deductions and a \$500x tentative passive activity loss under section 469, because D's \$1000x of passive expenses exceeds D's \$500x of passive income from V. The tentative disallowance of \$500x is generally allocated pro rata between D's passive expenses under §1.469-1T(f)(2)(ii)(A). In this case, fifty percent (\$500x of passive activity loss divided by \$1000x of total passive expenses) of each category of passive expense is tentatively disallowed: \$200x of business interest expense and \$300x of section 162 expense. D's tentative taxable income is \$0 (zero), which is determined by reducing \$500x of gross income by the remaining \$200x of business interest expense and \$300x of section 162 expense (\$500x - \$200x - \$300x).

(iii) *ATI.* Under section §1.163(j)-1(b)(1), to determine ATI, D must add business interest expense to tentative taxable income, but only to the extent that the business interest expense reduced tentative taxable income, or \$200x. The \$200x of business interest expense that was tentatively disallowed under section 469 is not added to tentative taxable income to determine ATI. D's ATI is \$200x, which is determined by adding the \$200x of business interest expense that reduced tentative taxable income to D's tentative taxable income, or \$0 (0 + \$200x).

(iv) *Section 163(j) limitation.* D's section 163(j) limitation in Year 1 is D's business interest income, or \$0, plus 30 percent of ATI, or \$60x (30 percent x \$200x ATI), plus D's floor plan financing, or \$0, for a total of \$60x (\$0 + \$60x + \$0). Before the application of section 469, D has \$60x of deductible business interest expense and \$340x of disallowed business interest expense carryforward under §1.163(j)-2(c).

(v) *Passive activity loss.* Because D's passive deductions exceed the passive income from V, and D does not have any passive income from other sources, section 469 applies to limit D's passive loss from V. Having first applied section 163(j), D has \$660x of passive expenses, determined by adding D's \$60x of business interest expense that is allowed by section 163(j) as a deduction and \$600x of section 162 expense (\$60x + \$600x). D offsets \$500x of the passive expenses against \$500x of passive income; therefore, D has a passive activity loss of \$160x in Year 1, determined as the excess of D's total passive expenses over D's passive income (\$660x - \$500x).

The amount of D's loss from the passive activity that is disallowed under section 469 (\$160x) is generally ratably allocated to each of D's passive activity deductions under §1.469-1T(f)(2)(ii)(A). As a general rule, each deduction is multiplied by the ratio of the total passive loss to total passive expenses (160x / 660x). Of D's \$60x business interest expense, \$14.55x ((160x / 660x) x \$60x) is disallowed in Year 1. Additionally, of D's \$600x section 162 expense, \$145.45x ((160x / 660x) x \$600x) is disallowed. The amounts disallowed under section 469(a)(1) and §1.469-2T(f)(2) are carried over to the succeeding taxable year under section 469(b) and §1.469-1(f)(4).

(6) *Example 6: Effect of passive activity loss carryforwards—(i) Facts.* The facts are the same as in Example 5 in paragraph (c)(5)(i) of this section. In

Year 2, V generates \$500x of passive income, \$100x of business interest expense, and \$0 (zero) of other deductible expenses. D is not engaged in any other trade or business activities. A disallowed business interest expense carryforward of \$340x has been carried to Year 2 from Year 1. Under section 469, D has a suspended loss from Year 1 that includes \$14.55x of business interest expense and \$145.45x of section 162 expense. These amounts are treated as passive activity deductions in Year 2.

(ii) *Tentative taxable income.* To determine D's tentative taxable income, D must first determine D's allowable deductions. In year 2, D has \$260x of allowable deductions, which includes \$100x of business interest expense generated Year 2, \$14.55x of business interest expense disallowed in Year 1 by section 469, and \$145.45x of section 162 expense disallowed in Year 1 by section 469 (\$100x + \$14.55x + \$145.45x)). D's disallowed business interest expense carryforward from Year 1 is not taken into account in determining tentative taxable income. See §1.163(j)-1(b)(43). Additionally, the \$14.55x of business interest expense disallowed in Year 1 by section 469 is not business interest expense in Year 2 because it was deductible after the application of section 163(j) (but before the application of section 469) in Year 1. D does not have a tentative passive activity loss in Year 2, because D's \$500x of passive income from V exceeds D's \$260x of tentative passive expenses. Therefore, D's tentative taxable income in Year 2 is \$240x, which is determined by subtracting D's allowable deductions other than disallowed business interest expense carryforwards, or \$260x, from D's gross income, or \$500x (\$500x - \$260x).

(iii) *ATI.* D's ATI in Year 2 is \$340x, which is determined by adding D's business interest expense, or \$100x, to D's tentative taxable income, or \$240x (\$240x + \$100x). Because disallowed business interest expense carryforwards are not taken into account in determining tentative taxable income, there is no corresponding adjustment for disallowed business interest expense carryforwards in calculating ATI. Therefore, there is no adjustment for D's \$340x of disallowed business interest expense carryforward in calculating D's ATI. D has no other adjustments to determine ATI.

(iv) *Section 163(j) limitation.* D's section 163(j) limitation in Year 2 is \$102x, which is determined by adding D's business interest income, or \$0, 30 percent of D's ATI for year 2, \$102 (\$340x x 30 percent), and D's floor plan financing for Year 2, or \$0 (\$0 + (\$102x) + \$0). Accordingly, before the application of section 469 in Year 2, \$102x of D's \$440x of total business interest expense (determined by adding \$340x of disallowed business interest expense carryforward from Year 1 and \$100x of business interest expense in Year 2) is deductible. D has \$338x of disallowed business interest expense carryforward that will carry forward to subsequent taxable years under §1.163(j)-2(c), determined by subtracting D's deductible business interest expense in Year 2, or \$102x, from D's total business interest expense in Year 2, or \$440x (\$440x - \$102x).

(v) *Section 469.* After applying the section 163(j) limitation, D applies section 469 to determine if any amount of D's expense is a disallowed passive activity loss. For Year 2, D has \$262x of passive expenses,

determined by adding D's business interest expense deduction allowed by section 163(j) (\$102x), D's section 162 expense carried forward from Year 1 under section 469 (\$145.45x), and D's interest expense carried forward from Year 1 under section 469 which is not business interest expense in Year 2, or \$14.55x (\$102x + \$145.45x + \$14.55x). Therefore, D has \$238x of net passive income in Year 2, determined by reducing D's total passive income in Year 2 (\$500x), by D's disallowed passive activity loss, or \$262x (\$500x - \$262x). D does not have a passive activity loss in Year 2, and no part of D's \$262x of passive expenses is disallowed in Year 2 under section 469.

(7) *Example 7: Capitalized interest expense—(i) Facts.* In 2020, X has \$50x of interest expense. Of X's interest expense, \$10x is required to be capitalized under section 263A. X capitalizes this interest expense to a depreciable asset. X's business interest income is \$9x and X's ATI is \$80x. X makes the election in §1.163(j)-2(b)(2)(ii) to use 30 percent, rather than 50 percent, of ATI in determining X's section 163(j) limitation for the 2020 taxable year.

(ii) *Analysis.* Under paragraph (b)(5) of this section, section 263A is applied before section 163(j). Accordingly, \$10x of X's interest expense cannot be taken into consideration for purposes of section 163(j) in 2020. Additionally, under paragraph (b)(5) of this section, X's \$10 of capitalized interest expense is not business interest expense for purposes of section 163(j). As a result, when X recovers its capitalized interest expense through depreciation deductions, such capitalized interest expense will not be taken into account as business interest expense in determining X's section 163(j) limitation. X's section 163(j) limitation in 2020, or the amount of business interest expense that X may deduct, is limited to \$33x under §1.163(j)-2(b), determined by adding X's business interest income (\$9x) and 30 percent of X's 2020 ATI (\$24x). X therefore has \$7x of disallowed business interest expense in 2020 that will be carried forward to 2021 as a disallowed business interest expense carryforward.

(d) *Applicability date.* This section applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.

§1.163(j)-4 General rules applicable to C corporations (including REITs, RICs, and members of consolidated groups) and tax-exempt corporations.

(a) *Scope.* This section provides rules regarding the computation of items of income and expense under section 163(j) for taxpayers that are C corporations, including, for example, members of a consolidated group, REITs, RICs, tax-exempt corporations, and cooperatives. Paragraph (b) of this section provides rules regarding the characterization of items of income, gain, deduction, or loss. Paragraph (c) of this section provides rules regarding adjustments to earnings and profits. Paragraph (d) of this section provides rules applicable to members of a consolidated group. Paragraph (e) of this section provides rules governing the ownership of partnership interests by members of a consolidated group. Paragraph (f) of this section provides cross-references to other rules within the 163(j) regulations that may be applicable to C corporations.

(b) *Characterization of items of income, gain, deduction, or loss—(1) Interest expense and interest income.* Solely for purposes of section 163(j), all interest expense of a taxpayer that is a C corporation is treated as properly allocable to a trade or business. Similarly, solely for purposes of section 163(j), all interest income of a taxpayer that is a C corporation is treated as properly allocable to a trade or business. For rules governing the allocation of interest expense and interest income between excepted and non-excepted trades or businesses, see §1.163(j)-10.

(2) *Adjusted taxable income.* Solely for purposes of section 163(j), all items of income, gain, deduction, or loss of a taxpayer that is a C corporation are treated as properly allocable to a trade or business. For rules governing the allocation of tax items between excepted and non-excepted trades or businesses, see §1.163(j)-10.

(3) *Investment interest, investment income, investment expenses, and certain other tax items of a partnership with a C corporation partner—(i) Characterization as expense or income properly allocable to a trade or business.* For purposes of section 163(j), any investment interest, investment income, or investment expense (within the meaning of section

163(d)) that a partnership pays, receives, or accrues and that is allocated to a C corporation partner as a separately stated item is treated by the C corporation partner as properly allocable to a trade or business of that partner. Similarly, for purposes of section 163(j), any other tax items of a partnership that are neither properly allocable to a trade or business of the partnership nor described in section 163(d) and that are allocated to a C corporation partner as separately stated items are treated as properly allocable to a trade or business of that partner.

(ii) *Effect of characterization on partnership.* The characterization of a partner's tax items pursuant to paragraph (b)(3)(i) of this section does not affect the characterization of these items at the partnership level.

(iii) *Separately stated interest expense and interest income of a partnership not treated as excess business interest expense or excess taxable income of a C corporation partner.* Investment interest expense and other interest expense of a partnership that is treated as business interest expense by a C corporation partner under paragraph (b)(3)(i) of this section is not treated as excess business interest expense of the partnership. Investment interest income and other interest income of a partnership that is treated as business interest income by a C corporation partner under paragraph (b)(3)(i) of this section is not treated as excess taxable income of the partnership. For rules governing excess business interest expense and excess taxable income, see §1.163(j)-6.

(iv) *Treatment of deemed inclusions of a domestic partnership that are not allocable to any trade or business.* If a United States shareholder that is a domestic partnership includes amounts in gross income under sections 951(a) or 951A(a) that are not properly allocable to a trade or business of the domestic partnership, then, notwithstanding paragraph (b)(3)(i) of this section, to the extent a C corporation partner, including an indirect partner in the case of tiered partnerships, takes such amounts into account as a distributive share in accordance with section 702 and §1.702-1(a)(8)(ii), the C corporation partner may not treat such amounts as properly allocable to a trade or business of the C corporation partner.

(4) *Application to RICs and REITs—(i) In general.* Except as otherwise provided in paragraphs (b)(4)(ii) and (iii) of this section, the rules in this paragraph (b) apply to RICs and REITs.

(ii) *Tentative taxable income of RICs and REITs.* The tentative taxable income of a RIC or REIT for purposes of calculating ATI is the tentative taxable income of the corporation, without any adjustment that would be made under section 852(b)(2) or 857(b)(2) to compute investment company taxable income or real estate investment trust taxable income, respectively. For example, the tentative taxable income of a RIC or REIT is not reduced by the deduction for dividends paid, but is reduced by the dividends received deduction (DRD) and the other deductions described in sections 852(b)(2)(C) and 857(b)(2)(A). See paragraph (b)(4)(iii) of this section for an adjustment to ATI in respect of these items.

(iii) *Other adjustments to adjusted taxable income for RICs and REITs.* In the case of a taxpayer that, for a taxable year, is a RIC to which section 852(b) applies or a REIT to which section 857(b) applies, the taxpayer's ATI for the taxable year is increased by the amounts of any deductions described in section 852(b)(2)(C) or 857(b)(2)(A).

(5) *Application to tax-exempt corporations.* The rules in this paragraph (b) apply to a tax-exempt corporation only with respect to that corporation's items of income, gain, deduction, or loss that are taken into account in computing the corporation's unrelated business taxable income, as defined in section 512.

(6) *Adjusted taxable income of cooperatives.* Solely for purposes of computing the ATI of a cooperative under §1.163(j)-1(b)(1), tentative taxable income is not reduced by the amount of any patronage dividend under section 1382(b)(1) or by any amount paid in redemption of nonqualified written notices of allocation distributed as patronage dividends under section 1382(b)(2) (for cooperatives subject to taxation under sections 1381 through 1388), any amount described in section 1382(c) (for cooperatives described in section 1381(a)(1) and section 521), or any equivalent amount deducted by an organization that operates on a cooperative

basis but is not subject to taxation under sections 1381 through 1388.

(7) *Examples.* The principles of this paragraph (b) are illustrated by the following examples. For purposes of the examples in this paragraph (b)(7) of this section, T is a taxable domestic C corporation whose taxable year ends on December 31; T is neither a consolidated group member nor a RIC or a REIT; neither T nor PS1, a domestic partnership, owns at least 80 percent of the stock of any corporation; neither T nor PS1 qualifies for the small business exemption in §1.163(j)-2(d) or is engaged in an excepted trade or business; T has no floor plan financing expense; all interest expense is deductible except for the potential application of section 163(j); and the facts set forth the only corporate or partnership activity.

(i) *Example 1: C corporation items properly allocable to a trade or business—(A) Facts.* In taxable year 2021, T's tentative taxable income (without regard to the application of section 163(j)) is \$320x. This amount is comprised of the following tax items: \$1,000x of revenue from inventory sales; \$500x of ordinary and necessary business expenses (excluding interest and depreciation); \$200x of interest expense; \$50x of interest income; \$50x of depreciation deductions under section 168; and a \$20x gain on the sale of stock.

(B) *Analysis.* For purposes of section 163(j), each of T's tax items is treated as properly allocable to a trade or business. Thus, T's ATI for the 2021 taxable year is \$520x (\$320x of tentative taxable income + \$200x business interest expense - \$50x business interest income + \$50x depreciation deductions = \$520x), and its section 163(j) limitation for the 2021 taxable year is \$206x (\$50x of business interest income + 30 percent of its ATI (30 percent x \$520x) = \$206x). As a result, all \$200x of T's interest expense is deductible in the 2021 taxable year under section 163(j).

(C) *Taxable year beginning in 2022.* The facts are the same as in *Example 1* in paragraph (b)(7)(i) (A) of this section, except that the taxable year begins in 2022 and therefore depreciation deductions are not added back to ATI under §1.163(j)-1(b)(1)(i) (E). As a result, T's ATI for 2022 is \$470x (\$320x of tentative taxable income + \$200x business interest expense - \$50x business interest income = \$470x), and its section 163(j) limitation for the 2022 taxable year is \$191x (\$50x of business interest income + 30 percent of its ATI (30 percent x \$470x) = \$191x). As a result, T may only deduct \$191x of its business interest expense for the taxable year, and the remaining \$9x is carried forward to the 2023 taxable year as a disallowed business interest expense carryforward. See §1.163(j)-2(c).

(ii) *Example 2: C corporation partner—(A) Facts.* T and individual A each own a 50 percent interest in PS1, a general partnership. PS1 borrows funds from a third party (Loan 1) and uses those funds to buy stock in publicly-traded corporation X.

PS1's only activities are holding X stock (and receiving dividends) and making payments on Loan 1. In the 2021 taxable year, PS1 receives \$150x in dividends and pays \$100x in interest on Loan 1.

(B) *Analysis.* For purposes of section 163(d) and (j), PS1 has investment interest expense of \$100x and investment income of \$150x, and PS1 has no interest expense or interest income that is properly allocable to a trade or business. PS1 allocates its investment interest expense and investment income equally to its two partners pursuant to §1.163(j)-6(k). Pursuant to paragraph (b)(3) of this section, T's allocable share of PS1's investment interest expense is treated as a business interest expense of T, and T's allocable share of PS1's investment income is treated as properly allocable to a trade or business of T. This business interest expense is not treated as excess business interest expense, and this income is not treated as excess taxable income. See paragraph (b)(3)(iii) of this section. T's treatment of its allocable share of PS1's investment interest expense and investment income as business interest expense and income properly allocable to a trade or business, respectively, does not affect the character of these items at the PS1 level and does not affect the character of A's allocable share of PS1's investment interest and investment income.

(C) *Partnership engaged in a trade or business.* The facts are the same as in *Example 2* in paragraph (b)(7)(ii)(A) of this section, except that PS1 also is engaged in Business 1, and PS1 borrows funds from a third party to finance Business 1 (Loan 2). In 2021, Business 1 earns \$150x of net income (excluding interest expense and depreciation), and PS1 pays \$100x of interest on Loan 2. For purposes of section 163(d) and (j), PS1 treats the interest paid on Loan 2 as properly allocable to a trade or business. As a result, PS1 has investment interest expense of \$100x (attributable to Loan 1), business interest expense of \$100x (attributable to Loan 2), \$150x of investment income, and \$150x of income from Business 1. PS1's ATI is \$150x (its net income from Business 1 excluding interest and depreciation), and its section 163(j) limitation is \$45x (30 percent x \$150x). Pursuant to §1.163(j)-6, PS1 has \$55x of excess business interest expense (\$100x - \$45x), half of which (\$27.5x) is allocable to T. Additionally, pursuant to paragraph (b)(3)(i) of this section, T's allocable share of PS1's investment interest expense (\$50x) is treated as a business interest expense of T for purposes of section 163(j), and T's allocable share of PS1's investment income (\$75x) is treated as properly allocable to a trade or business of T. Therefore, with respect to T's interest in PS1, T is treated as having \$50x of business interest expense that is not treated as excess business interest expense, \$75x of income that is properly allocable to a trade or business, and \$27.5x of excess business interest expense.

(c) *Effect on earnings and profits—(1) In general.* In the case of a taxpayer that is a domestic C corporation, except as otherwise provided in paragraph (c)(2) of this section, the disallowance and carryforward under §1.163(j)-2 (and §1.163(j)-5, in the case of a taxpayer that is a consolidated group member) of a deduction for business interest expense of the taxpayer

or of a partnership in which the taxpayer is a partner does not affect whether or when the business interest expense reduces the taxpayer's earnings and profits. In the case of a foreign corporation, the disallowance and carryforward of a deduction for the corporation's business interest expense under §1.163(j)-2 does not affect whether and when such business interest expense reduces the corporation's earnings and profits. Thus, for example, if a United States person has elected under section 1295 to treat a passive foreign investment company (as defined in section 1297) (PFIC) as a qualified electing fund, then the disallowance and carryforward of a deduction for the PFIC's business interest expense under §1.163(j)-2 does not affect whether or when such business interest expense reduces the PFIC's earnings and profits.

(2) *Special rule for RICs and REITs.* In the case of a taxpayer that is a RIC or a REIT for the taxable year in which a deduction for the taxpayer's business interest expense is disallowed under §1.163(j)-2(b), or in which the RIC or REIT is allocated any excess business interest expense from a partnership under section 163(j)(4)(B)(i) and §1.163(j)-6, the taxpayer's earnings and profits are adjusted in the taxable year or years in which the business interest expense is deductible or, if earlier, in the first taxable year for which the taxpayer no longer is a RIC or a REIT.

(3) *Special rule for partners that are C corporations.* If a taxpayer that is a C corporation is allocated any excess business interest expense from a partnership, and if all or a portion of the excess business interest expense has not yet been treated as business interest expense by the taxpayer at the time of the taxpayer's disposition of all or a portion of its interest in the partnership, the taxpayer must increase its earnings and profits immediately prior to the disposition by an amount equal to the amount of the basis adjustment required under section 163(j)(4)(B)(iii)(II) and §1.163(j)-6(h)(3).

(4) *Examples.* The principles of this paragraph (c) are illustrated by the following examples. For purposes of the examples in this paragraph (c)(4), except as otherwise provided in the examples, X is a taxable domestic C corporation whose taxable year ends on December 31; X is

not a member of a consolidated group; X does not qualify for the small business exemption under §1.163(j)-2(d); X is not engaged in an excepted trade or business; X has no floor plan financing indebtedness; all interest expense is deductible except for the potential application of section 163(j); X has no accumulated earnings and profits at the beginning of the 2021 taxable year; and the facts set forth the only corporate activity.

(i) *Example 1: Earnings and profits of a taxable domestic C corporation other than a RIC or a REIT—(A) Facts.* X is a corporation that does not intend to qualify as a RIC or a REIT for its 2021 taxable year. In that year, X has tentative taxable income (without regard to the application of section 163(j)) of \$0, which includes \$100x of gross income and \$100x of interest expense on a loan from an unrelated third party. X also makes a \$100x distribution to its shareholders that year.

(B) *Analysis.* The \$100x of interest expense is business interest expense for purposes of section 163(j) (see paragraph (b)(1) of this section). X's ATI in the 2021 taxable year is \$100x (\$0 of tentative taxable income computed without regard to \$100x of business interest expense). Thus, X may deduct \$30x of its \$100x of business interest expense in the 2021 taxable year under §1.163(j)-2(b) (30 percent x \$100x), and X may carry forward the remainder (\$70x) to X's 2022 taxable year as a disallowed business interest expense carryforward under §1.163(j)-2(c). Although X may not currently deduct all \$100x of its business interest expense in the 2021 taxable year, X must reduce its earnings and profits in that taxable year by the full amount of its business interest expense (\$100x) in that taxable year. As a result, no portion of X's distribution of \$100x to its shareholders in the 2021 taxable year is a dividend within the meaning of section 316(a).

(ii) *Example 2: RIC adjusted taxable income and earnings and profits—(A) Facts.* X is a corporation that intends to qualify as a RIC for its 2021 taxable year. In that taxable year, X's only items are \$100x of interest income, \$50x of dividend income from C corporations that only issue common stock and in which X has less than a twenty percent interest (by vote and value), \$10x of net capital gain, and \$125x of interest expense. None of the dividends are received on debt financed portfolio stock under section 246A. The DRD determined under section 243(a) with respect to X's \$50x of dividend income is \$25x. X pays \$42x in dividends to its shareholders, meeting the requirements of section 562 during X's 2021 taxable year, including \$10x that X reports as capital gain dividends in written statements furnished to X's shareholders.

(B) *Analysis.* (I) Under paragraph (b) of this section, all of X's interest expense is considered business interest expense, all of X's interest income is considered business interest income, and all of X's other income is considered to be properly allocable to a trade or business. Under paragraph (b)(4)(ii) of this section, prior to the application of section 163(j), X's tentative taxable income is \$10x (\$100x business interest income + \$50x dividend income + \$10x net

capital gain - \$125x business interest expense - \$25x DRD = \$10x). Under paragraph (b)(4)(iii) of this section, X's ATI is increased by the DRD. As such, X's ATI for the 2021 taxable year is \$60x (\$10x tentative taxable income + \$125x business interest expense - \$100x business interest income + \$25x DRD = \$60x).

(2) X may deduct \$118x of its \$125x of business interest expense in the 2021 taxable year under section 163(j)(1) (\$100x business interest income + (30 percent x \$60x of ATI) = \$118x), and X may carry forward the remainder (\$7x) to X's 2022 taxable year. See §1.163(j)-2(b) and (c).

(3) After the application of section 163(j), X has taxable income of \$17x (\$100x interest income + \$50x dividend income + \$10x capital gain - \$25x DRD - \$118x allowable interest expense = \$17x) for the 2021 taxable year. X will have investment company taxable income (ICTI) in the amount of \$0 (\$17x taxable income - \$10x capital gain + \$25x DRD - \$32x dividends paid deduction for ordinary dividends = \$0). The excess of X's net capital gain (\$10x) over X's dividends paid deduction determined with reference to capital gain dividends (\$10x) is also \$0.

(4) Under paragraph (c)(2) of this section, X will not reduce its earnings and profits by the amount of interest expense disallowed as a deduction in the 2021 taxable year under section 163(j). Thus, X has current earnings and profits in the amount of \$42x (\$100x interest income + \$50x dividend income + \$10x capital gain - \$118x allowable business interest expense = \$42x) before giving effect to dividends paid during the 2021 taxable year.

(iii) *Example 3: Carryforward of disallowed interest expense—(A) Facts.* The facts are the same as the facts in *Example 2* in paragraph (c)(4)(ii)(A) of this section for the 2021 taxable year. In addition, X has \$50x of interest income and \$20x of interest expense for the 2022 taxable year.

(B) *Analysis.* Under paragraph (b) of this section, all of X's interest expense is considered business interest expense, all of X's interest income is considered business interest income, and all of X's other income is considered to be properly allocable to a trade or business. Because X's \$50x of business interest income exceeds the \$20x of business interest expense from the 2022 taxable year and the \$7x of disallowed business interest expense carryforward from the 2021 taxable year, X may deduct \$27x of business interest expense in the 2022 taxable year. Under paragraph (c)(2) of this section, X must reduce its current earnings and profits for the 2022 taxable year by the full amount of the deductible business interest expense (\$27x).

(iv) *Example 4: REIT adjusted taxable income and earnings and profits—(A) Facts.* X is a corporation that intends to qualify as a REIT for its 2021 taxable year. X is not engaged in an excepted trade or business and is not engaged in a trade or business that is eligible to make any election under section 163(j)(7). In that year, X's only items are \$100x of mortgage interest income, \$30x of dividend income from C corporations that only issue common stock and in which X has less than a ten percent interest (by vote and value), \$10x of net capital gain from the sale of mortgages on real property that is not property described in section 1221(a)(1), and \$125x of

interest expense. None of the dividends are received on debt financed portfolio stock under section 246A. The DRD determined under section 243(a) with respect to X's \$30x of dividend income is \$15x. X pays \$28x in dividends meeting the requirements of section 562 during X's 2021 taxable year, including \$10x that X properly designates as capital gain dividends under section 857(b)(3)(B).

(B) *Analysis.* (I) Under paragraph (b) of this section, all of X's interest expense is considered business interest expense, all of X's interest income is considered business interest income, and all of X's other income is considered to be properly allocable to a trade or business. Under paragraph (b)(4)(ii) of this section, prior to the application of section 163(j), X's tentative taxable income is \$0 (\$100x business interest income + \$30x dividend income + \$10x net capital gain - \$125x business interest expense - \$15x DRD = \$0). Under paragraph (b)(4)(iii) of this section, X's ATI is increased by the DRD. As such, X's ATI for the 2021 taxable year is \$40x (\$0 tentative taxable income + \$125x business interest expense - \$100x business interest income + \$15x DRD = \$40x).

(2) X may deduct \$112x of its \$125x of business interest expense in the 2021 taxable year under section 163(j)(1) (\$100x business interest income + (30 percent x \$40x of ATI) = \$112x), and X may carry forward the remainder of its business interest expense (\$13x) to X's 2022 taxable year.

(3) After the application of section 163(j), X has taxable income of \$13x (\$100x business interest income + \$30x dividend income + \$10x capital gain - \$15x DRD - \$112x allowable business interest expense = \$13x) for the 2021 taxable year. X will have real estate investment trust taxable income (REITTI) in the amount of \$0 (\$13x taxable income + \$15x of DRD - \$28x dividends paid deduction = \$0).

(4) Under paragraph (c)(2) of this section, X will not reduce earnings and profits by the amount of business interest expense disallowed as a deduction in the 2021 taxable year. Thus, X has current earnings and profits in the amount of \$28x (\$100x business interest income + \$30x dividend income + \$10x capital gain - \$112x allowable business interest expense = \$28x) before giving effect to dividends paid during X's 2021 taxable year.

(v) *Example 5: Carryforward of disallowed interest expense—(A) Facts.* The facts are the same as in *Example 4* in paragraph (c)(4)(iv)(A) of this section for the 2021 taxable year. In addition, X has \$50x of mortgage interest income and \$20x of interest expense for the 2022 taxable year. X has no other tax items for the 2022 taxable year.

(B) *Analysis.* Because X's \$50x of business interest income exceeds the \$20x of business interest expense from the 2022 taxable year and the \$13x of disallowed business interest expense carryforwards from the 2021 taxable year, X may deduct \$33x of business interest expense in 2022. Under paragraph (c)(2) of this section, X must reduce its current earnings and profits for 2022 by the full amount of the deductible interest expense (\$33x).

(d) *Special rules for consolidated groups—(1) Scope.* This paragraph (d) provides rules applicable to members of a consolidated group. For all members of a consolidated group for a consolidated

return year, the computations required by section 163(j) and the regulations in this part under section 163(j) are made in accordance with the rules of this paragraph (d) unless otherwise provided elsewhere in the section 163(j) regulations. For rules governing the ownership of partnership interests by members of a consolidated group, see paragraph (e) of this section.

(2) *Calculation of the section 163(j) limitation for members of a consolidated group*—(i) *In general*. A consolidated group has a single section 163(j) limitation, the absorption of which is governed by §1.163(j)-5(b)(3)(ii).

(ii) *Interest*. For purposes of determining whether amounts, other than amounts in respect of intercompany obligations (as defined in §1.1502-13(g)(2)(ii)), intercompany items (as defined in §1.1502-13(b)(2)), or corresponding items (as defined in §1.1502-13(b)(3)), are treated as interest within the meaning of §1.163(j)-1(b)(22), all members of a consolidated group are treated as a single taxpayer.

(iii) *Calculation of business interest expense and business interest income for a consolidated group*. For purposes of calculating the section 163(j) limitation for a consolidated group, the consolidated group's current-year business interest expense and business interest income, respectively, are the sum of each member's current-year business interest expense and business interest income, including amounts treated as business interest expense and business interest income under paragraph (b)(3) of this section.

(iv) *Calculation of adjusted taxable income*. For purposes of calculating the ATI for a consolidated group, the tentative taxable income is the consolidated group's consolidated taxable income, determined under §1.1502-11 but without regard to any carryforwards or disallowances under section 163(j). Further, for purposes of calculating the ATI of the group, intercompany items and corresponding items are disregarded to the extent that they offset in amount. Thus, for example, certain portions of the intercompany items and corresponding items of a group member engaged in a non-excepted trade or business will not be included in ATI to the extent that the coun-

terparties to the relevant intercompany transactions are engaged in one or more excepted trades or businesses.

(v) *Treatment of intercompany obligations*—(A) *In general*. Except as otherwise provided in paragraph (d)(2)(v)(B) of this section, for purposes of determining a member's business interest expense and business interest income, and for purposes of calculating the consolidated group's ATI, all intercompany obligations, as defined in §1.1502-13(g)(2)(ii), are disregarded. Therefore, except as otherwise provided in paragraph (d)(2)(v)(B) of this section, interest expense and interest income from intercompany obligations are not treated as business interest expense and business interest income.

(B) *Repurchase premium*. This paragraph (d)(2)(v)(B) applies if a member of a consolidated group purchases an obligation of another member of the same consolidated group in a transaction to which §1.1502-13(g)(5) applies. Notwithstanding the general rule of paragraph (d)(2)(v)(A) of this section, if, as a result of the deemed satisfaction of the obligation under §1.1502-13(g)(5)(ii), the debtor member has repurchase premium that is deductible under §1.163-7(c), such repurchase premium is treated as interest that is subject to the section 163(j) limitation. See §1.163(j)-1(b)(22)(i)(H).

(3) *Investment adjustments*. For rules governing investment adjustments within a consolidated group, see §1.1502-32(b).

(4) *Examples*. The principles in this paragraph (d) are illustrated by the following examples. For purposes of the examples in this paragraph (d)(4), S is a member of the calendar-year consolidated group of which P is the common parent; the P group does not qualify for the small business exemption in §1.163(j)-2(d); no member of the P group is engaged in an excepted trade or business; all interest expense is deductible except for the potential application of section 163(j); and the facts set forth the only corporate activity.

(i) *Example 1: Calculation of the section 163(j) limitation*—(A) *Facts*. In the 2021 taxable year, P has \$50x of separate tentative taxable income after taking into account \$65x of interest paid on a loan from a third party (without regard to any disallowance under section 163(j)) and \$35x of depreciation deductions under section 168. In turn, S has \$40x of separate tentative taxable income in the 2021 taxable

year after taking into account \$10x of depreciation deductions under section 168. S has no interest expense in the 2021 taxable year. The P group's tentative taxable income the 2021 taxable year is \$90x, determined under §1.1502-11 without regard to any disallowance under section 163(j).

(B) *Analysis*. As provided in paragraph (b)(1) of this section, P's interest expense is treated as business interest expense for purposes of section 163(j). If P and S were to apply the section 163(j) limitation on a separate-entity basis, then P's ATI would be \$150x (\$50x + \$65x + \$35x = \$150x), its section 163(j) limitation would be \$45x (30 percent x \$150x = \$45x), and a deduction for \$20x of its \$65x of business interest expense would be disallowed in the 2021 taxable year under section 163(j). However, as provided in paragraph (d)(2) of this section, the P group computes a single section 163(j) limitation, and that computation begins with the P group's tentative taxable income (as determined prior to the application of section 163(j)), or \$90x. The P group's ATI is \$200x (\$50x + \$40x + \$65x + \$35x + \$10x = \$200x). Thus, the P group's section 163(j) limitation for the 2021 taxable year is \$60x (30 percent x \$200x = \$60x). As a result, all but \$5x of the P group's business interest expense is deductible in the 2021 taxable year. P carries over the \$5x of disallowed business interest expense to the succeeding taxable year.

(ii) *Example 2: Intercompany obligations*—(A) *Facts*. On January 1, 2021, G, a corporation unrelated to P and S, lends P \$100x in exchange for a note that accrues interest at a 10 percent annual rate. A month later, P lends \$100x to S in exchange for a note that accrues interest at a 12 percent annual rate. In 2021, P accrues and pays \$10x of interest to G on P's note, and S accrues and pays \$12x of interest to P on S's note. For that year, the P group's only other items of income, gain, deduction, and loss are \$40x of income earned by S from the sale of inventory, and a \$30x deductible expense arising from P's payment of tort liability claims.

(B) *Analysis*. As provided in paragraph (d)(2)(v) of this section, the intercompany obligation between P and S is disregarded in determining P and S's business interest expense and business interest income and in determining the P group's ATI. For purposes of section 163(j), P has \$10x of business interest expense and a \$30x deduction for the payment of tort liability claims, and S has \$40x of income. The P group's ATI is \$10x (\$40x - \$30x = \$10x), and its section 163(j) limitation is \$3x (30 percent x \$10x = \$3x). The P group may deduct \$3x of its business interest expense in the 2021 taxable year. A deduction for P's remaining \$7x of business interest expense is disallowed in the 2021 taxable year, and this amount is carried forward to the 2022 taxable year.

(e) *Ownership of partnership interests by members of a consolidated group*.

(1) [Reserved]

(2) *Change in status of a member*. A change in status of a member (that is, becoming or ceasing to be a member of the group) is not treated as a disposition for purposes of section 163(j)(4)(B)(iii)(II) and §1.163(j)-6(h)(3).

(3) *Basis adjustments under §1.1502-32.* A member's allocation of excess business interest expense from a partnership and the resulting decrease in basis in the partnership interest under section 163(j)(4)(B)(iii)(I) is not a noncapital, nondeductible expense for purposes of §1.1502-32(b)(3)(iii). Additionally, an increase in a member's basis in a partnership interest under section 163(j)(4)(B)(iii)(II) to reflect excess business interest expense not deducted by the consolidated group is not tax-exempt income for purposes of §1.1502-32(b)(3)(ii). Investment adjustments are made under §1.1502-32(b)(3)(i) when the excess business interest expense from the partnership is converted into business interest expense, deducted, and absorbed by the consolidated group. See §1.1502-32(b).

(4) *Excess business interest expense and §1.1502-36.* Excess business interest expense is a Category D asset within the meaning of §1.1502-36(d)(4)(i).

(f) *Cross-references.* For rules governing the treatment of disallowed business interest expense carryforwards for C corporations, including rules governing the treatment of disallowed business interest expense carryforwards when members enter or leave a consolidated group, see §1.163(j)-5. For rules governing the application of section 163(j) to a C corporation or a consolidated group engaged in both excepted and non-exceptioned trades or businesses, see §1.163(j)-10.

(g) *Applicability date—(1) In general.* This section applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.

(2) [Reserved]

§1.163(j)-5 General rules governing disallowed business interest expense carryforwards for C corporations.

(a) *Scope and definitions—(1) Scope.* This section provides rules regarding disallowed business interest expense carryforwards for taxpayers that are C corporations, including members of a consolidated group. Paragraph (b) of this section provides rules regarding the treatment of disallowed business interest expense carryforwards. Paragraph (c) of this section provides a cross-reference to other rules regarding disallowed business interest expense carryforwards in transactions to which section 381(a) applies. Paragraph (d) of this section provides rules regarding limitations on disallowed business interest expense carryforwards from separate return limitation years (SRLYs). Paragraph (e) of this section provides cross-references to other rules regarding the application of section 382 to disallowed business interest expense carryforwards. Paragraph (f) of this section provides a cross-reference to other rules regarding the overlap of the SRLY limitation with section 382. Paragraph (g) of this section references additional rules that may limit the deductibility of interest or the use of disallowed business interest expense carryforwards.

(2) *Definitions—(i) Allocable share of the consolidated group's remaining section 163(j) limitation.* The term *allocable share of the consolidated group's remaining section 163(j) limitation* means, with respect to any member of a consolidated group, the product of the consolidated group's remaining section 163(j) limitation and the member's remaining current-year interest ratio.

(ii) *Consolidated group's remaining section 163(j) limitation.* The term *consolidated group's remaining section 163(j) limitation* means the amount of the consolidated group's section 163(j) limitation calculated pursuant to §1.163(j)-4(d)(2), reduced by the amount of interest deducted by members of the consolidated group pursuant to paragraph (b)(3)(ii)(C)(2) of this section.

(iii) *Remaining current-year interest ratio.* The term *remaining current-year interest ratio* means, with respect to any member of a consolidated group for a particular taxable year, the ratio of the remaining current-year business interest

expense of the member after applying the rule in paragraph (b)(3)(ii)(C)(2) of this section, to the sum of the amounts of remaining current-year business interest expense for all members of the consolidated group after applying the rule in paragraph (b)(3)(ii)(C)(2) of this section.

(b) *Treatment of disallowed business interest expense carryforwards—(1) In general.* The amount of any business interest expense of a C corporation not allowed as a deduction for any taxable year as a result of the section 163(j) limitation is carried forward to the succeeding taxable year as a disallowed business interest expense carryforward under section 163(j)(2) and §1.163(j)-2(c).

(2) *Deduction of business interest expense.* For a taxpayer that is a C corporation, current-year business interest expense is deducted in the current taxable year before any disallowed business interest expense carryforwards from a prior taxable year are deducted in that year. Disallowed business interest expense carryforwards are deducted in the order of the taxable years in which they arose, beginning with the earliest taxable year, subject to certain limitations (for example, the limitation under section 382). For purposes of section 163(j), disallowed disqualified interest is treated as carried forward from the taxable year in which a deduction was disallowed under old section 163(j).

(3) *Consolidated groups—(i) In general.* A consolidated group's disallowed business interest expense carryforwards for the current consolidated return year (the current year) are the carryforwards from the group's prior consolidated return years plus any carryforwards from separate return years.

(ii) *Deduction of business interest expense—(A) General rule.* All current-year business interest expense of members of a consolidated group is deducted in the current year before any disallowed business interest expense carryforwards from prior taxable years are deducted in the current year. Disallowed business interest expense carryforwards from prior taxable years are deducted in the order of the taxable years in which they arose, beginning with the earliest taxable year, subject to the limitations described in this section.

(B) *Section 163(j) limitation equals or exceeds the current-year business interest expense and disallowed business interest*

expense carryforwards from prior taxable years. If a consolidated group's section 163(j) limitation for the current year equals or exceeds the aggregate amount of its members' current-year business interest expense and disallowed business interest expense carryforwards from prior taxable years that are available for deduction, then none of the current-year business interest expense or disallowed business interest expense carryforwards is subject to disallowance in the current year under section 163(j). However, a deduction for the members' business interest expense may be subject to limitation under other provisions of the Code or the Income Tax Regulations (see, for example, paragraphs (c), (d), (e), and (f) of this section).

(C) *Current-year business interest expense and disallowed business interest expense carryforwards exceed section 163(j) limitation.* If the aggregate amount of members' current-year business interest expense and disallowed business interest expense carryforwards from prior taxable years exceeds the consolidated group's section 163(j) limitation for the current year, then the following rules apply in the order provided:

(1) The group first determines whether its section 163(j) limitation for the current year equals or exceeds the aggregate amount of the members' current-year business interest expense.

(i) If the group's section 163(j) limitation for the current year equals or exceeds the aggregate amount of the members' current-year business interest expense, then no amount of the group's current-year business interest expense is subject to disallowance in the current year under section 163(j). Once the group has taken into account its members' current-year business interest expense, the group applies the rules of paragraph (b)(3)(ii)(C)(4) of this section.

(ii) If the aggregate amount of members' current-year business interest expense exceeds the group's section 163(j) limitation for the current year, then the

group applies the rule in paragraph (b)(3)(ii)(C)(2) of this section.

(2) If this paragraph (b)(3)(ii)(C)(2) applies (see paragraph (b)(3)(ii)(C)(1)(ii) of this section), then each member with current-year business interest expense and with current-year business interest income or floor plan financing interest expense deducts current-year business interest expense in an amount that does not exceed the sum of the member's business interest income and floor plan financing interest expense for the current year.

(3) After applying the rule in paragraph (b)(3)(ii)(C)(2) of this section, if the group has any section 163(j) limitation remaining for the current year, then each member with remaining current-year business interest expense deducts a portion of its expense based on its allocable share of the consolidated group's remaining section 163(j) limitation.

(4) If this paragraph (b)(3)(ii)(C)(4) applies (see paragraph (b)(3)(ii)(C)(1)(i) of this section), and if the group has any section 163(j) limitation remaining for the current year after applying the rules in paragraph (b)(3)(ii)(C)(1) of this section, then disallowed business interest expense carryforwards permitted to be deducted (including under paragraph (d)(1)(A) of this section) in the current year are to be deducted in the order of the taxable years in which they arose, beginning with the earliest taxable year. Disallowed business interest expense carryforwards from taxable years ending on the same date that are available to offset tentative taxable income for the current year generally are to be deducted on a pro rata basis under the principles of paragraph (b)(3)(ii)(C)(3) of this section. For example, assume that P and S are the only members of a consolidated group with a section 163(j) limitation for the current year (Year 2) of \$200x; the amount of current-year business interest expense deducted in Year 2 is \$100x; and P and S, respectively, have \$140x and \$60x of disallowed business interest expense carryforwards from Year

1 that are not subject to limitation under paragraph (c), (d), or (e) of this section. Under these facts, P would be allowed to deduct \$70x of its carryforwards from Year 1 ($\$100x \times (\$140x / (\$60x + \$140x)) = \$70x$), and S would be allowed to deduct \$30x of its carryforwards from Year 1 ($\$100x \times (\$60x / (\$60x + \$140x)) = \$30x$). But see §1.383-1(d)(1)(ii), providing that, if losses subject to and not subject to the section 382 limitation are carried from the same taxable year, losses subject to the limitation are deducted before losses not subject to the limitation.

(5) Each member with remaining business interest expense after applying the rules of this paragraph (b)(3)(ii), taking into account the limitations in paragraphs (c), (d), (e), and (f) of this section, carries the expense forward to the succeeding taxable year as a disallowed business interest expense carryforward under section 163(j)(2) and §1.163(j)-2(c).

(iii) *Departure from group.* If a corporation ceases to be a member during a consolidated return year, the corporation's current-year business interest expense from the taxable period ending on the day of the corporation's change in status as a member, as well as the corporation's disallowed business interest expense carryforwards from prior taxable years that are available to offset tentative taxable income in the consolidated return year, are first made available for deduction during that consolidated return year. See §1.1502-76(b)(1)(i); see also §1.1502-36(d) (regarding reductions of deferred deductions on the transfer of loss shares of subsidiary stock). Only the amount that is neither deducted by the group in that consolidated return year nor otherwise reduced under the Code or regulations may be carried to the corporation's first separate return year after its change in status.

(iv) *Example: Deduction of interest expense—*
 (A) *Facts.* (1) P wholly owns A, which is a member of the consolidated group of which P is the common parent. P and A each borrow money from Z, an unrelated third party. The business interest expense of P and A in Years 1, 2, and 3, and the P group's section 163(j) limitation for those years, are as follows:

Table 1 to paragraph (b)(3)(iv)(A)(1)

Year	P's business interest expense	A's business interest expense	P group's section 163(j) limitation
1	\$150x	\$50x	\$100x
2	60x	90x	120x
3	25x	50x	185x

(2) P and A have neither business interest income nor floor plan financing interest expense in Years 1, 2, and 3. Additionally, the P group is neither eligible for the small business exemption in §1.163(j)-2(d) nor engaged in an excepted trade or business.

(B) *Analysis—(1) Year 1.* In Year 1, the aggregate amount of the P group members' current-year business interest expense (\$150x + \$50x) exceeds the P group's section 163(j) limitation (\$100x). As a result, the rules of paragraph (b)(3)(ii)(C) of this section apply. Because the P group members' current-year business interest expense exceeds the group's section 163(j) limitation for Year 1, P and A must apply the rule in paragraph (b)(3)(ii)(C)(2) of this section. Pursuant to paragraph (b)(3)(ii)(C)(2) of this section, each of P and A must deduct its current-year business interest expense to the extent of its business interest income and floor plan financing interest expense. Neither P nor A has business interest income or floor plan financing interest expense in Year 1. Next, pursuant to paragraph (b)(3)(ii)(C)(3) of this section, each of P and A must deduct a portion of its current-year business interest expense based on its allocable share of the consolidated group's remaining section 163(j) limitation (\$100x).

P's allocable share is \$75x ($\$100x \times (\$150x / \$200x) = \$75x$), and A's allocable share is \$25x ($\$100x \times (\$50x / \$200x) = \$25x$). Accordingly, in Year 1, P deducts \$75x of its current-year business interest expense, and A deducts \$25x of its current-year business interest expense. P has a disallowed business interest expense carryforward from Year 1 of \$75x ($\$150x - \$75x = \$75x$), and A has a disallowed business interest expense carryforward from Year 1 of \$25x ($\$50x - \$25x = \$25x$).

(2) *Year 2.* In Year 2, the aggregate amount of the P group members' current-year business interest expense (\$60x + \$90x) and disallowed business interest expense carryforwards (\$75x + \$25x) exceeds the P group's section 163(j) limitation (\$120x). As a result, the rules of paragraph (b)(3)(ii)(C) of this section apply. Because the P group members' current-year business interest expense exceeds the group's section 163(j) limitation for Year 2, P and A must apply the rule in paragraph (b)(3)(ii)(C)(2) of this section. Pursuant to paragraph (b)(3)(ii)(C)(2) of this section, each of P and A must deduct its current-year business interest expense to the extent of its business interest income and floor plan financing interest expense. Neither

P nor A has business interest income or floor plan financing interest expense in Year 2. Next, pursuant to paragraph (b)(3)(ii)(C)(3) of this section, each of P and A must deduct a portion of its current-year business interest expense based on its allocable share of the consolidated group's remaining section 163(j) limitation (\$120x). P's allocable share is \$48x ($\$120x \times (\$60x / \$150x) = \$48x$), and A's allocable share is \$72x ($\$120x \times (\$90x / \$150x) = \$72x$). Accordingly, in Year 2, P deducts \$48x of current-year business interest expense, and A deducts \$72x of current-year business interest expense. P has a disallowed business interest expense carryforward from Year 2 of \$12x ($\$60x - \$48x = \$12x$), and A has a disallowed business interest expense carryforward from Year 2 of \$18x ($\$90x - \$72x = \$18x$). Additionally, because the P group has no section 163(j) limitation remaining after deducting current-year business interest expense in Year 2, the full amount of P and A's disallowed business interest expense carryforwards from Year 1 (\$75x and \$25x, respectively) also are carried forward to Year 3. As a result, at the beginning of Year 3, P and A's respective disallowed business interest expense carryforwards are as follows:

Table 2 to paragraph (b)(3)(iv)(B)(2)

	Year 1 disallowed business interest expense carryforwards	Year 2 disallowed business interest expense carryforwards	Total disallowed business interest expense carryforwards
P	\$75x	\$12x	\$87x
A	25x	18x	43x
Total	100x	30x	130x

(3) *Year 3.* In Year 3, the aggregate amount of the P group members' current-year business interest expense (\$25x + \$50x = \$75x) and disallowed business interest expense carryforwards (\$130x) exceeds the P group's section 163(j) limitation (\$185x). As a result, the rules of paragraph (b)(3)(ii)(C) of this section apply. Because the P group's section 163(j) limitation for Year 3 equals or exceeds the P group members' current-year business interest expense, no amount of the members' current-year business interest expense is subject to disallowance under section 163(j) (see paragraph (b)(3)(ii)(C)(1) of this section). After each of P and A deducts its current-year business interest expense, the P group has \$110x of section 163(j) limitation remaining for Year 3 (\$185x - \$25x - \$50x = \$110x). Next, pursuant to paragraph (b)(3)(ii)(C)(4) of this section, \$110x of disallowed business interest expense carryforwards are deducted on a pro rata basis, beginning with carryforwards from Year 1. Because the total amount of carryforwards from Year 1 (\$100x) is less than the section 163(j) limitation remaining after the deduction of Year 3 business interest expense (\$110x), all of the Year 1 carryforwards are deducted in Year 3. After current-year business interest expense and Year 1 carryforwards are deducted, the P group's remaining section 163(j) limitation in Year 3 is \$10x. Because the Year 2 carryforwards (\$30x) exceed the remaining section 163(j) limitation (\$10x), under paragraph (b)(3)(ii)(C)(4) of this section, each of P and A will deduct a portion of its Year 2 carryforwards based

on its allocable share of the consolidated group's remaining section 163(j) limitation. P's allocable share is \$4x ($\$10x \times (\$12x / \$30x) = \$4x$), and A's allocable share is \$6x ($\$10x \times (\$18x / \$30x) = \$6x$). Accordingly, P and A may deduct \$4x and \$6x, respectively, of their Year 2 carryforwards. For Year 4, P and A have \$8x and \$12x of disallowed business interest expense carryforwards from Year 2, respectively.

(c) *Disallowed business interest expense carryforwards in transactions to which section 381(a) applies.* For rules governing the application of section 381(c)(20) to disallowed business interest expense carryforwards, including limitations on an acquiring corporation's use of the disallowed business interest expense carryforwards of the transferor or distributor corporation in the acquiring corporation's first taxable year ending after the date of distribution or transfer, see §1.381(c)(20)-1.

(d) *Limitations on disallowed business interest expense carryforwards from separate return limitation years—(1) General rule—(A) Cumulative section 163(j) SRLY limitation.* This paragraph (d) ap-

plies to disallowed business interest expense carryforwards of a member arising in a SRLY (see §1.1502-1(f)) or treated as arising in a SRLY under the principles of §1.1502-21(c) and (g). The amount of the carryforwards described in the preceding sentence that are included in the consolidated group's business interest expense deduction for any taxable year under paragraph (b) of this section may not exceed the aggregate section 163(j) limitation for all consolidated return years of the group, determined by reference only to the member's items of income, gain, deduction, and loss, and reduced (including below zero) by the member's business interest expense (including disallowed business interest expense carryforwards) absorbed by the group in all consolidated return years (cumulative section 163(j) SRLY limitation). For purposes of computing the member's cumulative section 163(j) SRLY limitation, intercompany items referred to in §1.163(j)-4(d)(2)(iv) are included, with the exception of interest items with regard to intercompa-

ny obligations. See §1.163(j)-4(d)(2)(v). Thus, for purposes of this paragraph (d), income and expense items arising from intercompany transactions (other than interest income and expense with regard to intercompany obligations) are included in the calculation of the cumulative section 163(j) SRLY limitation. In addition, items of interest expense with regard to intercompany obligations are not characterized as business interest expense for purposes of the reduction described in the second sentence of this paragraph (d)(1)(A).

(B) *Subgrouping.* For purposes of this paragraph (d), the SRLY subgroup principles of §1.1502-21(c)(2)(i) (with regard to carryovers of SRLY losses) apply with appropriate adjustments.

(2) *Deduction of disallowed business interest expense carryforwards arising in a SRLY.* Notwithstanding paragraph (d)(1) of this section, disallowed business interest expense carryforwards of a member arising in a SRLY are available for deduction by the consolidated group in the current year only to the extent the group has remaining section 163(j) limitation for the current year after the deduction of current-year business interest expense and disallowed business interest expense carryforwards from earlier taxable years that are permitted to be deducted in the current year (see paragraph (b)(3)(ii)(A) of this section). SRLY-limited disallowed business interest expense carryforwards are deducted on a pro rata basis (under the principles of paragraph (b)(3)(ii)(C) (3) of this section) with non-SRLY limited disallowed business interest expense carryforwards from taxable years ending on the same date. See also §1.1502-21(b)(1).

(3) *Examples.* The principles of this paragraph (d) are illustrated by the following examples. For purposes of the examples in this paragraph (d)(3), unless

otherwise stated, P, R, S, and T are taxable domestic C corporations that are not RICs or REITs and that file their tax returns on a calendar-year basis; none of P, R, S, or T qualifies for the small business exemption under section 163(j)(3) or is engaged in an excepted trade or business; all interest expense is deductible except for the potential application of section 163(j); and the facts set forth are the only corporate activity.

(i) *Example 1: Determination of SRLY limitation—(A) Facts.* Individual A owns P. In 2021, A forms T, which pays or accrues a \$100x business interest expense for which a deduction is disallowed under section 163(j) and that is carried forward to 2022. P does not pay or accrue business interest expense in 2021, and P has no disallowed business interest expense carryforwards from prior taxable years. At the close of 2021, P acquires all of the stock of T, which joins with P in filing a consolidated return beginning in 2022. Neither P nor T pays or accrues business interest expense in 2022, and the P group has a section 163(j) limitation of \$300x in that year. This limitation would be \$70x if determined by reference solely to T's items for all consolidated return years of the P group.

(B) *Analysis.* T's \$100x of disallowed business interest expense carryforwards from 2021 arose in a SRLY. P's acquisition of T was not an ownership change as defined by section 382(g); thus, T's disallowed business interest expense carryforwards are subject to the SRLY limitation in paragraph (d)(1) of this section. T's cumulative section 163(j) SRLY limitation for 2022 is the P group's section 163(j) limitation, determined by reference solely to T's items for all consolidated return years of the P group (\$70x). See paragraph (d)(1) of this section. Thus, \$70x of T's disallowed business interest expense carryforwards are available to be deducted by the P group in 2022, and the remaining \$30x of T's disallowed business interest expense carryforwards are carried forward to 2023. After the P group deducts \$70x of T's disallowed business interest expense carryforwards, T's cumulative section 163(j) SRLY limitation is reduced by \$70x to \$0.

(C) *Cumulative section 163(j) SRLY limitation of \$0.* The facts are the same as in *Example 1* in paragraph (d)(3)(i)(A) of this section, except that T's cumulative section 163(j) SRLY limitation for 2022 is \$0. Because the amount of T's disallowed business interest expense carryforwards that may be deducted by the P group in 2022 may not exceed T's cumulative section 163(j) SRLY limitation, none of T's

carryforwards from 2021 may be deducted by the P group in 2022. Because none of T's disallowed business interest expense carryforwards are absorbed by the P group in 2022, T's cumulative section 163(j) SRLY limitation remains at \$0 entering 2023.

(ii) *Example 2: Cumulative section 163(j) SRLY limitation less than zero—(A) Facts.* P and S are the only members of a consolidated group. P has neither current-year business interest expense nor disallowed business interest expense carryforwards. For the current year, the P group has a section 163(j) limitation of \$150x, \$25x of which is attributable to P, and \$125x of which is attributable to S. S has \$100x of disallowed business interest expense carryforwards that arose in a SRLY and \$150x of current-year business interest expense. S's cumulative section 163(j) SRLY limitation entering the current year (computed by reference solely to S's items for all consolidated return years of the P group) is \$0.

(B) *Analysis.* Under paragraph (d)(1) of this section, S's cumulative section 163(j) SRLY limitation is increased by \$125x to reflect S's tax items for the current year. The P group's section 163(j) limitation permits the P group to deduct all \$150x of S's current-year business interest expense. S's cumulative section 163(j) SRLY limitation is reduced by the \$150x of S's business interest expense absorbed by the P group in the current year, which results in a -\$25x balance. Thus, none of S's SRLY'd disallowed business interest expense carryforwards may be deducted by the P group in the current year. Entering the subsequent year, S's cumulative section 163(j) SRLY limitation remains -\$25x.

(iii) *Example 3: Pro rata absorption of SRLY-limited disallowed business interest expense carryforwards—(A) Facts.* P, R, and S are the only members of a consolidated group, and no member has floor plan financing or business interest income. P has \$60x of current-year business interest expense and \$40x of disallowed business interest expense carryforwards from the previous year, which was not a separate return year. R has \$120x of current-year business interest expense and \$80x of disallowed business interest expense carryforwards from the previous year, which was not a separate return year. S has \$70x of current-year business interest expense and \$30x of disallowed business interest expense carryforwards from the previous year, which was a separate return year. The P group has a section 163(j) limitation of \$300x, \$50x of which is attributable to P, \$90x to R, and \$160x to S. S's cumulative section 163(j) SRLY limitation entering the current year (computed by reference solely to S's items for all consolidated return years of the P group) is \$0.

Table 3 to paragraph (d)(3)(iii)(A)

	Current-year business interest expense	Disallowed business interest expense carryforwards from prior taxable year	Section 163(j) limitation
P	\$60x	\$40x	\$50x
R	\$120x	\$80x	\$90x
S	\$70x	(SRLY) \$30x	\$160x
Total	\$250x	\$150x	\$300x

(B) *Analysis.* Under paragraph (d)(1) of this section, S's cumulative section 163(j) SRLY limitation is increased in the current year by \$160x. The P group's section 163(j) limitation permits the P group

to deduct all \$70x of S's current-year business interest expense (and all \$180x of P and R's current-year

business interest expense). S's cumulative section 163(j) SRLY limitation is reduced by the \$70x of S's business interest expense absorbed by the P group in the current year, resulting in a \$90x balance. Because the P group has \$50x of section 163(j) limitation remaining after the absorption of current-year business interest expense, the P group can absorb \$50x of its members' disallowed business interest expense carryforwards. Under paragraph (d)(2) of this section, SRLY-limited disallowed business interest expense carryforwards are deducted on a pro rata basis with other disallowed business interest expense carryforwards from the same taxable year. Accordingly, the P group can deduct \$10x (\$50x x (\$30x / \$150x)) of S's SRLY-limited disallowed business interest expense carryforwards. S's cumulative section 163(j) SRLY limitation is reduced (to \$80x) by the \$10x of SRLY-limited disallowed business interest carryforwards absorbed by the P group in the current year.

(C) *Cumulative section 163(j) SRLY limitation of -\$75x.* The facts are the same as in *Example 3* in paragraph (d)(3)(iii)(A) of this section, except that S's cumulative section 163(j) SRLY limitation entering the current year is -\$75x. After adjusting for S's tax items for the current year (\$160x) and the P group's absorption of S's current-year business interest expense (\$70x), S's cumulative section 163(j) SRLY limitation is \$15x (-\$75x + \$160x - \$70x). Because S's cumulative section 163(j) SRLY limitation (\$15x) is less than the amount of S's SRLY-limited disallowed business interest expense carryforwards (\$30x), the pro rata calculation under paragraph (d)(2) of this section is applied to \$15x (rather than \$30x) of S's carryforwards. Accordingly, the P group can deduct \$5.56x (\$50x x (\$15x / \$135x)) of S's SRLY-limited disallowed business interest expense carryforwards. S's cumulative section 163(j) SRLY limitation is reduced (to \$9.44x) by the \$5.56x of SRLY-limited disallowed business interest carryforwards absorbed by the P group in the current year.

(e) *Application of section 382—(1) Pre-change loss.* For rules governing the treatment of a disallowed business interest expense as a pre-change loss for purposes of section 382, see §§1.382-2(a) and 1.382-6. For rules governing the application of section 382 to disallowed disqualified interest carryforwards, see §1.163(j)-11(c)(4).

(2) *Loss corporation.* For rules governing when a disallowed business interest expense causes a corporation to be a loss corporation within the meaning of section 382(k)(1), see §1.382-2(a). For the application of section 382 to disallowed disqualified interest carryforwards, see §1.163(j)-11(c)(4).

(3) *Ordering rules for utilization of pre-change losses and for absorption of the section 382 limitation.* For ordering rules for the utilization of disallowed business interest expense, net operating losses, and other pre-change losses, and for the

absorption of the section 382 limitation, see §1.383-1(d).

(4) *Disallowed business interest expense from the pre-change period in the year of a testing date.* For rules governing the treatment of disallowed business interest expense from the pre-change period (within the meaning of §1.382-6(g)(2)) in the year of a testing date, see §1.382-2.

(5) *Recognized built-in loss.* For a rule providing that a section 382 disallowed business interest carryforward (as defined in §1.382-2(a)(7)) is not treated as a recognized built-in loss for purposes of section 382, see §1.382-7(d)(5).

(f) *Overlap of SRLY limitation with section 382.* For rules governing the overlap of the application of section 382 and the application of the SRLY rules, see §1.1502-21(g).

(g) *Additional limitations.* Additional rules provided under the Code or regulations also apply to limit the use of disallowed business interest expense carryforwards. For rules governing the relationship between section 163(j) and other provisions affecting the deductibility of interest, see §1.163(j)-3.

(h) *Applicability date.* This section applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.

§1.163(j)-6 Application of the section 163(j) limitation to partnerships and subchapter S corporations.

(a) *Overview.* If a deduction for business interest expense of a partnership or an S corporation is subject to the section 163(j) limitation, section 163(j)(4) pro-

vides that the section 163(j) limitation applies at the partnership or S corporation level and any deduction for business interest expense is taken into account in determining the nonseparately stated taxable income or loss of the partnership or S corporation. Once a partnership or an S corporation determines its business interest expense, business interest income, ATI, and floor plan financing interest expense, the partnership or S corporation calculates its section 163(j) limitation by applying the rules of §1.163(j)-2(b) and this section. Paragraph (b) of this section provides definitions used in this section. Paragraph (c) of this section provides rules regarding the character of a partnership's deductible business interest expense and excess business interest expense. Paragraph (d) of this section provides rules regarding the calculation of a partnership's ATI and floor plan financing interest expense. Paragraph (e) of this section provides rules regarding a partner's ATI and business interest income. Paragraph (f) of this section provides an eleven-step computation necessary for properly allocating a partnership's deductible business interest expense and section 163(j) excess items to its partners. Paragraph (g) of this section applies carryforward rules at the partner level if a partnership has excess business interest expense. Paragraph (h) of this section provides basis adjustment rules, and paragraph (k) of this section provides rules regarding investment items of a partnership. Paragraph (l) of this section provides rules regarding S corporations. Paragraph (m) of this section provides rules for partnerships and S corporations not subject to section 163(j). Paragraph (o) of this section provides examples illustrating the rules of this section.

(b) *Definitions.* In addition to the definitions contained in §1.163(j)-1, the following definitions apply for purposes of this section.

(1) *Section 163(j) items.* The term *section 163(j) items* means the partnership or S corporation's business interest expense, business interest income, and items comprising ATI.

(2) *Partner basis items.* The term *partner basis items* means any items of income, gain, loss, or deduction resulting from either an adjustment to the basis of partnership property used in a non-ex-

cepted trade or business made pursuant to section 743(b) or the operation of section 704(c)(1)(C)(i) with respect to such property. Partner basis items also include section 743(b) basis adjustments used to increase or decrease a partner's share of partnership gain or loss on the sale of partnership property used in a non-exceptioned trade or business (as described in §1.743-1(j)(3)(i)) and amounts resulting from the operation of section 704(c)(1)(C)(i) used to decrease a partner's share of partnership gain or increase a partner's share of partnership loss on the sale of such property.

(3) *Remedial items*. The term *remedial items* means any allocation to a partner of remedial items of income, gain, loss, or deduction pursuant to section 704(c) and §1.704-3(d).

(4) *Excess business interest income*. The term *excess business interest income* means the amount by which a partnership's or S corporation's business interest income exceeds its business interest expense in a taxable year.

(5) *Deductible business interest expense*. The term *deductible business interest expense* means the amount of a partnership's or S corporation's business interest expense that is deductible under section 163(j) in the current taxable year following the application of the limitation contained in §1.163(j)-2(b).

(6) *Section 163(j) excess items*. The term *section 163(j) excess items* means the partnership's excess business interest expense, excess taxable income, and excess business interest income.

(7) *Non-exceptioned assets*. The term *non-exceptioned assets* means assets from a non-exceptioned trade or business.

(8) *Exceptioned assets*. The term *exceptioned assets* means assets from an exceptioned trade or business.

(c) *Business interest income and business interest expense of a partnership—(1)–(2) [Reserved]*

(3) *Character of business interest expense*. If a partnership has deductible business interest expense, such deductible business interest expense is not subject to any additional application of section 163(j) at the partner-level because it is taken into account in determining the non-separately stated taxable income or loss of the partnership. However, for all other

purposes of the Code, deductible business interest expense and excess business interest expense retain their character as business interest expense at the partner-level. For example, for purposes of section 469, such business interest expense retains its character as either passive or non-passive in the hands of the partner. Additionally, for purposes of section 469, deductible business interest expense and excess business interest expense from a partnership remain interest derived from a trade or business in the hands of a partner even if the partner does not materially participate in the partnership's trade or business activity. For additional rules regarding the interaction between sections 465, 469, and 163(j), see §1.163(j)-3.

(d) *Adjusted taxable income of a partnership—(1) Tentative taxable income of a partnership*. For purposes of computing a partnership's ATI under §1.163(j)-1(b)(1), the tentative taxable income of a partnership is the partnership's taxable income determined under section 703(a), but computed without regard to the application of the section 163(j) limitation.

(2) *Section 734(b), partner basis items, and remedial items*. A partnership takes into account items resulting from adjustments made to the basis of its property pursuant to section 734(b) for purposes of calculating its ATI pursuant to §1.163(j)-1(b)(1). However, partner basis items and remedial items are not taken into account in determining a partnership's ATI under §1.163(j)-1(b)(1). Instead, partner basis items and remedial items are taken into account by the partner in determining the partner's ATI pursuant to §1.163(j)-1(b)(1). See *Example 6* in paragraph (o)(6) of this section.

(e) *Adjusted taxable income and business interest income of partners—(1) Modification of adjusted taxable income for partners*. The ATI of a partner in a partnership generally is determined in accordance with §1.163(j)-1(b)(1), without regard to such partner's distributive share of any items of income, gain, deduction, or loss of such partnership, except as provided for in paragraph (m) of this section, and is increased by such partner's distributive share of such partnership's excess taxable income determined under paragraph (f) of this section. For rules regarding corporate partners, see §1.163(j)-4(b)(3).

(2) *Partner basis items and remedial items*. Partner basis items and remedial items are taken into account as items derived directly by the partner in determining the partner's ATI for purposes of the partner's section 163(j) limitation. If a partner is allocated remedial items, such partner's ATI is increased or decreased by the amount of such items. Additionally, to the extent a partner is allocated partner basis items, such partner's ATI is increased or decreased by the amount of such items. See *Example 6* in paragraph (o)(6) of this section.

(3) *Disposition of partnership interests*. If a partner recognizes gain or loss upon the disposition of interests in a partnership, and the partnership in which the interest is being disposed owns only non-exceptioned trade or business assets, the gain or loss on the disposition of the partnership interest is included in the partner's ATI. See §1.163(j)-10(b)(4)(ii) for dispositions of interests in partnerships that own—

(i) Non-exceptioned assets and exceptioned assets; or

(ii) Investment assets; or

(iii) Both.

(4) *Double counting of business interest income and floor plan financing interest expense prohibited*. For purposes of calculating a partner's section 163(j) limitation, the partner does not include—

(i) Business interest income from a partnership that is subject to section 163(j), except to the extent the partner is allocated excess business interest income from that partnership pursuant to paragraph (f)(2) of this section; and

(ii) The partner's allocable share of the partnership's floor plan financing interest expense, because such floor plan financing interest expense already has been taken into account by the partnership in determining its nonseparately stated taxable income or loss for purposes of section 163(j).

(f) *Allocation and determination of section 163(j) excess items made in the same manner as nonseparately stated taxable income or loss of the partnership—(1) Overview—(i) In general*. The purpose of this paragraph is to provide guidance regarding how a partnership must allocate its deductible business interest expense and section 163(j) excess items, if any, among its partners. For purposes of sec-

tion 163(j)(4) and this section, allocations and determinations of deductible business interest expense and section 163(j) excess items are considered made in the same manner as the nonseparately stated taxable income or loss of the partnership if, and only if, such allocations and determinations are made in accordance with the eleven-step computation set forth in paragraphs (f)(2)(i) through (xi) of this section. A partnership first determines its section 163(j) limitation, total amount of deductible business interest expense, and section 163(j) excess items under paragraph (f)(2)(i) of this section. The partnership then applies paragraphs (f)(2)(ii) through (xi) of this section, in that order, to determine how those items of the partnership are allocated among its partners. At the conclusion of the eleven-step computation set forth in paragraphs (f)(2)(i) through (xi) of this section, the total amount of deductible business interest expense and section 163(j) excess items allocated to each partner will equal the partnership's total amount of deductible business interest expense and section 163(j) excess items.

(ii) *Relevance solely for purposes of section 163(j).* No rule set forth in paragraph (f)(2) of this section prohibits a partnership from making an allocation to a partner of any item of partnership income, gain, loss, or deduction that is otherwise permitted under section 704 and the regulations under section 704 of the Code. Accordingly, any calculations in paragraphs (f)(2)(i) through (xi) of this section are solely for the purpose of determining each partner's deductible business interest expense and section 163(j) excess items and do not otherwise affect any other provision under the Code, such as section 704(b). Additionally, floor plan financing interest expense is not allocated in accordance with paragraph (f)(2) of this section. Instead, floor plan financing interest expense of a partnership is allocated to its partners under section 704(b) and is taken into account as a nonseparately stated item of loss for purposes of section 163(j).

(2) *Steps for allocating deductible business interest expense and section 163(j) excess items—(i) Partnership-level calculation required by section 163(j)(4)(A).* First, a partnership must determine its section 163(j) limitation pursuant to §1.163(j)-2(b). This calculation deter-

mines a partnership's total amounts of excess business interest income, excess taxable income, excess business interest expense (that is, the partnership's section 163(j) excess items), and deductible business interest expense under section 163(j) for a taxable year.

(ii) *Determination of each partner's relevant section 163(j) items.* Second, a partnership must determine each partner's allocable share of each section 163(j) item under section 704(b) and the regulations under section 704 of the Code, including any allocations under section 704(c), other than remedial items. Only section 163(j) items that were actually taken into account in the partnership's section 163(j) calculation under paragraph (f)(2)(i) of this section are taken into account for purposes of this paragraph (f)(2)(ii). Partner basis items, allocations of investment income and expense, remedial items, and amounts determined for the partner under §1.163-8T are not taken into account for purposes of this paragraph (f)(2)(ii). For purposes of paragraphs (f)(2)(ii) through (xi) of this section, the term *allocable ATI* means a partner's distributive share of the partnership's ATI (that is, a partner's distributive share of gross income and gain items comprising ATI less such partner's distributive share of gross loss and deduction items comprising ATI), the term *allocable business interest income* means a partner's distributive share of the partnership's business interest income, and the term *allocable business interest expense* means a partner's distributive share of the partnership's business interest expense that is not floor plan financing interest expense. If the partnership determines that each partner has a pro rata share of allocable ATI, allocable business interest income, and allocable business interest expense, then the partnership may bypass paragraphs (f)(2)(iii) through (xi) of this section and allocate its section 163(j) excess items in the same proportion. See *Example 1* through *Example 16* in paragraphs (o)(1) through (16), respectively. This pro-rata exception does not result in allocations of section 163(j) excess items that vary from the array of allocations of section 163(j) excess items that would have resulted had paragraphs (f)(2)(iii) through (xi) been applied.

(iii) *Partner-level comparison of business interest income and business interest expense.* Third, a partnership must compare each partner's allocable business interest income to such partner's allocable business interest expense. Paragraphs (f)(2)(iii) through (v) of this section determine how a partnership must allocate its excess business interest income among its partners, as well as the amount of each partner's allocable business interest expense that is not deductible business interest expense after taking the partnership's business interest income into account. To the extent a partner's allocable business interest income exceeds its allocable business interest expense, the partner has an *allocable business interest income excess*. The aggregate of all the partners' allocable business interest income excess amounts is the *total allocable business interest income excess*. To the extent a partner's allocable business interest expense exceeds its allocable business interest income, the partner has an *allocable business interest income deficit*. The aggregate of all the partners' allocable business interest income deficit amounts is the *total allocable business interest income deficit*. These amounts are required to perform calculations in paragraphs (f)(2)(iv) and (v) of this section, which appropriately reallocate allocable business interest income excess to partners with allocable business interest income deficits in order to reconcile the partner-level calculation under paragraph (f)(2)(iii) of this section with the partnership-level result under paragraph (f)(2)(i) of this section.

(iv) *Matching partnership and aggregate partner excess business interest income.* Fourth, a partnership must determine each partner's final allocable business interest income excess. A partner's *final allocable business interest income excess* is determined by reducing, but not below zero, such partner's allocable business interest income excess (if any) by the partner's step four adjustment amount. A partner's *step four adjustment amount* is the product of the total allocable business interest income deficit and the ratio of such partner's allocable business interest income excess to the total allocable business interest income excess. The rules of this paragraph (f)(2)(iv) ensure that, following the application of paragraph (f)(2)

(xi) of this section, the aggregate of all the partners' allocations of excess business interest income equals the total amount of the partnership's excess business interest income as determined in paragraph (f)(2)(i) of this section.

(v) *Remaining business interest expense determination.* Fifth, a partnership must determine each partner's remaining business interest expense. A partner's *remaining business interest expense* is determined by reducing, but not below zero, such partner's allocable business interest income deficit (if any) by such partner's step five adjustment amount. A partner's *step five adjustment amount* is the product of the total allocable business interest income excess and the ratio of such partner's allocable business interest income deficit to the total allocable business interest income deficit. Generally, a partner's remaining business interest expense is a partner's allocable business interest income deficit adjusted to reflect a reallocation of allocable business interest income excess from other partners. Determining a partner's remaining business interest expense is necessary to perform an ATI calculation that begins in paragraph (f)(2)(vii) of this section.

(vi) *Determination of final allocable ATI.* Sixth, a partnership must determine each partner's final allocable ATI. Paragraphs (f)(2)(vi) through (x) of this section determine how a partnership must allocate its excess taxable income and excess business interest expense among its partners.

(A) *Positive allocable ATI.* To the extent a partner's income and gain items comprising its allocable ATI exceed its deduction and loss items comprising its allocable ATI, the partner has *positive allocable ATI*. The aggregate of all the partners' positive allocable ATI amounts is the *total positive allocable ATI*.

(B) *Negative allocable ATI.* To the extent a partner's deduction and loss items comprising its allocable ATI exceed its income and gain items comprising its allocable ATI, the partner has negative allocable ATI. The aggregate of all the partners' negative allocable ATI amounts is the *total negative allocable ATI*.

(C) *Final allocable ATI.* Any partner with a negative allocable ATI, or an allocable ATI of \$0, has a positive allocable ATI of \$0. Any partner with a positive al-

locable ATI of \$0 has a final allocable ATI of \$0. The final allocable ATI of any partner with a positive allocable ATI greater than \$0 is such partner's positive allocable ATI reduced, but not below zero, by the partner's step six adjustment amount. A partner's *step six adjustment amount* is the product of the total negative allocable ATI and the ratio of such partner's positive allocable ATI to the total positive allocable ATI. The total of the partners' final allocable ATI amounts must equal the partnership's ATI amount used to compute its section 163(j) limitation pursuant to §1.163(j)-2(b).

(vii) *Partner-level comparison of 30 percent of adjusted taxable income and remaining business interest expense.* Seventh, a partnership must compare each partner's ATI capacity to such partner's remaining business interest expense as determined under paragraph (f)(2)(v) of this section. A partner's *ATI capacity* is the amount that is 30 percent of such partner's final allocable ATI as determined under paragraph (f)(2)(vi) of this section. A partner's final allocable ATI is grossed down to 30 percent prior to being compared to its remaining business interest expense in this calculation to parallel the partnership's adjustment to its ATI under section 163(j)(1)(B). To the extent a partner's ATI capacity exceeds its remaining business interest expense, the partner has an *ATI capacity excess*. The aggregate of all the partners' ATI capacity excess amounts is the *total ATI capacity excess*. To the extent a partner's remaining business interest expense exceeds its ATI capacity, the partner has an *ATI capacity deficit*. The aggregate of all the partners' ATI capacity deficit amounts is the *total ATI capacity deficit*. These amounts (which may be subject to adjustment under paragraph (f)(2)(viii) of this section) are required to perform calculations in paragraphs (f)(2)(ix) and (x) of this section, which appropriately reallocate ATI capacity excess to partners with ATI capacity deficits in order to reconcile the partner-level calculation under paragraph (f)(2)(vii) of this section with the partnership-level result under paragraph (f)(2)(i) of this section.

(viii) *Partner priority right to ATI capacity excess determination.* (A) Eighth, the partnership must determine whether it is required to make any adjustments de-

scribed in this paragraph (f)(2)(viii) and, if it is, make such adjustments. The rules of this paragraph (f)(2)(viii) are necessary to account for adjustments made to a partner's allocable ATI in paragraph (f)(2)(vi) of this section to ensure that the partners who had a negative allocable ATI do not inappropriately benefit under the rules of paragraphs (f)(2)(ix) through (xi) of this section to the detriment of the partners who had positive allocable ATI. The partnership must perform the calculations and make the necessary adjustments described under paragraphs (f)(2)(viii)(B) and (C) or paragraph (f)(2)(viii)(D) of this section if, and only if, there is—

(1) An excess business interest expense amount greater than \$0 under paragraph (f)(2)(i) of this section;

(2) A total negative allocable ATI amount greater than \$0 under paragraph (f)(2)(vi) of this section; and

(3) A total ATI capacity excess amount greater than \$0 under paragraph (f)(2)(vii) of this section.

(B) A partnership must determine each partner's priority amount and usable priority amount. A partner's *priority amount* is 30 percent of the amount by which a partner's positive allocable ATI under paragraph (f)(2)(vi)(A) of this section exceeds such partner's final allocable ATI under paragraph (f)(2)(vi)(C) of this section. However, only partners with an ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section can have a priority amount greater than \$0. The aggregate of all the partners' priority amounts is the *total priority amount*. A partner's *usable priority amount* is the lesser of such partner's priority amount or such partner's ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section. The aggregate of all the partners' usable priority amounts is the *total usable priority amount*. If the total ATI capacity excess amount, as determined under paragraph (f)(2)(vii) of this section, is greater than or equal to the total usable priority amount, then the partnership must perform the adjustments described in paragraph (f)(2)(viii)(C) of this section. If the total usable priority amount is greater than the total ATI capacity excess amount, as determined under paragraph (f)(2)(vii) of this section, then the partnership must perform the

adjustments described in paragraph (f)(2)(viii)(D) of this section.

(C) For purposes of paragraph (f)(2)(ix) of this section, each partner's final ATI capacity excess amount is \$0. For purposes of paragraph (f)(2)(x) of this section, the following terms have the following meanings for each partner:

(1) Each partner's *ATI capacity deficit* is such partner's ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section, reduced by such partner's usable priority amount.

(2) The *total ATI capacity deficit* is the total ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section, reduced by the total usable priority amount.

(3) The *total ATI capacity excess* is the total ATI capacity excess as determined under paragraph (f)(2)(vii) of this section, reduced by the total usable priority amount.

(D) Any partner with a priority amount greater than \$0 is a *priority partner*. Any partner that is not a priority partner is a *non-priority partner*. For purposes of paragraph (f)(2)(ix) of this section, each partner's final ATI capacity excess amount is \$0. For purposes of paragraph (f)(2)(x) of this section, each non-priority partner's final ATI capacity deficit amount is such partner's ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section. For purposes of paragraph (f)(2)(x) of this section, the following terms have the following meanings for priority partners.

(1) Each priority partner must determine its step eight excess share. A partner's *step eight excess share* is the product of the total ATI capacity excess as determined under paragraph (f)(2)(vii) of this section and the ratio of the partner's priority amount to the total priority amount.

(2) To the extent a priority partner's step eight excess share exceeds its ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section, such excess amount is the priority partner's *ATI capacity excess* for purposes of paragraph (f)(2)(x) of this section. The *total ATI capacity excess* is the aggregate of the priority partners' ATI capacity excess amounts as determined under this paragraph (f)(2)(viii)(D)(2).

(3) To the extent a priority partner's ATI capacity deficit as determined under paragraph (f)(2)(vii) of this section exceeds its step eight excess share, such excess amount is the priority partner's *ATI capacity deficit* for purposes of paragraph (f)(2)(x) of this section. The *total ATI capacity deficit* is the aggregate of the priority partners' ATI capacity deficit amounts as determined under this paragraph (f)(2)(viii)(D)(3).

(ix) *Matching partnership and aggregate partner excess taxable income.* Ninth, a partnership must determine each partner's final ATI capacity excess. A partner's *final ATI capacity excess* amount is determined by reducing, but not below zero, such partner's ATI capacity excess (if any) by the partner's step nine adjustment amount. A partner's *step nine adjustment amount* is the product of the total ATI capacity deficit and the ratio of such partner's ATI capacity excess to the total ATI capacity excess. The rules of this paragraph (f)(2)(ix) ensure that, following the application of paragraph (f)(2)(xi) of this section, the aggregate of all the partners' allocations of excess taxable income equals the total amount of the partnership's excess taxable income as determined in paragraph (f)(2)(i) of this section.

(x) *Matching partnership and aggregate partner excess business interest expense.* Tenth, a partnership must determine each partner's final ATI capacity deficit. A partner's *final ATI capacity deficit* amount is determined by reducing, but not below zero, such partner's ATI capacity deficit (if any) by the partner's step ten adjustment amount. A partner's *step ten adjustment amount* is the product of the total ATI capacity excess and the ratio of such partner's ATI capacity deficit to the total ATI capacity deficit. Generally, a partner's final ATI capacity deficit is a partner's ATI capacity deficit adjusted to reflect a reallocation of ATI capacity excess from other partners. The rules of this paragraph (f)(2)(x) ensure that, following the application of paragraph (f)(2)(xi) of this section, the aggregate of all the partners' allocations of excess business interest expense equals the total amount of the partnership's excess business interest expense as determined in paragraph (f)(2)(i) of this section.

(xi) *Final section 163(j) excess item and deductible business interest expense allocation.* Eleventh, a partnership must allocate section 163(j) excess items and deductible business interest expense to its partners. Excess business interest income calculated under paragraph (f)(2)(i) of this section, if any, is allocated dollar for dollar by the partnership to its partners with final allocable business interest income excess amounts. Excess business interest expense calculated under paragraph (f)(2)(i) of this section, if any, is allocated dollar for dollar to partners with final ATI capacity deficit amounts. After grossing up each partner's final ATI capacity excess amount by ten-thirds, excess taxable income calculated under paragraph (f)(2)(i) of this section, if any, is allocated dollar for dollar to partners with final ATI capacity excess amounts. A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds such partner's share of excess business interest expense. See *Example 17* through *Example 21* in paragraphs (o)(17) through (21) of this section, respectively.

(g) *Carryforwards—(1) In general.* The amount of any business interest expense not allowed as a deduction to a partnership by reason of §1.163(j)-2(b) and paragraph (f)(2) of this section for any taxable year is—

(i) Not treated as business interest expense of the partnership in the succeeding taxable year; and

(ii) Subject to paragraph (g)(2) of this section, treated as excess business interest expense, which is allocated to each partner pursuant to paragraph (f)(2) of this section.

(2) *Treatment of excess business interest expense allocated to partners.* If a partner is allocated excess business interest expense from a partnership under paragraph (f)(2) of this section for any taxable year and the excess business interest expense is treated as such under paragraph (h)(2) of this section—

(i) Solely for purposes of section 163(j), such excess business interest expense is treated as business interest expense paid or accrued by the partner in the next succeeding taxable year in which the partner is allocated excess taxable income or excess business interest income from such partnership, but only to the extent

of such excess taxable income or excess business interest income; and

(ii) Any portion of such excess business interest expense remaining after the application of paragraph (g)(2)(i) of this section is excess business interest expense that is subject to the limitations of paragraph (g)(2)(i) of this section in succeeding taxable years, unless paragraph (m)(3) of this section applies. See *Example 1* through *Example 16* in paragraphs (o)(1) through (16) of this section, respectively.

(3) *Excess taxable income and excess business interest income ordering rule.* In the event a partner has excess business interest expense from a prior taxable year and is allocated excess taxable income or excess business interest income from the same partnership in a succeeding taxable year, the partner must treat, for purposes of section 163(j), the excess business interest expense as business interest expense paid or accrued by the partner in an amount equal to the partner's share of the partnership's excess taxable income or excess business interest income in such succeeding taxable year. See *Example 2* through *Example 16* in paragraphs (o)(2) through (16) of this section, respectively.

(h) *Basis adjustments—(1) Section 704(d) ordering.* Deductible business interest expense and excess business interest expense are subject to section 704(d). If a partner is subject to a limitation on loss under section 704(d) and a partner is allocated losses from a partnership in a taxable year, §1.704-1(d)(2) requires that the limitation on losses under section 704(d) be apportioned amongst these losses based on the character of each loss (each grouping of losses based on character being a *section 704(d) loss class*). If there are multiple section 704(d) loss classes in a given year, §1.704-1(d)(2) requires the partner to apportion the limitation on losses under section 704(d) to each section 704(d) loss class proportionately. For purposes of applying this proportionate rule, any deductible business interest expense and business interest expense of an exempt entity (whether allocated to the partner in the current taxable year or suspended under section 704(d) in a prior taxable year), any excess business interest expense allocated to the partner in the current taxable year, and any excess business interest expense from a prior taxable year that was

suspended under section 704(d) (negative section 163(j) expense) shall comprise the same section 704(d) loss class. Once the partner determines the amount of limitation on losses apportioned to this section 704(d) loss class, any deductible business interest expense is taken into account before any excess business interest expense or negative section 163(j) expense. See *Example 7* in paragraph (o)(7) of this section.

(2) *Excess business interest expense basis adjustments.* The adjusted basis of a partner in a partnership interest is reduced, but not below zero, by the amount of excess business interest expense allocated to the partner pursuant to paragraph (f)(2) of this section. Negative section 163(j) expense is not treated as excess business interest expense in any subsequent year until such negative section 163(j) expense is no longer suspended under section 704(d). Therefore, negative section 163(j) expense does not affect, and is not affected by, any allocation of excess taxable income to the partner. Accordingly, any excess taxable income allocated to a partner from a partnership while the partner still has negative section 163(j) expense will be included in the partner's ATI. However, once the negative section 163(j) expense is no longer suspended under section 704(d), it becomes excess business interest expense, which is subject to the general rules in paragraph (g) of this section. See *Example 8* in paragraph (o)(8) of this section.

(3) *Partner basis adjustment upon disposition of partnership interest.* If a partner (transferor) disposes of an interest in a partnership, the adjusted basis of the partnership interest being disposed of (transferred interest) is increased immediately before the disposition by the amount of the excess (if any) of the amount of the basis reduction under paragraph (h)(2) of this section over the portion of any excess business interest expense allocated to the transferor under paragraph (f)(2) of this section which has previously been treated under paragraph (g) of this section as business interest expense paid or accrued by the transferor, multiplied by the ratio of the fair market value of the transferred interest to the total fair market value of the transferor's partnership interest immediately prior to the disposition. Therefore, the adjusted basis of the transferred inter-

est is not increased immediately before the disposition by any allocation of excess business interest expense from the partnership that did not reduce the transferor's adjusted basis in its partnership interest pursuant to paragraph (h) of this section prior to the disposition, or by any excess business interest expense that was treated under paragraph (g) of this section as business interest expense paid or accrued by the transferor prior to the disposition. If the transferor disposes of all of its partnership interest, no deduction under section 163(j) is allowed to the transferor or transferee under chapter 1 of subtitle A of the Code for any excess business interest expense or negative section 163(j) expense. If the transferor disposes of a portion of its partnership interest, no deduction under section 163(j) is allowed to the transferor or transferee under chapter 1 of subtitle A of the Code for the amount of excess business interest expense proportionate to the transferred interest. The amount of excess business interest expense proportionate to the partnership interest retained by the transferor shall remain as excess business interest expense of the transferor until such time as such excess business interest expense is treated as business interest expense paid or accrued by the transferor pursuant to paragraph (g) of this section. Further, if the transferor disposes of a portion of its partnership interest, any negative section 163(j) expense shall remain negative section 163(j) expense of the transferor partner until such negative section 163(j) expense is no longer suspended under section 704(d). For purposes of this paragraph, a disposition includes a distribution of money or other property by the partnership to a partner in complete liquidation of its interest in the partnership. Further, solely for purposes of this section, each partner is considered to have disposed of its partnership interest if the partnership terminates under section 708(b)(1). See *Example 9* and *Example 10* in paragraphs (o)(9) and (o)(10) of this section, respectively.

(i)-(j) [Reserved]

(k) *Investment items and certain other items.* Any item of a partnership's income, gain, deduction, or loss that is investment interest income or expense pursuant to §1.163-8T, and any other tax item of a partnership that is neither properly alloca-

ble to a trade or business of the partnership nor described in section 163(d), is allocated to each partner in accordance with section 704(b) and the regulations under section 704 of the Code, and the effect of such allocation for purposes of section 163 is determined at the partner-level. See §1.163(j)-4(b)(3), section 163(d), and §1.163-8T.

(I) *S corporations*—(1) *In general*—(i) *Corporate level limitation*. In the case of any S corporation, the section 163(j) limitation is applied at the S corporation level, and any deduction allowed for business interest expense is taken into account in determining the nonseparately stated taxable income or loss of the S corporation. An S corporation determines its section 163(j) limitation in the same manner as set forth in §1.163(j)-2(b). Allocations of excess taxable income and excess business interest income are made in accordance with the shareholders' pro rata interests in the S corporation pursuant to section 1366(a)(1) after determining the S corporation's section 163(j) limitation pursuant to §1.163(j)-2(b). See *Example 22* and *Example 23* in paragraphs (o)(22) and (23) of this section, respectively.

(ii) *Short taxable periods* For rules on applying the section 163(j) limitation where an S corporation has a two short taxable periods or where its taxable year consists of two separate taxable years see §§ 1.1362-3(c), 1.1368-1(g), and 1.1377-1(b).

(2) *Character of deductible business interest expense*. If an S corporation has deductible business interest expense, such deductible business interest expense is not subject to any additional application of section 163(j) at the shareholder-level because such deductible business interest expense is taken into account in determining the nonseparately stated taxable income or loss of the S corporation. However, for all other purposes of the Code, deductible business interest expense retains its character as business interest expense at the shareholder-level. For example, for purposes of section 469, such deductible business interest expense retains its character as either passive or non-passive in the hands of the shareholder. Additionally, for purposes of section 469, deductible business interest expense from an S corporation remains interest derived from a trade

or business in the hands of a shareholder even if the shareholder does not materially participate in the S corporation's trade or business activity. For additional rules regarding the interaction between sections 465, 469, and 163(j), see §1.163(j)-3.

(3) *Adjusted taxable income of an S corporation*. The ATI of an S corporation generally is determined in accordance with §1.163(j)-1(b)(1). For purposes of computing the S corporation's ATI, the tentative taxable income of the S corporation is determined under section 1363(b) and includes—

- (i) Any item described in section 1363(b)(1); and
- (ii) Any item described in §1.163(j)-1(b)(1), to the extent such item is consistent with subchapter S of the Code.

(4) *Adjusted taxable income and business interest income of S corporation shareholders*—(i) *Adjusted taxable income of S corporation shareholders*. The ATI of an S corporation shareholder is determined in accordance with §1.163(j)-1(b)(1) without regard to such shareholder's distributive share of any items of income, gain, deduction, or loss of such S corporation, except as provided in paragraph (m), and is increased by such shareholder's distributive share of such S corporation's excess taxable income.

(ii) *Disposition of S corporation stock*. If a shareholder of an S corporation recognizes gain or loss upon the disposition of stock of the S corporation, and the corporation the stock of which is being disposed of only owns non-excepted trade or business assets, the gain or loss on the disposition of the stock is included in the shareholder's ATI. See §1.163(j)-10(b)(4)(ii) for dispositions of stock of S corporations that own—

- (A) Non-excepted assets and excepted assets; or
- (B) Investment assets; or
- (C) Both.

(iii) *Double counting of business interest income and floor plan financing interest expense prohibited*. For purposes of calculating an S corporation shareholder's section 163(j) limitation, the shareholder does not include—

(A) Business interest income from an S corporation that is subject to section 163(j), except to the extent the shareholder is allocated excess business interest in-

come from that S corporation pursuant to paragraph (l)(1) of this section; and

(B) The shareholder's share of the S corporation's floor plan financing interest expense, because such floor plan financing interest expense already has been taken into account by the S corporation in determining its nonseparately stated taxable income or loss for purposes of section 163(j).

(5) *Carryforwards*. The amount of any business interest expense not allowed as a deduction for any taxable year by reason of the limitation contained in §1.163(j)-2(b) is carried forward in the succeeding taxable year as a disallowed business interest expense carryforward under the rules set forth in §1.163(j)-2(c) (whether to an S corporation taxable year or a C corporation taxable year). For purposes of applying section 163(j), S corporations are subject to the same ordering rules as a C corporation that is not a member of a consolidated group. See §1.163(j)-5(b)(2).

(6) *Basis adjustments and disallowed business interest expense carryforwards*. An S corporation shareholder's adjusted basis in its S corporation stock is reduced, but not below zero, when a disallowed business interest expense carryforward becomes deductible under section 163(j).

(7) *Accumulated adjustment accounts*. The accumulated adjustment account of an S corporation is adjusted to take into account business interest expense in the year in which the S corporation treats such business interest expense as deductible under the section 163(j) limitation. See section 1368(e)(1).

(8) *Termination of qualified subchapter S subsidiary election*. If a corporation's qualified subchapter S subsidiary election terminates and any disallowed business interest expense carryforward is attributable to the activities of the qualified subchapter S subsidiary at the time of termination, such disallowed business interest expense carryforward remains with the parent S corporation, and no portion of these items is allocable to the former qualified subchapter S subsidiary.

(9) *Investment items*. Any item of an S corporation's income, gain, deduction, or loss that is investment interest income or expense pursuant to §1.163-8T is allocated to each shareholder in accordance with the shareholders' pro rata interests

in the S corporation pursuant to section 1366(a)(1). See section 163(d) and §1.163-8T.

(10) *Application of section 382.* In the event of an ownership change, within the meaning of section 382(g), the S corporation's business interest expense is subject to section 382. Therefore, the allocation of the S corporation's business interest expense between the pre-change period (as defined in §1.382-6(g)(2)) and the post-change period (as defined in §1.382-6(g)(3)), and the determination of the amount that is deducted and carried forward, is determined pursuant to §1.382-6. If the date of the ownership change is also the date of a qualifying disposition (as defined in §1.1368-1(g)(2)) or the date for a termination of shareholder interest (as defined in §1.1377-1(b)(4)), then—

(i) The rules of this paragraph govern the S corporation's business interest expense;

(ii) The S corporation must make an election under §1.382-6(b) with respect to such date if it also makes an election under §1.1368-1(g)(2) or a shareholder termination election to apply normal tax accounting rules, as applicable, with respect to such date; and

(iii) The S corporation may not make an election under §1.382-6(b) with respect to such date if it does not make an election under §1.1368-1(g)(2) or a termination election under §1.1377-1(b)(1), as applicable, with respect to such date.

(m) *Partnerships and S corporations not subject to section 163(j)—(1) Exempt partnerships and S corporations.* If the small business exemption in §1.163(j)-2(d) applies to a partnership or an S corporation in a taxable year (exempt entity), the general rule in §1.163(j)-2 and this section does not apply to limit the deduction for business interest expense of the exempt entity in that taxable year. Additionally, if a partner or S corporation shareholder is allocated business interest expense from an exempt entity, such business interest expense is not subject to the section 163(j) limitation at the partner's or S corporation shareholder's level. However, see paragraph (h)(1) of this section. Further, a partner or S corporation shareholder of an exempt entity includes its share of non-exempt trade or business items of income, gain, loss, and deduction

(including business interest expense and business interest income) of such exempt entity when calculating its ATI. However, if a partner's or S corporation shareholder's allocations of non-exempt trade or business items of loss and deduction from an exempt entity exceed its allocations of non-exempt trade or business items of income and gain from such exempt entity (net loss allocation), then such net loss allocation will not reduce a partner's or S corporation shareholder's ATI. See *Example 11* and *Example 12* in paragraphs (o)(11) and (12) of this section, respectively.

(2) *Partnerships and S corporations engaged in excepted trades or businesses.* To the extent a partnership or an S corporation is engaged in an excepted trade or business, the general rule in §1.163(j)-2 and this section does not apply to limit the deduction for business interest expense that is allocable to such excepted trade or business. If a partner or S corporation shareholder is allocated any section 163(j) item that is allocable to an excepted trade or business of the partnership or S corporation (excepted 163(j) items), such excepted 163(j) items are excluded from the partner's or shareholder's section 163(j) deduction calculation. See §1.163(j)-10(c) (regarding the allocation of items between excepted and non-excepted trades or businesses). See also *Example 13* in paragraph (o)(13) of this section.

(3) *Treatment of excess business interest expense from partnerships that are exempt entities in a succeeding taxable year.* If a partner is allocated excess business interest expense from a partnership and, in a succeeding taxable year, such partnership is an exempt entity, then the partner shall treat any of its excess business interest expense that was previously allocated from such partnership as business interest expense paid or accrued by the partner in such succeeding taxable year, which is potentially subject to limitation at the partner level under section 163(j). However, if a partner is allocated excess business interest expense from a partnership and, in a succeeding taxable year, such partnership engages in excepted trades or businesses, then the partner shall not treat any of its excess business interest expense that was previously allocated from such partnership as business interest expense paid or accrued by the partner in such succeeding

taxable year by reason of the partnership engaging in excepted trades or businesses. See *Example 14* through *Example 16* in paragraphs (o)(14) through (o)(16) of this section, respectively. For rules regarding the treatment of excess business interest expense from a partnership that terminates under section 708(b)(1), see paragraph (h)(3) of this section.

(4) *S corporations with disallowed business interest expense carryforwards prior to becoming exempt entities.* If an S corporation has a disallowed business interest expense carryforward for a taxable year and, in a succeeding taxable year, such S corporation is an exempt entity, then such disallowed business interest expense carryforward—

(i) Continues to be carried forward at the S corporation level;

(ii) Is no longer subject to the section 163(j) limitation; and

(iii) Is taken into account in determining the nonseparately stated taxable income or loss of the S corporation.

(n) [Reserved]

(o) *Examples.* The examples in this paragraph illustrate the provisions of section 163(j) as applied to partnerships and subchapter S corporations. For purposes of these examples, unless stated otherwise, each partnership and S corporation is subject to the provisions of section 163(j), is only engaged in non-excepted trades or businesses, was created or organized in the United States, and uses the calendar year for its annual accounting period. Unless stated otherwise, all partners and shareholders are subject to the provisions of section 163(j), are not subject to a limitation under section 704(d) or 1366(d), have no tax items other than those listed in the example, are U.S. citizens, and use the calendar year for their annual accounting period. The phrase "section 163(j) limit" shall equal the maximum potential deduction allowed under section 163(j)(1). Unless stated otherwise, business interest expense means business interest expense that is not floor plan financing interest expense. With respect to partnerships, all allocations are in accordance with section 704(b) and the regulations in this part under section 704 of the Code.

(1) *Example 1—(i) Facts.* X and Y are equal partners in partnership PRS. In Year 1, PRS has \$100 of ATI and \$40 of business interest expense. PRS allocates the items comprising its \$100 of ATI \$50 to X

and \$50 to Y. PRS allocates its \$40 of business interest expense \$20 to X and \$20 to Y. X has \$100 of ATI and \$20 of business interest expense from its sole proprietorship. Y has \$0 of ATI and \$20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level*. In Year 1, PRS's section 163(j) limit is 30 percent of its ATI, or \$30 (\$100 x 30 percent). Thus, PRS has \$30 of deductible business interest expense and \$10 of excess business interest expense. Such \$30 of deductible business interest expense is includable in PRS's nonseparately stated income or loss, and is not subject to further limitation under section 163(j) at the partners' level.

(iii) *Partner-level allocations*. Pursuant to §1.163(j)-6(f)(2), X and Y are each allocated \$15 of deductible business interest expense and \$5 of excess business interest expense. At the end of Year 1, X and Y each have \$5 of excess business interest expense from PRS, which is not treated as paid or accrued by the partner until such partner is allocated excess taxable income or excess business interest income from PRS in a succeeding taxable year. Pursuant to §1.163(j)-6(e)(1), X and Y, in computing their limit under section 163(j), do not increase any of their section 163(j) items by any of PRS's section 163(j) items. X and Y each increase their outside basis in PRS by \$30 (\$50 - \$20).

(iv) *Partner-level computations*. X, in computing its limit under section 163(j), has \$100 of ATI and \$20 of business interest expense from its sole proprietorship. X's section 163(j) limit is \$30 (\$100 x 30 percent). Thus, X's \$20 of business interest expense is deductible business interest expense. Y, in computing its limit under section 163(j), has \$20 of business interest expense from its sole proprietorship. Y's section 163(j) limit is \$0 (\$0 x 30 percent). Thus, Y's \$20 of business interest expense is not allowed as a deduction and is treated as business interest expense paid or accrued by Y in Year 2.

(2) *Example 2—(i) Facts*. The facts are the same as in *Example 1* in paragraph (o)(1)(i) of this section. In Year 2, PRS has \$200 of ATI, \$0 of business interest income, and \$30 of business interest expense. PRS allocates the items comprising its \$200 of ATI \$100 to X and \$100 to Y. PRS allocates its \$30 of business interest expense \$15 to X and \$15 to Y. X has \$100 of ATI and \$20 of business interest expense from its sole proprietorship. Y has \$0 of ATI and \$20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level*. In Year 2, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or \$60 (\$200 x 30 percent). Thus, PRS has \$100 of excess taxable income, \$30 of deductible business interest expense, and \$0 of excess business interest expense. Such \$30 of deductible business interest expense is includable in PRS's nonseparately stated income or loss, and is not subject to further limitation under section 163(j) at the partners' level.

(iii) *Partner-level allocations*. Pursuant to §1.163(j)-6(f)(2), X and Y are each allocated \$50 of excess taxable income, \$15 of deductible business interest expense, and \$0 of excess business interest expense. As a result, X and Y each increase their ATI by \$50. Because X and Y are each allocated \$50 of excess taxable income from PRS, and excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to a partner, X and Y each treat \$5 of excess business interest expense (the carryforward from Year 1) as paid or accrued in Year

paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to a partner, X and Y each treat \$5 of excess business interest expense (the carryforward from Year 1) as paid or accrued in Year 2. X and Y each increase their outside basis in PRS by \$85 (\$100 - \$15).

(iv) *Partner-level computations*. X, in computing its limit under section 163(j), has \$150 of ATI (\$100 from its sole proprietorship, plus \$50 excess taxable income) and \$25 of business interest expense (\$20 from its sole proprietorship, plus \$5 excess business interest expense treated as paid or accrued in Year 2). X's section 163(j) limit is \$45 (\$150 x 30 percent). Thus, X's \$25 of business interest expense is deductible business interest expense. At the end of Year 2, X has \$0 of excess business interest expense from PRS (\$5 from Year 1, less \$5 treated as paid or accrued in Year 2). Y, in computing its limit under section 163(j), has \$50 of ATI (\$0 from its sole proprietorship, plus \$50 excess taxable income) and \$45 of business interest expense (\$20 from its sole proprietorship, plus \$20 disallowed business interest expense from Year 1, plus \$5 excess business interest expense treated as paid or accrued in Year 2). Y's section 163(j) limit is \$15 (\$50 x 30 percent). Thus, \$15 of Y's business interest expense is deductible business interest expense. The \$30 of Y's business interest expense not allowed as a deduction (\$45 business interest expense, less \$15 section 163(j) limit) is treated as business interest expense paid or accrued by Y in Year 3. At the end of Year 2, Y has \$0 of excess business interest expense from PRS (\$5 from Year 1, less \$5 treated as paid or accrued in Year 2).

(3) *Example 3—(i) Facts*. The facts are the same as in *Example 1* in paragraph (o)(1)(i) of this section. In Year 2, PRS has \$0 of ATI, \$60 of business interest income, and \$40 of business interest expense. PRS allocates its \$60 of business interest income \$30 to X and \$30 to Y. PRS allocates its \$40 of business interest expense \$20 to X and \$20 to Y. X has \$100 of ATI and \$20 of business interest expense from its sole proprietorship. Y has \$0 of ATI and \$20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level*. In Year 2, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or \$90 (\$100 x 30 percent) + \$60. Thus, PRS has \$20 of excess business interest income, \$0 of excess taxable income, \$40 of deductible business interest expense, and \$0 of excess business interest expense. Such \$40 of deductible business interest expense is includable in PRS's nonseparately stated income or loss, and is not subject to further limitation under section 163(j) at the partners' level.

(iii) *Partner-level allocations*. Pursuant to §1.163(j)-6(f)(2), X and Y are each allocated \$10 of excess business interest income, \$50 of excess taxable income, and \$20 of deductible business interest expense. As a result, X and Y each increase their business interest income by \$10. Because X and Y are each allocated \$10 of excess business interest income from PRS, and excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to a partner, X and Y each treat \$5 of excess business interest expense (the carryforward from Year 1) as paid or accrued in Year

2. X and Y each increase their outside basis in PRS by \$10 (\$30 - \$20).

(iv) *Partner-level computations*. X, in computing its limit under section 163(j), has \$100 of ATI (from its sole proprietorship), \$10 of business interest income (from the allocation of \$10 of excess business interest income from PRS), and \$25 of business interest expense (\$20 from its sole proprietorship, plus \$5 excess business interest expense treated as paid or accrued in Year 2). X's section 163(j) limit is \$40 ((\\$100 x 30 percent) + \$10). Thus, X's \$25 of business interest expense is deductible business interest expense. At the end of Year 2, X has \$0 of excess business interest expense from PRS (\$5 from Year 1, less \$5 treated as paid or accrued in Year 2). Y, in computing its limit under section 163(j), has \$0 of ATI (from its sole proprietorship), \$10 of business interest income, and \$45 of business interest expense (\$20 from its sole proprietorship, plus \$20 disallowed business interest expense from Year 1, plus \$5 excess business interest expense treated as paid or accrued in Year 2). Y's section 163(j) limit is \$10 ((\\$0 x 30 percent) + \$10). Thus, \$10 of Y's business interest expense is deductible business interest expense. The \$35 of Y's business interest expense not allowed as a deduction (\$45 business interest expense, less \$10 section 163(j) limit) is treated as business interest expense paid or accrued by Y in Year 3. At the end of Year 2, Y has \$0 of excess business interest expense from PRS (\$5 from Year 1, less \$5 treated as paid or accrued in Year 2).

(4) *Example 4—(i) Facts*. The facts are the same as in *Example 1* in paragraph (o)(1)(i) of this section. In Year 2, PRS has \$100 of ATI, \$60 of business interest income, and \$40 of business interest expense. PRS allocates the items comprising its \$100 of ATI \$50 to X and \$50 to Y. PRS allocates its \$60 of business interest income \$30 to X and \$30 to Y. PRS allocates its \$40 of business interest expense \$20 to X and \$20 to Y. X has \$100 of ATI and \$20 of business interest expense from its sole proprietorship. Y has \$0 of ATI and \$20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level*. In Year 2, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or \$90 (\$100 x 30 percent) + \$60. Thus, PRS has \$20 of excess business interest income, \$100 of excess taxable income, \$40 of deductible business interest expense, and \$0 of excess business interest expense. Such \$40 of deductible business interest expense is includable in PRS's nonseparately stated income or loss, and is not subject to further limitation under section 163(j) at the partners' level.

(iii) *Partner-level allocations*. Pursuant to §1.163(j)-6(f)(2), X and Y are each allocated \$10 of excess business interest income, \$50 of excess taxable income, and \$20 of deductible business interest expense. As a result, X and Y each increase their business interest income by \$10 and ATI by \$50. Because X and Y are each allocated \$10 of excess business interest income and \$50 of excess taxable income from PRS, and excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to a partner, X and Y each treat \$5 of excess business interest expense (the carryforward from Year 1) as

paid or accrued in Year 2. X and Y each increase their outside basis in PRS by \$60 (\$80 - \$20).

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has \$150 of ATI (\$100 from its sole proprietorship, plus \$50 excess taxable income), \$10 of business interest income, and \$25 of business interest expense (\$20 from its sole proprietorship, plus \$5 excess business interest expense treated as paid or accrued in Year 2). X's section 163(j) limit is \$55 ((\$150 x 30 percent) + \$10). Thus, \$25 of X's business interest expense is deductible business interest expense. At the end of Year 2, X has \$0 of excess business interest expense from PRS (\$5 from Year 1, less \$2 treated as paid or accrued in Year 2). Y, in computing its limit under section 163(j), has \$50 of ATI (\$0 from its sole proprietorship, plus \$50 excess taxable income), \$10 of business interest income, and \$45 of business interest expense (\$20 from its sole proprietorship, plus \$20 disallowed business interest expense from Year 1, plus \$5 excess business interest expense treated as paid or accrued in Year 2). Y's section 163(j) limit is \$25 ((\$50 x 30 percent) + \$10). Thus, \$25 of Y's business interest expense is deductible business interest expense. Y's \$20 of business interest expense not allowed as a deduction (\$45 business interest expense, less \$25 section 163(j) limit) is treated as business interest expense paid or accrued by Y in Year 3. At the end of Year 2, Y has \$0 of excess business interest expense from PRS (\$5 from Year 1, less \$5 treated as paid or accrued in Year 2).

(5) *Example 5—(i) Facts.* The facts are the same as in *Example 1* in paragraph (o)(1)(i) of this section. In Year 2, PRS has \$100 of ATI, \$11.20 of business interest income, and \$40 of business interest expense. PRS allocates the items comprising its \$100 of ATI \$50 to X and \$50 to Y. PRS allocates its \$11.20 of business interest income \$5.60 to X and \$5.60 to Y. PRS allocates its \$40 of business interest expense \$20 to X and \$20 to Y. X has \$100 of ATI and \$20 of business interest expense from its sole proprietorship. Y has \$0 of ATI and \$20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 2, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or \$41.20 ((\$100 x 30 percent) + \$11.20). Thus, PRS has \$0 of excess business interest income, \$4 of excess taxable income, and \$40 of deductible business interest expense. Such \$40 of deductible business interest expense is includable in PRS's nonseparately stated income or loss, and is not subject to further limitation under section 163(j) at the partners' level.

(iii) *Partner-level allocations.* Pursuant to §1.163(j)-6(f)(2), X and Y are each allocated \$2 of excess taxable income, \$20 of deductible business interest expense, and \$0 of excess business interest expense. As a result, X and Y each increase their ATI by \$2. Because X and Y are each allocated \$2 of excess taxable income from PRS, and excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to a partner, X and Y each treat \$2 of excess business interest expense (a portion of the carryforward from Year 1) as paid or accrued in Year 2. X and Y each increase their outside basis in PRS by \$35.60 (\$55.60 - \$20).

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has \$102 of ATI (\$100 from its sole proprietorship, plus \$2 excess taxable income), \$0 of business interest income, and \$22 of business interest expense (\$20 from its sole proprietorship, plus \$2 excess business interest expense treated as paid or accrued). X's section 163(j) limit is \$30.60 (\$102 x 30 percent). Thus, X's \$22 of business interest expense is deductible business interest expense. At the end of Year 2, X has \$3 of excess business interest expense from PRS (\$5 from Year 1, less \$2 treated as paid or accrued in Year 2). Y, in computing its limit under section 163(j), has \$2 of ATI (\$0 from its sole proprietorship, plus \$2 excess taxable income), \$0 of business interest income, and \$42 of business interest expense (\$20 from its sole proprietorship, plus \$20 disallowed business interest expense from Year 1, plus \$2 excess business interest expense treated as paid or accrued in Year 2). Y's section 163(j) limit is \$0.60 (\$2 x 30 percent). Thus, \$0.60 of Y's business interest expense is deductible business interest expense. Y's \$41.40 of business interest expense not allowed as a deduction (\$42 business interest expense, less \$0.60 section 163(j) limit) is treated as business interest expense paid or accrued by Y in Year 3. At the end of Year 2, Y has \$3 of excess business interest expense from PRS (\$5 from Year 1, less \$2 treated as paid or accrued in Year 2).

(6) *Example 6—(i) Facts.* In Year 1, X, Y, and Z formed partnership PRS. Upon formation, X and Y each contributed \$100, and Z contributed non-excepted and non-depreciable trade or business property with a basis of \$0 and fair market value of \$100 (Blackacre). PRS allocates all items pro rata between its partners. Immediately after the formation of PRS, Z sold all of its interest in PRS to A for \$100 (assume the interest sale is respected for U.S. Federal income tax purposes). In connection with the interest transfer, PRS made a valid election under section 754. Therefore, after the interest sale, A had a \$100 positive section 743(b) adjustment in Blackacre. In Year 1, PRS had \$0 of ATI, \$15 of business interest expense, and \$0 of business interest income. Pursuant to §1.163(j)-6(f)(2), PRS allocated each of the partners \$5 of excess business interest expense. In Year 2, PRS sells Blackacre for \$100 which generated \$100 of ATI. The sale of Blackacre was PRS's only item of income in Year 2. In accordance with section 704(c), PRS allocates all \$100 of gain resulting from the sale of Blackacre to A. Additionally, PRS has \$15 of business interest expense, all of which it allocates to X. A has \$50 of ATI and \$20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 2, PRS's section 163(j) limit is 30 percent of its ATI, or \$30 (\$100 x 30 percent). Thus, PRS has \$15 of deductible business interest expense and \$50 of excess taxable income. Such \$15 of deductible business interest expense is includable in PRS's nonseparately stated income or loss, and is not subject to further limitation under section 163(j) at X's level.

(iii) *Partner-level allocations.* Pursuant to §1.163(j)-6(f)(2), X is allocated \$15 of deductible business interest expense and X's outside basis in PRS is reduced by \$15. A is allocated \$50 of excess taxable income and, as a result, A increases its ATI by \$50. Because A is allocated \$50 of excess taxable

income, and excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to a partner, A treats \$5 of excess business interest expense (the carryforward from Year 1) as paid or accrued in Year 2. PRS's \$100 of gain allocated to A in Year 2 is fully reduced by A's \$100 section 743(b) adjustment. Therefore, at the end of Year 2, there is no change to A's outside basis in PRS.

(iv) *Partner-level.* A, in computing its limit under section 163(j), has \$0 of ATI (\$50 from its sole proprietorship, plus \$50 excess taxable income, less \$100 ATI reduction as a result of A's section 743(b) adjustment under §1.163(j)-6(e)(2)) and \$25 of business interest expense (\$20 from its sole proprietorship, plus \$5 excess business interest expense treated as paid or accrued in Year 2). A's section 163(j) limit is \$0 (\$0 x 30 percent). Thus, all \$25 of A's business interest expense is not allowed as a deduction and is treated as business interest expense paid or accrued by A in Year 3.

(7) *Example 7—(i) Facts.* X and Y are equal partners in partnership PRS. At the beginning of Year 1, X and Y each have an outside basis in PRS of \$5. In Year 1, PRS has \$0 of ATI, \$20 of business interest income, and \$40 of business interest expense. PRS allocates its \$20 of business interest income \$10 to X and \$10 to Y. PRS allocates \$40 of business interest expense \$20 to X and \$20 to Y. X has \$100 of ATI and \$20 of business interest expense from its sole proprietorship. Y has \$0 of ATI and \$20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 1, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or \$20 ((\$0 x 30 percent) + \$20). Thus, PRS has \$0 of excess business interest income, \$0 of excess taxable income, \$20 of deductible business interest expense, and \$20 of excess business interest expense. Such \$20 of deductible business interest expense is includable in nonseparately stated income or loss of PRS, and not subject to further limitation under section 163(j) by the partners.

(iii) *Partner-level allocations.* Pursuant to §1.163(j)-6(f)(2), X and Y are each allocated \$10 of deductible business interest expense and \$10 of excess business interest expense. After adjusting each partner's respective basis for business interest income under section 705(a)(1)(A), pursuant to §1.163(j)-6(h)(1), X and Y each take their \$10 of deductible business interest expense into account when reducing their outside basis in PRS before taking the \$10 of excess business interest expense into account. Following each partner's reduction in outside basis due to the \$10 of deductible business interest expense, each partner has \$5 of outside basis remaining in PRS. Pursuant to §1.163(j)-6(h)(2), each partner has \$5 of excess business interest expense and \$5 of negative section 163(j) expense. In sum, at the end of Year 1, X and Y each have \$5 of excess business interest expense from PRS which reduces each partner's outside basis to \$0 (and is not treated as paid or accrued by the partners until such partner is allocated excess taxable income or excess business interest income from PRS in a succeeding taxable year), and \$5 of negative section 163(j) expense (which is suspended under section 704(d) and not treated as excess business interest expense of

the partners until such time as the negative section 163(j) expense is no longer subject to a limitation under section 704(d).

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has \$100 of ATI (from its sole proprietorship) and \$20 of business interest expense (from its sole proprietorship). X's section 163(j) limit is \$30 (\$100 x 30 percent). Thus, \$20 of X's business interest expense is deductible business interest expense. Y, in computing its limit under section 163(j), has \$20 of business interest expense (from its sole proprietorship). Y's section 163(j) limit is \$0 (\$0 x 30 percent). Thus, \$20 of Y's business interest expense is not allowed as a deduction in Year 1, and is treated as business interest expense paid or accrued by Y in Year 2.

(8) *Example 8—(i) Facts.* The facts are the same as in *Example 7* in paragraph (o)(7)(i) of this section. In Year 2, PRS has \$20 of gross income that is taken into account in determining PRS's ATI (in other words, properly allocable to a trade or business), \$30 of gross deductions from an investment activity, and \$0 of business interest expense. PRS allocates the items comprising its \$20 of ATI \$10 to X and \$10 to Y. PRS allocates the items comprising its \$30 of gross deductions \$15 to X and \$15 to Y. X has \$100 of ATI and \$20 of business interest expense from its sole proprietorship. Y has \$0 of ATI and \$20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 2, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or \$6 (\$20 x 30 percent). Because PRS has no business interest expense, all \$20 of its ATI is excess taxable income.

(iii) *Partner-level allocations.* Pursuant to §1.163(j)-6(f)(2), X and Y are each allocated \$10 of excess taxable income. Because X and Y are each allocated \$10 of excess taxable income from PRS, X and Y each increase their ATI by \$10. Pursuant to §1.704-1(d)(2), each partner's limitation on losses under section 704(d) must be allocated to its distributive share of each such loss. Thus, each partner reduces its adjusted basis of \$10 (attributable to the allocation of items comprising PRS's ATI in Year 2) by \$7.50 of gross deductions from Year 2 (\$10 x (\$15 of total gross deductions from Year 2 / \$20 of total losses disallowed)), and \$2.50 of excess business interest expense that was carried over as negative section 163(j) expense from Year 1 (\$10 x (\$5 of negative section 163(j) expense treated as excess business interest expense solely for the purposes of section 704(d) / \$20 of total losses disallowed)). Following the application of section 704(d), each partner has \$7.50 of excess business interest expense from PRS (\$5 excess business interest expense from Year 1, plus \$2.50 of excess business interest expense that was formerly negative section 163(j) expense carried over from Year 1). Excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess taxable income and excess business interest income are allocated from such partnership to the partner. As a result, X and Y each treat \$7.50 of excess business interest expense as paid or accrued in Year 2.

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has \$110 of ATI (\$100 from its sole proprietorship, plus \$10 excess taxable income) and \$27.50 of business interest expense

(\$20 from its sole proprietorship, plus \$7.50 excess business interest expense treated as paid or accrued in Year 2). X's section 163(j) limit is \$33 (\$110 x 30 percent). Thus, \$27.50 of X's business interest expense is deductible business interest expense. At the end of Year 2, X has \$0 of excess business interest expense from PRS (\$5 from Year 1, plus \$2.50 treated as excess business interest expense in Year 2, less \$7.50 treated as paid or accrued in Year 2), and \$2.50 of negative section 163(j) expense from PRS. Y, in computing its limit under section 163(j), has \$10 of ATI (\$0 from its sole proprietorship, plus \$10 excess taxable income) and \$47.50 of business interest expense (\$20 from its sole proprietorship, plus \$20 disallowed business interest expense from Year 1, plus \$7.50 excess business interest expense treated as paid or accrued in Year 2). Y's section 163(j) limit is \$3 (\$10 x 30 percent). Thus, \$3 of Y's business interest expense is deductible business interest expense. The \$44.50 of Y's business interest expense not allowed as a deduction (\$47.50 business interest expense, less \$3 section 163(j) limit) is treated as business interest expense paid or accrued by Y in Year 3. At the end of Year 2, Y has \$0 of excess business interest expense from PRS (\$5 from Year 1, plus \$2.50 treated as excess business interest expense in Year 2, less \$7.50 treated as paid or accrued in Year 2), and \$2.50 of negative section 163(j) expense from PRS.

(9) *Example 9—(i) Facts.* X and Y are equal partners in partnership PRS, and are not members of a consolidated group. At the beginning of Year 1, X and Y each have \$120 of outside basis in PRS. Neither X nor Y's share of partnership liabilities exceeds the adjusted basis of its entire interest. In Year 1, X is allocated \$20 of excess business interest expense, which reduces its outside basis from \$120 to \$100. In Year 2, X sells 80 percent of its interest in PRS to Z for \$160. Immediately prior to the sale, X's entire PRS interest had a fair market value of \$200 and the transferred portion of the interest had a fair market value of \$160.

(ii) *Basis adjustment.* Immediately before the sale to Z, X increases its basis in the portion of the interest sold by 80 percent of the amount of the excess of the amount of the basis reduction under paragraph (h)(2) of this section (\$20) over the portion of any excess business interest expense allocated to the partner under paragraph (f)(2) of this section that has previously been treated under paragraph (g) of this section as business interest expense paid or accrued by X (\$0). Therefore, X's basis in the portion of its interest sold is \$96 ((\\$100 x 80%) + (\\$20 x 80%)), and X's gain is \$64 (\\$160 - \\$96). Following the sale, X has \$20 of outside basis in its remaining partnership interest and \$4 of excess business interest expense.

(10) *Example 10—(i) Facts.* X and Y are equal partners in partnership PRS, and are not members of a consolidated group. At the beginning of Year 1, X and Y each have an outside basis in PRS of \$10. Neither X nor Y's share of partnership liabilities exceeds the adjusted basis of its entire interest. In Year 1, X is allocated \$8 of excess business interest expense and \$12 of loss from PRS. As a result, X has \$4 of excess business interest expense, \$4 of negative section 163(j) expense, \$6 of allowable loss, \$6 of loss suspended under section 704(d), and \$0 of outside

basis in PRS at the end of Year 1. In Year 2, X sells 50 percent of its interest in PRS to Z for \$20. Immediately prior to the sale, X's entire partnership interest had a fair market value of \$40 and the transferred portion of the interest had a fair market value of \$20.

(ii) *Basis adjustment.* Immediately before the sale to Z, X increases its basis in the portion of the interest sold by 50 percent of the amount of the excess of the amount of the basis reduction under paragraph (h)(2) of this section (\$4) over the portion of any excess business interest expense allocated to the partner under paragraph (f)(2) of this section that has previously been treated under paragraph (g) of this section as business interest expense paid or accrued by X (\$0). Therefore, X's basis in the portion of its interest sold is \$2 ((\\$0 x 50%) + \\$2), and X's gain is \$18 (\\$20 - \\$2). Following the sale, X has \$0 of outside basis in its remaining partnership interest, \$2 of excess business interest expense, \$4 of negative section 163(j) expense, and \$6 of loss suspended under section 704(d).

(11) *Example 11—(i) Facts.* X (a corporation), Y (an individual), and Z (an individual) are equal partners in partnership PRS. X, Y, and Z are subject to section 163(j). PRS is not subject to section 163(j) under section 163(j)(3). In 2021, PRS has \$150 of trade or business income (not taking into account business interest income or business interest expense), \$30 of business interest income, and \$45 of business interest expense. PRS also has \$75 of investment income and \$60 of investment interest expense. PRS allocates its items of income, gain, loss, and deduction equally among its partners. X, Y, and Z each have \$10 of business interest expense from their respective businesses.

(ii) *Partnership-level.* PRS is not subject to section 163(j) by reason of section 163(j)(3). As a result, none of PRS's \$45 of business interest expense is subject to the section 163(j) limitation.

(iii) *Partner-level allocations.* Because PRS is not subject to section 163(j) by reason of section 163(j)(3), PRS's \$45 of business interest expense does not retain its character as business interest expense for purposes of section 163(j). As a result, such business interest expense is not subject to the section 163(j) limitation at the level of either the partnership or partner. Additionally, pursuant to §1.163(j)-6(m)(1), each partner includes its share of non-excepted trade or business items of income, gain, loss, and deduction (including business interest expense and business interest income) of PRS when calculating its ATI. As a result, each partner increases its ATI by \$45 (one third of \$150 + \$30 - \$45). Also, X increases its ATI by an additional \$25 because its items of investment income and loss from PRS are recharacterized as non-excepted trade or business income and loss at its level pursuant to §§1.163(j)-4(b)(3)(i) and 1.163(j)-10(b)(6). Further, X increases its business interest expense by its \$20 allocation of investment interest expense from PRS pursuant to §§1.163(j)-4(b)(3)(i) and 1.163(j)-10(b)(6).

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has \$70 of ATI and \$30 of business interest expense. X's section 163(j) limit is \$21 (\$70 x 30 percent). Thus, X has \$21 of deductible business interest expense. X's \$9 of business interest expense not allowed as a deduction is treated as business interest expense paid or accrued

by X in 2020. Y and Z, in computing their respective limits under section 163(j), each have \$45 of ATI and \$10 of business interest expense. Y and Z each have a section 163(j) limit of \$13.50 (\$45 x 30 percent). Thus, Y and Z each have \$10 of deductible business interest expense.

(12) *Example 12—(i) Facts.* The facts are the same as in *Example 11* in paragraph (o)(11)(i) of this section, except PRS has \$200 of depreciation deductions in addition to its other items of income, gain, loss, and deduction.

(ii) *Partnership-level.* Same analysis as *Example 11* in paragraph (o)(11)(ii) of this section.

(iii) *Partner-level allocations.* Because PRS is not subject to section 163(j) by reason of section 163(j)(3), PRS's \$45 of business interest expense does not retain its character as business interest expense for purposes of section 163(j). As a result, such business interest expense is not subject to the section 163(j) limitation at the level of either the partnership or partner. Additionally, pursuant to §1.163(j)-6(m)(1), each partner includes its share of non-excepted trade or business items of income, gain, loss, and deduction (including business interest expense and business interest income) of PRS when calculating its ATI. Therefore, each partner increases its ATI by \$10 (each partner's share of \$20 of non-excepted income less each partner's share of \$10 of non-excepted loss).

income, gain, loss, and deduction equally among its partners. X, Y, and Z each have \$10 of business interest expense from their respective businesses.

(ii) *Partnership-level.* PRS is not subject to section 163(j) by reason of section 163(j)(3). As a result, none of PRS's business interest expense is subject to the section 163(j) limitation.

(iii) *Partner-level allocations.* Because PRS's business interest expense is not subject to the section 163(j) limitation, such business interest expense is not subject to the section 163(j) limitation at the level of either the partnership or partner. Additionally, pursuant to §1.163(j)-6(m)(1), each partner includes its share of non-excepted trade or business items of income, gain, loss, and deduction (including business interest expense and business interest income) of PRS when calculating its ATI. Therefore, each partner increases its ATI by \$10 (each partner's share of \$20 of non-excepted income less each partner's share of \$10 of non-excepted loss).

(iv) *Partner-level computations.* In computing its limit under section 163(j), each partner has \$10 of ATI and \$10 of business interest expense. Each partner's section 163(j) limit is \$3 (\$10 x 30 percent). Thus, each partner has \$3 of deductible business interest expense. Each partner has \$7 of business interest expense not allowed as a deduction that is treated as business interest expense paid or accrued by the partner in Year 2.

(14) *Example 14—(i) Facts.* The facts are the same as in *Example 5* in paragraph (o)(5)(i) of this section, except in Year 2 Y is not subject to section 163(j) under section 163(j)(3).

(ii) *Partnership-level.* Same analysis as *Example 5* in paragraph (o)(5)(ii) of this section.

(iii) *Partner-level allocations.* Same analysis as *Example 5* in paragraph (o)(5)(iii) of this section.

(iv) *Partner-level computations.* For X, same analysis as *Example 5* in paragraph (o)(5)(iv) of this section. Y is not subject to section 163(j) under section 163(j)(3). Thus, all \$42 of business interest expense (\$20 from its sole proprietorship, plus \$20 disallowed business interest expense from Year 1, plus \$2 excess business interest expense treated as paid or accrued in Year 2) is not subject to limitation under §1.163(j)-2(d). At the end of Year 2, Y has \$3 of excess business interest expense from PRS (\$5 from Year 1, less \$2 treated as paid or accrued in Year 2).

(15) *Example 15—(i) Facts.* The facts are the same as in *Example 5* in paragraph (o)(5)(i) of this section, except in Year 2 PRS and Y become not subject to section 163(j) by reason of section 163(j)(3).

(ii) *Partnership-level.* In Year 2, PRS is not subject to section 163(j) by reason of section 163(j)(3). As a result, none of PRS's \$40 of business interest expense is subject to the section 163(j) limitation at the level of either the partnership or partner.

(iii) *Partner-level allocations.* Because PRS is not subject to section 163(j) by reason of section 163(j)(3), PRS's \$40 of business interest expense does not retain its character as business interest expense for purposes of section 163(j). As a result, such business interest expense is not subject to the section 163(j) limitation at the level of either the partnership or partner. Additionally, pursuant to §1.163(j)-6(m)(1), each partner includes its share of non-excepted trade or business items of income, gain, loss, and deduction (including business interest expense and business interest income) of PRS when calculating its own ATI because such \$50 is excepted trade or business income.

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has \$135.60 of ATI (\$100 from its sole proprietorship, plus \$35.60 ATI from PRS) and \$25 of business interest expense (\$20 from its sole proprietorship, plus \$5 of excess business interest expense treated as paid or accrued in Year 2). X's section 163(j) limit is \$40.68 (\$135.60 x 30 percent). Thus, \$25 of X's business interest expense is deductible business interest expense. Y is not subject to section 163(j) under section 163(j)(3). As a result, Y's business interest expense is not subject to the section 163(j) limitation. Thus, all \$45 of Y's business interest expense (\$20 from its sole proprietorship, plus \$20 disallowed from year 1, plus \$5 of excess business interest expense treated as paid or accrued in Year 2) is not subject to the section 163(j) limitation.

(16) *Example 16—(i) Facts.* The facts are the same as in *Example 1* in paragraph (o)(1)(i) of this section, except that PRS's only trade or business is a real property trade or business for which PRS does not make the election provided for in section 163(j)(7)(B). In Year 2, when PRS's only trade or business is still its real property trade or business, PRS makes the election provided for in section 163(j)(7)(B). Further, in Year 2, PRS has \$100 of income and \$40 of business interest expense. PRS allocates its items of income, gain, deduction, and loss equally between X and Y. X has \$100 of ATI and \$20 of business interest expense from its sole proprietorship. Y has \$0 of ATI and \$20 of business interest expense from its sole proprietorship.

(ii) *Partnership-level.* In Year 2, PRS is not subject to section 163(j) because its only trade or business is an excepted trade or business. As a result, none of PRS's \$40 of business interest expense is subject to the section 163(j) limitation at the level of either the partnership or partner.

(iii) *Partner-level allocations.* Because PRS is not subject to section 163(j), PRS's \$40 of business interest expense does not retain its character as business interest expense for purposes of section 163(j). As a result, such business interest expense is not subject to the section 163(j) limitation at the partners' level. Pursuant to §1.163(j)-6(m)(1), the partners do not include their respective \$50 shares of income from PRS when calculating their own ATI because such \$50 is excepted trade or business income.

(iv) *Partner-level computations.* X, in computing its limit under section 163(j), has \$100 of ATI (\$100 from its sole proprietorship) and \$20 of business interest expense (\$20 from its sole proprietorship). X's section 163(j) limit is \$30 (\$100 x 30 percent). Thus, \$20 of X's business interest expense is deductible business interest expense. At the end of Year 2, X has \$5 of excess business interest expense from PRS (\$5 from Year 1). Y, in computing its limit under section 163(j), has \$0 of ATI and

\$40 of business interest expense (\$20 from its sole proprietorship, plus \$20 disallowed business interest expense from Year 1). Y's section 163(j) limit is \$0. Thus, Y's \$40 of business interest expense not allowed as a deduction is treated as business interest expense paid or accrued by Y in Year 3. At the end of Year 2, Y has \$5 of excess business interest expense from PRS (\$5 from Year 1).

(17) *Example 17: Facts.* A (an individual) and B (a corporation) own all of the interests in partnership PRS. At the beginning of Year 1, A and B each have \$100 section 704(b) capital account and \$100 of basis in PRS. In Year 1, PRS has \$100 of ATI, \$10 of investment interest income, \$20 of business interest income (BII), \$60 of business interest expense (BIE), and \$10 of floor plan financing inter-

est expense. PRS's ATI consists of \$100 of gross income and \$0 of gross deductions. PRS allocates its items comprising ATI \$100 to A and \$0 to B. PRS allocates its business interest income \$10 to A and \$10 to B. PRS allocates its business interest expense \$30 to A and \$30 to B. PRS allocates all \$10 of its investment interest income and all \$10 of its floor plan financing interest expense to B. A has ATI from a sole proprietorship, unrelated to PRS, in the amount of \$300.

(i) First, PRS determines its limitation pursuant to §1.163(j)-2. PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or $\$50 ((\$100 \times 30\%) + \$20)$. Thus, PRS has \$0 of excess business interest income (EBII), \$0 of excess taxable income, \$50 of deductible business

interest expense, and \$10 of excess business interest expense. PRS takes its \$10 of floor plan financing into account in determining its nonseparately stated taxable income or loss.

(ii) Second, PRS determines each partner's allocable share of section 163(j) items used in its own section 163(j) calculation. B's \$10 of investment interest income is not included in B's allocable business interest income amount because the \$10 of investment interest income was not taken into account in PRS's section 163(j) calculation. B's \$10 of floor plan financing interest expense is not included in B's allocable business interest expense. The \$300 of ATI from A's sole proprietorship is not included in A's allocable ATI amount because the \$300 was not taken into account in PRS's section 163(j) calculation.

Table 1 to paragraph (o)(17)(ii)

	A	B	Total
Allocable ATI	\$100	\$0	\$100
Allocable BII	\$10	\$10	\$20
Allocable BIE	\$30	\$30	\$60

(iii) Third, PRS compares each partner's allocable business interest income to such partner's allocable business interest expense. Because each partner's allocable business interest expense exceeds its alloca-

ble business interest income by \$20 (\$30 - \$10), each partner has an allocable business interest income deficit of \$20. Thus, the total allocable business interest income deficit is \$40 (\$20 + \$20). No partner has allo-

cable business interest income excess because no partner has allocable business interest income in excess of its allocable business interest expense. Thus, the total allocable business interest income excess is \$0.

Table 2 to paragraph (o)(17)(iii)

	A	B	Total
Allocable BII	\$10	\$10	N/A
Allocable BIE	\$30	\$30	N/A
If allocable BII exceeds allocable BIE, then such amount = Allocable BII excess	\$0	\$0	\$0
If allocable BIE exceeds allocable BII, then such amount = Allocable BII deficit	\$20	\$20	\$40

(iv) Fourth, PRS determines each partner's final allocable business interest income excess. Because no partner had any allocable business interest income excess, each partner has final allocable business interest income excess of \$0.

(v) Fifth, PRS determines each partner's remaining business interest expense. PRS determines A's remaining business interest expense by reducing, but not below \$0, A's allocable business inter-

est income deficit (\$20) by the product of the total allocable business interest income excess (\$0) and the ratio of A's allocable business interest income deficit to the total business interest income deficit (\$20/\$40). Therefore, A's allocable business interest income deficit of \$20 is reduced by \$0 (\$0 x 50 percent). As a result, A's remaining business interest expense is \$20. PRS determines B's remaining business interest expense by reducing, but not

below \$0, B's allocable business interest income deficit (\$20) by the product of the total allocable business interest income excess (\$0) and the ratio of B's allocable business interest income deficit to the total business interest income deficit (\$20/\$40). Therefore, B's allocable business interest income deficit of \$20 is reduced by \$0 (\$0 x 50 percent). As a result, B's remaining business interest expense is \$20.

Table 3 to paragraph (o)(17)(v)

	A	B	Total
Allocable BII deficit	\$20	\$20	\$40
Less: (Total allocable BII excess) x (Allocable BII deficit / Total allocable BII deficit)	\$0	\$0	N/A
= Remaining BIE	\$20	\$20	\$40

(vi) Sixth, PRS determines each partner's final allocable ATI. Any partner with a negative allocable ATI, or an allocable ATI of \$0, has a positive allocable ATI of \$0. Therefore, B has a positive allocable ATI of \$0. Because A's allocable ATI is comprised of \$100 of income and gain and \$0 of

deduction and loss, A has positive allocable ATI of \$100. Thus, the total positive allocable ATI is \$100 (\$100 + \$0). PRS determines A's final allocable ATI by reducing, but not below \$0, A's positive allocable ATI (\$100) by the product of total negative allocable ATI (\$0) and the ratio of A's positive

allocable ATI to the total positive allocable ATI (\$100/\$100). Therefore, A's positive allocable ATI is reduced by \$0 (\$0 x 100 percent). As a result, A's final allocable ATI is \$100. Because B has a positive allocable ATI of \$0, B's final allocable ATI is \$0.

Table 4 to paragraph (o)(17)(vi)			
	A	B	Total
Allocable ATI	\$100	\$0	\$100
If deduction and loss items comprising allocable ATI exceed income and gain items comprising allocable ATI, then such excess amount = Negative allocable ATI	\$0	\$0	\$0
If income and gain items comprising allocable ATI equal or exceed deduction and loss items comprising allocable ATI, then such amount = Positive allocable ATI	\$100	\$0	\$100

Table 5 to paragraph (o)(17)(vi)			
	A	B	Total
Positive allocable ATI	\$100	\$0	\$100
Less: (Total negative allocable ATI) x (Positive allocable ATI / Total positive allocable ATI)	\$0	\$0	N/A
= Final allocable ATI	\$100	\$0	\$100

(vii) Seventh, PRS compares each partner's ATI capacity (ATIC) amount to such partner's remaining business interest expense. A's ATIC amount is \$30 (\$100 x 30 percent) and B's ATIC amount is \$0 (\$0 x

30 percent). Because A's ATIC amount exceeds its remaining business interest expense by \$10 (\$30 - \$20), A has an ATIC excess of \$10. B does not have any ATIC excess. Thus, the total ATIC excess is \$10 (\$10

+ \$0). A does not have any ATIC deficit. Because B's remaining business interest expense exceeds its ATIC amount by \$20 (\$20 - \$0), B has an ATIC deficit of \$20. Thus, the total ATIC deficit is \$20 (\$0 + \$20).

Table 6 to paragraph (o)(17)(vii)			
	A	B	Total
ATIC (Final allocable ATI x 30 percent)	\$30	\$0	N/A
Remaining BIE	\$20	\$20	N/A
If ATIC exceeds remaining BIE, then such excess = ATIC excess	\$10	\$0	\$10
If remaining BIE exceeds ATIC, then such excess = ATIC deficit	\$0	\$20	\$20

(viii)(A) Eighth, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii) of this section if, and only if, PRS has—

(I) An excess business interest expense greater than \$0 under paragraph (f)(2)(i) of this section;

(2) A total negative allocable ATI greater than \$0 under paragraph (f)(2)(vi) of this section; and

(3) A total ATIC excess amount greater than \$0 under paragraph (f)(2)(vii) of this section.

(B) Because PRS does not meet all three requirements in paragraph (o)(17)(viii)(A) of this section,

PRS does not perform the calculations or adjustments described in paragraph (f)(2)(viii) of this section. In sum, the correct amounts to be used in paragraphs (o)(17)(ix) and (x) of this section are as follows.

Table 7 to paragraph (o)(17)(viii)(B)			
	A	B	Total
ATIC excess	\$10	\$0	\$10
ATIC deficit	\$0	\$20	\$20

(ix) Ninth, PRS determines each partner's final ATIC excess amount. Because A has an ATIC excess, PRS must determine A's final ATIC excess amount.

A's final ATIC excess amount is A's ATIC excess (\$10), reduced, but not below \$0, by the product of the total ATIC deficit (\$20) and the ratio of A's ATIC

excess to the total ATIC excess (\$10/\$10). Therefore, A has \$0 of final ATIC excess (\$10 - (\$20 x 100 percent)).

Table 8 to paragraph (o)(17)(ix)			
	A	B	Total
ATIC excess	\$10	\$0	N/A
Less: (Total ATIC deficit) x (ATIC excess / Total ATIC excess)	\$20	\$0	N/A
= Final ATIC excess	\$0	\$0	\$0

(x) Tenth, PRS determines each partner's final ATIC deficit amount. Because B has an ATIC deficit, PRS must determine B's final ATIC deficit amount.

B's final ATIC deficit amount is B's ATIC deficit (\$20), reduced, but not below \$0, by the product of the total ATIC excess (\$10) and the ratio of B's ATIC

deficit to the total ATIC deficit (\$20/\$20). Therefore, B has \$10 of final ATIC deficit (\$20 - (\$10 x 100 percent)).

Table 9 to paragraph (o)(17)(x)

	A	B	Total
ATIC deficit	\$0	\$20	N/A
Less: (Total ATIC excess) x (ATIC deficit / Total ATIC deficit)	\$0	\$10	N/A
= Final ATIC deficit	\$0	\$10	\$10

(xi) Eleventh, PRS allocates deductible business interest expense and section 163(j) excess items to the partners. Pursuant to paragraph (f)(2)(i) of this section, PRS has \$10 of excess business interest expense. PRS allocates the excess business interest expense dollar for dollar to the partners with final ATIC defi-

cits amounts. Thus, PRS allocates all \$10 of its excess business interest expense to B. A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds such partner's share of excess business interest expense. Therefore, A has deductible business interest expense of \$30 (\$30

- \$0) and B has deductible business interest expense of \$20 (\$30 - \$10). As a result of its allocations from PRS, A increases its section 704(b) capital account and basis in PRS by \$80 to \$180. As a result of its allocations from PRS, B decreases its capital account and basis in PRS by \$20 to \$80.

Table 10 to paragraph (o)(17)(xi)

	A	B	Total
Deductible BIE	\$30	\$20	\$50
EBIE allocated	\$0	\$10	\$10
ETI allocated	\$0	\$0	\$0
EBII allocated	\$0	\$0	\$0

(18) *Example 18: Facts.* A, B, and C own all of the interests in partnership PRS. In Year 1, PRS has \$150 of ATI, \$10 of business interest income, and \$40 of business interest expense. PRS's ATI consists of \$200 of gross income and \$50 of gross deductions. PRS allocates its items comprising ATI (\$50) to A, \$200 to B, and \$0 to C. PRS allocates its business

interest income \$0 to A, \$0 to B, and \$10 to C. PRS allocates its business interest expense \$30 to A, \$10 to B, and \$0 to C.

(i) First, PRS determines its limitation pursuant to §1.163(j)-2. PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or \$55 ((\\$150 x 30 percent) + \$10). Thus, PRS has

\$0 of excess business interest income, \$50 of excess taxable income, \$40 of deductible business interest expense, and \$0 of excess business interest expense.

(ii) Second, PRS determines each partner's allocable share of section 163(j) items used in its own section 163(j) calculation.

Table 11 to paragraph (o)(18)(ii)

	A	B	C	Total
Allocable ATI	(\$50)	\$200	\$0	\$150
Allocable BII	\$0	\$0	\$10	\$10
Allocable BIE	\$30	\$10	\$0	\$40

(iii) Third, PRS compares each partner's allocable business interest income to such partner's allocable business interest expense. Because A's allocable business interest expense exceeds its allocable business interest income by \$30 (\$30 - \$0), A has an allocable business interest income deficit of \$30. Because B's

allocable business interest expense exceeds its allocable business interest income by \$10 (\$10 - \$0), B has an allocable business interest income deficit of \$10. C does not have any allocable business interest income deficit. Thus, the total allocable business interest income deficit is \$40 (\$30 + \$10 + \$0). A and B do not

have any allocable business interest income excess. Because C's allocable business interest income exceeds its allocable business interest expense by \$10 (\$10 - \$0), C has an allocable business interest income excess of \$10. Thus, the total allocable business interest income excess is \$10 (\$0 + \$0 + \$10).

Table 12 to paragraph (o)(18)(iii)

	A	B	C	Total
Allocable BII	\$0	\$0	\$10	N/A
Allocable BIE	\$30	\$10	\$0	N/A
If allocable BII exceeds allocable BIE, then such amount = Allocable BII excess	\$0	\$0	\$10	\$10
If allocable BIE exceeds allocable BII, then such amount = Allocable BII deficit	\$30	\$10	\$0	\$40

(iv) Fourth, PRS determines each partner's final allocable business interest income excess. Because A and B do not have any allocable business interest income excess, each partner has final allocable business interest income excess of \$0. PRS determines

C's final allocable business interest income excess by reducing, but not below \$0, C's allocable business interest income excess (\$10) by the product of the total allocable business interest income deficit (\$40) and the ratio of C's allocable business interest

income excess to the total allocable business interest income excess (\$10/\$10). Therefore, C's allocable business interest income excess of \$10 is reduced by \$10 (\$40 x 100 percent). As a result, C's allocable business interest income excess is \$0.

Table 13 to paragraph (o)(18)(iv)				
	A	B	C	Total
Allocable BII excess	\$0	\$0	\$10	N/A
Less: (Total allocable BII deficit) x (Allocable BII excess / Total allocable BII excess)	\$0	\$0	\$40	N/A
= Final Allocable BII Excess	\$0	\$0	\$0	\$10

(v) Fifth, PRS determines each partner's remaining business interest expense. PRS determines A's remaining business interest expense by reducing, but not below \$0, A's allocable business interest income deficit (\$30) by the product of the total allocable business interest income excess (\$10) and the ratio of A's allocable business interest income deficit to the total business interest income deficit (\$30/\$40).

Therefore, A's allocable business interest income deficit of \$30 is reduced by \$7.50 (\$10 x 75 percent). As a result, A's remaining business interest expense is \$22.50. PRS determines B's remaining business interest expense by reducing, but not below \$0, B's allocable business interest income deficit (\$10) by the product of the total allocable business interest income excess (\$10) and the ratio of B's allocable

business interest income deficit to the total business interest income deficit (\$10/\$40). Therefore, B's allocable business interest income deficit of \$10 is reduced by \$2.50 (\$10 x 25 percent). As a result, B's remaining business interest expense is \$7.50. Because C does not have any allocable business interest income deficit, C's remaining business interest expense is \$0.

Table 14 to paragraph (o)(18)(v)				
	A	B	C	Total
Allocable BII deficit	\$30	\$10	\$0	\$40
Less: (Total allocable BII excess) x (Allocable BII deficit / Total allocable BII deficit)	\$7.50	\$2.50	\$0	N/A
= Remaining BIE	\$22.50	\$7.50	\$0	N/A

(vi) Sixth, PRS determines each partner's final allocable ATI. Because A's allocable ATI is comprised of \$50 of items of deduction and loss and \$0 of income and gain, A has negative allocable ATI of \$50. A is the only partner with negative allocable ATI. Thus, the total negative allocable ATI amount is \$50. Any partner with a negative allocable ATI, or

an allocable ATI of \$0, has a positive allocable ATI of \$0. Therefore, A and C have a positive allocable ATI of \$0. Because B's allocable ATI is comprised of \$200 of items of income and gain and \$0 of deduction and loss, B has positive allocable ATI of \$200. Thus, the total positive allocable ATI is \$200 (\$0 + \$200 + \$0). PRS determines B's final allocable ATI

by reducing, but not below \$0, B's positive allocable ATI (\$200) by the product of total negative allocable ATI (\$50) and the ratio of B's positive allocable ATI to the total positive allocable ATI (\$200/\$200). Therefore, B's positive allocable ATI is reduced by \$50 (\$50 x 100 percent). As a result, B's final allocable ATI is \$150.

Table 15 to paragraph (o)(18)(vi)				
	A	B	C	Total
Allocable ATI	(\$50)	\$200	\$0	\$150
If deduction and loss items comprising allocable ATI exceed income and gain items comprising allocable ATI, then such excess amount = Negative allocable ATI	\$50	\$0	\$0	\$50
If income and gain items comprising allocable ATI equal or exceed deduction and loss items comprising allocable ATI, then such amount = Positive allocable ATI	\$0	\$200	\$0	\$200

Table 16 to paragraph (o)(18)(vi)				
	A	B	C	Total
Positive allocable ATI	\$0	\$200	\$0	\$200
Less: (Total negative allocable ATI) x (Positive allocable ATI / Total positive allocable ATI)	\$0	\$50	\$0	N/A
= Final allocable ATI	\$0	\$150	\$0	\$150

(vii) Seventh, PRS compares each partner's ATI capacity (ATIC) amount to such partner's remaining business interest expense. A's ATIC amount is \$0 (\$0 x 30 percent), B's ATIC amount is \$45 (\$150 x 30 percent), and C's ATIC amount is \$0 (\$0 x 30 per-

cent). A does not have any ATIC excess. Because B's ATIC amount exceeds its remaining business interest expense by \$37.50 (\$45 - \$7.50), B has an ATIC excess amount of \$37.50. C does not have any ATIC excess. Thus, the total ATIC excess amount is \$37.50

(\$0 + \$37.50 + \$0). Because A's remaining business interest expense exceeds its ATIC amount by \$22.50 (\$22.50 - \$0), A has an ATIC deficit of \$22.50. B and C do not have any ATIC deficit. Thus, the total ATIC deficit is \$22.50 (\$22.50 + \$0 + \$0).

Table 17 to paragraph (o)(18)(vii)				
	A	B	C	Total
ATIC (Final allocable ATI x 30 percent)	\$0	\$45	\$0	N/A
Remaining BIE	\$22.50	\$7.50	\$0	N/A
If ATIC exceeds remaining BIE, then such excess = ATIC excess	\$0	\$37.50	\$0	\$37.50
If remaining BIE exceeds ATIC, then such excess = ATIC deficit	\$22.50	\$0	\$0	\$22.50

(viii)(A) Eighth, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii) of this section if, and only if, PRS has—

(I) An excess business interest expense greater than \$0 under paragraph (f)(2)(i) of this section;

(2) A total negative allocable ATI greater than \$0 under paragraph (f)(2)(vi) of this section; and

(3) A total ATIC excess amount greater than \$0 under paragraph (f)(2)(vii) of this section.

(B) Because PRS does not meet all three requirements in paragraph (o)(18)(viii)(A) of this section,

PRS does not perform the calculations or adjustments described in paragraph (f)(2)(viii) of this section. In sum, the correct amounts to be used in paragraphs (o)(18)(ix) and (x) of this section are as follows.

Table 18 to paragraph (o)(18)(viii)(B)				
	A	B	C	Total
ATIC excess	\$0	\$37.50	\$0	\$37.50
ATIC deficit	\$22.50	\$0	\$0	\$22.50

(ix) Ninth, PRS determines each partner's final ATIC excess amount. Because B has ATIC excess, PRS must determine B's final ATIC excess

amount. B's final ATIC excess amount is B's ATIC excess (\$37.50), reduced, but not below \$0, by the product of the total ATIC deficit (\$22.50) and the

ratio of B's ATIC excess to the total ATIC excess (\$37.50/\$37.50). Therefore, B has \$15 of final ATIC excess (\$37.50 – (\$22.50 x 100 percent)).

Table 19 to paragraph (o)(18)(ix)				
	A	B	C	Total
ATIC excess	\$0	\$37.50	\$0	N/A
Less: (Total ATIC deficit) x (ATIC excess / Total ATIC excess)	\$0	\$22.50	\$0	N/A
= Final ATIC excess	\$0	\$15	\$0	\$15

(x) Tenth, PRS determines each partner's final ATIC deficit amount. Because A has an ATIC deficit, PRS must determine A's final ATIC deficit

amount. A's final ATIC deficit amount is A's ATIC deficit (\$22.50), reduced, but not below \$0, by the product of the total ATIC excess (\$37.50) and the

ratio of A's ATIC deficit to the total ATIC deficit (\$22.50/\$22.50). Therefore, A has \$0 of final ATIC deficit (\$22.50 – (\$37.50 x 100 percent)).

Table 20 to paragraph (o)(18)(x)				
	A	B	C	Total
ATIC deficit	\$22.50	\$0	\$0	N/A
Less: (Total ATIC excess) x (ATIC deficit / Total ATIC deficit)	\$37.50	\$0	\$0	N/A
= Final ATIC deficit	\$0	\$0	\$0	\$0

(xi) Eleventh, PRS allocates deductible business interest expense and section 163(j) excess items to the partners. Pursuant to paragraph (f)(2)(i) of this section, PRS has \$50 of excess taxable income and \$40 of deductible business interest expense. After grossing up each partner's final ATIC

excess amounts by ten-thirds, excess taxable income is allocated dollar for dollar to partners with final ATIC excess amounts. Thus, PRS allocates its excess taxable income \$50 to B. A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds

such partner's share of excess business interest expense. Therefore, A has deductible business interest expense of \$30 (\$30 - \$0), B has deductible business interest expense of \$10 (\$10 - \$0), and C has deductible business interest expense of \$0 (\$0 - \$0).

Table 21 to paragraph (o)(18)(xi)				
	A	B	C	Total
Deductible BIE	\$30	\$10	\$0	\$40
EBIE allocated	\$0	\$0	\$0	\$0
ETI allocated	\$0	\$50	\$0	\$50
EBII allocated	\$0	\$0	\$0	\$0

(19) *Example 19: Facts.* A, B, and C own all of the interests in partnership PRS. In Year 1, PRS has \$100 of ATI, \$0 of business interest income, and \$50 of business interest expense. PRS's ATI consists of \$200 of gross income and \$100 of gross deductions. PRS allocates its items comprising ATI

\$100 to A, \$100 to B, and (\$100) to C. PRS allocates its business interest expense \$0 to A, \$25 to B, and \$25 to C.

(i) First, PRS determines its limitation pursuant to §1.163(j)-2. PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or

\$30 (\$100 x 30 percent). Thus, PRS has \$30 of deductible business interest expense and \$20 of excess business interest expense.

(ii) Second, PRS determines each partner's allocable share of section 163(j) items used in its own section 163(j) calculation.

Table 22 to paragraph (o)(19)(ii)				
	A	B	C	Total
Allocable ATI	\$100	\$100	(\$100)	\$100
Allocable BII	\$0	\$0	\$0	\$0
Allocable BIE	\$0	\$25	\$25	\$50

(iii) Third, PRS compares each partner's allocable business interest income to such partner's allocable business interest expense. No partner has allocable business interest income. Consequently, each partner's allocable business interest income deficit is equal

to such partner's allocable business interest expense. Thus, A's allocable business interest income deficit is \$0, B's allocable business interest income deficit is \$25, and C's allocable business interest income deficit is \$25. The total allocable business interest income

deficit is \$50 (\$0 + \$25 + \$25). No partner has allocable business interest income excess because no partner has allocable business interest income in excess of its allocable business interest expense. Thus, the total allocable business interest income excess is \$0.

Table 23 to paragraph (o)(19)(iii)				
	A	B	C	Total
Allocable BII	\$0	\$0	\$0	N/A
Allocable BIE	\$0	\$25	\$25	N/A
If allocable BII exceeds allocable BIE, then such amount = Allocable BII excess	\$0	\$0	\$0	\$0
If allocable BIE exceeds allocable BII, then such amount = Allocable BII deficit	\$0	\$25	\$25	\$50

(iv) Fourth, PRS determines each partner's final allocable business interest income excess. Because no partner had any allocable business interest income excess, each partner has final allocable business interest income excess of \$0.

(v) Fifth, PRS determines each partner's remaining business interest expense. Because no partner has any allocable business interest income excess, each partner's remaining business interest expense equals its allocable business interest in-

come deficit. Thus, A's remaining business interest expense is \$0, B's remaining business interest expense is \$25, and C's remaining business interest expense is \$25.

Table 24 to paragraph (o)(19)(v)				
	A	B	C	Total
Allocable BII deficit	\$0	\$25	\$25	\$50
Less: (Total allocable BII excess) x (Allocable BII deficit / Total allocable BII deficit)	\$0	\$0	\$0	N/A
= Remaining BIE	\$0	\$25	\$25	N/A

(vi) Sixth, PRS determines each partner's final allocable ATI. Because C's allocable ATI is comprised of \$100 of items of deduction and loss and \$0 of income and gain, C has negative allocable ATI of \$100. C is the only partner with negative allocable ATI. Thus, the total negative allocable ATI amount is \$100. Any partner with a negative allocable ATI, or an allocable ATI of \$0, has a positive allocable ATI of \$0. Therefore, C has a positive allocable ATI of \$0. Because A's allocable ATI is comprised of \$100 of items of income and gain and \$0 of deduc-

tion and loss, A has positive allocable ATI of \$100. Because B's allocable ATI is comprised of \$100 of items of income and gain and \$0 of deduction and loss, B has positive allocable ATI of \$100. Thus, the total positive allocable ATI is \$200 (\$100 + \$100 + \$0). PRS determines A's final allocable ATI by reducing, but not below \$0, A's positive allocable ATI (\$100) by the product of total negative allocable ATI (\$100) and the ratio of B's positive allocable ATI to the total positive allocable ATI (\$100/\$200). Therefore, B's positive allocable ATI is reduced by \$50 (\$100 x 50 percent). As a result, B's final allocable ATI is \$50. Because C has a positive allocable ATI of \$0, C's final allocable ATI is \$0.

by \$50 (\$100 x 50 percent). As a result, A's final allocable ATI is \$50. PRS determines B's final allocable ATI by reducing, but not below \$0, B's positive allocable ATI (\$100) by the product of total negative allocable ATI (\$100) and the ratio of B's positive allocable ATI to the total positive allocable ATI (\$100/\$200). Therefore, B's positive allocable ATI is reduced by \$50 (\$100 x 50 percent). As a result, B's final allocable ATI is \$50. Because C has a positive allocable ATI of \$0, C's final allocable ATI is \$0.

Table 25 to paragraph (o)(19)(vi)				
	A	B	C	Total
Allocable ATI	\$100	\$100	(\$100)	\$100
If deduction and loss items comprising allocable ATI exceed income and gain items comprising allocable ATI, then such excess amount = Negative allocable ATI	\$0	\$0	\$100	\$100
If income and gain items comprising allocable ATI equal or exceed deduction and loss items comprising allocable ATI, then such amount = Positive allocable ATI	\$100	\$100	\$0	\$200

Table 26 to paragraph (o)(19)(vi)				
	A	B	C	Total
Positive allocable ATI	\$100	\$100	\$0	\$200
Less: (Total negative allocable ATI) x (Positive allocable ATI / Total positive allocable ATI)	\$50	\$50	\$0	N/A
= Final allocable ATI	\$50	\$50	\$0	\$100

(vii) Seventh, PRS compares each partner's ATI capacity (ATIC) amount to such partner's remaining business interest expense. A's ATIC amount is \$15 (\$50 x 30 percent), B's ATIC amount is \$15 (\$50 x 30 percent), and C's ATIC amount is \$0 (\$0 x 30 percent). Because A's ATIC amount exceeds

its remaining business interest expense by \$15 (\$15 - \$0), A has an ATIC excess of \$15. B and C do not have any ATIC excess. Thus, the total ATIC excess is \$15 (\$15 + \$0 + \$0). A does not have any ATIC deficit. Because B's remaining business interest expense exceeds its ATIC amount by \$10

(\$25 - \$15), B has an ATIC deficit of \$10. Because C's remaining business interest expense exceeds its ATIC amount by \$25 (\$25 - \$0), C has an ATIC deficit of \$25. Thus, the total ATIC deficit is \$35 (\$0 + \$10 + \$25).

Table 27 to paragraph (o)(19)(vii)				
	A	B	C	Total
ATIC (Final allocable ATI x 30 percent)	\$15	\$15	\$0	N/A
Remaining BIE	\$0	\$25	\$25	N/A
If ATIC exceeds remaining BIE, then such excess = ATIC excess	\$15	\$0	\$0	\$15
If remaining BIE exceeds ATIC, then such excess = ATIC deficit	\$0	\$10	\$25	\$35

(viii)(A) Eighth, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii) of this section if, and only if, PRS has—

(1) An excess business interest expense greater than \$0 under paragraph (f)(2)(i) of this section;

(2) A total negative allocable ATI greater than \$0 under paragraph (f)(2)(vi) of this section; and

(3) A total ATIC excess greater than \$0 under paragraph (f)(2)(vii) of this section. Because PRS satisfies each of these three requirements, PRS must perform the calculations and make the necessary ad-

justments described under paragraphs (f)(2)(viii)(B) and (C) or (D) of this section.

(B) PRS must determine each partner's priority amount and usable priority amount. Only partners with an ATIC deficit under paragraph (f)(2)(vii) of this section can have a priority amount greater than \$0. Thus, only partners B and C can have a priority amount greater than \$0. PRS determines a partner's priority amount as 30 percent of the amount by which such partner's allocable positive ATI exceeds its final allocable ATI. Therefore, A's priority amount is \$0, B's priority amount is \$15 ((\\$100 - \\$50) x 30 percent), and C's priority amount is \$0 ((\\$0 - \\$0) x

30 percent). Thus, the total priority amount is \$15 (\$0 + \$15 + \$0). Next, PRS must determine each partner's usable priority amount. Each partner's usable priority amount is the lesser of such partner's priority amount or ATIC deficit. Thus, A has a usable priority amount of \$0, B has a usable priority amount of \$10, and C has a usable priority amount of \$0. As a result, the total usable priority amount is \$10 (\$0 + \$10 + \$0). Because the total ATIC excess under paragraph (f)(2)(vii) of this section (\$15) is greater than the total usable priority amount (\$10), PRS must perform the adjustments described in paragraph (f)(2)(viii)(C) of this section.

Table 28 to paragraph (o)(19)(viii)(B)				
	A	B	C	Total
(Positive allocable ATI - Final allocable ATI)	\$0	\$50	\$0	N/A
Multiplied by 30 percent	30%	30%	30%	N/A
= Priority amount	\$0	\$15	\$0	\$15

Table 29 to paragraph (o)(19)(viii)(B)				
	A	B	C	Total
Priority amount	\$0	\$15	\$0	N/A
ATIC deficit	\$0	\$10	\$25	N/A
Lesser of priority amount or ATIC deficit = Usable priority amount	\$0	\$10	\$0	\$10

(C) For purposes of paragraph (f)(2)(ix) of this section, each partner's final ATIC excess is \$0. For purposes of paragraph (f)(2)(x) of this section, the following terms have the following meanings. Each partner's ATIC deficit is such partner's ATIC deficit as determined pursuant to paragraph (f)(2)(vii) of

this section reduced by such partner's usable priority amount. Thus, A's ATIC deficit is \$0 (\$0 - \$0), B's ATIC deficit is \$0 (\$10 - \$10), and C's ATIC deficit is \$25 (\$25 - \$0). The total ATIC deficit is the total ATIC deficit determined pursuant to paragraph (f)(2)(vii) (\$35) reduced by the total usable priori-

ty amount (\$10). Thus, the total ATIC deficit is \$25 (\$35 - \$10). The total ATIC excess is the total ATIC excess determined pursuant to paragraph (f)(2)(vii) of this section (\$15) reduced by the total usable priority amount (\$10). Thus, the total ATIC excess is \$5 (\$15 - \$5).

Table 30 to paragraph (o)(19)(viii)(C)				
	A	B	C	Total
ATIC deficit	\$0	\$10	\$25	N/A
Less: Usable priority amount	\$0	\$10	\$0	N/A
= ATIC deficit for purposes of paragraph (f)(2)(x) of this section	\$0	\$0	\$25	\$25

(D)(1) In light of the fact that the total ATIC excess was greater than the total usable priority amount

under paragraph (f)(2)(viii)(B) of this section, paragraph (f)(2)(viii)(D) of this section does not apply.

(2) In sum, the correct amounts to be used in paragraphs (o)(19)(ix) and (x) of this section are as follows.

Table 31 to paragraph (o)(19)(viii)(D)(2)				
	A	B	C	Total
ATIC excess	\$5	\$0	\$0	\$5
ATIC deficit	\$0	\$0	\$25	\$25

(ix) Ninth, PRS determines each partner's final ATIC excess amount. Pursuant to paragraph (f)(2)(viii)(C) of this section, each partner's final ATIC excess amount is \$0.

(x) Tenth, PRS determines each partner's final ATIC deficit amount. Because C has an ATIC deficit, PRS must determine C's final ATIC deficit amount. C's final ATIC deficit amount is C's ATIC deficit (\$25), re-

duced, but not below \$0, by the product of the total ATIC excess (\$5) and the ratio of C's ATIC deficit to the total ATIC deficit (\$25/\$25). Therefore, C has \$20 of final ATIC deficit (\$25 - (\$5 x 100 percent)).

Table 32 to paragraph (o)(19)(x)				
	A	B	C	Total
ATIC deficit	\$0	\$0	\$25	N/A
Less: (Total ATIC excess) x (ATIC deficit / Total ATIC deficit)	\$0	\$0	\$5	N/A
= Final ATIC deficit	\$0	\$0	\$20	\$20

(xi) Eleventh, PRS allocates deductible business interest expense and section 163(j) excess items to the partners. Pursuant to paragraph (f)(2)(i) of this section, PRS has \$20 of excess business interest expense. PRS allocates the excess business interest

expense dollar for dollar to the partners with final ATIC deficits. Thus, PRS allocates its excess business interest expense \$20 to C. A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds such partner's

share of excess business interest expense. Therefore, A has deductible business interest expense of \$0 (\$0 - \$0), B has deductible business interest expense of \$25 (\$25 - \$0), and C has deductible business interest expense of \$5 (\$25 - \$20).

Table 33 to paragraph (o)(19)(xi)				
	A	B	C	Total
Deductible BIE	\$0	\$25	\$5	\$30
EBIE allocated	\$0	\$0	\$20	\$20
ETI allocated	\$0	\$0	\$0	\$0
EBII allocated	\$0	\$0	\$0	\$0

(20) *Example 20: Facts.* A, B, C, and D own all of the interests in partnership PRS. In Year 1, PRS has \$200 of ATI, \$0 of business interest income, and \$140 of business interest expense. PRS's ATI consists of \$600 of gross income and \$400 of gross deductions. PRS allocates its items comprising ATI

\$100 to A, \$100 to B, \$400 to C, and (\$400) to D. PRS allocates its business interest expense \$0 to A, \$40 to B, \$60 to C, and \$40 to D.

(i) First, PRS determines its limitation pursuant to §1.163(j)-2. PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or

\$60 ($\200×30 percent). Thus, PRS has \$60 of deductible business interest expense and \$80 of excess business interest expense.

(ii) Second, PRS determines each partner's allocable share of section 163(j) items used in its own section 163(j) calculation.

Table 34 to paragraph (o)(20)(ii)

	A	B	C	D	Total
Allocable ATI	\$100	\$100	\$400	(\$400)	\$200
Allocable BII	\$0	\$0	\$0	\$0	\$0
Allocable BIE	\$0	\$40	\$60	\$40	\$140

(iii) Third, PRS compares each partner's allocable business interest income to such partner's allocable business interest expense. No partner has allocable business interest income. Consequently, each partner's allocable business interest income deficit is equal to such partner's allocable business

interest expense. Thus, A's allocable business interest income deficit is \$0, B's allocable business interest income deficit is \$40, C's allocable business interest income deficit is \$60, and D's allocable business interest income deficit is \$40. The total allocable business interest income deficit is

\$140 ($\$0 + \$40 + \$60 + \40). No partner has allocable business interest income excess because no partner has allocable business interest income in excess of its allocable business interest expense. Thus, the total allocable business interest income excess is \$0.

Table 35 to paragraph (o)(20)(iii)

	A	B	C	D	Total
Allocable BII	\$0	\$0	\$0	\$0	N/A
Allocable BIE	\$0	\$40	\$60	\$40	N/A
If allocable BII exceeds allocable BIE, then such amount = Allocable BII excess	\$0	\$0	\$0	\$0	\$0
If allocable BIE exceeds allocable BII, then such amount = Allocable BII deficit	\$0	\$40	\$60	\$40	\$140

(iv) Fourth, PRS determines each partner's final allocable business interest income excess. Because no partner has any allocable business interest income excess, each partner has final allocable business interest income excess of \$0.

(v) Fifth, PRS determines each partner's remaining business interest expense. Because no partner has any allocable business interest income excess, each partner's remaining business interest expense equals its allocable business interest in-

come deficit. Thus, A's remaining business interest expense is \$0, B's remaining business interest expense is \$40, C's remaining business interest expense is \$60, and D's remaining business interest expense is \$40.

Table 36 to paragraph (o)(20)(v)

	A	B	C	D	Total
Allocable BII deficit	\$0	\$40	\$60	\$40	\$140
Less: (Total allocable BII excess) x (Allocable BII deficit / Total allocable BII deficit)	\$0	\$0	\$0	\$0	N/A
= Remaining BIE	\$0	\$40	\$60	\$40	N/A

(vi) Sixth, PRS determines each partner's final allocable ATI. Because D's allocable ATI is comprised of \$400 of items of deduction and loss and \$0 of income and gain, D has negative allocable ATI of \$400. D is the only partner with negative allocable ATI. Thus, the total negative allocable ATI amount is \$400. Any partner with a negative allocable ATI, or an allocable ATI of \$0, has a positive allocable ATI of \$0. Therefore, D has a positive allocable ATI of \$0. PRS determines A's final allocable ATI by reducing, but not below \$0, A's positive allocable

ATI (\$100) by the product of total negative allocable ATI (\$400) and the ratio of A's positive allocable ATI to the total positive allocable ATI ($\$100/\600). Therefore, A's positive allocable ATI is reduced by $\$66.67$ ($\$400 \times 16.67$ percent). As a result, A's final allocable ATI is \$33.33. PRS determines B's final allocable ATI by reducing, but not below \$0, B's positive allocable ATI ($\$100$) by the product of total negative allocable ATI (\$400) and the ratio of B's positive allocable ATI to the total positive allocable ATI ($\$100/\600). Therefore, B's positive allocable ATI is reduced by $\$66.67$ ($\$400 \times 16.67$ percent). As a result, B's final allocable ATI is \$33.33. PRS determines C's final allocable ATI by reducing, but not below \$0, C's positive allocable ATI (\$400) by the product of total negative allocable ATI (\$400) and the ratio of C's positive allocable ATI to the total positive allocable ATI ($\$400/\600). Therefore, C's positive allocable ATI is reduced by $\$266.67$ ($\$400 \times 66.67$ percent). As a result, C's final allocable ATI is \$133.33. Because D has a positive allocable ATI of \$0, D's final allocable ATI is \$0.

ATI is reduced by $\$66.67$ ($\$400 \times 16.67$ percent). As a result, B's final allocable ATI is \$33.33. PRS determines C's final allocable ATI by reducing, but not below \$0, C's positive allocable ATI (\$400) by the product of total negative allocable ATI (\$400) and the ratio of C's positive allocable ATI to the total positive allocable ATI ($\$400/\600). Therefore, C's positive allocable ATI is reduced by $\$266.67$ ($\$400 \times 66.67$ percent). As a result, C's final allocable ATI is \$133.33. Because D has a positive allocable ATI of \$0, D's final allocable ATI is \$0.

Table 37 to paragraph (o)(20)(vi)					
	A	B	C	D	Total
Allocable ATI	\$100	\$100	\$400	(\$400)	\$200
If deduction and loss items comprising allocable ATI exceed income and gain items comprising allocable ATI, then such excess amount = Negative allocable ATI	\$0	\$0	\$0	\$400	\$400
If income and gain items comprising allocable ATI equal or exceed deduction and loss items comprising allocable ATI, then such amount = Positive allocable ATI	\$100	\$100	\$400	\$0	\$600

Table 38 to paragraph (o)(20)(vi)					
	A	B	C	D	Total
Positive allocable ATI	\$100	\$100	\$400	\$0	\$600
Less: (Total negative allocable ATI) x (Positive allocable ATI / Total positive allocable ATI)	\$66.67	\$66.67	\$266.67	\$0	N/A
= Final allocable ATI	\$33.33	\$33.33	\$133.33	\$0	\$200

(vii) Seventh, PRS compares each partner's ATI capacity (ATIC) amount to such partner's remaining business interest expense. A's ATIC amount is \$10 ($\$33.33 \times 30\text{ percent}$), B's ATIC amount is \$10 ($\$33.33 \times 30\text{ percent}$), C's ATIC amount is \$40 ($\$133.33 \times 30\text{ percent}$), and D's ATIC amount is \$0 ($\$0 \times 30\text{ percent}$). Because A's ATIC amount

exceeds its remaining business interest expense by \$10 ($\$10 - \0), A has an ATIC excess of \$10. B, C, and D do not have any ATIC excess. Thus, the total ATIC excess is \$10 ($\$10 + \$0 + \$0 + \0). A does not have any ATIC deficit. Because B's remaining business interest expense exceeds its ATIC amount by \$30 ($\$40 - \10), B has an ATIC deficit of \$30.

Because C's remaining business interest expense exceeds its ATIC amount by \$20 ($\$60 - \40), C has an ATIC deficit of \$20. Because D's remaining business interest expense exceeds its ATIC amount by \$40 ($\$40 - \0), D has an ATIC deficit of \$40. Thus, the total ATIC deficit is \$90 ($\$0 + \$30 + \$20 + \40).

Table 39 to paragraph (o)(20)(vii)					
	A	B	C	D	Total
ATIC (Final allocable ATI x 30 percent)	\$10	\$10	\$40	\$0	N/A
Remaining BIE	\$0	\$40	\$60	\$40	N/A
If ATIC exceeds remaining BIE, then such excess = ATIC excess	\$10	\$0	\$0	\$0	\$10
If remaining BIE exceeds ATIC, then such excess = ATIC deficit	\$0	\$30	\$20	\$40	\$90

(viii)(A) Eighth, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii) of this section if, and only if, PRS has (1) an excess business interest expense greater than \$0 under paragraph (f)(2)(i) of this section, (2) a total negative allocable ATI greater than \$0 under paragraph (f)(2)(vi) of this section, and (3) a total ATIC excess amount greater than \$0 under paragraph (f)(2)(vii) of this section. Because PRS satisfies each of these three requirements, PRS must perform the calculations and make the necessary adjustments described under paragraphs (f)(2)(viii)(B) and (C) or paragraph (f)(2)(viii)(D) of this section.

(B) PRS must determine each partner's priority amount and usable priority amount. Only partners with an ATIC deficit under paragraph (f)(2)(vii) of this section can have a priority amount greater than \$0. Thus, only partners B, C, and D can have a priority amount greater than \$0. PRS determines a partner's priority amount as 30 percent of the amount by which such partner's allocable positive ATI exceeds its final allocable ATI. Therefore, B's priority amount is \$20 ($(\$100 - \$33.33) \times 30\text{ percent}$), C's priority amount is \$80 ($(\$400 - \$133.33) \times 30\text{ percent}$), and D's priority amount is \$0 ($(\$0 - \$0) \times 30\text{ percent}$). Thus, the total priority amount is \$100 ($\$0 + \$20 + \$80 + \0).

Next, PRS must determine each partner's usable priority amount. Each partner's usable priority amount is the lesser of such partner's priority amount or ATIC deficit. Thus, A has a usable priority amount of \$0, B has a usable priority amount of \$20, C has a usable priority amount of \$20, and D has a usable priority amount of \$0. As a result, the total usable priority amount is \$40 ($\$0 + \$20 + \$20 + \0). Because the total usable priority amount (\$40) is greater than the total ATIC excess under paragraph (f)(2)(vii) of this section (\$10), PRS must perform the adjustments described in paragraph (f)(2)(viii)(D) of this section.

Table 40 to paragraph (o)(20)(viii)(B)					
	A	B	C	D	Total
(Positive allocable ATI - Final allocable ATI)	\$0	\$66.67	\$266.67	\$0	N/A
Multiplied by 30 percent	30%	30%	30%	30%	N/A
= Priority amount	\$0	\$20	\$80	\$0	\$100

Table 41 to paragraph (o)(20)(viii)(B)

	A	B	C	D	Total
Priority amount	\$0	\$20	\$80	\$0	N/A
ATIC deficit	\$0	\$30	\$20	\$40	N/A
Lesser of priority amount or ATIC deficit = Usable priority amount	\$0	\$20	\$20	\$0	\$40

(C) In light of the fact that the total usable priority amount is greater than the total ATIC excess under paragraph (f)(2)(viii)(B) of this section, paragraph (f)(2)(viii)(C) of this section does not apply.

(D)(1) Because B and C are the only partners with priority amounts greater than \$0, B and C are priority partners, while A and D are non-priority partners. For purposes of paragraph (f)(2)(ix) of this section, each partner's final ATIC excess amount is \$0. For purposes of paragraph (f)(2)(x) of this section, each non-priority partner's final ATIC deficit amount is such partner's ATIC deficit determined pursuant to paragraph (f)(2)(vii) of this sec-

tion. Therefore, A has a final ATIC deficit of \$0 and D has a final ATIC deficit of \$40. Additionally, for purposes of paragraph (f)(2)(x) of this section, PRS must determine each priority partner's step eight excess share. A priority partner's step eight excess share is the product of the total ATIC excess and the ratio of the partner's priority amount to the total priority amount. Thus, B's step eight excess share is \$2 ($\$10 \times (\$20/\$100)$) and C's step eight excess share is \$8 ($\$10 \times (\$80/\$100)$). To the extent a priority partner's step eight excess share exceeds its ATIC deficit, the excess will be the partner's ATIC excess for purposes of paragraph (f)(2)(x) of this

section. Thus, B and C each have an ATIC excess of \$0, resulting in a total ATIC excess is \$0. To the extent a priority partner's ATIC deficit exceeds its step eight excess share, the excess will be the partner's ATIC deficit for purposes of paragraph (f)(2)(x) of this section. Because B's ATIC deficit (\$30) exceeds its step eight excess share (\$2), B's ATIC deficit for purposes of paragraph (f)(2)(x) of this section is \$28 ($\$30 - \2). Because C's ATIC deficit (\$20) exceeds its step eight excess share (\$8), C's ATIC deficit for purposes of paragraph (f)(2)(x) of this section is \$12 ($\$20 - \8). Thus, the total ATIC deficit is \$40 ($\$28 + \12).

Table 42 to paragraph (o)(20)(viii)(D)(1)

	A	B	C	D	Total
Non-priority partners ATIC deficit in paragraph (f)(2)(vii) = Final ATIC deficit for purposes of paragraph (f)(2)(x) of this section	\$0	N/A	N/A	\$40	N/A

Table 43 to paragraph (o)(20)(viii)(D)(1)

	A	B	C	D	Total
Priority partners step eight excess share = (Total ATIC excess) x (Priority / Total priority)	N/A	\$2	\$8	N/A	N/A
ATIC deficit	N/A	\$30	\$20	N/A	N/A
If step eight excess share exceeds ATIC deficit, then such excess = ATIC excess for purposes of paragraph (f)(2)(x) of this section	N/A	\$0	\$0	N/A	\$0
If ATIC deficit exceeds step eight excess share, then such excess = ATIC deficit for purposes of paragraph (f)(2)(x) of this section	N/A	\$28	\$12	N/A	\$40

(2) In sum, the correct amounts to be used in paragraphs (o)(20)(ix) and (x) of this section are as follows.

Table 44 to paragraph (o)(20)(viii)(D)(2)

	A	B	C	D	Total
ATIC excess	\$0	\$0	\$0	\$0	\$0
ATIC deficit	\$0	\$28	\$12	\$0	\$40
Non-priority partner final ATIC deficit	\$0	\$0	\$0	\$40	N/A

(ix) Ninth, PRS determines each partner's final ATIC excess amount. Pursuant to paragraph (f)(2)(viii)(D) of this section, each priority and non-priority partner's final ATIC excess amount is \$0.

(x) Tenth, PRS determines each partner's final ATIC deficit amount. Because B has an ATIC deficit, PRS must determine B's final ATIC deficit amount.

B's final ATIC deficit amount is B's ATIC deficit (\$28), reduced, but not below \$0, by the product of the total ATIC excess (\$0) and the ratio of B's ATIC deficit to the total ATIC deficit ($\$28/\40). Therefore, B has \$28 of final ATIC deficit ($\$28 - (\$0 \times 70\%)$). Because C has an ATIC deficit, PRS must determine C's final ATIC deficit amount. C's

final ATIC deficit amount is C's ATIC deficit (\$12), reduced, but not below \$0, by the product of the total ATIC excess (\$0) and the ratio of C's ATIC deficit to the total ATIC deficit ($\$12/\40). Therefore, C has \$12 of final ATIC deficit ($\$12 - (\$0 \times 30\%)$). Pursuant to paragraph (f)(2)(viii)(D) of this section, D's final ATIC deficit amount is \$40.

Table 45 to paragraph (o)(20)(x)

	A	B	C	D	Total
ATIC deficit	N/A	\$28	\$12	N/A	N/A
Less: (Total ATIC excess) x (ATIC deficit / Total ATIC deficit)	N/A	\$0	\$0	N/A	N/A
= Final ATIC deficit	\$0	\$28	\$12	\$40	\$80

(xi) Eleventh, PRS allocates deductible business interest expense and section 163(j) excess items to the partners. Pursuant to paragraph (f)(2)(i) of this section, PRS has \$80 of excess business interest expense. PRS allocates the excess business interest expense dollar for dollar to the partners with final

ATIC deficits. Thus, PRS allocates its excess business interest expense \$28 to B, \$12 to C, and \$40 to D. A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds such partner's share of excess business interest expense. Therefore, A has deductible business

interest expense of \$0 (\$0 - \$0), B has deductible business interest expense of \$12 (\$40 - \$28), C has deductible business interest expense of \$48 (\$60 - \$12), and D has deductible business interest expense of \$0 (\$40 - \$40).

Table 46 to paragraph (o)(20)(xi)					
	A	B	C	D	Total
Deductible BIE	\$0	\$12	\$48	\$0	\$60
EBIE allocated	\$0	\$28	\$12	\$40	\$80
ETI allocated	\$0	\$0	\$0	\$0	\$0
EBII allocated	\$0	\$0	\$0	\$0	\$0

(21) *Example 21: Facts.* A, B, C, and D own all of the interests in partnership PRS. In Year 1, PRS has \$200 of ATI, \$0 of business interest income, and \$150 of business interest expense. PRS's ATI consists of \$500 of gross income and \$300 of gross deductions. PRS allocates its items comprising ATI

\$50 to A, \$50 to B, \$400 to C, and (\$300) to D. PRS allocates its business interest expense \$0 to A, \$50 to B, \$50 to C, and \$50 to D.

(i) First, PRS determines its limitation pursuant to §1.163(j)-2. PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or

\$60 (\$200 x 30 percent). Thus, PRS has \$60 of deductible business interest expense, and \$90 of excess business interest expense.

(ii) Second, PRS determines each partner's allocable share of section 163(j) items used in its own section 163(j) calculation.

Table 47 to paragraph (o)(21)(ii)					
	A	B	C	D	Total
Allocable ATI	\$50	\$50	\$400	(\$300)	\$200
Allocable BII	\$0	\$0	\$0	\$0	\$0
Allocable BIE	\$0	\$50	\$50	\$50	\$150

(iii) Third, PRS compares each partner's allocable business interest income to such partner's allocable business interest expense. No partner has allocable business interest income. Consequently, each partner's allocable business interest income deficit is equal to such partner's allocable business

interest expense. Thus, A's allocable business interest income deficit is \$0, B's allocable business interest income deficit is \$50, C's allocable business interest income deficit is \$50, and D's allocable business interest income deficit is \$50. The total allocable business interest income deficit is

\$150 (\$0 + \$50 + \$50 + \$50). No partner has allocable business interest income excess because no partner has allocable business interest income in excess of its allocable business interest expense. Thus, the total allocable business interest income excess is \$0.

Table 48 to paragraph (o)(21)(iii)					
	A	B	C	D	Total
Allocable BII	\$0	\$0	\$0	\$0	N/A
Allocable BIE	\$0	\$50	\$50	\$50	N/A
If allocable BII exceeds allocable BIE, then such amount = Allocable BII excess	\$0	\$0	\$0	\$0	\$0
If allocable BIE exceeds allocable BII, then such amount = Allocable BII deficit	\$0	\$50	\$50	\$50	\$150

(iv) Fourth, PRS determines each partner's final allocable business interest income excess. Because no partner has any allocable business interest income excess, each partner has final allocable business interest income excess of \$0.

(v) Fifth, PRS determines each partner's remaining business interest expense. Because no partner has any allocable business interest income excess, each partner's remaining business interest expense equals its allocable business interest in-

come deficit. Thus, A's remaining business interest expense is \$0, B's remaining business interest expense is \$50, C's remaining business interest expense is \$50, and D's remaining business interest expense is \$50.

Table 49 to paragraph (o)(21)(v)					
	A	B	C	D	Total
Allocable BII deficit	\$0	\$50	\$50	\$50	\$150
Less: (Total allocable BII excess) x (Allocable BII deficit / Total allocable BII deficit)	\$0	\$0	\$0	\$0	N/A
= Remaining BIE	\$0	\$50	\$50	\$50	N/A

(vi) Sixth, PRS determines each partner's final allocable ATI. Because D's allocable ATI is comprised of \$300 of items of deduction and loss and \$0 of income and gain, D has negative allocable ATI of \$300. D is the only partner with negative allocable ATI. Thus, the total negative allocable ATI amount is \$300. Any partner with a negative allocable ATI, or an allocable ATI of \$0, has a positive allocable ATI of \$0. Therefore, D has a positive allocable ATI of \$0. PRS determines A's final allocable ATI by reducing, but not below \$0, A's positive allocable ATI (\$50)

by the product of total negative allocable ATI (\$300) and the ratio of A's positive allocable ATI to the total positive allocable ATI ($\$50/\500). Therefore, A's positive allocable ATI is reduced by \$30 ($\$300 \times 10\%$). As a result, A's final allocable ATI is \$20. PRS determines B's final allocable ATI by reducing, but not below \$0, B's positive allocable ATI (\$50) by the product of total negative allocable ATI (\$300) and the ratio of B's positive allocable ATI to the total positive allocable ATI ($\$50/\500). Therefore, B's positive allocable ATI is reduced by \$30 ($\$300 \times 10\%$)

percent). As a result, B's final allocable ATI is \$20. PRS determines C's final allocable ATI by reducing, but not below \$0, C's positive allocable ATI (\$400) by the product of total negative allocable ATI (\$300) and the ratio of C's positive allocable ATI to the total positive allocable ATI ($\$400/\500). Therefore, C's positive allocable ATI is reduced by \$240 ($\$300 \times 80\%$). As a result, C's final allocable ATI is \$160. Because D has a positive allocable ATI of \$0, D's final allocable ATI is \$0.

Table 50 to paragraph (o)(21)(vi)

	A	B	C	D	Total
Allocable ATI	\$50	\$50	\$400	(\$300)	\$200
If deduction and loss items comprising allocable ATI exceed income and gain items comprising allocable ATI, then such excess amount = Negative allocable ATI	\$0	\$0	\$0	\$300	\$300
If income and gain items comprising allocable ATI equal or exceed deduction and loss items comprising allocable ATI, then such amount = Positive allocable ATI	\$50	\$50	\$400	\$0	\$500

Table 51 to paragraph (o)(21)(vi)

	A	B	C	D	Total
Positive allocable ATI	\$50	\$50	\$400	\$0	\$500
Less: (Total negative allocable ATI) x (Positive allocable ATI / Total positive allocable ATI)	\$30	\$30	\$240	\$0	N/A
= Final allocable ATI	\$20	\$20	\$160	\$0	\$200

(vii) Seventh, PRS compares each partner's ATI capacity (ATIC) amount to such partner's remaining business interest expense. A's ATIC amount is \$6 ($\$20 \times 30\%$), B's ATIC amount is \$6 ($\$20 \times 30\%$), C's ATIC amount is \$48 ($\$160 \times 30\%$), and D's ATIC amount is \$0 ($\$0 \times 30\%$). Because A's ATIC amount exceeds its remain-

ing business interest expense by \$6 ($\$6 - \0), A has an ATIC excess of \$6. B, C, and D do not have any ATIC excess. Thus, the total ATIC excess amount is \$6 ($\$6 + \$0 + \$0 + \0). A does not have any ATIC deficit. Because B's remaining business interest expense exceeds its ATIC amount by \$44 ($\$50 - \6), B has an ATIC deficit of \$44. Because C's remaining

business interest expense exceeds its ATIC amount by \$2 ($\$50 - \48), C has an ATIC deficit of \$2. Because D's remaining business interest expense exceeds its ATIC amount by \$50 ($\$50 - \0), D has an ATIC deficit of \$50. Thus, the total ATIC deficit is \$96 ($\$0 + \$44 + \$2 + \50).

Table 52 to paragraph (o)(21)(vii)

	A	B	C	D	Total
ATIC (Final allocable ATI x 30 percent)	\$6	\$6	\$48	\$0	N/A
Remaining BIE	\$0	\$50	\$50	\$50	N/A
If ATIC exceeds remaining BIE, then such excess = ATIC excess	\$6	\$0	\$0	\$0	\$6
If remaining BIE exceeds ATIC, then such excess = ATIC deficit	\$0	\$44	\$2	\$50	\$96

(viii)(A) Eighth, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii) of this section if, and only if, PRS has—

(1) An excess business interest expense greater than \$0 under paragraph (f)(2)(i) of this section;

(2) A total negative allocable ATI greater than \$0 under paragraph (f)(2)(vi) of this section; and

(3) A total ATIC excess amount greater than \$0 under paragraph (f)(2)(vii) of this section. Because PRS satisfies each of these three requirements, PRS must perform the calculations and make the necessary adjustments described under paragraph (f)(2)(viii) of this section.

(B) PRS must determine each partner's priority amount and usable priority amount. Only partners with an ATIC deficit under paragraph (f)(2)(vii) of this section of this section can have a priority amount greater than \$0. Thus, only partners B, C, and D can have a priority amount greater than \$0. PRS determines a partner's priority amount as 30 percent of the amount by which such partner's allocable positive ATI exceeds its final allocable ATI. Therefore, B's priority amount is \$9 ($(\$50 - \$20) \times 30\%$), C's priority amount is \$72 ($(\$400 - \$160) \times 30\%$), and D's priority amount is \$0 ($(\$0 - \$0) \times 30\%$). Thus, the total priority amount is \$81 ($\$9 + \$72 + \0). Next, PRS must determine each

partner's usable priority amount. Each partner's usable priority amount is the lesser of such partner's priority amount or ATIC deficit. Thus, B has a usable priority amount of \$9, C has a usable priority amount of \$2, and D has a usable priority amount of \$0. As a result, the total usable priority amount is \$11 ($\$9 + \$9 + \$2 + \0). Because the total usable priority amount (\$11) is greater than the total ATIC excess (\$6) under paragraph (f)(2)(vii) of this section, PRS must perform the adjustments described in paragraph (f)(2)(viii)(D) of this section.

	A	B	C	D	Total
(Positive allocable ATI - Final allocable ATI)	\$0	\$30	\$240	\$0	N/A
Multipled by 30 percent	30%	30%	30%	30%	N/A
= Priority amount	\$0	\$9	\$72	\$0	\$81

	A	B	C	D	Total
Priority amount	\$0	\$9	\$72	\$0	N/A
ATIC deficit	\$0	\$44	\$2	\$50	N/A
Lesser of priority amount or ATIC deficit = Usable priority amount	\$0	\$9	\$2	\$0	\$11

(C) In light of the fact that the total usable priority amount is greater than the total ATIC excess under paragraph (f)(2)(viii)(B) of this section, paragraph (f)(2)(viii)(C) of this section does not apply.

(D)(1) Because B and C are the only partners with priority amounts greater than \$0, B and C are priority partners, while A and D are non-priority partners. For purposes of paragraph (f)(2)(ix) of this section, each partner's final ATIC excess amount is \$0. For purposes of paragraph (f)(2)(x) of this section, each non-priority partner's final ATIC deficit amount is such partner's ATIC deficit determined pursuant to paragraph (f)(2)(vii) of this section. Therefore, A has a final ATIC deficit of \$0 and D has a final ATIC defi-

cit of \$50. Additionally, for purposes of paragraph (f)(2)(x) of this section, PRS must determine each priority partner's step eight excess share. A priority partner's step eight excess share is the product of the total ATIC excess and the ratio of the partner's priority amount to the total priority amount. Thus, B's step eight excess share is \$0.67 (\$6 x (\$9/\$81)) and C's step eight excess share is \$5.33 (\$6 x (\$72/\$81)). To the extent a priority partner's step eight excess share exceeds its ATIC deficit, the excess will be the partner's ATIC excess for purposes of paragraph (f)(2)(x) of this section. B's step eight excess share does not exceed its ATIC deficit. Because C's step eight excess share (\$5.33) exceeds its ATIC deficit (\$2),

C's ATIC excess for purposes of paragraph (f)(2)(x) of this section is \$3.33 (\$5.33 - \$2). Thus, the total ATIC excess for purposes of paragraph (f)(2)(x) of this section is \$3.33 (\$0 + \$3.33). To the extent a priority partner's ATIC deficit exceeds its step eight excess share, the excess will be the partner's ATIC deficit for purposes of paragraph (f)(2)(x) of this section. Because B's ATIC deficit (\$44) exceeds its step eight excess share (\$0.67), B's ATIC deficit for purposes of paragraph (f)(2)(x) of this section is \$43.33 (\$44 - \$0.67). C's ATIC deficit does not exceed its step eight excess share. Thus, the total ATIC deficit for purposes of paragraph (f)(2)(x) of this section is \$43.33 (\$43.33 + \$0).

	A	B	C	D	Total
Non-priority partners ATIC deficit in paragraph (f)(2)(vii) = Final ATIC deficit for purposes of paragraph (f)(2)(x) of this section	\$0	N/A	N/A	\$50	N/A

	A	B	C	D	Total
Priority partners step eight excess share = (Total ATIC excess) x (Priority / Total priority)	N/A	\$0.67	\$5.33	N/A	N/A
ATIC deficit	N/A	\$44	\$2	N/A	N/A
If step eight excess share exceeds ATIC deficit, then such excess = ATIC excess for purposes of paragraph (f)(2)(x) of this section	N/A	\$0	\$3.33	N/A	\$3.33
If ATIC deficit exceeds step eight excess share, then such excess = ATIC deficit for purposes of paragraph (f)(2)(x) of this section	N/A	\$43.33	\$0	N/A	\$43.33

(2) In sum, the correct amounts to be used in paragraphs (o)(21)(ix) and (x) of this section are as follows.

	A	B	C	D	Total
ATIC excess	\$0	\$0	\$3.33	\$0	\$3.33
ATIC deficit	\$0	\$43.33	\$0	\$0	\$43.33
Non-priority partner final ATIC deficit	\$0	\$0	\$0	\$50	N/A

(ix) Ninth, PRS determines each partner's final ATIC excess amount. Pursuant to paragraph (f)(2)

(viii)(D) of this section, each priority and non-priority partner's final ATIC excess amount is \$0.

(x) Tenth, PRS determines each partner's final ATIC deficit amount. Because B has an ATIC

deficit, PRS must determine B's final ATIC deficit amount. B's final ATIC deficit amount is B's ATIC deficit (\$43.33), reduced, but not below \$0, by the

product of the total ATIC excess (\$3.33) and the ratio of B's ATIC deficit to the total ATIC deficit (\$43.33/\$43.33). Therefore, B has \$40 of final ATIC

deficit ($\$43.33 - (\$3.33 \times 100\text{ percent})$). Pursuant to paragraph (f)(2)(viii)(D) of this section, D's final ATIC deficit amount is \$40.

Table 58 to paragraph (o)(21)(x)

	A	B	C	D	Total
ATIC deficit	\$0	\$43.33	\$0	N/A	N/A
Less: (Total ATIC excess) x (ATIC deficit / Total ATIC deficit)	\$0	\$3.33	\$0	N/A	N/A
= Final ATIC deficit	\$0	\$40	\$0	\$50	\$90

(xi) Eleventh, PRS allocates deductible business interest expense and section 163(j) excess items to the partners. Pursuant to paragraph (f)(2)(i) of this section, PRS has \$90 of excess business interest expense. PRS allocates the excess business interest expense dollar for dollar to the partners with final

ATIC deficits. Thus, PRS allocates its excess business interest expense \$40 to B and \$50 to D. A partner's allocable business interest expense is deductible business interest expense to the extent it exceeds such partner's share of excess business interest expense. Therefore, A has deductible business interest

expense of \$0 (\$0 - \$0), B has deductible business interest expense of \$10 (\$50 - \$40), C has deductible business interest expense of \$50 (\$50 - \$0), and D has deductible business interest expense of \$0 (\$50 - \$50).

Table 59 to paragraph (o)(21)(xi)

	A	B	C	D	Total
Deductible BIE	\$0	\$10	\$50	\$0	\$60
EBIE allocated	\$0	\$40	\$0	\$50	\$90
ETI allocated	\$0	\$0	\$0	\$0	\$0
EBII allocated	\$0	\$0	\$0	\$0	\$0

(22) *Example 22—(i) Facts.* A and B are equal shareholders in X, a subchapter S corporation. In Year 1, X has \$100 of ATI and \$40 of business interest expense. A has \$100 of ATI and \$20 of business interest expense from its sole proprietorship. B has \$0 of ATI and \$20 of business interest expense from its sole proprietorship.

(ii) *S corporation-level.* In Year 1, X's section 163(j) limit is 30 percent of its ATI, or \$30 (\$100 x 30 percent). Thus, X has \$30 of deductible business interest expense and \$10 of disallowed business interest expense. Such \$30 of deductible business interest expense is includable in X's nonseparately stated income or loss, and is not subject to further limitation under section 163(j). X carries forward the \$10 of disallowed business interest expense to Year 2 as a disallowed business interest expense carryforward under §1.163(j)-2(c). X may not currently deduct all \$40 of its business interest expense in Year 1. X only reduces its accumulated adjustments account in Year 1 by the \$30 of deductible business interest expense in Year 1 under §1.163(j)-6(l)(7).

(iii) *Shareholder allocations.* A and B are each allocated \$35 of nonseparately stated taxable income (\$50 items of income or gain, less \$15 of deductible business interest expense) from X. A and B do not reduce their basis in X by the \$10 of disallowed business interest expense.

(iv) *Shareholder-level computations.* A, in computing its limit under section 163(j), has \$100 of ATI and \$20 of business interest expense from its sole proprietorship. A's section 163(j) limit is \$30 (\$100 x 30 percent). Thus, A's \$20 of business interest expense is deductible business interest expense. B, in computing its limit under section 163(j), has \$20 of business interest expense from its sole proprietorship. B's section 163(j) limit is \$0 (\$0 x 30 percent).

Thus, B's \$20 of business interest expense is not allowed as a deduction and is treated as business interest expense paid or accrued by B in Year 2.

(23) *Example 23—(i) Facts.* The facts are the same as in *Example 22* in paragraph (o)(22)(i) of this section. In Year 2, X has \$233.33 of ATI, \$0 of business interest income, and \$30 of business interest expense. A has \$100 of ATI and \$20 of business interest expense from its sole proprietorship. B has \$0 of ATI and \$20 of business interest expense from its sole proprietorship.

(ii) *S corporation-level.* In Year 2, X's section 163(j) limit is 30 percent of its ATI plus its business interest income, or \$70 (\$233.33 x 30 percent). Because X's section 163(j) limit exceeds X's \$40 of business interest expense (\$30 from Year 2, plus the \$10 disallowed business interest expense carryforwards from Year 1), X may deduct all \$40 of business interest expense in Year 2. Such \$40 of deductible business interest expense is includable in X's nonseparately stated income or loss, and is not subject to further limitation under section 163(j). Pursuant to §1.163(j)-6(l)(7), X must reduce its accumulated adjustments account by \$40. Additionally, X has \$100 of excess taxable income under §1.163(j)-1(b)(17).

(iii) *Shareholder allocations.* A and B are each allocated \$96.67 of nonseparately stated taxable income (\$116.67 items of income or gain, less \$20 of deductible business interest expense) from X. Additionally, A and B are each allocated \$50 of excess taxable income under §1.163(j)-6(l)(4). As a result, A and B each increase their ATI by \$50.

(iv) *Shareholder-level computations.* A, in computing its limit under section 163(j), has \$150 of ATI (\$100 from its sole proprietorship, plus \$50 excess taxable income) and \$20 of business interest expense (from its sole proprietorship). A's section 163(j) limit

is \$45 (\$150 x 30 percent). Thus, A's \$20 of business interest expense is deductible business interest expense. B, in computing its limit under section 163(j), has \$50 of ATI (\$0 from its sole proprietorship, plus \$50 excess taxable income) and \$40 of business interest expense (\$20 from its sole proprietorship, plus \$20 disallowed business interest expense from its sole proprietorship in Year 1). B's section 163(j) limit is \$15 (\$50 x 30 percent). Thus, \$15 of B's business interest expense is deductible business interest expense. The \$25 of B's business interest expense not allowed as a deduction (\$40 business interest expense, less \$15 section 163(j) limit) is treated as business interest expense paid or accrued by B in Year 3.

(p) *Applicability date.* This section applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-

5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.

§1.163(j)-7 Application of the section 163(j) limitation to foreign corporations and United States shareholders.

(a) *Overview.* This section provides rules for the application of section 163(j) to relevant foreign corporations with shareholders that are United States persons. Paragraph (b) of this section describes the general rule regarding the application of section 163(j) to relevant foreign corporations. Paragraphs (c) through (f) of this section are reserved. Paragraph (g) of this section provides rules concerning the computation of ATI of a relevant foreign corporation. Paragraphs (h) through (k) of this section are reserved.

(b) *General rule regarding the application of section 163(j) to relevant foreign corporations.* Except as otherwise provided in this section, section 163(j) and the section 163(j) regulations apply to determine the deductibility of a relevant foreign corporation's business interest expense for purposes of computing its taxable income for U.S. income tax purposes (if any) in the same manner as those provisions apply to determine the deductibility of a domestic C corporation's business interest expense for purposes of computing its taxable income. See also §1.952-2. If a relevant foreign corporation is a direct or indirect partner in a partnership, see §1.163(j)-6 (concerning the application of section 163(j) to partnerships).

(c)-(f) [Reserved]

(g) *Rules concerning the computation of adjusted taxable income of a relevant foreign corporation—(1) Tentative taxable income.* For purposes of computing the tentative taxable income of a relevant foreign corporation for a taxable year, the relevant foreign corporation's gross income and allowable deductions are determined under the principles of §1.952-2 or under the rules of section 882 for determining income that is, or deductions that are allocable to, effectively connected income, as applicable.

(2) *Treatment of certain dividends.* For purposes of computing the ATI of a relevant foreign corporation for a taxable year, any dividend included in gross in-

come that is received from a related person, within the meaning of section 954(d)(3), with respect to the distributee is subtracted from tentative taxable income.

(h)-(l) [Reserved]

(m) *Applicability date.* This section applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.

§1.163(j)-8. [Reserved]

§1.163(j)-9 Elections for excepted trades or businesses; safe harbor for certain REITs.

(a) *Overview.* The limitation in section 163(j) applies to business interest, which is defined under section 163(j)(5) as interest properly allocable to a trade or business. The term trade or business does not include any electing real property trade or business or any electing farming business. See section 163(j)(7). This section provides the rules and procedures for taxpayers to follow in making an election under section 163(j)(7)(B) for a trade or business to be an electing real property trade or business and an election under section 163(j)(7)(C) for a trade or business to be an electing farming business.

(b) *Availability of election—(1) In general.* An election under section 163(j)(7)(B) for a real property trade or business to be an electing real property trade or business is available to any trade or business that is described in §1.163(j)-1(b)(14)(i), (ii), or (iii), and an election under section 163(j)(7)(C) for a farming business to be an electing farming business is available to any trade or business that is described in §1.163(j)-1(b)(13)(i), (ii), or (iii).

(2) *Special rules—(i) Exempt small businesses.* An election described in paragraph (b)(1) of this section is available regardless of whether the real property trade or business or farming business making the election also meets the requirements of the small business exemption in section 163(j)(3) and §1.163(j)-2(d). See paragraph (c)(2) of this section for the effect of the election relating to depreciation.

(ii) *Section 162 trade or business not required for electing real property trade or business.* An election described in paragraph (b)(1) of this section to be an electing real property trade or business is available regardless of whether the trade or business with respect to which the election is made is a trade or business under section 162. For example, a taxpayer engaged in activities described in section 469(c)(7)(C) and §1.469-9(b)(2), as required in §1.163(j)-1(b)(14)(i), may make an election for a trade or business to be an electing real property trade or business, regardless of whether its activities rise to the level of a section 162 trade or business.

(c) *Scope and effect of election—(1) In general.* An election under this section is made with respect to each eligible trade or business of the taxpayer and applies only to such trade or business for which the election is made. An election under this section applies to the taxable year in which the election is made and to all subsequent taxable years. See paragraph (e) of this section for terminations of elections.

(2) *Irrevocability.* An election under this section is irrevocable.

(3) *Depreciation.* Taxpayers making an election under this section are required to use the alternative depreciation system for certain types of property under section 163(j)(11) and cannot claim the additional first-year depreciation deduction under section 168(k) for those types of property.

(d) *Time and manner of making election—(1) In general.* Subject to paragraph (f) of this section, a taxpayer makes an election under this section by attaching an election statement to the taxpayer's timely filed original Federal income tax return, including extensions. A taxpayer may make elections for multiple trades or businesses on a single election statement.

(2) *Election statement contents.* The election statement should be titled “Section 1.163(j)-9 Election” and must contain the following information for each trade or business:

- (i) The taxpayer’s name;
- (ii) The taxpayer’s address;
- (iii) The taxpayer’s social security number (SSN) or employer identification number (EIN);
- (iv) A description of the taxpayer’s electing trade or business sufficient to demonstrate qualification for an election under this section, including the principal business activity code; and
- (v) A statement that the taxpayer is making an election under section 163(j)(7)(B) or (C), as applicable.

(3) *Consolidated group’s trade or business.* For a consolidated group’s trade or business, the election under this section is made by the agent for the group, as defined in §1.1502-77, on behalf of itself and members of the consolidated group. Only the name and taxpayer identification number (TIN) of the agent for the group, as defined in §1.1502-77, must be provided on the election statement.

(4) *Partnership’s trade or business.* An election for a partnership must be made on the partnership’s return for a trade or business that the partnership conducts. An election by a partnership does not apply to a trade or business conducted by a partner outside the partnership.

(e) *Termination of election—(1) In general.* An election under this section automatically terminates if a taxpayer ceases to engage in the electing trade or business. A taxpayer is considered to cease to engage in an electing trade or business if the taxpayer sells or transfers substantially all of the assets of the electing trade or business to an acquirer that is not a related party in a taxable asset transfer. A taxpayer is also considered to cease to engage in an electing trade or business if the taxpayer terminates its existence for Federal income tax purposes or ceases operation of the electing trade or business, except to the extent that such termination or cessation results in the sale or transfer of substantially all of the assets of the electing trade or business to an acquirer that is a related party, or in a transaction that is not a taxable asset transfer.

(2) *Taxable asset transfer defined.* For purposes of this paragraph (e), the term *taxable asset transfer* means a transfer in which the acquirer’s basis or adjusted basis in the assets is not determined, directly or indirectly, in whole or in part, by reference to the transferor’s basis in the assets.

(3) *Related party defined.* For purposes of this paragraph (e), the term *related party* means any person who bears a relationship to the taxpayer which is described in section 267(b) or 707(b)(1).

(4) *Anti-abuse rule.* If, within 60 months of a sale or transfer of assets described in paragraph (e)(1) of this section, the taxpayer or a related party reacquires substantially all of the assets that were used in the taxpayer’s prior electing trade or business, or substantially similar assets, and resumes conducting such prior electing trade or business, the taxpayer’s previously terminated election under this section is reinstated and is effective on the date the prior electing trade or business is reacquired.

(f) *Additional guidance.* The rules and procedures regarding the time and manner of making an election under this section and the election statement contents in paragraph (d) of this section may be modified through other guidance (see §§601.601(d) and 601.602 of this chapter). Additional situations in which an election may terminate under paragraph (e) of this section may be provided through guidance published in the Federal Register or in the Internal Revenue Bulletin (see §601.601(d) of this chapter).

(g) *Examples.* The examples in this paragraph (g) illustrate the application of this section. Unless otherwise indicated, X and Y are domestic C corporations; D and E are U.S. resident individuals not subject to any foreign income tax; and the exemption for certain small businesses in §1.163(j)-2(d) does not apply.

(1) *Example 1: Scope of election—(i) Facts.* For the taxable year ending December 31, 2021, D, a sole proprietor, owned and operated a dairy farm and an orchard as separate farming businesses described in section 263A(e)(4). D filed an original Federal income tax return for the 2021 taxable year on August 1, 2022, and included with the return an election statement meeting the requirements of paragraph (d)(2) of this section. The election statement identified D’s dairy farm business as an electing trade or business under this section. On March 1, 2023, D sold some but not all or substantially all of the assets from D’s dairy farm business to D’s neighbor, E, who is

unrelated to D. After the sale, D continued to operate the dairy farm trade or business.

(ii) *Analysis.* D’s election under this section was properly made and is effective for the 2021 taxable year and subsequent years. D’s dairy farm business is an excepted trade or business because D made the election with D’s timely filed Federal income tax return. D’s orchard business is a non-excepted trade or business, because D did not make an election for the orchard business to be an excepted trade or business. The sale of some but not all or substantially all of the assets from D’s dairy farm business does not affect D’s election under this section.

(2) *Example 2: Availability of election—(i) Facts.* E, an individual, operates a dairy business that is a farming business under section 263A and also owns real property that is not part of E’s dairy business that E leases to an unrelated party through a triple net lease. E’s average gross receipts, excluding inherently personal amounts, for the three years prior to 2021 are approximately \$25 million, but E is unsure of the exact amount.

(ii) *Analysis.* Under paragraph (b)(2)(i) of this section, E may make an election under this section for the dairy business to be an electing farming business, even though E is unsure whether the small business exemption of §1.163(j)-2(d) applies. Additionally, under paragraph (b)(2)(ii) of this section, assuming the requirements of section 163(j)(7)(C) and this section are otherwise satisfied, E may make an election under this section for its triple net lease property to be an electing real property trade or business, even though E may not be engaged in a trade or business under section 162 with respect to the real property.

(3) *Example 3: Cessation of entire trade or business—(i) Facts.* X has a real property trade or business for which X made an election under this section by attaching an election statement to A’s 2021 Federal income tax return. On March 1, 2022, X sold all of the assets used in its real property trade or business to Y, an unrelated party, and ceased to engage in the electing trade or business. On June 1, 2027, X started a new real property trade or business that was substantially similar to X’s prior electing trade or business.

(ii) *Analysis.* X’s election under this section terminated on March 1, 2022, under paragraph (e)(1) of this section. X may choose whether to make an election under this section for X’s new real property trade or business that A started in 2027.

(4) *Example 4: Anti-abuse rule—(i) Facts.* The facts are the same as in *Example 3* in paragraph (g)(3)(i) of this section, except that X re-started its previous real property trade or business on February 1, 2023, when X reacquired substantially all of the assets that X had sold on March 1, 2022.

(ii) *Analysis.* X’s election under this section terminated on March 1, 2022, under paragraph (e)(1) of this section. On February 1, 2023, X’s election was reinstated under paragraph (e)(4) of this section. X’s new real property trade or business is treated as a resumption of X’s prior electing trade or business and is therefore treated as an electing real property trade or business.

(5) *Example 5: Trade or business continuing after acquisition—(i) Facts.* X has a farming business for which X made an election under this section by

attaching an election statement to X's timely filed 2021 Federal income tax return. Y, unrelated to X, also has a farming business, but Y has not made an election under this section. On July 1, 2022, X transferred all of its assets to Y in a transaction described in section 368(a)(1)(D). After the transfer, Y continues to operate the farming trade or business acquired from X.

(ii) *Analysis.* Under paragraph (e)(1) of this section, Y is subject to X's election under this section for the trade or business that uses X's assets because the sale or transfer was not in a taxable transaction. Y cannot revoke X's election, but X's election has no effect on Y's existing farming business for which Y has not made an election under this section.

(6) *Example 6: Trade or business merged after acquisition—(i) Facts.* The facts are the same as in *Example 5* in paragraph (g)(5)(i) of this section, except that Y uses the assets acquired from X in a trade or business that is neither a farming business (as defined in section 263A(e)(4) or §1.263A-4(a)(4)) nor a trade or business of a specified agricultural or horticultural cooperative (as defined in section 199A(g)(4)).

(ii) *Analysis.* Y is not subject to X's election for Y's farming business because the farming trade or business ceased to exist after the acquisition.

(h) *Safe harbor for REITs—(1) In general.* If a REIT holds real property, as defined in §1.856-10, interests in one or more partnerships directly or indirectly holding real property (through interests in other partnerships or shares in other REITs), as defined in §1.856-10, or shares in one or more other REITs directly or indirectly holding real property (through interests in partnerships or shares in other REITs), as defined in §1.856-10, the REIT is eligible to make the election described in paragraph (b)(1) of this section to be an electing real property trade or business for purposes of sections 163(j)(7)(B) and 168(g)(1)(F) for all or part of its assets. The portion of the REIT's assets eligible for this election is determined under paragraph (h)(2) or (3) of this section.

(2) *REITs that do not significantly invest in real property financing assets.* If a REIT makes the election under paragraph (h)(1) of this section and the value of the REIT's real property financing assets, as defined in paragraphs (h)(5) and (6) of this section, at the close of the taxable year is 10 percent or less of the value of the REIT's total assets at the close of the taxable year, as determined under section 856(c)(4)(A), then all of the REIT's assets are treated as assets of an excepted trade or business.

(3) *REITs that significantly invest in real property financing assets.* If a REIT

makes the election under paragraph (h)(1) of this section and the value of the REIT's real property financing assets, as defined in paragraphs (h)(5) and (6) of this section, at the close of the taxable year is more than 10 percent of the value of the REIT's total assets at the close of the taxable year, as determined under section 856(c)(4)(A), then for the allocation of interest expense, interest income, and other items of expense and gross income to excepted and non-excepted trades or businesses, the REIT must apply the rules set forth in §1.163(j)-10 as modified by paragraph (h)(4) of this section.

(4) *REIT real property assets, interests in partnerships, and shares in other REITs—(i) Real property assets.* Assets held by a REIT described in paragraph (h)(3) of this section that meet the definition of real property under §1.856-10 are treated as assets of an excepted trade or business.

(ii) *Partnership interests.* If a REIT described in paragraph (h)(3) of this section holds an interest in a partnership, in applying the partnership look-through rule described in §1.163(j)-10(c)(5)(ii)(A)(2), the REIT treats assets of the partnership that meet the definition of real property under §1.856-10 as assets of an excepted trade or business. This application of the definition of real property under §1.856-10 does not affect the characterization of the partnership's assets at the partnership level or for any non-REIT partner. However, no portion of the adjusted basis of the REIT's interest in the partnership is allocated to a non-excepted trade or business if the partnership makes an election under paragraph (h)(7) of this section and if all of the partnership's assets are treated as assets of an excepted trade or business under paragraph (h)(2) of this section.

(iii) *Shares in other REITs—(A) In general.* If a REIT (shareholder REIT) described in paragraph (h)(3) of this section holds an interest in another REIT, then for purposes of applying the allocation rules in §1.163(j)-10, the partnership look-through rule described in §1.163(j)-10(c)(5)(ii)(A)(2), as modified by paragraph (h)(4)(ii) of this section, applies to the assets of the other REIT (as if the other REIT were a partnership) in determining the portion of shareholder REIT's adjusted basis in the shares of the other REIT that is allocable to an excepted or non-except-

ed trade or business of shareholder REIT. However, no portion of the adjusted basis of shareholder REIT's shares in the other REIT is allocated to a non-excepted trade or business if all of the other REIT's assets are treated as assets of an excepted trade or business under paragraph (h)(2) of this section.

(B) *Information necessary.* If shareholder REIT does not receive, either directly from the other REIT or indirectly through the analysis of an applicable financial statement (within the meaning of section 451(b)(3)) of the other REIT, the information necessary to determine whether and to what extent the assets of the other REIT are investments in real property financing assets, then shareholder REIT's shares in the other REIT are treated as assets of a non-excepted trade or business under §1.163(j)-10(c).

(iv) *Tiered entities.* In applying §1.163(j)-10(c)(5)(ii)(E), the rules in paragraphs (h)(4)(ii) and (h)(4)(iii)(A) and (B) of this section apply to any partnerships and other REITs within the tier.

(5) *Value of shares in other REITs—(i) In general.* If a REIT (shareholder REIT) holds shares in another REIT, then solely for purposes of applying the value tests under paragraphs (h)(2) and (3) of this section, the value of shareholder REIT's real property financing assets includes the portion of the value of shareholder REIT's shares in the other REIT that is attributable to the other REIT's investments in real property financing assets. However, no portion of the value of shareholder REIT's shares in the other REIT is included in the value of shareholder REIT's real property financing assets if all of the other REIT's assets are treated as assets of an excepted trade or business under paragraph (h)(2) of this section.

(ii) *Information necessary.* If shareholder REIT does not receive, either directly from the other REIT or indirectly through the analysis of an applicable financial statement (within the meaning of section 451(b)(3)) of the other REIT, the information necessary to determine whether and to what extent the assets of the other REIT are investments in real property financing assets, then shareholder REIT's shares in the other REIT are treated as real property financing assets for purposes of paragraphs (h)(2) and (3) of this section.

(iii) *Tiered REITs.* The rules in paragraphs (h)(5)(i) and (ii) of this section apply successively to the extent that the other REIT, and any other REIT in the tier, holds shares in another REIT.

(6) *Real property financing assets.* For purposes of this paragraph (h), *real property financing assets* include interests, including participation interests, in the following: mortgages, deeds of trust, and installment land contracts; mortgage pass-through certificates guaranteed by Government National Mortgage Association (GNMA), Federal National Mortgage Association (FNMA), Federal Home Loan Mortgage Corporation (FHLMC), or Canada Mortgage and Housing Corporation (CMHC); REMIC regular interests; other interests in investment trusts classified as trusts under §301.7701-4(c) of this chapter that represent undivided beneficial ownership in a pool of obligations principally secured by interests in real property and related assets that would be permitted investments if the investment trust were a REMIC; obligations secured by manufactured housing treated as single family residences under section 25(e)(10), without regard to the treatment of the obligations or the properties under state law; and debt instruments issued by publicly offered REITs.

(7) *Application of safe harbor for partnerships controlled by REITs.* A partnership is eligible to make the election under paragraph (h)(1) of this section if one or more REITs own directly or indirectly at least 50 percent of the partnership's capital and profits, the partnership meets the requirements of section 856(c)(2), (3), and (4) as if the partnership were a REIT, and the partnership satisfies the requirements described in paragraph (h)(1) of this section as if the partnership were a REIT. The portion of the partnership's assets eligible for this election is determined under paragraph (h)(2) or (3) of this section, treating the partnership as if it were a REIT.

(8) *REITs or partnerships controlled by REITs that do not apply the safe harbor.* A REIT or a partnership that is eligible but chooses not to apply the safe harbor provisions of paragraph (h)(1) or (7) of this section, respectively, may still elect, under paragraph (b)(1) of this section, for one or more of its trades or businesses to be an electing real property trade or business,

provided that such trade or business is otherwise eligible to elect under paragraph (b)(1) of this section. A REIT or partnership that makes the election under paragraph (b)(1) of this section without utilizing the safe harbor provisions of paragraph (h) of this section may not rely on any portion of paragraphs (h)(1) through (7) of this section.

(i) [Reserved]

(j) *Special anti-abuse rule for certain real property trades or businesses—(1) In general.* Except as provided in paragraph (j)(2) of this section, a trade or business (lessor) does not constitute a trade or business eligible for an election described in paragraph (b)(1) of this section to be an electing real property trade or business if at least 80 percent, determined by fair market rental value, of the real property used in the business is leased to a trade or business (lessee) under common control with the lessor, regardless of whether the arrangement is pursuant to a written lease or pursuant to a service contract or another agreement that is not denominated as a lease. For purposes of this paragraph (j), fair market rental value is the amount of rent that a prospective lessee that is unrelated to the lessor would be willing to pay for a rental interest in real property, taking into account the geographic location, size, and type of the real property. For purposes of this paragraph (j), two trades or businesses are under common control if 50 percent of the direct and indirect ownership of both businesses are held by related parties within the meaning of sections 267(b) and 707(b).

(2) *Exceptions—(i) De minimis exception.* The limitation in paragraph (j)(1) of this section does not apply, and the lessor is eligible to make an election under paragraph (b)(1) of this section, if the lessor leases, regardless of whether the arrangement is pursuant to a written lease or pursuant to a service contract or another agreement that is not denominated as a lease, at least 90 percent of the lessor's real property, determined by fair market rental value, to one or more of the following:

(A) A party not under common control with the lessor or lessee;

(B) A party under common control with the lessor or lessee that has made an election described in paragraph (b)(1) of

this section for a trade or business to be an electing real property trade or business or electing farming business, but only to the extent that the real property is used as part of its electing real property trade or business or electing farming business; or

(C) A party under common control with the lessor or lessee that is an excepted regulated utility trade or business, but only to the extent that the real property is used as part of its excepted regulated utility trade or business.

(ii) *Look-through exception.* If the de minimis exception in paragraph (j)(2)(i) of this section does not apply because less than 90 percent of the lessor's real property is leased to parties described in paragraphs (j)(2)(i)(A), (B), and (C), the lessor is eligible to make the election under paragraph (b)(1) of this section to the extent that the lessor leases the real property to parties described in paragraph (j)(2)(A), (B), or (C), and to the extent that the lessee subleases (or lessees ultimately sublease) the real property to:

(A) A party not under common control with the lessor or lessee;

(B) A party under common control with the lessor or lessee that has made an election described in paragraph (b)(1) of this section for a trade or business to be an electing real property trade or business or electing farming business to the extent that the real property is used as part of its electing real property trade or business or electing farming business; or

(C) A party under common control with the lessor or lessee that is an excepted regulated utility trade or business to the extent that the real property is used as part of its excepted regulated utility trade or business.

(iii) *Inapplicability of exceptions to consolidated groups.* The exceptions in paragraphs (j)(2)(i) and (ii) of this section do not apply when the lessor and lessee are members of the same consolidated group.

(iv) *Exception for certain REITs.* The special anti-abuse rule in paragraph (j)(1) of this section does not apply to REITs or to partnerships making an election under paragraph (h)(7) of this section that lease qualified lodging facilities, as defined in section 856(d)(9)(D), and qualified health care properties, as defined in section 856(e)(6)(D).

(3) *Allocations*. See §1.163(j)-10(c)(3)(iii)(D) for rules related to the allocation of the basis of assets used in lessor trades or businesses described in paragraphs (j)(1) and (j)(2)(i) of this section.

(4) *Examples*. The examples in this paragraph (j)(4) illustrate the application of paragraphs (j)(1), (2), and (3) of this section. Unless otherwise indicated, the parties are all domestic entities and are not members of a single consolidated group within the meaning of §1.1502-1(h).

(i) *Example 1: Related party lease of hotel—(A) Facts*. X and Y are under common control, as defined in paragraph (j)(1) of this section. X owns one piece of real property, a hotel, that X leases to Y. Y operates the hotel and provides hotel rooms and associated amenities to third party guests of the hotel. The form of the arrangement with third party hotel guests is a license to use rooms in the hotel and associated amenities. Y is a real property trade or business that has made an election under paragraph (b)(1) of this section.

(B) *Analysis*. Because X leases at least 80 percent of X's real property to a party under common control, X is subject to the anti-abuse rule in paragraph (j)(1) of this section. However, under the de minimis exception under paragraph (j)(2)(i) of this section, 100 percent of the fair market rental value of the building is leased to a party under common control that has made an election to be an electing real property trade or business. Accordingly, X is eligible to make the election described in paragraph (b)(1) of this section for its entire trade or business.

(ii) *Example 2—(A) Facts*. The facts are the same as in *Example 1* in paragraph (j)(4)(i)(A) of this section, except that Y has not made an election under paragraph (b)(1) of this section, and is not otherwise using the real property in an excepted trade or business.

(B) *Analysis*. Because X leases at least 80 percent of X's real property, determined by fair market rental value, to Y, a party under common control, X is subject to the anti-abuse rule in paragraph (j)(1) of this section. X is not eligible for the de minimis exception under paragraph (j)(2)(i) of this section because X does not lease at least 90 percent of its real property to a party under common control, as defined in paragraph (j)(1) of this section, such as Y, and Y is not using the property in an otherwise excepted trade or business. However, X is eligible for the look-through exception under paragraph (j)(2)(ii) of this section because X leases 100 percent of its real property to Y, a party that is under common control, and Y subleases 100 percent of the real property to parties that are not under common control with X or Y. The fact that the license provided to hotel guests is not denominated as a lease does not prevent these licenses from being treated as a lease for purposes of paragraph (j) of this section. Accordingly, under the look-through exception under paragraph (j)(2)(ii) of this section, X is eligible to make the election described in paragraph (b)(1) of this section with regard to its entire trade or business.

(iii) *Example 3: Sublease to related party and unrelated third party—(A) Facts*. X owns one piece

of real property that X leases to Y, a party under common control, as defined in paragraph (j)(1) of this section. Y does not operate an excepted trade or business. Y subleases 80 percent of the real property, determined by the fair market rental value, to a party under common control with Y that does not operate an excepted trade or business and 20 percent of the real property, determined by the fair market rental value, to an unrelated third party.

(B) *Analysis*. Because X leases at least 80 percent of X's real property, determined by fair market rental value, to a party under common control, X is subject to the anti-abuse rule in paragraph (j)(1) of this section. X is not eligible for the de minimis exception in paragraph (j)(2)(i) of this section because X is not leasing at least 90 percent of the real property, determined by fair market rental value, to a party under common control that operates an excepted trade or business and/or unrelated parties. Under the look-through exception under paragraph (j)(2)(ii) of this section, X is eligible to make the election described in paragraph (b)(1) of this section with respect to the 20 percent of the fair market rental value of the real property subleased to an unrelated party because X is treated as directly leasing this portion to an unrelated party. X is not eligible to make the election described in paragraph (b)(1) of this section with respect to the 80 percent of the building subleased to a party under common control because X is still treated as directly leasing this portion to a related party. Under §1.163(j)-10(c)(3)(iii)(D), X must allocate 80 percent of the basis in the real property as a non-excepted trade or business and 20 percent of the basis in the real property as an excepted trade or business.

(iv) *Example 4: Multiple subleases—(A) Facts*. X owns a building that X leases to Y, a party under common control as defined in paragraph (j)(1) of this section. Y does not operate an excepted trade or business. Y subleases 80 percent of the building, determined by fair market rental value, to Z, a party under common control with both X and Y. Y subleases the remaining 20 percent of the building, determined by fair market rental value, to unrelated parties. Z subleases 50 percent of its leasehold interest, determined by fair market rental value, to parties unrelated to X, Y and Z, and uses the remaining leasehold interest in its retail business. Z does not operate an excepted trade or business.

(B) *Analysis*. Because X leases at least 80 percent of X's real property, determined by fair market rental value, to a party under common control, X is subject to the anti-abuse rule in paragraph (j)(1) of this section. X is not eligible for the de minimis exception in paragraph (j)(2)(i) because X is not leasing at least 90 percent of the building, determined by fair market rental value, to a party under common control that operates an excepted trade or business and/or unrelated parties. Under the look-through exception under paragraph (j)(2)(ii) of this section, X is eligible to make the election described in paragraph (b)(1) of this section with respect to the 60 percent of the building that is subleased to unrelated parties, determined by adding 40 percent (50 percent of the 80 percent leasehold interest) from Z's sublease to an unrelated party and 20 percent from Y's sublease to unrelated parties (40 + 20). X is not eligible to make the election described in paragraph (b)(1) of this sec-

tion with respect to the 40 percent of the building subleased to Z, because Z is a related party that does not operate an excepted trade or business.

(v) *Example 5: Lessee's Trade or Business—(A) Facts*. X owns a building that X leases to W, a party under common control as defined in paragraph (j)(1) of this section. W operates the building as a widget manufacturing plant and does not sublease any portion of the building.

(B) *Analysis*. X is not eligible to make the election described in paragraph (b)(1) of this section because X leases the entire building to a party under common control. X is not eligible for the de minimis exception in paragraph (j)(2)(i) of this section because X is not leasing at least 90 percent of the real property to a party under common control that operates an excepted trade or business and/or unrelated parties. W's trade or business cannot be an electing real property trade or business. X is not eligible for the look-through exception under paragraph (j)(2)(ii) of this section because W is not subleasing any part of the building.

(k) *Applicability date*. This section applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.

§1.163(j)-10 Allocation of interest expense, interest income, and other items of expense and gross income to an excepted trade or business.

(a) *Overview—(1) In general—(i) Purposes*. Except as provided in §1.163(j)-6(m) or §1.163(j)-9(h), this section provides the exclusive rules for allocating tax items that are properly allocable to a trade or business between excepted trades or businesses and non-excepted trades or businesses for purposes of section 163(j). The amount of a taxpayer's interest expense that is properly allocable to excepted trades or businesses is not subject to the section 163(j) limitation. The amount of a taxpayer's other items of income, gain,

deduction, or loss, including interest income, that is properly allocable to excepted trades or businesses is excluded from the calculation of the taxpayer's section 163(j) limitation. See section 163(j)(6) and (j)(8)(A)(i); see also §1.163(j)-1(b)(1)(i)(H), (b)(1)(ii)(F), and (b)(3). The general method of allocation set forth in paragraph (c) of this section is based on the approach that money is fungible and that interest expense is attributable to all activities and property, regardless of any specific purpose for incurring an obligation on which interest is paid. In no event may the amount of interest expense allocated under this section exceed the amount of interest paid or accrued, or treated as paid or accrued, by the taxpayer within the taxable year.

(ii) *Application of section.* The amount of a taxpayer's tax items properly allocable to a trade or business, other than interest expense and interest income, that is properly allocable to excepted trades or businesses for purposes of section 163(j) is determined as set forth in paragraph (b) of this section. The amount of a taxpayer's interest expense and interest income that is properly allocable to excepted trades or businesses for purposes of section 163(j) generally is determined as set forth in paragraph (c) of this section, except as otherwise provided in paragraph (d) of this section. For purposes of this section, a taxpayer's activities are not treated as a separate trade or business to the extent those activities involve the provision of real property, goods, or services to a trade or business of the taxpayer (or, if the taxpayer is a member of a consolidated group, the consolidated group). For example, if a taxpayer engaged in a manufacturing trade or business has in-house legal personnel that provide legal services solely with respect to the taxpayer's manufacturing business, the taxpayer is not treated as also engaged in the trade or business of providing legal services. Similarly, if the taxpayer described in the previous sentence constructs or acquires real property solely for use by the taxpayer's manufacturing business, the taxpayer is not treated as also engaged in a real property trade or business.

(2) *Coordination with other rules—(i) In general.* The rules of this section apply after a taxpayer has determined whether

any interest expense or interest income paid, received, or accrued is properly allocable to a trade or business. Similarly, the rules of this section apply to other tax items after a taxpayer has determined whether those items are properly allocable to a trade or business. For instance, a taxpayer must apply §1.163-8T, if applicable, to determine which items of interest expense are investment interest under section 163(d) before applying the rules in paragraph (c) of this section to allocate interest expense between excepted and non-excepted trades or businesses. After determining whether its tax items are properly allocable to a trade or business, a taxpayer that is engaged in both excepted and non-excepted trades or businesses must apply the rules of this section to determine the amount of interest expense that is business interest expense subject to the section 163(j) limitation and to determine which items are included or excluded in computing its section 163(j) limitation.

(ii) *Treatment of investment interest, investment income, investment expenses, and certain other tax items of a partnership with a C corporation or tax-exempt corporation as a partner.* For rules governing the treatment of investment interest, investment income, investment expenses, and certain other separately stated tax items of a partnership with a C corporation or tax-exempt corporation as a partner, see §§1.163(j)-4(b)(3) and 1.163(j)-6(k).

(3) *Application of allocation rules to foreign corporations and foreign partnerships.* The rules of this section apply to foreign corporations and foreign partnerships.

(4) *Application of allocation rules to members of a consolidated group—(i) In general.* As provided in §1.163(j)-4(d), the computations required by section 163(j) and the regulations in this part under section 163(j) of the Code generally are made for a consolidated group on a consolidated basis. In this regard, for purposes of applying the allocation rules of this section, all members of a consolidated group are treated as one corporation. Therefore, the rules of this section apply to the activities conducted by the group as if those activities were conducted by a single corporation. For example,

the group (rather than a particular member) is treated as engaged in excepted or non-excepted trades or businesses. In the case of intercompany obligations, within the meaning of §1.1502-13(g)(2)(ii), for purposes of allocating asset basis between excepted and non-excepted trades or businesses, the obligation of the member borrower is not considered an asset of the creditor member. Similarly, intercompany transactions, within the meaning of §1.1502-13(b)(1)(i), are disregarded for purposes of this section, as are the resulting offsetting items, and property is allocated to a trade or business based on the activities of the group as if the members of the group were divisions of a single corporation. Further, stock of a group member that is owned by another member of the same group is not treated as an asset for purposes of this section, and the transfer of any amount of member stock to a non-member is treated by the group as a transfer of the member's assets proportionate to the amount of member stock transferred. Additionally, stock of a corporation that is not a group member is treated as owned by the group.

(ii) *Application of excepted business percentage to members of a consolidated group.* After a consolidated group has determined the percentage of the group's interest expense allocable to excepted trades or businesses for the taxable year (and thus not subject to the section 163(j) limitation), this exempt percentage is applied to the interest paid or accrued by each member during the taxable year to any lender that is not a group member. Therefore, except to the extent paragraph (d) of this section (providing rules for certain qualified nonrecourse indebtedness) applies, an identical percentage of the interest paid or accrued by each member of the group to any lender that is not a group member is treated as allocable to excepted trades or businesses, regardless of whether any particular member actually engaged in an excepted trade or business.

(iii) *Basis in assets transferred in an intercompany transaction.* For purposes of allocating interest expense and interest income under paragraph (c) of this section, the basis of property does not include any gain or loss realized with respect to the property by another member in an intercompany transaction, as defined in

§1.1502-13(b), whether or not the gain or loss is deferred.

(5) *Tax-exempt organizations.* For tax-exempt organizations, section 512 and the regulations in this part under section 512 of the Code determine the rules for allocating all income and expenses among multiple trades or businesses.

(6) *Application of allocation rules to disallowed disqualified interest.* A taxpayer may apply the allocation rules of this section to disallowed disqualified interest by either:

(i) Applying the allocation rules of this section to all of the taxpayer's disallowed disqualified interest in the taxable year(s) in which the disallowed disqualified interest was paid or accrued (the historical approach); or

(ii) Treating all of the taxpayer's disallowed disqualified interest as if it were paid or accrued in the taxpayer's first taxable year beginning after December 31, 2017 (the effective date approach).

(7) *Examples.* The following examples illustrate the principles of this paragraph (a).

(i) *Example 1: Items properly allocable to a trade or business—(A) Facts.* Individual T operates Business X, a non-excepted trade or business, as a sole proprietor. In Year 1, T pays or accrues \$40x of interest expense and receives \$100x of gross income with respect to Business X that is not eligible for a section 199A deduction. T borrows money to buy a car for personal use, and T pays or accrues \$20x of interest expense with respect to the car loan. T also invests in corporate bonds, and, in Year 1, T receives \$50x of interest income on those bonds.

(B) *Analysis.* Under paragraphs (a)(1) and (2) of this section, T must determine which items of income and expense, including items of interest income and interest expense, are properly allocable to a trade or business. T's \$100x of gross income and T's \$40x of interest expense with respect to Business X are properly allocable to a trade or business. However, the interest expense on T's car loan is personal interest within the meaning of section 163(h)(2) rather than interest properly allocable to a trade or business. Similarly, T's interest income from corporate bonds is not properly allocable to a trade or business because it is interest from investment activity. See section 163(d)(4)(B).

(ii) *Example 2: Intercompany transaction—(A) Facts.* S is a member of a consolidated group of which P is the common parent. P conducts an electing real property trade or business (Business X), and S conducts a non-excepted trade or business (Business Y). P leases Building V (which P owns) to S for use in Business Y.

(B) *Analysis.* Under paragraph (a)(4)(i) of this section, a consolidated group is treated as a single corporation for purposes of applying the allocation rules of this section, and the consolidated group

(rather than a particular member of the group) is treated as engaged in excepted and non-excepted trades or businesses. Thus, intercompany transactions are disregarded for purposes of this section. As a result, the lease of Building V by P to S is disregarded. Moreover, because Building V is used in Business Y, basis in this asset is allocated to Business Y rather than Business X for purposes of these allocation rules, regardless of which member (P or S) owns the building.

(iii) *Example 3: Intercompany sale of natural gas—(A) Facts.* S is a member of a consolidated group of which P is the common parent. S drills for natural gas and is not an excepted regulated utility trade or business. S sells most of its natural gas production to P, which produces electricity at its natural gas-fired power plants, and S sells the rest of its natural gas production to third parties at market rates. P is an excepted regulated utility trade or business to the extent that it is engaged in a trade or business described in §1.163(j)-1(b)(15)(i).

(B) *Analysis.* Intercompany transactions are disregarded for purposes of this section. As a result, the intercompany sales of natural gas by S to P are disregarded. Moreover, the assets of S and P are allocated between the excepted and non-excepted trades or businesses of the P group based on the assets used in each trade or business. Assets of S may be allocated to the P group's excepted trade or business to the extent those assets are used in the trade or business of the furnishing or sale of electrical energy. Likewise, assets of P may be allocated to the P group's non-excepted trade or business to the extent those assets are used in the trade or business of natural gas production.

(iv) *Example 4: Disallowed disqualified interest—(A) Facts.* S is a member of a consolidated group of which P is the common parent. P and S are the only members of an affiliated group under old section 163(j)(6)(C). S operates a farm equipment leasing business (Business X) that is not an excepted trade or business. P is engaged in an electing farming business (Business Y). Entering its first taxable year beginning after December 31, 2017, the P group has disallowed disqualified interest of \$120x, all of which the P group paid or accrued in earlier taxable years in which it only operated Business X. The P group also incurs \$100x of interest expense during its 2018 taxable year, of which \$25x (25 percent of \$100x) is business interest expense properly allocable to Business X and \$75x (75 percent of \$100x) is properly allocable to Business Y under paragraph (c) of this section.

(B) *Analysis.* Under paragraph (a)(6) of this section, the P group may allocate disallowed disqualified interest to Business X and Business Y by either applying the allocation rules of this section in the taxable years in which the disallowed disqualified interest was paid or accrued (the historical approach) or by treating such interest as though it were paid or accrued in the P group's first taxable year beginning after December 31, 2017 (the effective date approach). Accordingly, if the P group chooses to rely on the historical approach, it allocates all \$120x of disallowed disqualified interest to Business X (a non-excepted trade or business), and all \$120x of disallowed disqualified interest is subject to the section 163(j) limitation. If, instead, the P group chooses

to rely on the effective date approach, it allocates its \$120x of disallowed disqualified interest in the same proportion as its \$100x of business interest expense that was paid or accrued in its 2018 taxable year. Of the \$120x of disallowed disqualified interest, \$30x (25 percent of \$120x) is allocated to Business X and \$90x (75 percent of \$120x) is allocated to Business Y. The \$90x of disallowed disqualified interest that is properly allocable to Business Y (an excepted trade or business) is not subject to the section 163(j) limitation.

(b) *Allocation of tax items other than interest expense and interest income—(1) In general.* Except as otherwise provided in §1.163(j)-6(m) or §1.163(j)-9(h), for purposes of calculating ATI, tax items other than interest expense and interest income are allocated to a particular trade or business in the manner described in this paragraph (b). It is not necessary to allocate items under this paragraph (b) for purposes of calculating ATI if all of the taxpayer's items subject to allocation under this paragraph (b) are allocable to excepted trades or businesses, or if all of those items are allocable to non-excepted trades or businesses.

(2) *Gross income other than dividends and interest income.* A taxpayer's gross income other than dividends and interest income is allocated to the trade or business that generated the gross income.

(3) *Dividends—(i) Look-through rule.* If a taxpayer receives a dividend, within the meaning of section 316, that is not investment income, within the meaning of section 163(d), and if the taxpayer satisfies the minimum ownership threshold in paragraph (c)(7) of this section, then, solely for purposes of allocating amounts received as a dividend during the taxable year to excepted or non-excepted trades or businesses under this paragraph (b), the dividend income is treated as allocable to excepted or non-excepted trades or businesses based upon the relative amounts of the payor corporation's adjusted basis in the assets used in its trades or businesses, determined pursuant to paragraph (c) of this section. If at least 90 percent of the payor corporation's adjusted basis in its assets during the taxable year, determined pursuant to paragraph (c) of this section, is allocable to either excepted trades or businesses or to non-excepted trades or businesses, all of the taxpayer's dividend income from the payor corporation for the taxable year is treated as allocable to either excepted

or non-excepted trades or businesses, respectively.

(ii) *Inapplicability of the look-through rule.* If a taxpayer receives a dividend that is not investment income, within the meaning of section 163(d), and if the taxpayer does not satisfy the minimum ownership threshold in paragraph (c)(7) of this section, then the taxpayer must treat the dividend as allocable to a non-excepted trade or business.

(4) *Gain or loss from the disposition of non-consolidated C corporation stock, partnership interests, or S corporation stock—(i) Non-consolidated C corporations.* (A) If a taxpayer recognizes gain or loss upon the disposition of stock in a non-consolidated C corporation that is not property held for investment, within the meaning of section 163(d)(5), and if the taxpayer looks through to the assets of the C corporation under paragraph (c)(5)(ii) of this section for the taxable year, then the taxpayer must allocate gain or loss from the disposition of stock to excepted or non-excepted trades or businesses based upon the relative amounts of the C corporation's adjusted basis in the assets used in its trades or businesses, determined pursuant to paragraph (c) of this section. If at least 90 percent of the C corporation's adjusted basis in its assets during the taxable year, determined pursuant to paragraph (c) of this section, is allocable to either excepted trades or businesses or to non-excepted trades or businesses, all of the taxpayer's gain or loss from the disposition is treated as allocable to either excepted or non-excepted trades or businesses, respectively.

(B) If a taxpayer recognizes gain or loss upon the disposition of stock in a non-consolidated C corporation that is not property held for investment, within the meaning of section 163(d)(5), and if the taxpayer does not look through to the assets of the C corporation under paragraph (c)(5)(ii) of this section for the taxable year, then the taxpayer must treat the gain or loss from the disposition of stock as allocable to a non-excepted trade or business.

(C) For rules governing the transfer of stock of a member of a consolidated group, see paragraph (a)(4)(i) of this section.

(ii) *Partnerships and S corporations.* (A) If a taxpayer recognizes gain or loss

upon the disposition of interests in a partnership or stock in an S corporation that owns—

(1) Non-excepted assets and excepted assets;

(2) Investment assets; or

(3) Both;

(B) The taxpayer determines a proportionate share of the amount properly allocable to a non-excepted trade or business in accordance with the allocation rules set forth in paragraph (c)(5)(ii)(A) or (c)(5)(ii)(B)(3) of this section, as appropriate, and includes such proportionate share of gain or loss in the taxpayer's ATI. However, if at least 90 percent of the partnership's or S corporation's adjusted basis in its assets during the taxable year, determined pursuant to paragraph (c) of this section, is allocable to either excepted trades or businesses or to non-excepted trades or businesses, all of the taxpayer's gain or loss from the disposition is treated as allocable to either excepted or non-excepted trades or businesses, respectively. This rule also applies to tiered passthrough entities by looking through each passthrough entity tier (for example, an S corporation that is the partner of the highest-tier partnership would look through each lower-tier partnership), subject to paragraph (c)(5)(ii)(D) of this section. With respect to a partner that is a C corporation or tax-exempt corporation, a partnership's investment assets are taken into account and treated as non-excepted trade or business assets. For purposes of this paragraph, a passthrough entity means a partnership, S corporation, or any other entity (domestic or foreign) that is not a corporation if all items of income and deduction of the entity are included in the income of its owners or beneficiaries.

(5) *Expenses, losses, and other deductions—(i) Expenses, losses, and other deductions that are definitely related to a trade or business.* Expenses (other than interest expense), losses, and other deductions (collectively, *deductions* for purposes of this paragraph (b)(5)) that are definitely related to a trade or business are allocable to the trade or business to which they relate. A deduction is considered definitely related to a trade or business if the item giving rise to the deduction is incurred as a result of, or incident to, an activity of the trade or business or in

connection with property used in the trade or business (see §1.861-8(b)(2)). If a deduction is definitely related to one or more excepted trades or businesses and one or more non-excepted trades or businesses, the deduction is apportioned between the excepted and non-excepted trades or businesses based upon the relative amounts of the taxpayer's adjusted basis in the assets used in those trades or businesses, as determined under paragraph (c) of this section.

(ii) *Other deductions.* Deductions that are not described in paragraph (b)(5)(i) of this section are ratably apportioned based on the gross income of each trade or business.

(6) *Treatment of investment items and certain other items of a partnership with a C corporation partner.* Any investment income, investment expense, or other item that a partnership receives, pays, or accrues and that is treated as properly allocable to a trade or business of a C corporation partner under §1.163(j)-4(b)(3)(i) is treated as properly allocable to a non-excepted trade or business of the C corporation partner, except that any item with respect to property or activities for which an election has been made by the partnership under §1.163(j)-9(b) is treated as properly allocable to an excepted trade or business. See, for example, an election for activities described in §1.163(j)-9(b)(2)(ii) or an election under §1.163(j)-9(h).

(7) *Examples: Allocation of income and expense.* The following examples illustrate the principles of this paragraph (b):

(i) *Example 1: Allocation of income and expense between excepted and non-excepted trades or businesses—(A) Facts.* T conducts an electing real property trade or business (Business Y), which is an excepted trade or business. T also operates a lumber yard (Business Z), which is a non-excepted trade or business. In Year 1, T receives \$100x of gross rental income from real property leasing activities. T also pays or accrues \$60x of expenses in connection with its real property leasing activities and \$20x of legal services performed on behalf of both Business Y and Business Z. T receives \$60x of gross income from lumber yard customers and pays or accrues \$50x of expenses related to the lumber yard business. For purposes of expense allocations under paragraphs (b) and (c) of this section, T has \$240x of adjusted basis in its Business Y assets and \$80x of adjusted basis in its Business Z assets.

(B) *Analysis.* Under paragraph (b)(2) of this section, for Year 1, \$100x of rental income is allocated to Business Y, and \$60x of income from lumber yard customers is allocated to Business Z. Under para-

graph (b)(5)(i) of this section, \$60x of expenses paid or accrued in connection with real property leasing activities are allocated to Business Y, and \$50x of expenses related to the lumber yard are allocated to Business Z. The \$20x of remaining expenses for legal services performed on behalf of both Business Y and Business Z are allocated according to the relative amounts of T's basis in the assets used in each business. The total amount of T's basis in the assets used in Businesses Y and Z is \$320x, of which 75 percent (\$240x / \$320x) is used in Business Y and 25 percent (\$80x / \$320x) is used in Business Z. Accordingly, \$15x of the expenses for legal services are allocated to Business Y and \$5x are allocated to Business Z.

(ii) *Example 2: Allocation of partnership items from investment activity*—(A) *Facts.* U, a domestic C corporation, directly conducts an electing real property trade or business. U also has an interest in PRS, a partnership that holds real property for investment. PRS's investment in real property is not a trade or business under section 162 or a real property trade or business under section 469. During the taxable year, PRS sells some of its real property to third parties and allocates \$80x of income to U from these sales. In addition, PRS incurs deductible expenses related to its investment in real property and allocates \$9x of these deductible expenses to U.

(B) *Analysis.* Under paragraph (b)(6) of this section, any investment income or investment expense that a partnership receives, pays, or accrues and that is treated as properly allocable to a trade or business of a C corporation partner is treated as properly allocable to a non-excepted trade or business of the C corporation partner. Because PRS generates its income and expense from investment activity that is not a trade or business under section 162 or a real property trade or business under section 469, U's allocation of \$80x of income and \$9x of deductible expense from PRS is treated as properly allocable to a non-excepted trade or business.

(c) *Allocating interest expense and interest income that is properly allocable to a trade or business*—(1) *General rule*—(i) *In general.* Except as otherwise provided in this section, §1.163(j)-6(m), or §1.163(j)-9(h), the amount of a taxpayer's interest expense and interest income that is properly allocable to a trade or business is allocated to the taxpayer's excepted or non-excepted trades or businesses for purposes of section 163(j) based upon the relative amounts of the taxpayer's adjusted basis in the assets, as determined under paragraph (c)(5) of this section, used in its excepted or non-excepted trades or businesses. The taxpayer must determine the adjusted basis in its assets as of the close of each determination date, as defined in paragraph (c)(6) of this section, in the taxable year and average those amounts to determine the relative amounts of asset basis for its excepted and non-excepted trades or businesses for that year. It is not necessary to allocate interest expense or

interest income under this paragraph (c) for purposes of determining a taxpayer's business interest expense and business interest income if all of the taxpayer's interest income and expense is allocable to excepted trades or businesses (in which case the taxpayer is not subject to the section 163(j) limitation) or if all of the taxpayer's interest income and expense is allocable to non-excepted trades or businesses.

(ii) *De minimis exception.* If at least 90 percent of the taxpayer's basis in its assets for the taxable year is allocable to either excepted or non-excepted trades or businesses pursuant to this paragraph (c), then all of the taxpayer's interest expense and interest income for that year that is properly allocable to a trade or business is treated as allocable to either excepted or non-excepted trades or businesses, respectively.

(2) *Example.* The following example illustrates the principles of paragraph (c) (1) of this section:

(i) *Facts.* T is a calendar-year C corporation engaged in an electing real property trade or business, the business of selling wine, and the business of selling hand-carved wooden furniture. In Year 1, T has \$100x of interest expense that is deductible except for the potential application of section 163(j). Based upon determinations made on the determination dates in Year 1, T's average adjusted basis in the assets used in the electing real property trade or business (an excepted trade or business) in Year 1 is \$800x, and T's total average adjusted basis in the assets used in the other two businesses (which are non-excepted trades or businesses) in Year 1 is \$200x.

(ii) *Analysis.* \$80x ($\$800x / (\$800x + \$200x)$) x \$100x of T's interest expense for Year 1 is allocable to T's electing real property trade or business and is not business interest expense subject to the section 163(j) limitation. The remaining \$20x of T's interest expense is business interest expense for Year 1 that is subject to the section 163(j) limitation.

(3) *Asset used in more than one trade or business*—(i) *General rule.* If an asset is used in more than one trade or business during a determination period, as defined in paragraph (c)(6) of this section, the taxpayer's adjusted basis in the asset is allocated to each trade or business using the permissible methodology under this paragraph (c)(3) that most reasonably reflects the use of the asset in each trade or business during that determination period. An allocation methodology most reasonably reflects the use of the asset in each trade or business if it most properly reflects the proportionate benefit derived from the use

of the asset in each trade or business. A taxpayer is not required to use the same allocation methodology for each type of asset used in a trade or business. Instead, a taxpayer may use different allocation methodologies for different types of assets used in a trade or business. If none of the permissible methodologies set forth in paragraph (c)(3)(ii) of this section reasonably reflects the use of the asset in each trade or business, the taxpayer's basis in the asset is not taken into account for purposes of this paragraph (c).

(ii) *Permissible methodologies for allocating asset basis between or among two or more trades or businesses.* Subject to the special rules in paragraphs (c)(3)(iii) and (c)(5) of this section, a taxpayer's basis in an asset used in two or more trades or businesses during a determination period may be allocated to those trades or businesses based upon—

(A) The relative amounts of gross income that an asset generates, has generated, or may reasonably be expected to generate, within the meaning of §1.861-9T(g)(3), with respect to the trades or businesses;

(B) If the asset is land or an inherently permanent structure, the relative amounts of physical space used by the trades or businesses; or

(C) If the trades or businesses generate the same unit of output, the relative amounts of output of those trades or businesses (for example, if an asset is used in two trades or businesses, one of which is an excepted regulated utility trade or business, and the other of which is a non-excepted regulated utility trade or business, the taxpayer may allocate basis in the asset based upon the relative amounts of kilowatt-hours generated by each trade or business).

(iii) *Special rules*—(A) *Consistent allocation methodologies*—(1) *In general.* Except as otherwise provided in paragraph (c)(3)(iii)(A)(2) of this section, a taxpayer must maintain the same allocation methodology for a period of at least five taxable years.

(2) *Consent to change allocation methodology.* If a taxpayer has used the same allocation methodology for at least five taxable years, the taxpayers may change its method of allocation under paragraphs (c)(3)(i) and (ii) of this section without the

consent of the Commissioner. If a taxpayer has used the same allocation methodology for less than five taxable years, and if the taxpayer determines that a different allocation methodology properly reflects the proportionate benefit derived from the use of assets in its trades or businesses, the taxpayer may change its method of allocation under paragraphs (c)(3)(i) and (ii) of this section only with the consent of the Commissioner. To obtain consent, a taxpayer must submit a request for a letter ruling under the applicable administrative procedures, and consent will be granted only in extraordinary circumstances.

(B) *De minimis exception.* If at least 90 percent of the taxpayer's basis in an asset would be allocated to either excepted trades or businesses or non-excepted trades or businesses during a determination period pursuant to this paragraph (c)(3), the taxpayer's entire basis in the asset for the determination period must be allocated to either excepted or non-excepted trades or businesses, respectively. This rule applies before the application of paragraph (c)(1)(ii) of this section.

(C) *Allocations of excepted regulated utility trades or businesses—(1) In general.* Except as provided in the de minimis rule in paragraph (c)(3)(iii)(C)(3) of this section, a taxpayer is engaged in an excepted regulated utility trade or business only to the extent that the taxpayer is engaged in an excepted regulated utility trade or business described in §1.163(j)-1(b)(15)(i)(A), (B), or (C), and any remaining utility trade or business is a non-excepted trade or business. Thus, for example, electricity sold by a utility trade or business at rates not established or approved by an entity described in §1.163(j)-1(b)(15)(i)(A)(2) and not subject to an election under §1.163(j)-1(b)(15)(iii) must be treated as electricity sold by a non-excepted regulated utility trade or business. The taxpayer must allocate under this paragraph (c) the basis of assets used in the utility trade or business between its excepted and non-excepted trades or businesses.

(2) *Permissible method for allocating asset basis for utility trades or businesses.* In the case of a utility trade or business described in paragraph (c)(3)(iii)(C)(1) of this section, and except as provided in the de minimis rule in paragraph (c)(3)(iii)(C)(3) of this section, the method described

in paragraph (c)(3)(ii)(C) of this section is the only permissible method under this paragraph (c)(3) for allocating the taxpayer's basis in assets used in both the excepted and non-excepted trades or businesses of selling or furnishing the items described in §1.163(j)-1(b)(15)(i)(A)(1).

(3) *De minimis rule for excepted utility trades or businesses.* If a taxpayer is engaged in a utility trade or business described in paragraph (c)(3)(iii)(C)(1) of this section, and if at least 90 percent of the items described in §1.163(j)-1(b)(15)(i)(A)(1) are furnished or sold by trades or businesses described in §1.163(j)-1(b)(15)(i)(A), (B) or (C), the taxpayer's entire trade or business is an excepted regulated utility trade or business, and paragraph (c)(3)(iii)(C)(2) of this section does not apply. This rule applies before the application of paragraph (c)(3)(iii)(B) of this section.

(4) *Example.* The following example illustrates the principles of this paragraph (c)(3)(iii)(C):

(i) *Facts.* X, a C corporation, is engaged in the trade or business of generating electrical energy. During each determination period in the taxable year, 80 percent of the megawatt-hours generated in the electricity generation trade or business is sold at rates negotiated with the purchaser, and with respect to which X filed a schedule of rates with a public utility commission. The public utility commission has the authority to take action on the filed schedule of rates, but if no action is taken, the rules governing the public utility commission explicitly state that the public utility commission is deemed to have approved the rates. The public utility has taken no action with respect to the negotiated rate. The remaining 20 percent of the megawatt-hours is sold on the wholesale market at rates not established or subject to approval by a regulator described in §1.163(j)-1(b)(15)(i)(A)(2). X has made an election under §1.163(j)-1(b)(15)(iii). None of the assets used in X's utility generation trade or business are used in any other trade or business.

(ii) *Analysis.* For purposes of section 163(j), under paragraph (c)(3)(iii)(C)(1) of this section, 80 percent of X's electricity generation business is an excepted regulated utility trade or business, because the rate for the sale of the electricity was subject to approval by a regulator described in §1.163(j)-1(b)(15)(i)(A)(2). The remaining 20 percent of X's business is a non-excepted utility trade or business. Under paragraph (c)(3)(iii)(C)(2) of this section, X must allocate 80 percent of the basis of the assets used in its utility business to excepted trades or business and the remaining 20 percent of the basis in the assets to non-excepted trades or businesses.

(D) *Special allocation rule for real property trades or businesses subject to special anti-abuse rule—(1) In general.* In the case of a trade or business that leases

real property subject to an arrangement described in §1.163(j)-9(j)(1), including trades or businesses to which the look-through exception in §1.163(j)-9(j)(2)(ii) applies, the taxpayer must allocate under this paragraph (c)(3) the basis of property used in both the excepted and non-excepted portions of its trade or business, as determined under §1.163(j)-9(j)(3).

(2) *Allocation methodology for real property.* For purposes of this paragraph (c)(3)(ii)(D), a taxpayer must allocate the basis of real property leased under an arrangement described in §1.163(j)-9(j)(1) or (j)(2)(i) between the excepted and non-excepted portions of the real property trade or business based on the relative fair market rental value of the real property that is attributable to the excepted and non-excepted portions of the trade or business, respectively.

(3) *Example.* The following example illustrates the principles of this paragraph (c)(3)(iii)(D):

(i) *Facts.* X and Y are domestic C corporations under common control within the meaning of section 267(b), but neither X nor Y are members of a consolidated group. The small business exemption in §1.163(j)-2(d) does not apply to X or Y. X owns an office building and leases the entire building to Y. Y subleases 80 percent of the office building, measured by fair market rental value, to a related party. Y subleases the remaining 20 percent of the building to unrelated third parties. X also owns depreciable scaffolding equipment, which it uses to clean all of the building's windows as part of its leasing arrangement with Y.

(ii) *Analysis.* Under §1.163(j)-9(j)(2)(ii), X is eligible to make an election for 20 percent of its business of leasing the office building to be an electing real property trade or business. Assuming X makes such an election, X must allocate the basis of assets used in both the excepted and non-excepted portions of its leasing trade or business under this paragraph (c). Under paragraph (c)(3)(iii)(D)(2) of this section, X must allocate the basis of the office building based on the relative fair market value attributable to the excepted and non-excepted portions of its leasing business. Therefore, X must allocate 20 percent of the basis of the building to the excepted portion of its leasing business, and it must allocate the remaining 80 percent of the building to the non-excepted portion of its leasing business. Under paragraph (c)(3)(iii)(D)(2) of this section, X may use one of the allocation methods described in paragraph (c)(3)(ii) of this section to allocate the basis of its scaffolding equipment between the excepted and non-excepted portions of its leasing trade or business.

(4) *Disallowed business interest expense carryforwards; floor plan financing interest expense.* Disallowed business interest expense carryforwards (which were treated as allocable to a non-excepted

trade or business in a prior taxable year) are not re-allocated between non-excepted and excepted trades or businesses in a succeeding taxable year. Instead, the carryforwards continue to be treated as allocable to a non-excepted trade or business. Floor plan financing interest expense also is not subject to allocation between excepted and non-excepted trades or businesses (see §1.163(j)-1(b)(19)) and is always treated as allocable to non-excepted trades or businesses.

(5) *Additional rules relating to basis*—(i) *Calculation of adjusted basis*—(A) *Non-depreciable property other than land*. Except as otherwise provided in paragraph (c)(5)(i)(E) of this section, for purposes of this section, the adjusted basis of an asset other than land with respect to which no deduction is allowable under section 167, former section 168, or section 197, as applicable, is the adjusted basis of the asset for determining gain or loss from the sale or other disposition of that asset as provided in §1.1011-1. Self-created intangible assets are not taken into account for purposes of this paragraph (c).

(B) *Depreciable property other than inherently permanent structures*. For purposes of this section, the adjusted basis of any tangible asset with respect to which a deduction is allowable under section 167, other than inherently permanent structures, is determined by using the alternative depreciation system under section 168(g) before any application of the additional first-year depreciation deduction (for example, under section 168(k) or (m)), and the adjusted basis of any tangible asset with respect to which a deduction is allowable under former section 168, other than inherently permanent structures, is determined by using the taxpayer's method of computing depreciation for the asset under former section 168. The depreciation deduction with respect to the property described in this paragraph (c)(5)(i)(B) is allocated ratably to each day during the period in the taxable year to which the depreciation relates. A change to the alternative depreciation system should be determined in a manner similar to that in §1.168(i)-4(d)(4) or (d)(5)(ii)(B), as applicable.

(C) *Special rule for land and inherently permanent structures*. Except as otherwise provided in paragraph (c)(5)(i)(E) of this

section, for purposes of this section, the adjusted basis of any asset that is land, including nondepreciable improvements to land, or an inherently permanent structure is its unadjusted basis.

(D) *Depreciable or amortizable intangible property and depreciable income forecast method property*. For purposes of this section, the adjusted basis of any intangible asset with respect to which a deduction is allowable under section 167 or 197, as applicable, is determined in accordance with section 167 or 197, as applicable, and the adjusted basis of any asset described in section 167(g)(6) for which a deduction is allowable under section 167 is determined in accordance with section 167(g). The adjusted basis of any intangible asset under this paragraph (c)(5)(i)(D) is determined before any application of the additional first-year depreciation deduction. The depreciation or amortization deduction with respect to the property described in this paragraph (c)(5)(i)(D) is allocated ratably to each day during the period in the taxable year to which the depreciation or amortization relates.

(E) *Assets not yet used in a trade or business*. Assets that have been acquired or that are under development but that are not yet used in a trade or business are not taken into account for purposes of this paragraph (c). For example, construction works in progress (such as buildings, airplanes, or ships) are not taken into account for purposes of this paragraph (c). Similarly, land acquired by a taxpayer for construction of a building by the taxpayer to be used in a trade or business is not taken into account for purposes of under this paragraph (c) until the building is placed in service. This rule does not apply to interests in a partnership or stock in a corporation.

(F) *Trusts established to fund specific liabilities*. Trusts required to fund specific liabilities (for example, pension trusts, and nuclear decommissioning funds (including, but not limited to, those funds for which an election is made under section 468A)) are not taken into account for purposes of this paragraph (c).

(G) *Inherently permanent structure*. For purposes of this section, the term *inherently permanent structure* has the meaning provided in §1.856-10(d)(2).

(ii) *Partnership interests; stock in non-consolidated C corporations*—(A) *Partnership interests*—(1) *Calculation of asset basis*. For purposes of this section, a partner's interest in a partnership is treated as an asset of the partner. For these purposes, the partner's adjusted basis in a partnership interest is reduced, but not below zero, by the partner's share of partnership liabilities, as determined under section 752, and is further reduced as provided in paragraph (c)(5)(ii)(A)(2)(iii) of this section. If a partner elects or is required to apply the rules in this paragraph (c)(5)(ii)(A) to look through to a partnership's basis in the partnership's assets, the partner's basis in the partnership interest is adjusted to the extent of the partner's share of any adjustments to the basis of the partnership's assets required pursuant to the rules in paragraph (c)(5)(i) of this section.

(2) *Allocation of asset basis*—(i) *In general*. For purposes of determining the extent to which a partner's adjusted basis in its partnership interest is allocable to an excepted or non-excepted trade or business, the partner may look through to such partner's share of the partnership's basis in the partnership's assets, taking into account any adjustments under sections 734(b) and 743(b), and adjusted to the extent required under paragraph (d)(4) of this section, except as otherwise provided in paragraph (c)(5)(ii)(D) of this section. For purposes of the preceding sentence, such partner's share of partnership assets is determined using a reasonable method taking into account special allocations under section 704(b). Notwithstanding paragraph (c)(7) of this section, if a partner's direct and indirect interest in a partnership is greater than or equal to 80 percent of the partnership's capital or profits, the partner must apply the rules in this paragraph (c)(5)(ii)(A)(2) to look through to the partnership's basis in the partnership's assets. If a partner elects or is required to apply the rules in this paragraph (c)(5)(ii)(A)(2) to look through to a partnership's basis in the partnership's assets, the partner allocates the basis of its partnership interest between excepted and non-excepted trades or businesses based on the ratio in which the partner's share of the partnership's adjusted tax basis in its trade or business

assets is allocated between excepted and non-excepted trade or business assets.

(ii) *De minimis rule*. If, after applying paragraph (c)(5)(ii)(A)(2)(iii) of this section, at least 90 percent of a partner's share of a partnership's basis in its assets (including adjustments under sections 734(b) and 743(b)) is allocable to either excepted trades or businesses or non-excepted trades or businesses, without regard to assets not properly allocable to a trade or business, the partner's entire basis in its partnership interest is treated as allocable to either excepted or non-excepted trades or businesses, respectively. For purposes of the preceding sentence, such partner's share of partnership assets is determined using a reasonable method taking into account special allocations under section 704(b).

(iii) *Partnership assets not properly allocable to a trade or business*. For purposes of applying paragraphs (c)(5)(ii)(A)(2)(i) and (ii) of this section to a partner that is a C corporation or tax-exempt corporation, such partner's share of a partnership's assets that are not properly allocable to a trade or business is treated as properly allocable to a non-excepted trade or business of such partner. However, if the partnership made an election under §1.163(j)-9(b) or §1.163(j)-9(h) with respect to an asset or activity, the assets (or assets related to such activities) are treated as properly allocable to an excepted trade or business of such partner. See, for example, an election under §1.163(j)-9(h) for an asset or an election under §1.163(j)-9(b) with respect to activities described in §1.163(j)-9(b)(2)(ii). For a partner other than a C corporation or tax-exempt corporation, a partnership's assets that are not properly allocable to a trade or business are treated as neither excepted nor non-excepted trade or business assets; instead, such partner's adjusted basis in its partnership interest is decreased by that partner's share of the excess of the partnership's basis in those assets over the partnership's debt that is traced to such assets in accordance with §1.163-8T, and it is increased by that partner's share of the excess of the partnership's debt that is traced to such assets in accordance with §1.163-8T over the partnership's basis in those assets. For purposes of the preceding sentence, the partnership's asset basis in property not

allocable to a trade or business is adjusted pursuant to the rules in paragraph (c)(5)(i) of this section. For purposes of this paragraph (c)(5)(ii)(A)(2)(iii), such partner's share of a partnership's assets is determined under a reasonable method taking into account special allocations under section 704(b).

(iv) *Inapplicability of partnership look-through rule*. If a partner, other than a C corporation or a tax-exempt corporation, chooses not to look through to the partnership's basis in the partnership's assets under paragraph (c)(5)(ii)(A)(2)(i) of this section or is precluded by paragraph (c)(5)(ii)(D) of this section from applying such partnership look-through rule, the partner generally will treat its basis in the partnership interest as either an asset held for investment or a non-excepted trade or business asset as determined under section 163(d). If a partner that is a C corporation or a tax-exempt corporation chooses not to look through to the partnership's basis in the partnership's assets under paragraph (c)(5)(ii)(A)(2)(i) of this section or is precluded by paragraph (c)(5)(ii)(D) of this section from applying such partnership look-through rule, the taxpayer must treat its entire basis in the partnership interest as allocable to a non-excepted trade or business.

(B) *Stock in domestic non-consolidated corporations*—(1) *In general*. For purposes of this section, if a taxpayer owns stock in a domestic C corporation that is not a member of the taxpayer's consolidated group, or if the taxpayer owns stock in an S corporation, the stock is treated as an asset of the taxpayer.

(2) *Domestic non-consolidated C corporations*—(i) *Allocation of asset basis*. If a shareholder satisfies the minimum ownership threshold in paragraph (c)(7) of this section for stock in a domestic non-consolidated C corporation, and if dividends paid on such stock would not be included in the shareholder's investment income under section 163(d)(4)(B), then, for purposes of determining the extent to which the shareholder's basis in the stock is allocable to an excepted or non-excepted trade or business, the shareholder must look through to the corporation's basis in the corporation's assets, adjusted to the extent required under paragraph (d)(4) of this section, except as otherwise provided

in paragraph (c)(5)(ii)(D) of this section. If a shareholder does not satisfy the minimum ownership threshold in paragraph (c)(7) of this section for stock in a domestic non-consolidated C corporation, but the shareholder's direct and indirect interest in such corporation is greater than or equal to 80 percent by value, and if dividends paid on such stock would not be included in the shareholder's investment income under section 163(d)(4)(B), then, for purposes of determining the extent to which the shareholder's basis in the stock is allocable to an excepted or non-excepted trade or business, the shareholder may look through to the corporation's basis in the corporation's assets, adjusted to the extent required under paragraph (d)(4) of this section, except as otherwise provided in paragraph (c)(5)(ii)(D) of this section. For purposes of the preceding sentence, indirect stock ownership is determined by applying the constructive ownership rules of section 318(a).

(ii) *De minimis rule*. If at least 90 percent of the domestic non-consolidated C corporation's basis in the corporation's assets is allocable to either excepted trades or businesses or non-excepted trades or businesses, the shareholder's entire interest in the corporation's stock is treated as allocable to either excepted or non-excepted trades or businesses, respectively.

(iii) *Inapplicability of corporate look-through rule*. If a shareholder other than a C corporation or a tax-exempt corporation is ineligible to look through or chooses not to look through to a corporation's basis in its assets under paragraph (c)(5)(ii)(B)(2)(i) of this section, the shareholder generally will treat its entire basis in the corporation's stock as an asset held for investment. If a shareholder that is a C corporation or a tax-exempt corporation is ineligible to look through or chooses not to look through to a corporation's basis in its assets under paragraph (c)(5)(ii)(B)(2)(i) of this section, the shareholder must treat its entire basis in the corporation's stock as allocable to a non-excepted trade or business.

(iv) *Use of inside basis for purposes of C corporation look-through rule*. This paragraph (c)(5)(ii)(B)(2)(iv) applies if a shareholder meets the requirements to look through the stock of a domestic non-consolidated C corporation under paragraph

(c)(5)(ii)(B)(2)(i) of this section, determined without applying the constructive ownership rules of section 318(a). If this paragraph (c)(5)(ii)(B)(2)(iv) applies, then solely for purposes of allocating asset basis under paragraph (c)(5)(ii)(B)(2)(i) of this section, and except as otherwise provided in paragraph (c)(5)(ii)(D) of this section, the shareholder may look through to such shareholder's pro rata share of the C corporation's basis in its assets, taking into account the modifications in paragraph (c)(5)(i) of this section with respect to the C corporation's assets, and adjusted to the extent required under paragraph (d)(4) of this section (asset basis look-through approach). If a shareholder applies the asset basis look-through approach, it must do so for all domestic non-consolidated C corporations for which the shareholder is eligible to use this approach, and it must report its use of this approach on the information statement described in paragraph (c)(6)(iii) of this section. The shareholder also must continue to use the asset basis look-through approach in all future taxable years in which the shareholder is eligible to use this approach.

(3) *S corporations*—(i) *Calculation of asset basis*. For purposes of this section, a shareholder's share of stock in an S corporation is treated as an asset of the shareholder. Additionally, for these purposes, the shareholder's adjusted basis in a share of S corporation stock is adjusted to take into account the modifications in paragraph (c)(5)(i) of this section with respect to the assets of the S corporation (for example, a shareholder's adjusted basis in its S corporation stock is increased by the shareholder's share of depreciation with respect to an inherently permanent structure owned by the S corporation).

(ii) *Allocation of asset basis*. For purposes of determining the extent to which a shareholder's basis in its stock of an S corporation is allocable to an excepted or non-excepted trade or business, the shareholder may look through to such shareholder's share of the S corporation's basis in the S corporation's assets, allocated on a pro rata basis, adjusted to the extent required under paragraph (d)(4) of this section, except as otherwise provided in paragraph (c)(5)(ii)(D) of this section. Notwithstanding paragraph (c)(7) of this section, if a shareholder's direct

and indirect interest in an S corporation is greater than or equal to 80 percent of the S corporation's stock by vote and value, the shareholder must apply the rules in this paragraph (c)(5)(ii)(B)(3) to look through to the S corporation's basis in the S corporation's assets. For these purposes, indirect stock ownership is determined by applying the constructive ownership rules of section 318(a).

(iii) *De minimis rule*. If at least 90 percent of a shareholder's share of an S corporation's basis in its assets is allocable to either excepted trades or businesses or non-excepted trades or businesses, the shareholder's entire basis in its S corporation stock is treated as allocable to either excepted or non-excepted trades or businesses, respectively.

(iv) *Inapplicability of S corporation look-through rule*. If a shareholder chooses not to look through to the S corporation's basis in the S corporation's assets under paragraph (c)(5)(ii)(B)(3)(ii) of this section or is precluded by paragraph (c)(5)(ii)(D) of this section from applying such S corporation look-through rule, the shareholder will treat its basis in the S corporation stock as either an asset held for investment or a non-excepted trade or business asset as determined under section 163(d).

(C) *Stock in relevant foreign corporations*—(1) *In general*. The rules applicable to domestic non-consolidated C corporations in paragraph (c)(5)(ii)(B) of this section also apply to relevant foreign corporations (as defined in §1.163(j)-1(b)(33)).

(2) *Special rule for CFC utilities*. Solely for purposes of applying the rules in paragraph (c)(5)(ii)(B) of this section, a utility trade or business conducted by an applicable CFC is treated as an excepted regulated utility trade or business, but only to the extent that the applicable CFC sells or furnishes the items described in §1.163(j)-1(b)(15)(i)(A)(1) pursuant to rates established or approved by an entity described in §1.163(j)-1(b)(15)(i)(A)(2), a foreign government, a public service or public utility commission or other similar body of any foreign government, or the governing or ratemaking body of a foreign electric cooperative. For purposes of this paragraph (c)(5)(ii)(C)(2), the term *foreign government* means any foreign

government, any political subdivision of a foreign government, or any wholly owned agency or instrumentality of any one of the foregoing within the meaning of §1.1471-6(b).

(D) *Inapplicability of look-through rule to partnerships or non-consolidated C corporations to which the small business exemption applies*. A taxpayer may not apply the look-through rules in paragraphs (b)(3) and (c)(5)(ii)(A), (B), and (C) of this section to a partnership, S corporation, or non-consolidated C corporation that is eligible for the small business exemption under section 163(j)(3) and §1.163(j)-2(d)(1), unless the partnership, S corporation, or non-consolidated C corporation elects under §1.163(j)-9 for a trade or business to be an electing real property trade or business or an electing farming business.

(E) *Tiered entities*. If a taxpayer applies the look-through rules of this paragraph (c)(5)(ii), the taxpayer must do so for all lower-tier entities with respect to which the taxpayer satisfies, directly or indirectly, the minimum ownership threshold in paragraph (c)(7) of this section, subject to the limitation in paragraph (c)(5)(ii)(D) of this section, beginning with the lowest-tier entity.

(iii) *Cash and cash equivalents and customer receivables*. Except as otherwise provided in the last sentence of this paragraph (c)(5)(iii), a taxpayer's basis in its cash and cash equivalents and customer receivables is not taken into account for purposes of this paragraph (c). This rule also applies to a lower-tier entity if a taxpayer looks through to the assets of that entity under paragraph (c)(5)(ii) of this section. For purposes of this paragraph (c)(5)(iii), the term *cash and cash equivalents* includes cash, foreign currency, commercial paper, any interest in an investment company registered under the Investment Company Act of 1940 (1940 Act) and regulated as a money market fund under 17 CFR 270.2a-7 (Rule 2a-7 under the 1940 Act), any obligation of a government, and any derivative that is substantially secured by an obligation of a government, or any similar asset. For purposes of this paragraph (c)(5)(iii), a *derivative* is a derivative described in section 59A(h)(4)(A), without regard to section 59A(h)(4)(C). For purposes of this paragraph (c)

(5)(iii), the term *government* means the United States or any agency or instrumentality of the United States; a State, a territory, a possession of the United States, the District of Columbia, or any political subdivision thereof within the meaning of section 103 and §1.103-1; or any foreign government, any political subdivision of a foreign government, or any wholly owned agency or instrumentality of any one of the foregoing within the meaning of §1.1471-6(b). This paragraph (c)(5)(iii) does not apply to an entity that qualifies as a financial services entity as described in §1.904-4(e)(3).

(iv) *Deemed asset sale.* Solely for purposes of determining the amount of basis allocable to excepted and non-excepted trades or businesses under this section, an election under section 336, 338, or 754, as applicable, is deemed to have been made for any acquisition of corporate stock or partnership interests with respect to which the taxpayer demonstrates, in the information statement required by paragraph (c)(6)(iii)(B) of this section, that the acquisition qualified for such an election and that, immediately before the acquisition, the acquired entity had a regulatory liability for deferred taxes recorded on its books with respect to property predominantly used in an excepted regulated utility trade or business. Any additional basis taken into account under this rule is reduced ratably over a 15-year period beginning with the month of the acquisition and is not subject to the anti-abuse rule in paragraph (c)(8) of this section.

(v) *Other adjustments.* The Commissioner may make appropriate adjustments to prevent a taxpayer from intentionally and artificially increasing its basis in assets attributable to an excepted trade or business.

(6) *Determination dates; determination periods; reporting requirements—(i) Determination dates and determination periods—(A) Quarterly determination periods.* For purposes of this section, and except as otherwise provided in paragraph (c)(6)(i)(B) of this section, the term *determination date* means the last day of each quarter of the taxpayer's taxable year (and the last day of the taxpayer's taxable year, if the taxpayer has a short taxable year), and the term *determination period* means the period beginning the day after one de-

termination date and ending on the next determination date.

(B) *Annual determination periods.* If a taxpayer satisfies the requirements of the last sentence of this paragraph (c)(6)(i)(B), the taxpayer may allocate asset basis for a taxable year based on the average of adjusted asset basis at the beginning of the year and the end of the year (annual determination method). For these purposes, the term *determination date* means the last day of the taxpayer's taxable year, and the term *determination period* has the same meaning as provided in paragraph (c)(6)(i)(A) of this section. A taxpayer may use the annual determination method for a taxable year only if the taxpayer demonstrates that its total adjusted basis (as determined under paragraph (c)(5) of this section) at the end of the year in its assets used in its excepted trades or businesses, as a percentage of the taxpayer's total adjusted basis at the end of such year in all of its assets used in a trade or business, does not differ by more than 20 percent from such percentage at the beginning of the year.

(ii) *Application of look-through rules.* If a taxpayer that applies the look-through rules of paragraph (c)(5)(ii) of this section has a different taxable year than the partnership or non-consolidated C corporation to which the taxpayer is applying those rules, then, for purposes of this paragraph (c)(6), the taxpayer must use the most recent asset basis figures from the partnership or non-consolidated C corporation. For example, assume that PS1 is a partnership with a May 31 taxable year, and that C (a calendar-year C corporation that is ineligible to use the annual determination method for the taxable year) is a partner in PS1. PS1's determination dates are February 28, May 31, August 31, and November 30. In turn, C's determination dates are March 31, June 30, September 30, and December 31. If C looks through to PS1's basis in its assets under paragraph (c)(5)(ii) of this section, then, for purposes of determining the amount of C's asset basis that is attributable to its excepted and non-excepted businesses on March 31, C must use PS1's asset basis calculations for February 28.

(iii) *Reporting requirements—(A) Books and records.* A taxpayer must maintain books of account and other records

and data as necessary to substantiate the taxpayer's use of an asset in an excepted trade or business and to substantiate any adjustments to asset basis for purposes of applying this paragraph (c). One indication that a particular asset is used in a particular trade or business is if the taxpayer maintains separate books and records for all of its excepted and non-excepted trades or businesses and can show the asset in the books and records of a particular excepted or non-excepted trade or business. For rules governing record retention, see §1.6001-1.

(B) *Information statement.* Except as otherwise provided in publications, forms, instructions, or other guidance, each taxpayer that is making an allocation under this paragraph (c), including any taxpayer that satisfies the de minimis rule in paragraph (c)(1)(ii) of this section, must prepare a statement titled "Section 163(j) Asset Basis Calculations" containing the information described in paragraphs (c)(6)(iii)(B)(1) through (7) of this section and must attach the statement to its timely filed Federal income tax return for the taxable year:

(1) The taxpayer's adjusted basis in the assets used in its excepted and non-excepted businesses, determined as set forth in this section, including detailed information for the different groups of assets identified in paragraphs (c)(5)(i) and (ii) and (d) of this section;

(2) The determination dates on which asset basis was measured during the taxable year;

(3) The names and taxpayer identification numbers (TINs) of all entities for which basis information is being provided, including partnerships and corporations if the taxpayer that owns an interest in a partnership or corporation looks through to the partnership's or corporation's basis in the partnership's or corporation's assets under paragraph (c)(5)(ii) of this section. If the taxpayer is a member of a consolidated group, the name and TIN of the agent for the group, as defined in §1.1502-77, must be provided, but the taxpayer need not provide the names and TINs of all other consolidated group members;

(4) Asset basis information for corporations or partnerships if the taxpayer looks through to the corporation's or partnership's basis in the corporation's or

partnership's assets under paragraph (c)(5)(ii) of this section;

(5) A summary of the method or methods used to determine asset basis in property used in both excepted and non-excepted businesses, as well as information regarding any deemed sale under paragraph (c)(5)(iv) of this section;

(6) Whether the taxpayer used the historical approach or the effective date approach for all of its disallowed disqualified interest; and

(7) If the taxpayer changed its methodology for allocating asset basis between or among two or more trades or businesses under paragraph (c)(3)(ii) of this section, a statement that the taxpayer has changed the allocation methodology and a description of the new methodology or, if the taxpayer is required to request consent for the allocation methodology change under paragraph (c)(3)(iii)(A)(2) of this section, a statement that the request has been or will be filed and a description of the methodology change.

(iv) *Failure to file statement.* If a taxpayer fails to file the statement described in paragraph (c)(6)(iii) of this section or files a statement that does not comply with the requirements of paragraph (c)(6)(iii) of this section, the Commissioner may treat the taxpayer as if all of its interest expense is properly allocable to a non-excepted trade or business, unless the taxpayer shows that there was reasonable cause for failing to comply with, and the taxpayer acted in good faith with respect to, the requirements of paragraph (c)(6)(iii) of this section, taking into account all pertinent facts and circumstances.

(7) *Ownership threshold for look-through rules—(i) Corporations—(A) Asset basis.* For purposes of this section, a shareholder must look through to the assets of a domestic non-consolidated C corporation or a relevant foreign corporation under paragraph (c)(5)(ii) of this section if the shareholder's direct and indirect interest in the corporation satisfies the ownership requirements of section 1504(a)(2). For purposes of this paragraph (c)(7)(i)(A), indirect stock ownership is determined by applying the constructive ownership rules of section 318(a). A shareholder may look through to the assets of an S corporation under

paragraph (c)(5)(ii) of this section for purposes of allocating the shareholder's basis in its stock in the S corporation between excepted and non-excepted trades or businesses regardless of the shareholder's direct and indirect interest in the S corporation.

(B) *Dividends.* A shareholder must look through to the activities of a domestic non-consolidated C corporation or a relevant foreign corporation under paragraph (b)(3) of this section if the shareholder's direct interest in the corporation satisfies the ownership requirements of section 1504(a)(2). A shareholder may look through to the activities of a domestic non-consolidated C corporation or an applicable CFC under paragraph (b)(3) of this section if the shareholder's direct interest in the corporation is greater than or equal to 80 percent by value. A shareholder may look through to the activities of an S corporation under paragraph (b)(3) of this section regardless of the shareholder's direct interest in the S corporation.

(ii) *Partnerships.* A partner may look through to the assets of a partnership under paragraph (c)(5)(ii) of this section for purposes of allocating the partner's basis in its partnership interest between excepted and non-excepted trades or businesses regardless of the partner's direct and indirect interest in the partnership.

(iii) *Inapplicability of look-through rule.* For circumstances in which a taxpayer that satisfies the ownership threshold in this paragraph (c)(7) may not apply the look-through rules in paragraphs (b)(3) and (c)(5)(ii) of this section, see paragraph (c)(5)(ii)(D) of this section.

(8) *Anti-abuse rule.* If a principal purpose for the acquisition, disposition, or change in use of an asset was to artificially shift the amount of basis allocable to excepted or non-excepted trades or businesses on a determination date, the additional basis or change in use will not be taken into account for purposes of this section. For example, if an asset is used in a non-excepted trade or business for most of the taxable year, and if the taxpayer begins using the asset in an excepted trade or business towards the end of the year with a principal purpose of shifting the amount of basis in the asset that is allocable to the excepted trade or business,

the change in use is disregarded for purposes of this section. A purpose may be a principal purpose even though it is outweighed by other purposes (taken together or separately). In determining whether a taxpayer has a principal purpose described in this paragraph (c)(8), factors to be considered include, for example, the following: the business purpose for the acquisition, disposition, or change in use; the length of time the asset was used in a trade or business; whether the asset was acquired from a related person; and whether the taxpayer's aggregate basis in its assets increased or decreased temporarily on or around a determination date. A principal purpose is presumed to be present in any case in which the acquisition, disposition, or change in use lacks a substantial business purpose and increases the taxpayer's basis in assets used in its excepted trades or businesses by more than 10 percent during the taxable year.

(d) *Direct allocations—(1) In general.* It is not necessary to allocate interest expense under this paragraph (d) if all of the taxpayer's interest expense is allocable to excepted trades or businesses or if all of the taxpayer's interest expense is allocable to non-excepted trades or businesses.

(2) *Qualified nonrecourse indebtedness.* For purposes of this section, a taxpayer with qualified nonrecourse indebtedness must directly allocate interest expense from the indebtedness to the taxpayer's assets in the manner and to the extent provided in §1.861-10T(b). For purposes of this paragraph (d)(2), the term *qualified nonrecourse indebtedness* has the meaning provided in §1.861-10T(b), except that the term *cash flow from the property* (within the meaning of §1.861-10T(b)(3)(i)) includes revenue derived from the sale or lease of inventory or similar property with respect to an excepted regulated utility trade or business or a non-excepted regulated utility trade or business.

(3) *Assets used in more than one trade or business.* If an asset is used in more than one trade or business, the taxpayer must apply the rules in paragraph (c)(3) of this section to determine the extent to which interest that is directly allocated under this paragraph (d) is allocable to excepted or non-excepted trades or businesses.

(4) *Adjustments to basis of assets to account for direct allocations.* In determining the amount of a taxpayer's basis in the assets used in its excepted and non-excepted trades or businesses for purposes of paragraph (c) of this section, adjustments must be made to reflect direct allocations under this paragraph (d). These adjustments consist of reductions in the taxpayer's basis in its assets for purposes of paragraph (c) of this section to reflect assets to which interest expense is directly allocated under this paragraph (d). The amount of the taxpayer's basis in these assets must be reduced, but not below zero, by the amount of qualified nonrecourse indebtedness secured by these assets. These adjustments must be made before the taxpayer averages the adjusted basis in its assets as determined on each determination date during the taxable year.

(5) *Example: Direct allocation of interest expense—(i) Facts.* T conducts an electing real property trade or business (Business X) and operates a retail store that is a non-excepted trade or business (Business Y). In Year 1, T issues Note A to a third party in exchange for \$1,000x for the purpose of acquiring Building B. Note A is qualified nonrecourse indebtedness (within the meaning of §1.861-10T(b)) secured by Building B. T then uses those funds to acquire Building B for \$1,200x, and T uses Building B in Business X. During Year 1, T pays \$500x of interest, of which \$100x is interest payments on Note A. For Year 1, T's basis in its assets used in Business X (as determined under paragraph (c) of this section) is \$3,600x (excluding cash and cash equivalents), and T's basis in its assets used in Business Y (as determined under paragraph (c) of this section) is \$800x (excluding cash and cash equivalents). Each of Business X and Business Y also has \$100x of cash and cash equivalents.

(ii) *Analysis.* Because Note A is qualified nonrecourse indebtedness that is secured by Building B, in allocating interest expense between Businesses X and Y, T first must directly allocate the \$100x of interest expense it paid with respect to Note A to Business X in accordance with paragraph (d)(2) of this section. Thereafter, T must allocate the remaining \$400x of interest expense between Businesses X and Y under paragraph (c) of this section. After excluding \$1,000x of T's basis in Building B to reflect the amount of Note A (see paragraph (d)(4) of this section), and without regard to T's \$200x of cash and cash equivalents (see paragraph (c)(5)(iii) of this section), T's basis in its assets used in Businesses X and Y is \$2,600x and \$800x (76.5 percent and 23.5 percent), respectively. Thus, \$306x of the remaining \$400x of interest expense would be allocated to Business X, and \$94x would be allocated to Business Y.

(e) *Examples.* The examples in this paragraph (e) illustrate the principles of this section. For purposes of these exam-

ples, no taxpayer is eligible for the small business exemption under section 163(j)(3) and §1.163(j)-2(d), no taxpayer has floor plan financing interest expense, and no taxpayer has qualified nonrecourse indebtedness within the meaning of §1.861-10T(b).

(1) *Example 1: Interest allocation within a consolidated group—(i) Facts.* S is a member of a consolidated group of which P is the common parent. P conducts an electing real property trade or business (Business X), and S conducts a non-excepted trade or business (Business Y). In Year 1, P pays or accrues (without regard to section 163(j)) \$35x of interest expense and receives \$10x of interest income, and S pays or accrues (without regard to section 163(j)) \$115x of interest expense and receives \$5x of interest income (for a total of \$150x of interest expense and \$15x of interest income). For purposes of this example, assume that, pursuant to paragraph (c) of this section, \$30x of the P group's interest expense and \$3x of the P group's interest income is allocable to Business X, and the remaining \$120x of interest expense and \$12x of interest income is allocable to Business Y.

(ii) *Analysis.* Under paragraph (a)(4) of this section, 20 percent of the P group's Year 1 interest expense (\$30x / \$150x) and interest income (\$3x / \$15x) is allocable to an excepted trade or business. Thus, \$7x (\$35x x 20 percent) of P's interest expense and \$2x (\$10x x 20 percent) of P's interest income is allocable to an excepted trade or business. The remaining \$28x of P's interest expense is business interest expense subject to the section 163(j) limitation, and the remaining \$8x of P's interest income is business interest income that increases the group's section 163(j) limitation. In turn, \$23x (\$115x x 20 percent) of S's interest expense and \$1x (\$5x x 20 percent) of S's interest income is allocable to an excepted trade or business. The remaining \$92x of S's interest expense is business interest expense subject to the section 163(j) limitation, and the remaining \$4x of S's interest income is business interest income that increases the group's section 163(j) limitation.

(2) *Example 2: Interest allocation within a consolidated group with assets used in more than one trade or business—(i) Facts.* S is a member of a consolidated group of which P is the common parent. P conducts an electing real property trade or business (Business X), and S conducts a non-excepted trade or business (Business Y). In Year 1, P pays or accrues (without regard to section 163(j)) \$50x of interest expense, and S pays or accrues \$100x of interest expense (without regard to section 163(j)). P leases 40 percent of space in Building V (which P owns) to S for use in Business Y, and P leases the remaining 60 percent of space in Building V to third parties. For purposes of allocating interest expense under paragraph (c) of this section, the P group's basis in its assets (excluding Building V) used in Businesses X and Y is \$180x and \$620x, respectively. The P group's basis in Building V for purposes of allocating interest expense under paragraph (c) of this section is \$200x.

(ii) *Analysis.* Under paragraph (c)(3)(ii) of this section, the P group's basis in Building V (\$200x) is allocated to excepted and non-excepted trades or

businesses in accordance with the use of space by Business Y (40 percent) and Business X (the remainder, or 60 percent). Accordingly, \$120x of the basis in Building V is allocated to excepted trades or businesses (60 percent x \$200x), and \$80x is allocated to non-excepted trades or businesses (40 percent x \$200x). After allocating the basis in Building V, the P group's total basis in the assets used in excepted and non-excepted trades or businesses is \$300x and \$700x, respectively. Under paragraphs (a)(4) and (c) of this section, 30 percent (\$300x / \$1,000x) of the P group's Year 1 interest expense is properly allocable to an excepted trade or business. Thus, \$15x (\$50x x 30 percent) of P's interest expense is properly allocable to an excepted trade or business, and the remaining \$35x of P's interest expense is business interest expense subject to the section 163(j) limitation. In turn, \$30x (\$100x x 30 percent) of S's interest expense is properly allocable to an excepted trade or business, and the remaining \$70x of S's interest expense is business interest expense subject to the section 163(j) limitation.

(3) *Example 3: Application of look-through rules—(i) Facts.* (A) Each of Corp A, Corp B, Corp C, and Corp D is a domestic calendar-year corporation that is not a member of a consolidated group. Corp A owns 100 percent of the stock of Corp C; the basis of Corp A's stock in Corp C is \$500x. Corp C owns 10 percent of the interests in PS1 (a domestic partnership), and Corp B owns the remaining 90 percent. Corp C's basis in its PS1 interests is \$25x; Corp B's basis in its PS1 interests is \$225x. PS1 owns 100 percent of the stock of Corp D; the basis of PS1's stock in Corp D is \$1,000x. Corp A and Corp B are owned by unrelated, non-overlapping shareholders.

(B) In 2021, Corp C was engaged solely in a non-excepted trade or business. That same year, PS1's only activity was holding Corp D stock. In turn, Corp D was engaged in both an electing farming business and a non-excepted trade or business. Under the allocation rules in paragraph (c) of this section, 50 percent of Corp D's asset basis in 2021 was allocable to the electing farming business, and the remaining 50 percent was allocable to the non-excepted trade or business.

(C) Corp A and Corp B each paid or accrued (without regard to section 163(j)) \$150x of interest expense allocable to a trade or business. Corp A's trade or business was an excepted trade or business, and Corp B's trade or business was a non-excepted trade or business. Corp A's basis in the assets used in its trade or business was \$100x, and Corp B's basis in the assets used in its trade or business was \$112.5x.

(ii) *Analysis.* (A) As provided in paragraph (c)(5)(ii)(E) of this section, if a taxpayer applies the look-through rules of paragraph (c)(5)(ii) of this section, the taxpayer must begin with the lowest-tier entity to which it is eligible to apply the look-through rules. Corp A directly owns 100 percent of the stock of Corp C; thus, Corp A satisfies the 80 percent minimum ownership threshold with respect to Corp C. Corp A also owns 10 percent of the interests in PS1. There is no minimum ownership threshold for partnerships; thus, Corp A may apply the look-through rules to PS1. However, Corp A does not directly or indirectly own at least 80 percent of the stock of Corp D; thus, Corp A cannot look through its indirect interest in Corp D. In turn, Corp B directly owns 90

percent of the interests in PS1, and Corp B indirectly owns at least 80 percent of the stock of Corp D. Thus, Corp B must apply the look-through rules to PS1 and Corp D.

(B) From Corp A's perspective, PS1 is not engaged in a trade or business for purposes of section 163(j); instead, PS1 is merely holding its Corp D stock as an investment. Under paragraph (c)(5)(ii)(A)(2) of this section, if a partnership is not engaged in a trade or business, then its C corporation partner must treat its entire basis in the partnership interest as allocable to a non-excepted trade or business. Thus, for purposes of Corp A's application of the look-through rules, Corp C's entire basis in its PS1 interest (\$25x) is allocable to a non-excepted trade or business. Corp C's basis in its other assets also is allocable to a non-excepted trade or business (the only trade or business in which Corp C is engaged). Thus, under paragraph (c) of this section, Corp A's \$500x basis in its Corp C stock is allocable entirely to a non-excepted trade or business. Corp A's \$100x basis in its other business assets is allocable to an excepted trade or business. Thus, 5/6 (or \$125x) of Corp A's \$150x of interest expense is properly allocable to a non-excepted trade or business and is business interest expense subject to the section 163(j) limitation, and the remaining \$25x of Corp A's \$150x of interest expense is allocable to an excepted trade or business and is not subject to the section 163(j) limitation.

(C) From Corp B's perspective, PS1 must look through its stock in Corp D to determine the extent to which PS1's basis in the stock is allocable to an excepted or non-excepted trade or business. Half of Corp D's basis in its assets is allocable to an excepted trade or business, and the other half is allocable to a non-excepted trade or business. Thus, from Corp B's perspective, \$500x of PS1's basis in its Corp D stock (PS1's only asset) is allocable to an excepted trade or business, and the other half is allocable to a non-excepted trade or business. Corp B's basis in its PS1 interests is \$225x. Applying the look-through rules to Corp B's PS1 interests, \$112.5x of Corp B's basis in its PS1 interests is allocable to an excepted trade or business, and \$112.5x of Corp B's basis in its PS1 interests is allocable to a non-excepted trade or business. Since Corp B's basis in the assets used in its non-excepted trade or business also was \$112.5x, two-thirds of Corp B's interest expense (\$100x) is properly allocable to a non-excepted trade or business and is business interest expense subject to the section 163(j) limitation, and one-third of Corp B's interest expense (\$50x) is allocable to an excepted trade or business and is not subject to the section 163(j) limitation.

(4) *Example 4: Excepted and non-excepted trades or businesses in a consolidated group*—(i) *Facts.* P is the common parent of a consolidated group of which A and B are the only other members. A conducts an electing real property trade or business (Business X), and B conducts a non-excepted trade or business (Business Y). In Year 1, A pays or accrues (without regard to section 163(j)) \$50x of interest expense and earns \$70x of gross income in the conduct of Business X, and B pays or accrues (without regard to section 163(j)) \$100x of interest expense and earns \$150x of gross income in the conduct of Business Y. B owns Building V, which it uses in Business Y. For purposes of allocating the P

group's Year 1 business interest expense between excepted and non-excepted trades or businesses under paragraph (c) of this section, the P group's basis in its assets (other than Building V) used in Businesses X and Y is \$180x and \$620x, respectively, and the P group's basis in Building V is \$200x. At the end of Year 1, B sells Building V to a third party and realizes a gain of \$60x in addition to the \$150x of gross income B earned that year from the conduct of Business Y.

(ii) *Analysis.* (A) Under paragraphs (a)(4) and (c) of this section, the P group's basis in its assets used in its trades or businesses is allocated between the P group's excepted trade or business (Business X) and its non-excepted trade or business (Business Y) as though these trades or businesses were conducted by a single corporation. Under paragraph (c) of this section, the P group's basis in its assets used in Businesses X and Y is \$180x and \$820x, respectively. Accordingly, 18 percent (\$180x / \$1,000x) of the P group's total interest expense (\$150x) is properly allocable to an excepted trade or business (\$27x), and the remaining 82 percent of the P group's total interest expense is business interest expense properly allocable to a non-excepted trade or business (\$123x).

(B) To determine the P group's section 163(j) limitation, paragraph (a) of this section requires that certain items of income and deduction be allocated to the excepted and non-excepted trades or businesses of the P group as though these trades or businesses were conducted by a single corporation. In Year 1, the P group's excepted trade or business (Business X) has gross income of \$70x, and the P group's non-excepted trade or business (Business Y) has gross income of \$150x. Because Building V was used exclusively in Business Y, the \$60x of gain from the sale of Building V in Year 1 is attributed to Business Y under paragraph (b)(2) of this section. The P group's section 163(j) limitation is \$63x (30 percent x \$210x), which allows the P group to deduct \$63x of its \$123x of business interest expense allocated to the P group's non-excepted trades or businesses. The group's \$27x of interest expense that is allocable to excepted trades or businesses may be deducted without limitation under section 163(j).

(iii) *Intercompany transaction.* The facts are the same as in *Example 4* in paragraph (e)(4)(i) of this section, except that A owns Building V and leases it to B in Year 1 for \$20x for use in Business Y, and A sells Building V to a third party for a \$60 gain at the end of Year 1. Under paragraphs (a)(4) and (c) of this section, all members of the P group are treated as a single corporation. As a result, the P group's basis in its assets used in its trades or businesses is allocated between the P group's excepted trade or business (Business X) and its non-excepted trade or business (Business Y) as though these trades or businesses were conducted by a single corporation. A lease between two divisions of a single corporation would produce no rental income or expense. Thus, the \$20x of rent paid by B to A does not affect the P group's ATI. Moreover, under paragraph (c) of this section, Building V is an asset used in the P group's non-excepted trade or business (Business Y). Accordingly, although A owns Building V, the basis in Building V is added to the P group's basis in assets used in Business Y for purposes of allocating interest expense under paragraph (c) of this section. In the

same vein, when A sells Building V to a third party at a gain of \$60x, the gain is included in the P group's ATI because Building V was used in a non-excepted trade or business of the P group (Business Y) prior to its sale.

(5) *Example 5: Captive activities*—(i) *Facts.* S and T are members of a consolidated group of which P is the common parent. P conducts an electing real property trade or business (Business X), S conducts a non-excepted trade or business (Business Y), and T provides transportation services to Businesses X and Y but does not have any customers outside of the P group. For Year 1, T provides transportation services using a single bus with a basis of \$120x.

(ii) *Analysis.* Under paragraph (a)(4) of this section, activities conducted by a consolidated group are treated as though those activities were conducted by a single corporation. Because the activities of T are limited to providing intercompany transportation services, T does not conduct a trade or business for purposes of section 163(j). Under paragraph (c)(3) of this section, business interest expense is allocated to excepted and non-excepted trades or businesses based on the relative basis of the assets used in those businesses. The basis in T's only asset, a bus, is therefore allocated between Business X and Business Y according to the use of T's bus by these businesses. Business X uses one-third of T's services, and Business Y uses two-thirds of T's services. Thus, \$40x of the basis of T's bus is allocated to Business X, and \$80x of the basis of T's bus is allocated to Business Y.

(6) *Example 6: Constructive ownership*—(i) *Facts.* P, S, T, and U are domestic C corporations that are not members of a consolidated group. P directly owns 80 percent of the stock of each of S and T as measured by total voting power and value; an unrelated third party, X, owns the remaining 20 percent. In turn, S and T directly own 15 percent and 80 percent, respectively, of the stock of U as measured by total voting power and value; P directly owns the remaining 5 percent. P conducts both excepted and non-excepted trades or businesses. S and T conduct only non-excepted trades or businesses, and U conducts both excepted and non-excepted trades or businesses.

(ii) *Analysis.* Under paragraph (c)(7)(i)(A) of this section, a shareholder must look through to the assets of a domestic non-consolidated C corporation for purposes of allocating the shareholder's basis in its stock in the corporation between excepted and non-excepted trades or businesses if the shareholder's direct and indirect interest in the corporation satisfies the ownership requirements of section 1504(a)(2). For purposes of paragraph (c)(7)(i)(A) of this section, a shareholder's stock ownership is determined by applying the constructive ownership rules of section 318(a). P directly owns 80 percent of each of S and T as measured by total voting power and value; thus, P must look through to the assets of S and T when allocating the basis in its stock of S and T. P directly owns 5 percent of the stock of U as measured by total voting power and value, and P constructively owns the other 95 percent; thus, P also must look through to U's assets when allocating the basis in its U stock. S directly owns 15 percent of the stock of U, and S constructively owns only 5 percent through P; thus, S cannot look through to

U's assets when allocating the basis in its U stock. T directly owns 80 percent of the stock of U, and T constructively owns an additional 5 percent; thus, T must look through to U's assets when allocating the basis in its U stock.

(iii) *Dividend*. The facts are the same as in paragraph (e)(6)(i) of this section, except that U distributes a \$160x dividend pro rata to its shareholders. Thus, P receives \$8x (5 percent of \$160x) of the U dividend, S receives \$24x (15 percent of \$160x), and T receives \$128x (80 percent of \$160x). Under paragraph (c)(7)(i)(B) of this section, if a shareholder's direct interest in a corporation satisfies the ownership requirements of section 1504(a)(2), the shareholder must look through to the activities of a domestic non-consolidated C corporation in determining whether dividend income is from an excepted or non-excepted trade or business. The constructive ownership rules do not apply in allocating dividends under paragraph (c)(7)(i)(B) of this section. P directly owns 5 percent of the stock of U as measured by vote and value, and S directly owns 15 percent of the stock of U as measured by vote and value; thus, neither P nor S is required to apply the look-through rules in allocating its dividend income from U, and all such income is allocable to non-excepted trades or businesses. T directly owns 80 percent of the stock of U as measured by vote and value; thus, T must allocate its U dividend in accordance with the activities of U's excepted and non-excepted trades or businesses.

(7) *Example 7: Dispositions with a principal purpose of shifting basis—(i) Facts.* U and V are members of a consolidated group of which P is the common parent. U conducts an electing farming business (Business F), and V conducts a farm equipment leasing business (Business L) that is a non-excepted trade or business. After the end of a farming season, the P group, with a principal purpose of shifting basis from Business L to Business F, has V sell to U all off-lease farming equipment that previously was leased out as part of Business L. Immediately before the start of the next season, U sells the farming equipment back to V for use in Business L.

(ii) *Analysis.* Under paragraph (c)(8) of this section, in the case of a disposition of assets undertaken with a principal purpose of artificially shifting the amount of basis allocable to excepted or non-excepted trades or businesses on a determination date, the additional basis or change in use will not be taken into account. Because V's sale of farming equipment to U for storage in Business F's facilities is undertaken with a principal purpose of shifting basis from Business L to Business F, the additional basis Business F receives from these transactions will not be taken into account for purposes of this section. Instead, the basis of the farming equipment will be allocated as though the farming equipment continued to be used in Business L.

(f) *Applicability date.* This section applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and

their related parties consistently apply the rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year. Accordingly, for purposes of §1.163(j)-10(c)(5), taxpayers make any change to the alternative depreciation system as of November 13, 2020, or if relying on the provisions of §1.163(j)-10 in regulation project REG-106089-18 (83 FR 67490), as of December 28, 2018.

§1.163(j)-11 Transition rules.

(a) *Overview.* This section provides transition rules regarding the section 163(j) limitation. Paragraph (b) of this section provides rules regarding the application of the section 163(j) limitation to a corporation that joins a consolidated group during a taxable year of the group beginning before January 1, 2018 and is subject to the section 163(j) limitation at the time of its change in status. Paragraph (c) of this section provides rules regarding the treatment of carryforwards of disallowed disqualified interest.

(b) *Application of section 163(j) limitation if a corporation joins a consolidated group during a taxable year of the group beginning before January 1, 2018—(1) In general.* If a corporation (S) joins a consolidated group during a taxable year of the group beginning before January 1, 2018, and if S is subject to the section 163(j) limitation at the time of its change in status, then section 163(j) will apply to S's short taxable year that ends on the day of S's change in status, but section 163(j) will not apply to S's short taxable year that begins the next day (when S is a member of the acquiring consolidated group). Any business interest expense paid or accrued (without regard to section 163(j)) by S in its short taxable year ending on the day of S's change in status for which a deduction is disallowed under section 163(j) will be carried forward to the acquiring group's first taxable year beginning after

December 31, 2017. Those disallowed business interest expense carryforwards may be subject to limitation under other provisions of these regulations (see, for example, §1.163(j)-5(c), (d), (e), and (f)).

(2) *Example.* Acquiring Group is a consolidated group with a fiscal year end of November 30; Target is a stand-alone calendar-year C corporation. On May 31, 2018, Acquiring Group acquires Target in a transaction that is not an ownership change for purposes of section 382. Acquiring Group is not subject to the section 163(j) limitation during its taxable year beginning December 1, 2017. As a result of the acquisition, Target has a short taxable year beginning January 1, 2018 and ending May 31, 2018. Target is subject to the section 163(j) limitation during this short taxable year. However, Target (as a member of Acquiring Group) is not subject to the section 163(j) limitation during Acquiring Group's taxable year ending November 30, 2018. Any disallowed business interest expense carryforwards from Target's taxable year ending May 31, 2018, will not be available for use in Acquiring Group's taxable year ending November 30, 2018. However, that disallowed business interest expense is carried forward to Acquiring Group's taxable year beginning December 1, 2018, and can be deducted by the group, subject to the separate return limitation year (SRLY) limitation. See §1.163(j)-5(d).

(c) *Treatment of disallowed disqualified interest—(1) In general.* Disallowed disqualified interest is carried forward to the taxpayer's first taxable year beginning after December 31, 2017. Disallowed disqualified interest is subject to disallowance as a disallowed business interest expense carryforward under section 163(j) and §1.163(j)-2 to the extent the interest is properly allocable to a non-excepted trade or business under §1.163(j)-10. Disallowed disqualified interest that is properly allocable to an excepted trade or business is not subject to the section 163(j) limitation. See §1.163(j)-10(a)(6) for rules governing the allocation of disallowed disqualified interest between excepted and non-excepted trades or businesses.

(2) *Earnings and profits.* A taxpayer may not reduce its earnings and profits in a taxable year beginning after December 31, 2017, to reflect any disallowed disqualified interest carryforwards to the extent the payment or accrual of the disallowed disqualified interest reduced the earnings and profits of the taxpayer in a prior taxable year.

(3) *Disallowed disqualified interest of members of an affiliated group—(i) Scope.* This paragraph (c)(3)(i) applies to corporations that were treated as a single taxpayer under old section 163(j)(6)(C) and that had disallowed disqualified interest.

(ii) *Allocation of disallowed disqualified interest to members of the affiliated group*—(A) *In general.* Each member of the affiliated group is allocated its allocable share of the affiliated group's disallowed disqualified interest as provided in paragraph (c)(3)(ii)(B) of this section.

(B) *Definitions.* The following definitions apply for purposes of paragraph (c)(3)(ii) of this section.

(1) *Allocable share of the affiliated group's disallowed disqualified interest.* The term *allocable share of the affiliated group's disallowed disqualified interest* means, with respect to any member of an affiliated group for the member's last taxable year beginning before January 1, 2018, the product of the total amount of the disallowed disqualified interest of all members of the affiliated group under old section 163(j)(6)(C) and the member's disallowed disqualified interest ratio.

(2) *Disallowed disqualified interest ratio.* The term *disallowed disqualified interest ratio* means, with respect to any member of an affiliated group for the member's last taxable year beginning before January 1, 2018, the ratio of the exempt related person interest expense of the member for the last taxable year beginning before January 1, 2018, to the sum of the amounts of exempt related person interest expense for all members of the affiliated group.

(3) *Exempt related person interest expense.* The term *exempt related person interest expense* means interest expense that is, or is treated as, paid or accrued by a domestic C corporation, or by a foreign corporation with income, gain, or loss that is effectively connected, or treated as effectively connected, with the conduct of a trade or business in the United States, to—

(i) Any person related to the taxpayer, within the meaning of sections 267(b) or 707(b)(1), applying the constructive ownership and attribution rules of section 267(c), if no U.S. tax is imposed with respect to the interest under subtitle A of the Code, determined without regard to net operating losses or net operating loss carryovers, and taking into account any applicable treaty obligation of the United States. For this purpose, interest that is subject to a reduced rate of tax under any treaty obligation of the United States applicable to the recipient is treated as, in

part, subject to the statutory tax rate under sections 871 or 881 and, in part, not subject to tax, based on the proportion that the rate of tax under the treaty bears to the statutory tax rate. Thus, for purposes of section 163(j), if the statutory tax rate is 30 percent, and pursuant to a treaty U.S. tax is instead limited to a rate of 10 percent, two-thirds of the interest is considered interest not subject to U.S. tax under subtitle A of the Code;

(ii) A person that is not related to the taxpayer, within the meaning of section 267(b) or 707(b)(1), applying the constructive ownership and attribution rules of section 267(c), with respect to indebtedness on which there is a disqualified guarantee, within the meaning of paragraph (6)(D) of old section 163(j), of such indebtedness, and no gross basis U.S. tax is imposed with respect to the interest. For purposes of this paragraph (c)(3)(ii)(B)(3)(ii), a *gross basis U.S. tax* means any tax imposed by this subtitle A of the Code that is determined by reference to the gross amount of any item of income without any reduction for any deduction allowed by subtitle A of the Code. Interest that is subject to a gross basis U.S. tax that is eligible for a reduced rate of tax under any treaty obligation of the United States applicable to the recipient is treated as, in part, subject to the statutory tax rate under section 871 or 881 and, in part, not subject to a gross basis U.S. tax, based on the proportion that the rate of tax under the treaty bears to the statutory tax rate. Thus, for purposes of section 163(j), if the statutory tax rate is 30 percent, and pursuant to a treaty U.S. tax is instead limited to a rate of 10 percent, two-thirds of the interest is considered interest not subject to a gross basis U.S. tax under subtitle A of the Code; or

(iii) A REIT, directly or indirectly, to the extent that the domestic C corporation, or a foreign corporation with income, gain, or loss that is effectively connected, or treated as effectively connected, with the conduct of a trade or business in the United States, is a taxable REIT subsidiary, as defined in section 856(l), with respect to the REIT.

(iii) *Treatment of carryforwards.* The amount of disallowed disqualified interest allocated to a taxpayer pursuant to paragraph (c)(3)(ii) of this section is treated

in the same manner as described in paragraph (c)(1) of this section.

(4) *Application of section 382*—(i) *Ownership change occurring before November 13, 2020*—(A) *Pre-change loss.* For purposes of section 382(d)(3), unless the rules of §1.382-2(a)(7) apply, disallowed disqualified interest is not a pre-change loss under §1.382-2(a) subject to a section 382 limitation with regard to an ownership change on a change date occurring before November 13, 2020. But see section 382(h)(6)(B) (regarding built-in deduction items).

(B) *Loss corporation.* For purposes of section 382(k)(1), unless the rules of §1.382-2(a)(7) apply, disallowed disqualified interest is not a carryforward of disallowed interest described in section 381(c)(20) with regard to an ownership change on a change date occurring before November 13, 2020. But see section 382(h)(6) (regarding built-in deductions).

(ii) *Ownership change occurring on or after November 13, 2020*—(A) *Pre-change loss.* For rules governing the treatment of disallowed disqualified interest as a pre-change loss for purposes of section 382 with regard to an ownership change on a change date occurring on or after November 13, 2020, see §§1.382-2(a)(2) and 1.382-6(c)(3).

(B) *Loss corporation.* For rules governing when disallowed disqualified interest causes a corporation to be a loss corporation with regard to an ownership change occurring on or after November 13, 2020, see §1.382-2(a)(1)(i)(A).

(5) *Treatment of excess limitation from taxable years beginning before January 1, 2018.* No amount of excess limitation under old section 163(j)(2)(B) may be carried forward to taxable years beginning after December 31, 2017.

(6) *Example: Members of an affiliated group*—
(i) *Facts.* A, B, and C are calendar-year domestic C corporations that are members of an affiliated group (within the meaning of section 1504(a)) that was treated as a single taxpayer under old section 163(j)(6)(C) and the proposed regulations in this part under old section 163(j) (see formerly proposed §1.163(j)-5). For the taxable year ending December 31, 2017, the separately determined amounts of exempt related person interest expense of A, B, and C were \$0, \$600x, and \$150x, respectively (for a total of \$750x). The affiliated group has \$200x of disallowed disqualified interest in that year.

(ii) *Analysis.* The affiliated group's disallowed disqualified interest expense for the 2017 taxable year (\$200x) is allocated among A, B, and C based

on the ratio of each member's exempt related person interest expense to the group's exempt related person interest expense. Because A has no exempt related person interest expense, no disallowed disqualified interest is allocated to A. Disallowed disqualified interest of \$160x is allocated to B (($\$600x / \$750x$) x \$200x), and disallowed disqualified interest of \$40x is allocated to C (($\$150x / \$750x$) x \$200x). Thus, B and C have \$160x and \$40x, respectively, of disallowed disqualified interest that is carried forward to the first taxable year beginning after December 31, 2017. No excess limitation that was allocated to A, B, or C under old section 163(j) will carry forward to a taxable year beginning after December 31, 2017.

(iii) *Carryforward of disallowed disqualified interest to 2018 taxable year.* The facts are the same as in the *Example* in paragraph (c)(7)(i) of this section, except that, for the taxable year ending December 31, 2018, A, B, and C are members of a consolidated group that has a section 163(j) limitation of \$140x, current-year business interest expense (as defined in §1.163(j)-1(b)(9)) of \$80x, and no excepted trade or business. Under paragraph (c)(1) of this section, disallowed disqualified interest is carried to the taxpayer's first taxable year beginning after December 31, 2017, and is subject to disallowance under section 163(j) and §1.163(j)-2. Under §1.163(j)-5(b)(3)(ii)(D)(1), a consolidated group that has section 163(j) limitation remaining for the current year after deducting all current-year business interest expense deducts each member's disallowed disqualified interest carryforwards from prior taxable years, starting with the earliest taxable year, on a pro rata basis (subject to certain limitations). In accordance with paragraph (c)(1) of this section, the rule in §1.163(j)-5(b)(3)(ii)(D)(1) applies to disallowed disqualified interest carried forward to the taxpayer's first taxable year beginning after December 31, 2017. Accordingly, after deducting \$80x of current-year business interest expense in 2018, the group may deduct \$60x of its \$200x disallowed disqualified interest carryforwards. Under paragraph (c)(3) of this section, B has \$160x of disallowed disqualified interest carryforwards, and C has \$40x of disallowed disqualified interest carryforwards. Thus, \$48x (($\$160x / \$200x$) x \$60x) of B's disallowed disqualified interest carryforwards, and \$12x (($\$40x / \$200x$) x \$60x) of C's disallowed disqualified interest carryforwards, are deducted by the consolidated group in the 2018 taxable year.

(d) *Applicability date.* This section applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5,

1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.

Par. 4. Section 1.263A-9 is amended by revising the first and third sentences of paragraph (g)(1)(i) to read as follows:

§1.263A-9 The avoided cost method.

* * * * *

(g) * * *

(1) * * *

(i) * * * Interest must be capitalized under section 263A(f) before the application of section 163(d) (regarding the investment interest limitation), section 163(j) (regarding the limitation on business interest expense), section 266 (regarding the election to capitalize carrying charges), section 469 (regarding the limitation on passive losses), and section 861 (regarding the allocation of interest to United States sources). * * * However, in applying section 263A(f) with respect to the excess expenditure amount, the taxpayer must capitalize all interest that is neither investment interest under section 163(d), business interest expense under section 163(j), nor passive interest under section 469 before capitalizing any interest that is either investment interest, business interest expense, or passive interest. * * *

* * * * *

Par. 5. Section 1.263A-15 is amended by adding paragraph (a)(4) to read as follows:

§1.263A-15 Effective dates, transitional rules, and anti-abuse rules.

(a) * * *

(4) Section 1.263A-9(g)(1)(i) applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of that section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations (as defined in §1.163(j)-1(b)(37)), and, if applicable, §§1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5,

1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.

* * * * *

Par. 6. Section 1.381(c)(20)-1 is added to read as follows:

§1.381(c)(20)-1 Carryforward of disallowed business interest.

(a) *Carryover requirement.* Section 381(c)(20) provides that the acquiring corporation in a transaction described in section 381(a) will succeed to and take into account the carryover of disallowed business interest described in section 163(j)(2) to taxable years ending after the date of distribution or transfer.

(b) *Carryover of disallowed business interest described in section 163(j)(2).* For purposes of section 381(c)(20) and this section, the term *carryover of disallowed business interest described in section 163(j)(2)* means the disallowed business interest expense carryforward (as defined in §1.163(j)-1(b)(11)), including any disallowed disqualified interest (as defined in §1.163(j)-1(b)(12)), and including the distributor or transferor corporation's disallowed business interest expense from the taxable year that ends on the date of distribution or transfer. For the application of section 382 to disallowed business interest expense described in section 163(j)(2), see the regulations in this part under section 382 of the Code, including but not limited to §1.382-2.

(c) *Limitation on use of disallowed business interest expense carryforwards in the acquiring corporation's first taxable year ending after the date of distribution or transfer—(1) In general.* In determining the extent to which the acquiring corporation may use disallowed business interest expense carryforwards in its first taxable year ending after the date of distribution or transfer, the principles of §§1.381(c)(1)-1 and 1.381(c)(1)-2 apply with appropriate adjustments, including but not limited to the adjustments described in paragraphs (c)(2) and (3) of this section.

(2) *One date of distribution or transfer within the acquiring corporation's taxable year.* If the acquiring corporation succeeds to the disallowed business interest expense carryforwards of one or more distributor or transferor corporations on a single date of distribution or transfer within one taxable year of the acquiring corporation, then, for the acquiring corporation's first taxable year ending after the date of distribution or transfer, that part of the acquiring corporation's business interest expense deduction (if any) that is attributable to the disallowed business interest expense carryforwards of the distributor or transferor corporation is limited under this paragraph (c) to an amount equal to the post-acquisition portion of the acquiring corporation's section 163(j) limitation, as defined in paragraph (c)(4) of this section.

(3) *Two or more dates of distribution or transfer in the taxable year.* If the acquiring corporation succeeds to the disallowed business interest expense carryforwards of two or more distributor or transferor corporations on two or more dates of distribution or transfer within one taxable year of the acquiring corporation, the limitation to be applied under this paragraph (c) is determined by applying the principles of §1.381(c)(1)-2(b) to the post-acquisition portion of the acquiring corporation's section 163(j) limitation, as defined in paragraph (c)(4) of this section.

(4) *Definition.* For purposes of this paragraph (c), the term *post-acquisition portion of the acquiring corporation's section 163(j) limitation* means the amount that bears the same ratio to the acquiring corporation's section 163(j) limitation (within the meaning of §1.163(j)-1(b)(31)) (or, if the acquiring corporation is a member of a consolidated group, the consolidated group's section 163(j) limitation) for the first taxable year ending after the date of distribution or transfer (taking into account items to which the acquiring corporation succeeds under section 381, other than disallowed business interest expense carryforwards) as the number of days in that year after the date of distribution or transfer bears to the total number of days in that year.

(5) *Examples.* For purposes of this paragraph (c)(5), unless otherwise stated, X, Y, and Z are taxable domestic C corpo-

rations that were incorporated on January 1, 2021 and that file their tax returns on a calendar-year basis; none of X, Y, or Z is a member of a consolidated group; the small business exemption in §1.163(j)-2(d) does not apply; interest expense is deductible except to the extent of the potential application of section 163(j); and the facts set forth the only corporate activity. The principles of this paragraph (c) are illustrated by the following examples.

(i) *Example 1: Transfer before last day of acquiring corporation's taxable year—(A) Facts.* On October 31, 2022, X transferred all of its assets to Y in a statutory merger to which section 361 applies. For the 2021 taxable year, X had \$400x of disallowed business interest expense, and Y had \$0 of disallowed business interest expense. For the taxable year ending October 31, 2022, X had an additional \$350x of disallowed business interest expense (X did not deduct any of its 2021 carryforwards in its 2022 taxable year). For the taxable year ending December 31, 2022, Y had business interest expense of \$100x, business interest income of \$200x, and ATI of \$1,000x. Y's section 163(j) limitation for the 2022 taxable year was \$500x (\$200x + (30 percent x \$1,000x) = \$500x).

(B) *Analysis.* Pursuant to §1.163(j)-5(b)(2), Y deducts its \$100x of current-year business interest expense (as defined in §1.163(j)-1(b)(9)) before any disallowed business interest expense carryforwards (including X's carryforwards) from a prior taxable year are deducted. The aggregate disallowed business interest expense of X carried forward under section 381(c)(20) to Y's taxable year ending December 31, 2022, is \$750x. However, pursuant to paragraph (c)(2) of this section, for Y's first taxable year ending after the date of distribution or transfer, the maximum amount of X's disallowed business interest expense carryforwards that Y can deduct is equal to the post-acquisition portion of Y's section 163(j) limitation. Pursuant to paragraph (c)(4) of this section, the post-acquisition portion of Y's section 163(j) limitation means Y's section 163(j) limitation times the ratio of the number of days in the taxable year after the date of distribution or transfer to the total number of days in that year. Therefore, only \$84x of the aggregate amount (\$500x x (61/365) = \$84x) may be deducted by Y in that year, and the remaining \$666x (\$750x - \$84x = \$666x) is carried forward to the succeeding taxable year.

(C) *Transfer on last day of acquiring corporation's taxable year.* The facts are the same as in Example 1 in paragraph (c)(5)(i)(A) of this section, except that X's transfer of its assets to Y occurred on December 31, 2022. For the taxable year ending December 31, 2022, X had an additional \$350x of disallowed business interest expense (X did not deduct any of its 2021 carryforwards in its 2022 taxable year). For the taxable year ending December 31, 2023, Y had business interest expense of \$100x, business interest income of \$200x, and ATI of \$1,000x. Y's section 163(j) limitation for the 2023 taxable year was \$500x (\$200x + (30 percent x \$1,000x) = \$500x). The aggregate disallowed business interest expense of X carried under section 381(c)(20) to Y's

taxable year ending December 31, 2023, is \$750x. Paragraph (c)(2) of this section does not limit the amount of X's disallowed business interest expense carryforwards that may be deducted by Y in the 2023 taxable year. Since the amount of Y's section 163(j) limit for the 2023 taxable year was \$500x, Y may deduct the full amount (\$100x) of its own business interest expense for the 2023 taxable year, along with \$400x of X's disallowed business interest expense carryforwards.

(ii) *Example 2: Multiple transferors on same date—(A) Facts.* On October 31, 2022, X and Y transferred all of their assets to Z in statutory mergers to which section 361 applies. For the 2021 taxable year, X had \$300x of disallowed business interest expense, Y had \$200x, and Z had \$0. For the taxable year ending October 31, 2022, each of X and Y had an additional \$125x of disallowed business interest expense (neither X nor Y deducted any of its 2021 carryforwards in 2022). For the taxable year ending December 31, 2022, Z had business interest expense of \$100x, business interest income of \$200x, and ATI of \$1,000x. Z's section 163(j) limitation for the 2022 taxable year was \$500x (\$200x + (30 percent x \$1,000x) = \$500x).

(B) *Analysis.* The aggregate disallowed business interest expense of X and Y carried under section 381(c)(20) to Z's taxable year ending December 31, 2022, is \$750x. However, pursuant to paragraph (c)(2) of this section, only \$84x of the aggregate amount (\$500x x (61/365) = \$84x) may be deducted by Z in that year. Moreover, under paragraph (b)(2) of this section, this amount only may be deducted by Z in that year after Z has deducted its \$100x of current-year business interest expense (as defined in §1.163(j)-1(b)(9)).

(d) *Applicability date.* This section applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations (as defined in §1.163(j)-1(b)(37)), and, if applicable, §§1.263A-9, 1.263A-15, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.

Par. 7. Section 1.382-1 is amended by:

1. Adding an entry for §1.382-2(a)(1)(vi) and (a)(7) and (8);
2. Revising the entry for §1.382-2(b)(3);

3. Adding entries for §1.382-6(a)(1) and (2) and (b)(4);

4. Revising the entry for §1.382-6(h); and

5. Adding an entry for §1.382-7(c), (d), (d)(1) through (5), (e) through (g), and (g) (1) through (4).

The additions and revisions read as follows:

§1.382-1 Table of contents.

* * * * *

§1.382-2 General rules for ownership change.

(a) * * *

(1) * * *

(vi) Any section 382 disallowed business interest carryforward.

* * * * *

(7) Section 382 disallowed business interest carryforward.

(8) Testing period.

(b) * * *

(3) Rules provided in paragraphs (a)(1) (i)(A), (a)(1)(ii), (iv), and (v), (a)(2)(iv) through (vi), (a)(3)(i), and (a)(4) through (8) of this section.

* * * * *

§1.382-6 Allocation of income and loss to periods before and after the change date for purposes of section 382.

(a) * * *

(1) In general.

(2) Allocation of business interest expense.

(i) Scope.

(ii) Deductibility of business interest expense.

* * * * *

(b) * * *

(4) Allocation of business interest expense.

(i) Scope.

(ii) Deductibility of business interest expense.

(iii) Example.

* * * * *

(h) Applicability date.

(1) In general.

(2) Paragraphs (a) and (b)(1) and (4) of this section.

* * * * *

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* * * * *

(c) [Reserved]
(d) *Special rules.*
(1)-(4) [Reserved]
(5) Section 382 disallowed business interest carryforwards.

(e)-(f) [Reserved]
(g) *Applicability dates.*
(1)-(3) [Reserved]

(4) Paragraph (d)(5) of this section.

* * * * *

Par. 8. Section 1.382-2 is amended by:

1. Revising paragraph (a)(1)(i)(A);
2. Removing “, or” and adding “; or” in its place at the end of paragraph (a)(1)(i)(B);

3. Revising paragraphs (a)(1)(ii) introductory text and (a)(1)(ii)(A);

4. Removing “, and” and adding “; and” in its place at the end of paragraph (a)(1)(ii)(B);

5. Removing the last sentence in paragraphs (a)(1)(iv) and (v);

6. Removing the commas and adding semicolons in their place at the end of paragraphs (a)(2)(i) and (iii);

7. Removing the period and adding a semicolon in its place at the end of paragraph (a)(2)(ii);

8. Removing “, and” and adding a semicolon in its place at the end of paragraph (a)(2)(iv);

9. Removing the period and adding “; and” in its place at the end of paragraph (a)(2)(v);

10. Adding paragraph (a)(2)(vi);

11. Removing the last sentence in paragraphs (a)(3)(i), (a)(4)(i), and (a)(5) and (6);

12. Adding paragraphs (a)(7) and (8); and

13. Revising paragraph (b)(3).

The revisions and additions read as follows:

§1.382-2 General rules for ownership change.

(a) * * *

(1) * * *

(i) * * *

(A) Is entitled to use a net operating loss carryforward, a capital loss carryover, a carryover of excess foreign taxes under section 904(c), a carryforward of a general business credit under section 39, a carryover of a minimum tax credit under section 53, or a section 382 dis-

allowed business interest carryforward described in paragraph (a)(7) of this section;

* * * * *

(ii) *Distributor or transferor loss corporation in a transaction under section 381.* Notwithstanding that a loss corporation ceases to exist under state law, if its disallowed business interest expense carryforwards, net operating loss carryforwards, excess foreign taxes, or other items described in section 381(c) are succeeded to and taken into account by an acquiring corporation in a transaction described in section 381(a), such loss corporation will be treated as continuing in existence until—

(A) Any pre-change losses (excluding pre-change credits described in §1.383-1(c)(3)), determined as if the date of such transaction were the change date, are fully utilized or expire under section 163(j), 172, or 1212;

* * * * *

(2) * * *

(vi) Any section 382 disallowed business interest carryforward.

* * * * *

(7) *Section 382 disallowed business interest carryforward.* The term *section 382 disallowed business interest carryforward* includes the following items:

(i) The loss corporation’s disallowed business interest expense carryforwards (as defined in §1.163(j)-1(b)(11)), including disallowed disqualified interest (as defined in §1.163(j)-1(b)(12)), as of the date of the ownership change.

(ii) The loss corporation’s current-year business interest expense (as defined in §1.163(j)-1(b)(9)) in the change year (as defined in §1.382-6(g)(1)) that is allocable to the pre-change period (as defined in §1.382-6(g)(2)) under §1.382-6(a) or (b) and that becomes disallowed business interest expense (as defined in §1.163(j)-1(b)(10)).

(8) *Testing period.* Notwithstanding the temporal limitations provided in §1.382-2T(d)(3)(i), the testing period for a loss corporation can begin as early as the first day of the first taxable year from which there is a section 382 disallowed business interest carryforward to the first taxable year ending after the testing date.

(b) * * *

(3) Rules provided in paragraphs (a)(1)(i)(A), (a)(1)(ii), (iv), and (v), (a)(2)(iv) through (vi), (a)(3)(i), and (a)(4) through (8) of this section. The rules provided in paragraphs (a)(1)(i)(A), (a)(1)(ii), (iv), and (v), (a)(2)(iv) through (vi), (a)(3)(i), and (a)(4) through (8) of this section apply to testing dates occurring on or after November 13, 2020. For loss corporations that have testing dates occurring before November 13, 2020, see §1.382-2 as contained in 26 CFR part 1, revised April 1, 2019. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to testing dates occurring during a taxable year beginning after December 31, 2017, and before November 13, 2020, so long as the taxpayers and their related parties consistently apply the rules of this section, the section 163(j) regulations (as defined in §1.163(j)-1(b)(37)), §§1.382-1, 1.382-5, 1.382-6, 1.382-7, 1.383-0, and 1.383-1, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.

Par. 9. Section 1.382-5 is amended by revising the first and second sentences of paragraph (d)(1) and by adding three sentences to the end of paragraph (f) to read as follows:

§1.382-5 Section 382 limitation.

* * * * *

(d) * * *

(1) * * * If a loss corporation has two (or more) ownership changes, any losses or section 382 disallowed business interest carryforwards ((within the meaning of §1.382-2(a)(7)) attributable to the period preceding the earlier ownership change are treated as pre-change losses with respect to both ownership changes. Thus, the later ownership change may result in a lesser (but never in a greater) section 382 limitation with respect to such pre-change losses. * * *

* * * * *

(f) * * * Paragraph (d)(1) of this section applies with respect to an ownership change occurring on or after November 13, 2020. For loss corporations that have undergone an ownership change before or after November 13, 2020, see §1.382-5 as contained in 26 CFR part 1, revised April 1, 2019. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to testing dates occurring during a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of this section, the section 163(j) regulations (as defined in §1.163(j)-1(b)(37)), §§1.382-1, 1.382-5, 1.382-6, 1.382-7, 1.383-0, and 1.383-1, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.

Par. 10. Section 1.382-6 is amended by:

1. Redesignating the text of paragraph (a) as paragraph (a)(1);
2. Adding a subject heading to newly redesignated paragraph (a)(1);
3. Adding paragraph (a)(2);
4. Removing the language “Subject to paragraphs (b)(3)(ii) and (d)” in the first sentence of paragraph (b)(1) and adding “Subject to paragraphs (b)(3)(ii), (b)(4), and (d)” in its place;
5. Adding paragraph (b)(4); and
6. Revising paragraph (h).

The additions and revision read as follows:

§1.382-6 Allocation of income and loss to periods before and after the change date for purposes of section 382.

(a) * * *

(1) *In general.* * * *

(2) *Allocation of business interest expense—(i) Scope.* Except as provided in paragraph (b)(4) of this section, this paragraph (a)(2) applies if a loss corporation has business interest expense (as defined in §1.163(j)-1(b)(3)) in the change year. The rules of this paragraph (a)(2) apply to determine the amount of current-year business interest expense (as defined in

§1.163(j)-1(b)(9)) that is deducted in the change year. These rules also apply to determine the amount of any current-year business interest expense that is characterized as disallowed business interest expense (as defined in §1.163(j)-1(b)(10)) allocable to the pre-change period and the post-change period, and to allocate disallowed business interest expense carryforwards (as defined in §1.163(j)-1(b)(11)) to the change year for deduction in the pre-change period and the post-change period.

(ii) *Deductibility of business interest expense.* The rules of this paragraph (a)(2)(ii) apply in the following order.

(A) First, the loss corporation calculates its section 163(j) limitation (as defined in §1.163(j)-1(b)(36)) for the change year.

(B) Second, the loss corporation calculates its deductible current-year BIE and deducts this amount in determining its taxable income or net operating loss for the change year. For purposes of this paragraph (a)(2)(ii), the term *deductible current-year BIE* means the loss corporation’s current-year business interest expense (including its floor plan financing interest expense, as defined in §1.163(j)-1(b)(19)), to the extent of its section 163(j) limitation.

(C) Third, if the loss corporation has disallowed business interest expense paid or accrued (without regard to section 163(j)) in the change year that is carried forward to post-change years, it allocates an equal portion of that disallowed business interest expense to each day in the change year. Any amount of disallowed business interest expense that is allocated to the pre-change period pursuant to this paragraph (a)(2)(ii)(C) is carried forward subject to section 382(d)(3). Any amount of disallowed business interest expense that is allocated to the post-change period pursuant to this paragraph (a)(2)(ii)(C) is carried forward and is not subject to section 382(d)(3).

(D) Fourth, if the loss corporation has excess section 163(j) limitation, then the loss corporation calculates its deductible disallowed business interest expense carryforward and allocates an equal portion to each day in the change year. For purposes of this paragraph (a)(2)(ii), the term *excess section 163(j) limitation* means the excess, if any, of the loss cor-

poration's section 163(j) limitation over its deductible current-year BIE, and the term *deductible disallowed business interest expense carryforward* means the loss corporation's disallowed business interest expense carryforward to the extent of its excess section 163(j) limitation.

(E) Fifth, the loss corporation deducts its deductible disallowed business interest expense carryforward that was allocated to the pre-change period under paragraph (a)(2)(ii)(D) of this section. Subject to the application of sections 382(b)(3)(B) and 382(d)(3), the loss corporation deducts its deductible disallowed business interest expense carryforward that was allocated to the post-change period under paragraph (a)(2)(ii)(D) of this section. Any amount of disallowed business interest expense carryforward that is not deducted pursuant to this paragraph (a)(2)(ii)(E) is carried forward subject to section 382(d)(3).

* * * *

(b) * * *

(4) *Allocation of business interest expense*—(i) *Scope*. This paragraph (b)(4) applies if a loss corporation makes a closing-of-the-books election pursuant to paragraph (b) of this section and has business interest expense in the change year. The rules of this paragraph (b)(4) apply to determine the amount of deductible current-year business interest expense that is allocable to the pre-change period and the post-change period for purposes of the allocations referred to in paragraph (b)(1) of this section. These rules also apply to determine the amount of any current-year business interest expense that is characterized as disallowed business interest expense allocable to the pre-change period and the post-change period, and to allocate disallowed business interest expense carryforwards to the change year between the pre-change period and the post-change period for deduction.

(ii) *Deductibility of business interest expense*. The rules of this paragraph (b)(4)(ii) apply in the order provided.

(A) The loss corporation calculates its ATI limit, which is the product of its ATI (as defined in §1.163(j)-1(b)(1)) for the change year and 30 percent. For purposes of this paragraph (b)(4)(ii), the terms *pre-change ATI limit* and *post-change*

ATI limit mean the amount of ATI limit allocated to the pre-change period or the post-change period, respectively, computed by allocating an equal portion of the ATI limit to each day in the change year.

(B) Pursuant to paragraph (b)(1) of this section, the loss corporation allocates its current-year business interest expense (including its floor plan financing interest expense) and its business interest income (as defined in §1.163(j)-1(b)(4)) to the pre-change and post-change periods as if the loss corporation's books were closed on the change date. For purposes of this paragraph (b)(4)(ii), the terms *pre-change BIE* and *post-change BIE* mean the amount of the loss corporation's current-year business interest expense that is allocated to the pre-change period or the post-change period, respectively, under this paragraph (b)(4)(ii)(B).

(C) The loss corporation deducts its pre-change BIE to the extent of its pre-change section 163(j) limit, and the loss corporation deducts its post-change BIE to the extent of its post-change section 163(j) limit. For purposes of this paragraph (b)(4)(ii), the term *pre-change section 163(j) limit* means the sum of the pre-change ATI and the amount of business interest income and floor plan financing interest expense allocated to the pre-change period; the term *post-change section 163(j) limit* means the sum of the post-change ATI limit and the amount of business interest income and floor plan financing interest expense allocated to the post-change period.

(D) If any pre-change BIE or post-change BIE has not been deducted under paragraph (b)(4)(ii)(C) of this section, the loss corporation deducts either any pre-change BIE that has not been deducted to the extent of its surplus post-change section 163(j) limit or any post-change BIE that has not been deducted to the extent of its surplus pre-change section 163(j) limit. For purposes of this paragraph (b)(4)(ii), the term *surplus pre-change section 163(j) limit* means the amount by which the pre-change section 163(j) limit exceeds the amount of pre-change BIE deducted pursuant to paragraph (b)(4)(ii)(C) of this section; the term *surplus post-change section 163(j) limit* means the amount by which the post-change section 163(j) limit

exceeds the amount of post-change BIE deducted pursuant to paragraph (b)(4)(ii)(C) of this section.

(E) If the loss corporation has any excess pre-change section 163(j) limit or excess post-change section 163(j) limit, the loss corporation allocates its disallowed business interest expense carryforward, if any, ratably between the pre-change and post-change periods based upon the relative amounts of excess pre-change section 163(j) limit and excess post-change section 163(j) limit. For purposes of this paragraph (b)(4)(ii), the term *excess pre-change section 163(j) limit* means the amount by which the surplus pre-change section 163(j) limit exceeds the amount of post-change BIE deducted pursuant to paragraph (b)(4)(ii)(D) of this section; the term *excess post-change section 163(j) limit* means the amount by which the surplus post-change section 163(j) limit exceeds the amount of pre-change BIE deducted pursuant to paragraph (b)(4)(ii)(D) of this section.

(F) The loss corporation deducts its disallowed business interest expense carryforward that was allocated to the pre-change period under paragraph (b)(4)(ii)(E) of this section to the extent of its excess pre-change section 163(j) limit. Subject to the application of sections 382(b)(3)(B) and 382(d)(3), the loss corporation deducts its disallowed business interest expense carryforward that was allocated to the post-change period under paragraph (b)(4)(ii)(E) of this section to the extent of its excess post-change section 163(j) limit. Any amount of disallowed business interest expense carryforward that is not deducted pursuant to this paragraph (b)(4)(ii)(F) is subject to section 382(d)(3) irrespective of the period to which it was allocated pursuant to paragraph (b)(4)(ii)(E) of this section.

(iii) *Example 1—(A) Facts*. X is a calendar-year domestic C corporation that is not a member of a consolidated group. As of January 1, 2021, X has no disallowed business interest expense carryforwards. On October 19, 2021, X experiences an ownership change under section 382(g). For calendar year 2021, X's ATI is \$500. For the period beginning on January 1, 2021 and ending on October 19, 2021, X pays or accrues \$250 of current-year business interest expense that is deductible but for the potential application of section 163(j), including \$50 of floor plan financing interest expense, and X has \$60 of business interest income. For the period beginning on October 20, 2021 and ending on December 31,

2021, X pays or accrues \$100 of current-year business interest expense that is deductible but for the potential application of section 163(j), including \$40 of floor plan financing interest expense, and X has \$70 of business interest income. X makes a closing-of-the-books election pursuant to paragraph (b) of this section.

(B) *Analysis—(1) Calculation and allocation of ATI limit.* For purposes of allocating its net operating loss or taxable income for the change year between the pre-change period and the post-change period under §1.382-6, X applies paragraph (b)(4) of this section to allocate items related to section 163(j). X's ATI for calendar year 2021 is \$500x. Therefore, pursuant to paragraph (b)(4)(ii)(A) of this section, X's ATI limit is \$150 (\$500 x 30 percent). Additionally, pursuant to paragraph (b)(4)(ii)(A) of this section, X's pre-change ATI limit is \$120 (\$150 x (292 days / 365 days)), and X's post-change ATI limit is \$30 (\$150 x (73 days / 365 days)).

(2) *Determination of pre-change BIE and post-change BIE.* Pursuant to paragraph (b)(4)(ii)(B) of this section, X's pre-change BIE and post-change BIE are \$250 and \$100, respectively.

(3) *Determination of pre-change section 163(j) limit and post-change section 163(j) limit.* Pursuant to paragraph (b)(4)(ii)(C) of this section, X's pre-change section 163(j) limit is \$230 (\$120 (X's pre-change ATI limit) + \$60 (X's business interest income allocated to the pre-change period) + \$50 (X's floor plan financing interest expense allocated to the pre-change period)). Additionally, pursuant to paragraph (b)(4)(ii)(C) of this section, X's post-change section 163(j) limit is \$140 (\$30 (X's post-change ATI limit) + \$70 (X's business interest income allocated to the post-change period) + \$40 (X's floor plan financing interest expense allocated to the post-change period)).

(4) *Initial deduction of BIE.* Pursuant to paragraph (b)(4)(ii)(C) of this section, X deducts \$230 (its pre-change section 163(j) limit) of its \$250 pre-change BIE and all \$100 (less than its \$140 post-change section 163(j) limit) of its post-change BIE.

(5) *Deduction of BIE due to surplus post-change section 163(j) limit.* After applying paragraph (b)(4)(ii)(C) of this section, X has \$20 of pre-change BIE that has not been deducted (\$250 - \$230) and a surplus post-change section 163(j) limit of \$40 (\$140 - \$100). As a result, pursuant to paragraph (b)(4)(ii)(D) of this section, X deducts its remaining \$20 of pre-change BIE. (If, after applying paragraph (b)(4)(ii)(C) of this section, X instead had \$20 of post-change BIE that had not yet been deducted and a \$40 surplus pre-change section 163(j) limit, then X would deduct its remaining \$20 of post-change BIE pursuant to paragraph (b)(4)(ii)(D) of this section.)

(iv) *Example 2—Potential deduction of disallowed business interest expense carryforwards.* The facts are the same as in paragraph (b)(4)(iii)(A) of this section, except that, as of January 1, 2021, X has \$90 of disallowed business interest expense carryforwards and \$150 (rather than \$250) of pre-change BIE. X's pre-change section 163(j) limit and post-change section 163(j) limit are the same as in paragraph (b)(4)(iii)(B)(3) of this section. Pursuant to paragraph (b)(4)(ii)(C) of this section, X deducts all \$150 of its pre-change BIE and all \$100 of its post-change BIE. X has no

remaining pre-change BIE or post-change BIE to deduct under paragraph (b)(4)(ii)(D) of this section. Paragraph (b)(4)(ii)(E) of this section applies because X has \$80 of excess pre-change section 163(j) limit (\$230 - \$150) and \$40 of excess post-change section 163(j) limit (\$140 - \$100). Under paragraph (b)(4)(ii)(E) of this section, X allocates \$60 of its disallowed business interest expense carryforwards to the pre-change period ($\$90 \times (\$80 / (\$80 + \$40))$) and \$30 of its disallowed business interest expense carryforwards to the post-change period ($\$90 \times (\$40 / (\$80 + \$40))$). As provided in paragraph (b)(4)(ii)(F) of this section, X deducts all \$60 of its disallowed business interest expense carryforwards that are allocated to the pre-change period; subject to the application of section 382, X deducts all \$30 of its disallowed business interest expense carryforwards that are allocated to the post-change period.

* * * *

(h) *Applicability date—(1) In general.* This section applies to ownership changes occurring on or after June 22, 1994.

(2) *Ownership changes.* Paragraphs (a) and (b)(1) and (4) of this section apply with respect to an ownership change occurring during a taxable year beginning on or after November 13, 2020. For ownership changes occurring during a taxable year beginning before November 13, 2020, see §1.382-6 as contained in 26 CFR part 1, revised April 1, 2019. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of paragraph (d)(5) of this section to testing dates occurring during a taxable year beginning after December 31, 2017.

(d) *Special rules.* This paragraph (d) contains special rules regarding the identification of recognized built-in losses.

(1)-(4) [Reserved]

(5) *Section 382 disallowed business interest carryforwards.* Section 382 disallowed business interest carryforwards are not treated as recognized built-in losses.

(e)-(f) [Reserved]

(g) *Applicability dates.*

(1)-(3) [Reserved]

(4) *Paragraph (d)(5) of this section.*

Paragraph (d)(5) of this section applies with respect to an ownership change occurring on or after November 13, 2020. For loss corporations that have undergone an ownership change before or after November 13, 2020, see §1.382-7 as contained in 26 CFR part 1, revised April 1, 2019. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of paragraph (d)(5) of this section to testing dates occurring during a taxable year beginning after December 31, 2017.

Par. 12. Section 1.383-0 is amended by revising paragraph (a) to read as follows:

§1.383-0 Effective date.

(a) The regulations in this part under section 383 of the Code (other than the regulations described in paragraph (b) of this section) reflect the amendments made to sections 382 and 383 by the Tax Reform Act of 1986 and the amendments made to section 382 by Public Law No. 115-97 (2017). See §1.383-1(j) for effective date rules.

* * * *

Par. 13. Section 1.383-1 is amended by:

1. In paragraph (a):
 - a. Adding entries for paragraphs (d)(1) (i) and (ii);
 - b. Revising the entries for paragraphs (e)(3) and (j);
 - c. Adding entries for paragraphs (j)(1) and (2); and
 - d. Removing the entry for paragraph (k).
2. Removing “(iv)” and adding “(v)” in its place in paragraph (c)(6)(i)(B).
3. Revising paragraphs (c)(6)(ii) and (d)(1).
4. Removing the commas and adding semicolons in their place at ends of paragraphs (d)(2)(i), (ii), and (vi).
5. Revising paragraph (d)(2)(iii).

6. Redesignating paragraphs (d)(2)(iv) through (vii) as paragraphs (d)(2)(v) through (viii), respectively.

7. Adding a new paragraph (d)(2)(iv).

8. Revising newly redesignated paragraph (d)(2)(v) and paragraph (d)(3)(ii).

9. Removing “(iv)” and adding “(v)” in its place in paragraph (e)(1).

10. In paragraph (e)(2):

a. Removing “sections 11(b)(2) and (15)” and adding “section 15” in its place in the fourth sentence; and

b. Removing the last two sentences.

11. Removing and reserving paragraph (e)(3).

12. In paragraph (f):

a. Removing *Example 4*;

b. Designating *Examples 1* through *3* as paragraphs (f)(1) through (3), respectively; and

c. Revising newly designated paragraphs (f)(2) and (3).

13. In the last sentence of paragraph (g), removing “(e.g., 0.34 for taxable years beginning in 1989)”.

14. In paragraph (j):

a. Revising the subject heading;

b. Designating the text of paragraph (j) as paragraph (j)(1) and adding a heading to newly designated paragraph (j)(1); and

c. Adding paragraph (j)(2).

15. Removing paragraph (k).

The revisions and additions read as follows:

§1.383-1 Special limitations on certain capital losses and excess credits.

(a) * * *

* * * * *

(d) * * *

(1) * * *

(i) In general.

(ii) Ordering rule for losses or credits from same taxable year.

* * * * *

(e) * * *

(3) [Reserved]

* * * * *

(j) Applicability date.

(1) In general.

(2) Interaction with section 163(j).

* * * * *

(c) * * *

(6) * * *

(ii) *Example.* L, a new loss corporation, is a calendar-year taxpayer. L has an ownership change on December 31, 2021. For 2022, L has taxable income (prior to the use of any pre-change losses) of \$100,000. In addition, L has a section 382 limitation of \$25,000, a pre-change net operating loss carry-over of \$12,000, a pre-change general business credit carryforward under section 39 of \$50,000, and no items described in §1.383-1(d)(2)(i) through (iv). L’s section 383 credit limitation for 2022 is the excess of its regular tax liability computed after allowing a \$12,000 net operating loss deduction (taxable income of \$88,000; regular tax liability of \$18,480), over its regular tax liability computed after allowing an additional deduction in the amount of L’s section 382 limitation remaining after the application of paragraphs (d)(2)(i) through (v) of this section, or \$13,000 (taxable income of \$75,000; regular tax liability of \$15,750). L’s section 383 credit limitation is therefore \$2,730 (\$18,480 minus \$15,750).

(d) * * *

(1) *In general—(i) General rule.* The amount of taxable income of a new loss corporation for any post-change year that may be offset by pre-change losses shall not exceed the amount of the section 382 limitation for the post-change year. The amount of the regular tax liability of a new loss corporation for any post-change year that may be offset by pre-change credits shall not exceed the amount of the section 383 credit limitation for the post-change year.

(ii) *Ordering rule for losses or credits from same taxable year.* A loss corporation’s taxable income is offset first by losses subject to a section 382 limitation, to the extent the section 382 limitation for that taxable year has not yet been absorbed, before being offset by losses of the same type from the same taxable year that are not subject to a section 382 limitation. For example, assume that Corporation X has an ownership change in Year 1 and carries over disallowed business interest expense as defined in §1.163(j)-1(b)(10), some of which constitutes a section 382 disallowed business interest carryforward, from Year 1 to Year 2. To the extent of its section 163(j) limitation, as defined in §1.163(j)-1(b)(36), and its remaining section 382 limitation, Corporation X offsets its Year 2 income with the section 382 disallowed business interest carryforward before using any of the disallowed business interest expense that is not a section 382 disallowed business interest carryforward. Similar principles apply to the use of tax credits.

(2) * * *

(iii) Pre-change losses that are described in §1.382-2(a)(2)(iii), other than losses that are pre-change capital losses, that are recognized and are subject to the section 382 limitation in such post-change year;

(iv)(A) With respect to an ownership change date occurring prior to November 13, 2020, but during the taxable year which includes November 13, 2020, the pre-change loss described in section 382(d)(3);

(B) With respect to an ownership change date occurring on or after November 13, 2020, section 382 disallowed business interest carryforwards (within the meaning of §1.382-2(a)(7));

(v) Pre-change losses not described in paragraphs (d)(2)(i) through (iv) of this section;

* * * * *

(3) * * *

(ii) *Example.* L, a calendar-year taxpayer, has an ownership change on December 31, 2021. For 2022, L has taxable income of \$300,000 and a regular tax liability of \$63,000. L has no pre-change losses, but it has a business credit carryforward from 2020 of \$25,000. L has a section 382 limitation for 2022 of \$50,000. L’s section 383 credit limitation is \$10,500, an amount equal to the excess of L’s regular tax liability (\$63,000) over its regular tax liability calculated by allowing an additional deduction of \$50,000 (\$52,500). Pursuant to the limitation contained in section 38(c), however, L is entitled to use only \$9,500 ((\\$63,000 - \\$25,000) x 25 percent) of its business credit carryforward in 2022. The unabsorbed portion of L’s section 382 limitation, \$1,000 (computed pursuant to paragraph (e) of this section), is carried forward under section 382(b)(2). The unused portion of L’s business credit carryforward, \$14,500, is carried forward to the extent provided in section 39.

* * * * *

(f) * * *

(2) *Example 2—(i) Facts.* L, a calendar-year taxpayer, has an ownership change on December 31, 2021. For 2022, L has \$750,000 of ordinary taxable income (before the application of carryovers) and a section 382 limitation of \$1,500,000. L’s only carryovers are from pre-2021 taxable years and consist of a \$500,000 net operating loss (NOL) carryover, and a \$200,000 foreign tax credit carryover (all of which may be used under the section 904 limitation). The NOL carryover is a pre-change loss, and the foreign tax credit carryover is a pre-change credit. L has no other pre-change losses or credits that can be used in 2022.

(ii) *Analysis.* The following computation illustrates the application of this section for 2022:

Table 1 to paragraph (f)(2)(ii)

1. Taxable income before carryovers	\$750,000
2. Pre-change NOL carryover	\$500,000
3. Section 382 limitation	\$1,500,000
4. Amount of pre-change NOL carryover that can be used (least of line 1, 2, or 3)	\$500,000
5. Taxable income (line 1 minus line 4)	\$250,000
6. Section 382 limitation remaining (line 3 minus line 4)	\$1,000,000
7. Pre-change credit carryover	\$200,000
8. Regular tax liability (line 5 x section 11 rates)	\$52,500
9. Modified tax liability (line 5 minus line 6 (but not less than zero) x section 11 rates)	\$0
10. Section 383 credit limitation (line 8 minus line 9)	\$52,500
11. Amount of pre-change credits that can be used in 2022 (lesser of line 7 or line 10)	\$52,500
12. Amount of pre-change credits to be carried over to 2023 under section 904(c) (line 7 minus line 11)	\$147,500
13. Section 383 credit reduction amount: \$52,500/0.21	\$250,000
14. Section 382 limitation to be carried to 2023 under section 382(b)(2) (line 6 minus line 13)	\$750,000

(3) *Example 3—(i) Facts.* L, a calendar-year taxpayer, has an ownership change on December 31, 2021. L has \$80,000 of ordinary taxable income (before the application of carryovers) and a section 382 limitation of \$25,000 for 2022, a post-change year.

L's only carryover is from a pre-2021 taxable year and is a general business credit carryforward under section 39 in the amount of \$10,000 (no portion of which is attributable to the investment tax credit under section 46). The general business credit carryfor-

ward is a pre-change credit. L has no other credits which can be used in 2022.

(ii) *Analysis.* The following computation illustrates the application of this section:

Table 2 to paragraph (f)(3)(ii)

1. Taxable income before carryovers	\$80,000
2. Section 382 limitation	\$25,000
3. Pre-change credit carryover	\$10,000
4. Regular tax liability (line 1 x section 11 rates)	\$16,800
5. Modified tax liability ((line 1 minus line 2) x section 11 rates)	\$11,550
6. Section 383 credit limitation (line 4 minus line 5)	\$5,250
7. Amount of pre-change credits that can be used (lesser of line 3 or line 6)	\$5,250
8. Amount of pre-change credits to be carried over to 2023 under sections 39 and 382(l)(2) (line 3 minus line 7)	\$4,750
9. Regular tax payable (line 4 minus line 7)	\$11,550
10. Section 383 credit reduction amount: \$5,250/0.21	\$25,000
11. Section 382 limitation to be carried to 2023 under section 382(b)(2) (line 2 minus line 10)	\$0

* * * * *

(j) *Applicability date—(1) In general.*

(2) *Interaction with section 163(j).* Paragraphs (c)(6)(i)(B) and (c)(6)(ii), (d)(1), (d)(2)(iii) through (viii), (d)(3)(ii), (e)(1) through (3), (f), and (g) of this section apply with respect to ownership changes occurring during a taxable year beginning on or after November 13, 2020. For loss corporations that have undergone an ownership change during a taxable year beginning before November 13, 2020, see §1.383-1 as contained in 26 CFR part 1, revised April 1, 2019. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)

(1), may choose to apply the rules of this section to an ownership change occurring during a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply either the rules of this section (except paragraph (d)(2)(iv)(B) of this section), the section 163(j) regulations (as defined in §1.163(j)-1(b)(37)) and §§1.382-1, 1.382-2, 1.382-5, 1.382-6, and 1.383-0, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, 1.382-7, and 1.383-1), and 1.1504-4, to those ownership changes.

Par. 14. Section 1.446-3 is amended by revising paragraphs (g)(4) and (j)(2) to read as follows:

§1.446-3 Notional principal contracts.

* * * *

(g) * * *

(4) *Swaps with significant nonperiodic payments*—(i) *General rule*. Except as provided in paragraph (g)(4)(ii) of this section, a swap with significant nonperiodic payments is treated as two separate transactions consisting of an on-market, level payment swap and a loan. The loan must be accounted for by the parties to the contract independently of the swap. The time value component associated with the loan, determined in accordance with paragraph (f)(2)(iii)(A) of this section, is recognized as interest expense to the payor and interest income to the recipient.

(ii) *Exception for cleared swaps and non-cleared swaps subject to margin or collateral requirements*. Paragraph (g)(4)(i) of this section does not apply to a swap if the contract is described in paragraph (g)(4)(ii)(A) or (B) of this section.

(A) The swap is cleared by a derivatives clearing organization, as such term is defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a), or by a clearing agency, as such term is defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), that is registered as a derivatives clearing organization under the Commodity Exchange Act or as a clearing agency under the Securities Exchange Act of 1934, respectively, and the derivatives clearing organization or clearing agency requires the parties to the swap to post and collect margin or collateral.

(B) The swap is a non-cleared swap that requires the parties to meet the margin or collateral requirements of a federal regulator or that provides for margin or collateral requirements that are substantially similar to a cleared swap or a non-cleared swap subject to the margin or collateral requirements of a federal regulator. For purposes of this paragraph (g)(4)(ii)(B), the term *federal regulator* means the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), or a prudential regulator, as defined in section 1a(39) of the Commodity Exchange Act (7 U.S.C. 1a), as amended by section 721 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law No. 111-203, 124 Stat. 1376, Title VII.

(iii) *Coordination with section 163(j)*. For the treatment of swaps with significant nonperiodic payments under section 163(j), see §1.163(j)-1(b)(22)(ii).

* * * *

(j) * * *

(2) The rules provided in paragraph (g)(4) of this section apply to notional principal contracts entered into on or after September 14, 2021. Taxpayers may choose to apply the rules provided in paragraph (g)(4) of this section to notional principal contracts entered into before September 14, 2021.

Par. 15. Section 1.469-9 is amended by revising paragraph (b)(2) to read as follows:

§1.469-9 Rules for certain rental real estate activities.

* * * *

(b) * * *

(2) *Real property trade or business*.

The following terms have the following meanings in determining whether a trade or business is a real property trade or business for purposes of section 469(c)(7)(C) and this section.

(i) *Real property*—(A) *In general*. The term *real property* includes land, buildings, and other inherently permanent structures that are permanently affixed to land. Any interest in real property, including fee ownership, co-ownership, a leasehold, an option, or a similar interest is real property under this section. Tenant improvements to land, buildings, or other structures that are inherently permanent or otherwise classified as real property under this section are real property for purposes of section 469(c)(7)(C). However, property manufactured or produced for sale that is not real property in the hands of the manufacturer or producer, but that may be incorporated into real property through installation or any similar process or technique by any person after the manufacture or production of such property (for example, bricks, nails, paint, and windowpanes), is not treated as real property in the hands of any person (including any person involved in the manufacture, production, sale, incorporation or installation of such property) prior to the completed incorporation or installation of such property into the real prop-

erty for purposes of section 469(c)(7)(C) and this section.

(B) *Land*. The term *land* includes water and air space superjacent to land and natural products and deposits that are unsevered from the land. Natural products and deposits, such as plants, crops, trees, water, ores, and minerals, cease to be real property when they are harvested, severed, extracted, or removed from the land. Accordingly, any trade or business that involves the cultivation and harvesting of plants, crops, or certain types of trees in a farming operation as defined in section 464(e), or severing, extracting, or removing natural products or deposits from land is not a real property trade or business for purposes of section 469(c)(7)(C) and this section. The storage or maintenance of severed or extracted natural products or deposits, such as plants, crops, trees, water, ores, and minerals, in or upon real property does not cause the stored property to be recharacterized as real property, and any trade or business relating to or involving such storage or maintenance of severed or extracted natural products or deposits is not a real property trade or business, even though such storage or maintenance otherwise may occur upon or within real property.

(C) *Inherently permanent structure*. The term *inherently permanent structure* means any permanently affixed building or other permanently affixed structure. If the affixation is reasonably expected to last indefinitely, based on all the facts and circumstances, the affixation is considered permanent. However, an asset that serves an active function, such as an item of machinery or equipment (for example, HVAC system, elevator or escalator), is not a building or other inherently permanent structure, and therefore is not real property for purposes of section 469(c)(7)(C) and this section, even if such item of machinery or equipment is permanently affixed to or becomes incorporated within a building or other inherently permanent structure. Accordingly, a trade or business that involves the manufacture, installation, operation, maintenance, or repair of any asset that serves an active function will not be a real property trade or business, or a unit or component of another real property trade or business, for purposes of section 469(c)(7)(C) and this section.

(D) *Building*—(1) *In general.* A building encloses a space within its walls and is generally covered by a roof or other external upper covering that protects the walls and inner space from the elements.

(2) *Types of buildings.* Buildings include the following assets if permanently affixed to land: houses; townhouses; apartments; condominiums; hotels; motels; stadiums; arenas; shopping malls; factory and office buildings; warehouses; barns; enclosed garages; enclosed transportation stations and terminals; and stores.

(E) *Other inherently permanent structures*—(1) *In general.* Other inherently permanent structures include the following assets if permanently affixed to land: parking facilities; bridges; tunnels; roadbeds; railroad tracks; pipelines; storage structures such as silos and oil and gas storage tanks; and stationary wharves and docks.

(2) *Facts and circumstances determination.* The determination of whether an asset is an inherently permanent structure is based on all the facts and circumstances. In particular, the following factors must be taken into account:

(i) The manner in which the asset is affixed to land and whether such manner of affixation allows the asset to be easily removed from the land;

(ii) Whether the asset is designed to be removed or to remain in place indefinitely on the land;

(iii) The damage that removal of the asset would cause to the asset itself or to the land to which it is affixed;

(iv) Any circumstances that suggest the expected period of affixation is not indefinite (for example, a lease that requires or permits removal of the asset from the land upon the expiration of the lease); and

(v) The time and expense required to move the asset from the land.

(ii) *Other definitions*—(A) through (G) [Reserved]

(H) *Real property operation.* The term *real property operation* means handling, by a direct or indirect owner of the real property, the day-to-day operations of a trade or business, under paragraph (b)(1) of this section, relating to the maintenance and occupancy of the real property that affect the availability and functionality of that real property used, or held out for use, by customers where payments

received from customers are principally for the customers' use of the real property. The principal purpose of such business operations must be the provision of the use of the real property, or physical space accorded by or within the real property, to one or more customers, and not the provision of other significant or extraordinary personal services, under §1.469-1T(e)(3)(iv) and (v), to customers in conjunction with the customers' incidental use of the real property or physical space. If the real property or physical space is provided to a customer to be used to carry on the customer's trade or business, the principal purpose of the business operations must be to provide the customer with exclusive use of the real property or physical space in furtherance of the customer's trade or business, and not to provide other significant or extraordinary personal services to the customer in addition to or in conjunction with the use of the real property or physical space, regardless of whether the customer pays for the services separately. However, for purposes of and with respect to the preceding sentence, other incidental personal services may be provided to the customer in conjunction with the use of real property or physical space, as long as such services are insubstantial in relation to the customer's use of the real property or physical space. A professional manager is a person responsible, on a full-time basis, for the overall management and oversight of the real property or properties and who is not a direct or indirect owner of the real property or properties.

(iii) *Examples.* The following examples illustrate the operation of this paragraph (b)(2):

(A) *Example 1.* A owns farmland and uses the land in A's farming business to grow and harvest crops of various kinds. As part of this farming business, A utilizes a greenhouse that is an inherently permanent structure to grow certain crops during the winter months. Under the rules of this section, any trade or business that involves the cultivation and harvesting of plants, crops, or trees is not a real property trade or business for purposes of section 469(c)(7)(C) and this section, even though the cultivation and harvesting of crops occurs upon or within real property. Accordingly, under these facts, A is not engaged in a real property trade or business for purposes of section 469(c)(7)(C) and this section.

(B) *Example 2.* B is a retired farmer and owns farmland that B rents exclusively to C to operate a farm. The arrangement between B and C is a trade or business (under paragraph (b)(1) of this section) where payments by C are principally for C's use of B's real property. B also provides certain farm equipment for C's use. However, C is solely responsible for the maintenance and repair of the farm equipment along with any costs associated with operating the equipment. B also occasionally provides oral advice to C regarding various aspects of the farm operation, based on B's prior experience as a farmer. Other than the provision of this occasional advice, B does not provide any significant or extraordinary personal services to C in connection with the rental of the farmland to C. Under these facts, B is engaged in a real property trade or business (which does not include the use or deemed rental of any farm equipment) for purposes of section 469(c)(7)(C) and this section, and B's oral advice is an incidental personal service that B provides in conjunction with C's use of the real property. Nevertheless, under these facts,

C is not engaged in a real property trade or business for purposes of section 469(c)(7)(C) and this section because C is engaged in the business of farming.

(C) *Example 3.* D owns a building in which D operates a restaurant and bar. Even though D provides customers with use of the physical space inside the building, D is not engaged in a trade or business where payments by customers are principally for the use of real property or physical space. Instead, the payments by D's customers are principally for the receipt of significant or extraordinary personal services (under §1.469-1T(e)(3)(iv) and (v)), mainly food and beverage preparation and presentation services, and the use of the physical space by customers is incidental to the receipt of these personal services. Under the rules of this section, any trade or business that involves the provision of significant or extraordinary personal services to customers in conjunction with the customers' incidental use of real property or physical space is not a real property trade or business, even though the business operations occur upon or within real property. Accordingly, under these facts, D is not engaged in a real property trade or business for purposes of section 469(c)(7)(C) and this section.

(D) *Example 4.* E owns a majority interest in an S corporation, X, that is engaged in the trade or business of manufacturing industrial cooling systems for installation in commercial buildings and for other uses. E also owns a majority interest in an S corporation, Y, that purchases the industrial cooling systems from X and that installs, maintains, and repairs those systems in both existing commercial buildings and commercial buildings under construction. Under the rules of this section, any trade or business that involves the manufacture, installation, operation, maintenance, or repair of any machinery or equipment that serves an active function will not be a real property trade or business (or a unit or component of another real property trade or business) for purposes of section 469(c)(7)(C) and this section, even though the machinery or equipment will be permanently affixed to real property once it is installed. In this case, the industrial cooling systems are machinery or equipment that serves an active function. Accordingly, under these facts, E, X and Y will not be treated as engaged in one or more real property trades or businesses for purposes of section 469(c)(7)(C) and this section.

(E) *Example 5.* (1) F owns an interest in P, a limited partnership. P owns and operates a luxury hotel. In addition to providing rooms and suites for use by customers, the hotel offers many additional amenities such as in-room food and beverage service, maid and linen service, parking valet service, concierge service, front desk and bellhop service, dry cleaning and laundry service, and in-room barber and hairdresser service. P contracted with M to provide maid and janitorial services to P's hotel. M is an S corporation principally engaged in the trade or business of providing maid and janitorial services to various types of businesses, including hotels. G is a professional manager employed by M who handles the day-to-day business operations relating to M's provision of maid and janitorial services to M's various customers, including P.

(2) Even though the personal services that P provides to the customers of its hotel are significant

personal services under §1.469-1T(e)(3)(iv), the principal purpose of P's hotel business operations is the provision of use of the hotel's rooms and suites to customers, and not the provision of the significant personal services to P's customers in conjunction with the customers' incidental use of those rooms or suites. The provision of these significant personal services by P to P's customers is incidental to the customers' use of the hotel's real property. Accordingly, under these facts, F is treated as owning an interest in a real property trade or business conducted by or through P and P is treated as engaged in a real property trade or business for purposes of section 469(c)(7)(C) and this section.

(3) With respect to the maid and janitorial services provided by M, M's operations affect the availability and functionality of real property used, or held out for use, by customers in a trade or business where payments by customers are principally for the use of real property (in this case, P's hotel). However, M does not operate or manage real property. Instead, M is engaged in a trade or business of providing maid and janitorial services to customers, such as P, that are engaged in real property trades or businesses. Thus, M's business operations are merely ancillary to real property trades or businesses. Therefore, M is not engaged in real property operations or management as defined in this section. Accordingly, under these facts, M is not engaged in a real property trade or business under section 469(c)(7)(C) and this section.

(4) With respect to the day-to-day business operations that G handles as a professional manager of M, the business operations that G manages is not the provision of use of P's hotel rooms and suites to customers. G does not operate or manage real property. Instead, G manages the provision of maid and janitorial services to customers, including P's hotel. Therefore, G is not engaged in real property management as defined in this section. Accordingly, under these facts, G is not engaged in a real property trade or business under section 469(c)(7)(C) and this section.

* * * * *

Par. 16. Section 1.469-11 is amended by:

1. Revising the section heading;
2. Removing the period at the end of paragraph (a)(1) and adding a semicolon in its place;
3. Revising paragraph (a)(3);
4. Redesignating paragraphs (a)(4) and (5) as paragraphs (a)(5) and (6), respectively; and
5. Adding a new paragraph (a)(4).

The revision and addition read as follows:

§1.469-11 Applicability date and transition rules.

(a) * * *

(3) The rules contained in §1.469-9, other than paragraph (b)(2), apply for taxable years beginning on or after Janu-

ary 1, 1995, and to elections made under §1.469-9(g) with returns filed on or after January 1, 1995;

(4) The rules contained in §1.469-9(b)(2) apply to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, under sections 267(b) and 707(b)(1), may choose to apply the rules of §1.469-9(b)(2) for a taxable year beginning after December 31, 2017, so long as they consistently apply the rules of §1.469-9(b)(2), the section 163(j) regulations (as defined in §1.163(j)-1(b)(37)), and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, 1.382-7, and 1.383-1), and 1.1504-4 to that taxable year;

* * * * *

Par. 17. Section 1.704-1 is amended by adding paragraph (b)(4)(xi) to read as follows:

§1.704-1 Partner's distributive share.

* * * * *

(b) * * *

(4) * * *

(xi) *Section 163(j) excess items.* Allocations of section 163(j) excess items as defined in §1.163(j)-6(b)(6) do not have substantial economic effect under paragraph (b)(2) of this section and, accordingly, such expenditures must be allocated in accordance with the partners' interests in the partnership. See paragraph (b)(3)(iv) of this section. Allocations of section 163(j) excess items will be deemed to be in accordance with the partners' interests in the partnership if such allocations are made in accordance with §1.163(j)-6(f).

Par. 18. Section 1.860C-2 is amended by revising paragraph (b)(2) to read as follows:

§1.860C-2 Determination of REMIC taxable income or net loss.

* * * * *

(b) * * *

(2) *Deduction allowable under section 163*—(i) A REMIC is allowed a deduction, determined without regard to section 163(d), for any interest expense accrued during the taxable year.

(ii) For taxable years beginning after December 31, 2017, a REMIC is allowed a deduction, determined without regard to section 163(j), for any interest expense accrued during the taxable year.

* * * * *

Par. 19. Section 1.1362-3 is amended by:

1. Redesignating the text in paragraph (c)(3) as paragraph (c)(3)(i), adding a subject heading to newly redesignated paragraph (c)(3)(i), and adding paragraph (c)(3)(ii); and

2. Designating *Examples 1* through 4 of paragraph (d) as paragraphs (d)(1) through (d)(4), respectively.

The additions read as follows:

§1.1362-3 Treatment of S termination year.

* * * * *

(c) * * *

(3) * * *

(i) *In general.* * * *

(ii) *Application of section 163(j).* For purposes of section 163(j), a separate limitation (as defined in §1.163(j)-1(b)(36)) applies to each S short year and each C short year. Any items necessary to determine the amount of business interest expense (as defined in §1.163(j)-1(b)(3)) that are deducted in each S short year or C short year must be allocated between the S short year and C short year in accordance with an allocation methodology provided in section 1362(e).

* * * * *

Par. 20. Section 1.1368-1 is amended by adding a sentence to the end of paragraph (g)(2)(ii) to read as follows:

§1.1368-1 Distributions by S corporations.

* * * * *

(g) * * *

(2) * * *

(ii) * * * In the case of a taxable year for which an election is made under paragraph (g)(2)(i), for purposes of section 163(j), a separate section 163(j) limita-

tion (as defined in §1.163(j)-1(b)(36)) applies to each separate taxable year. Any items necessary to determine the amount of business interest expense (as defined in §1.163(j)-1(b)(3)) that are deducted in each separate taxable year must be allocated between the two separate taxable years in accordance with an allocation methodology provided in this paragraph (g).

* * * * *

Par. 21. Section 1.1377-1 is amended by:

1. Redesignating paragraphs (b)(3) (ii) through (iv) as paragraphs (b)(3)(iii) through (v), respectively; and

2. Adding a new paragraph (b)(3)(ii).

The addition reads as follows:

§1.1377-1 Pro rata share.

* * * * *

(b) * * *

(3) * * *

(ii) *Section 163(j).* If a terminating election is made to treat the S corporation's taxable year as consisting of separate taxable years, for purposes of section 163(j), a separate limitation (as defined in §1.163(j)-1(b)(36)) will apply to each separate taxable year. Any items necessary to determine the amount of business interest expense (as defined in §1.163(j)-1(b)(3)) that are deducted in each separate taxable year must be allocated between the separate taxable years in accordance with an allocation methodology provided in this section.

* * * * *

Par. 22. Section 1.1502-13 is amended:

1. In paragraph (a)(6)(ii), under the heading "Anti-avoidance rules. (§1.1502-13(h)(2))", by:

i. Designating *Examples 1* through 5 as entries (i) through (v); and

ii. Adding an entry (vi);

2. In paragraph (h)(2) by:

a. Designating *Examples 1* through 5 as paragraphs (h)(2)(i) through (v), respectively.

b. In newly designated paragraphs (h)(2)(i) through (v):

i. Redesignating paragraphs (h)(2)(i) (a) and (b) as paragraphs (h)(2)(i)(A) and (B);

ii. Redesignating paragraphs (h)(2)(ii) (a) and (b) as paragraphs (h)(2)(ii)(A) and (B);

iii. Redesignating paragraphs (h)(2)(iii)(a) and (b) as paragraphs (h)(2)(iii)(A) and (B);

iv. Redesignating paragraphs (h)(2)(iv) (a) and (b) as paragraphs (h)(2)(iv)(A) and (B);

v. Redesignating paragraphs (h)(2)(v) (a) and (b) as paragraphs (h)(2)(v)(A) and (B); and

c. Adding paragraph (h)(2)(vi).

The additions read as follows:

§1.1502-13 Intercompany transactions.

(a) * * *

(6) * * *

(ii) * * *

Anti-avoidance rules. (§1.1502-13(h)(2))

* * * * *

(vi) *Example 6.* Section 163(j) interest limitation.

* * * * *

(h) * * *

(2) * * *

(vi) *Example 6: Section 163(j) interest limitation—(A) Facts.* S1 and S2 are members of a consolidated group of which P is the common parent. S1 is engaged in an excepted trade or business, and S2 is engaged in a non-excepted trade or business. If S1 were to lend funds directly to S2 in an intercompany transaction, under §1.163(j)-10(a)(4)(i), the intercompany obligation of S2 would not be considered an asset of S1 for purposes of §1.163(j)-10 (concerning allocations of interest and other taxable items between excepted and non-excepted trades or businesses for purposes of section 163(j)). With a principal purpose of avoiding treatment of a lending transaction between S1 and S2 as an intercompany transaction (and increasing the P group's basis in its assets allocable to excepted trades or businesses), S1 lends funds to X (an unrelated third party). X then on-lends funds to S2 on substantially similar terms.

(B) *Analysis.* A principal purpose of the steps undertaken was to avoid treatment of a lending transaction between S1 and S2 as an intercompany transaction. Therefore, under paragraph (h)(1) of this section, appropriate adjustments are made, and the X obligation in the hands of S1 is not treated as an asset of S1 for purposes of §1.163(j)-10, to the extent of the loan from X to S2.

* * * * *

Par. 23. Section 1.1502-21 is amended by adding new paragraph (c)(3) to read as follows:

§1.1502-21 Net operating losses.

* * * * *

(c) * * *

(3) *Cross-reference*. For rules governing the application of a SRLY limitation to business interest expense for which a deduction is disallowed under section 163(j), see §1.163(j)-5(d) and (f).

* * * *

Par. 24. Section 1.1502-36 is amended by:

1. Revising the second sentence of paragraph (f)(2);
2. Revising the paragraph (h) heading;
3. Designating the text of paragraph (h) as paragraph (h)(1) and adding a heading to newly designated paragraph (h)(1); and
4. Adding paragraph (h)(2).

The revisions and addition read as follows:

§1.1502-36 Unified loss rule.

* * * *

(f) * * *

(2) * * * Such provisions include, for example, sections 163(j), 267(f), and 469, and §1.1502-13. * * *

* * * *

(h) *Applicability date*—(1) *In general*.

* * *

(2) *Definition in paragraph (f)(2) of this section*. Paragraph (f)(2) of this section applies to taxable years beginning on or after November 13, 2020. For taxable years beginning before November 13, 2020, see §1.1502-36 as contained in 26 CFR part 1, revised April 1, 2019. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, and before November 13, 2020, so long as the taxpayers and their related parties consistently apply the rules of this section, the section 163(j) regulations (as defined in §1.163(j)-1(b)(37)), and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, 1.382-7, and 1.383-1), and 1.1504-4, to that taxable year.

Par. 25. Section 1.1502-79 is amended by adding paragraph (f) to read as follows:

§1.1502-79 Separate return years.

* * * *

(f) *Disallowed business interest expense carryforwards*. For the treatment of disallowed business interest expense carryforwards (as defined in §1.163(j)-1(b)(11)) of a member arising in a separate return limitation year, see §1.163(j)-5(d) and (f).

Par. 26. Section 1.1502-90 is amended by revising the entry for §1.1502-98 and adding an entry for §1.1502-99(d) to read as follows:

§1.1502-90 Table of contents.

* * * *

§1.1502-98 Coordination with sections 383 and 163(j).

§1.1502-99 Effective dates.

* * * *

(d) Application to section 163(j).

Par. 27. Section 1.1502-91 is amended by revising paragraph (e)(2) to read as follows:

§1.1502-91 Application of section 382 with respect to a consolidated group.

* * * *

(e) * * *

(2) *Example—(i) Facts*. The L group has a consolidated net operating loss arising in Year 1 that is carried over to Year 2. The L loss group has an ownership change at the beginning of Year 2.

(ii) *Analysis*. The net operating loss carryover of the L loss group from Year 1 is a pre-change consolidated attribute because the L group was entitled to use the loss in Year 2 and therefore the loss was described in paragraph (c)(1)(i) of this section. Under paragraph (a)(2)(i) of this section, the amount of consolidated taxable income of the L group for Year 2 that may be offset by this loss carryover may not exceed the consolidated section 382 limitation of the L group for that year. See §1.1502-93 for rules relating to the computation of the consolidated section 382 limitation.

(iii) *Business interest expense*. The facts are the same as in the *Example* in paragraph (e)(2)(i) of this section, except that, rather than a consolidated net operating loss, a member of the L group pays or accrues a business interest expense in Year 1 for which a deduction is disallowed in that year under section 163(j) and §1.163(j)-2(b). The disallowed business interest expense is carried over to Year 2 under section 163(j)(2) and §1.163(j)-2(c). Thus, the disallowed business interest expense carryforward is a pre-change loss. Under section 163(j), the L loss group is entitled to deduct the carryforward in Year 2; however, the amount of consolidated taxable income of the L group for Year 2 that may be offset by this carryforward may not exceed the consolidated section 382 limitation of the L group for that year.

See §1.1502-98(b) (providing that §§1.1502-91 through 1.1502-96 apply section 382 to business interest expense, with appropriate adjustments).

* * * *

Par. 28. Section 1.1502-95 is amended in paragraph (b)(4) by:

1. Designating *Examples 1 and 2* as paragraphs (b)(4)(i) and (ii), respectively;

2. In newly designated paragraph (b)(4)(i), redesignating paragraphs (b)(4)(i)(i) and (ii) as paragraphs (b)(4)(i)(A) and (B), respectively;

3. In newly designated paragraph (b)(4)(ii), redesignating paragraphs (b)(4)(ii)(i) and (ii) as paragraphs (b)(4)(ii)(A) and (B), respectively; and

4. Adding two sentences at the end of newly redesigned paragraph (b)(4)(ii)(B).

The additions read follows:

§1.1502-95 Rules on ceasing to be a member of a consolidated group (or loss subgroup).

* * * *

(b) * * *

(4) * * *

(ii) * * *

(B) * * * The analysis would be similar if the L loss group had an ownership change under §1.1502-92 in Year 2 with respect to disallowed business interest expense paid or accrued by L2 in Year 1 and carried forward under section 163(j)(2) to Year 2 and Year 3. See §1.1502-98(b) (providing that §§1.1502-91 through 1.1502-96 apply section 382 to business interest expense, with appropriate adjustments).

* * * *

Par. 29. Section 1.1502-98 is amended by:

1. Revising the section heading;

2. Designating the undesignated text as paragraph (a) and adding a subject heading for newly designated paragraph (a); and

3. Adding paragraph (b).

The revision and additions read as follows:

§1.1502-98 Coordination with sections 383 and 163(j).

(a) *Coordination with section 383*. * *

(b) *Application to section 163(j)—(1)*
In general. The regulations in this part under sections 163(j), 382, and 383 of the Code contain rules governing the application of section 382 to interest expense governed by section 163(j) and the regulations in this part under section 163(j) of the Code. See, for example, §§1.163(j)-11(c), 1.382-2, 1.382-6, 1.382-7, and 1.383-1. The rules contained in §§1.1502-91 through 1.1502-96 apply these rules to members of a consolidated group, or corporations that join or leave a consolidated group, with appropriate adjustments. For example, for purposes of §§1.1502-91 through 1.1502-96, the term *loss group* includes a consolidated group in which any member is entitled to use a disallowed business interest expense carryforward, as defined in §1.163(j)-1(b)(11), that did not arise, and is not treated as arising, in a SRLY with regard to that group. Additionally, a reference to net operating loss carryovers in §§1.1502-91 through 1.1502-96 generally includes a reference to disallowed business interest expense carryforwards. References to a loss or losses in §§1.1502-91 through 1.1502-96 include references to disallowed business interest expense carryforwards or section 382 disallowed business interest carryforwards, within the meaning of §1.382-2(a)(7), as appropriate.

(2) *Appropriate adjustments.* For purposes of applying the rules in §§1.1502-91 through 1.1502-96 to current-year business interest expense (as defined in §1.163(j)-1(b)(9)), disallowed business interest expense carryforwards, and section 382 disallowed business interest carryforwards, appropriate adjustments are required.

Par. 30. Section 1.1502-99 is amended by adding paragraph (d) to read as follows:

§1.1502-99 Effective/applicability dates.

* * * * *

(d) *Application to section 163(j)—(1)*
Sections 1.382-2 and 1.382-5. To the extent the rules of §§1.1502-91 through 1.1502-99 effectuate the rules of §§1.382-2 and 1.382-5, the provisions apply with

respect to ownership changes occurring on or after November 13, 2020. For loss corporations that have ownership changes occurring before November 13, 2020, see §§1.1502-91 through 1.1502-99 as contained in 26 CFR part 1, revised April 1, 2019. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of §§1.1502-91 through 1.1502-99 to the extent they apply the rules of §§1.382-2 and 1.382-5, to ownership changes occurring during a taxable year beginning after December 31, 2017, as well as consistently applying the rules of the §§1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-6 and 1.383-1), the section 163(j) regulations (as defined in §1.163(j)-1(b)(37)), and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-7, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, and 1.1504-4, to a taxable year beginning after December 31, 2017.

Par. 31. Section 1.1504-4 is amended by:

1. Removing “163(j), 864(e),” from the first sentence of paragraph (a)(2) and adding “864(e)” in its place; and

2. Adding two sentences at the end of paragraph (i).

The additions read as follows:

§1.1504-4 Treatment of warrants, options, convertible obligations, and other similar interests.

* * * * *

(i) * * * Paragraph (a)(2) of this section applies with respect to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of this section, the section 163(j) regulations (as defined in §1.163(j)-1(b)(37)), and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, 1.382-7, and 1.383-1), to that taxable year.

Sunita Lough,
Deputy Commissioner for Services
and Enforcement.

Approved: July 14, 2020.

David J. Kautter,
Assistant Secretary of the Treasury
(Tax Policy).

(Filed by the Office of the Federal Register on September 3, 2020, 4:15 p.m., and published in the issue of the Federal Register for September 14, 2020, 85 F.R. 56686)

Part III

Notice 2020-59

SECTION 1. PURPOSE

This notice contains a proposed revenue procedure providing a safe harbor for a trade or business that manages or operates a qualified residential living facility, as defined in section 3.01 of the proposed revenue procedure, to be treated as a real property trade or business solely for purposes of qualifying as an electing real property trade or business under section 163(j)(7)(B) of the Internal Revenue Code (Code).

SECTION 2. BACKGROUND

On December 22, 2017, section 163(j) of the Code was revised by § 13301(a) of Public Law No. 115-97, 131 Stat. 2054, commonly referred to as the Tax Cuts and Jobs Act (TCJA), effective for tax years beginning after December 31, 2017. On March 27, 2020, section 163(j) was further amended by § 2306 of the Coronavirus Aid, Relief, and Economic Security Act, Public Law No. 116-136, 134 Stat. 281 (CARES Act), to provide special rules for applying section 163(j) to taxable years beginning in 2019 or 2020.

Section 163(j) generally limits the amount of a taxpayer's business interest expense that can be deducted in the current taxable year. The deduction limitation is calculated as the sum of: (1) the taxpayer's business interest income, as defined in section 163(j)(6), for the taxable year; (2) 30 percent of the taxpayer's adjusted taxable income, as defined in section 163(j)(8), for the taxable year, or 50 percent of the taxpayer's adjusted taxable income (if applicable, as provided in section 163(j)(10)); and (3) the taxpayer's floor plan financing interest, as defined in section 163(j)(9), for the taxable year.

The term "business interest" means any interest that is properly allocable to a trade or business. For purposes of section 163(j), the term "trade or business" does not include certain trades or businesses listed in section 163(j)(7). Section 163(j)(7)(A)(ii) provides that, for purposes of the limitation on the deduction for business interest, the term "trade or business"

does not include an "electing real property trade or business." Section 163(j)(7)(B) defines an electing real property trade or business as a trade or business defined in section 469(c)(7)(C) that makes a proper election. Taxpayers that make an election under section 163(j)(7)(B) must use the alternative depreciation system under section 168, and cannot claim bonus depreciation. *See* section 163(j)(11)(A).

Section 1.163(j)-9 of the Income Tax Regulations provides the rules and procedures for making an election under section 163(j)(7)(B) to be an electing real property trade or business. In addition, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) released Rev. Proc. 2020-22, 2020-18 I.R.B. 745, (April 27, 2020) to provide the time and manner of making a late election, or withdrawing an election under section 163(j)(7)(B) to be an electing real property trade or business for taxable years beginning in 2018, 2019, or 2020. Rev. Proc. 2020-22 also provides the time and manner of making or revoking elections provided by the CARES Act under section 163(j)(10) for taxable years beginning in 2019 or 2020. *See* Rev. Proc. 2020-22 for more information regarding the time and manner of making, revoking, or withdrawing elections under section 163(j)(7) and section 163(j)(10).

The Treasury Department and the IRS are aware that taxpayers have uncertainty about whether residential living facilities that include the provision of supplemental assistive, nursing, or routine medical services qualify as electing real property trades or businesses under section 163(j)(7)(B).

To mitigate this uncertainty, the proposed revenue procedure in section 6 of this notice provides a safe harbor under which a qualified residential living facility, as defined in section 3.01 of the proposed revenue procedure, is treated as eligible to be an electing real property trade or business under section 163(j)(7)(B).

SECTION 3. REQUEST FOR COMMENTS

The Treasury Department and the IRS request comments on the proposed reve-

nue procedure set forth in section 6 of this notice. Interested parties are invited to submit comments on this notice by September 28, 2020. The Treasury Department and the IRS will publish for public availability any comment received to its public docket, whether submitted electronically or in hard copy.

WHERE TO SEND COMMENTS

Commenters are strongly encouraged to submit public comments electronically. Persons may submit comments electronically via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and NOT-126369-19). Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

Send hard copy submissions to: CC:PA:LPD:PR (NOT-126369-19), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable.

SECTION 4. APPLICABILITY AND IMMEDIATE RELIANCE

The proposed revenue procedure is proposed to apply to taxable years beginning after December 31, 2017.

Until the date on which the proposed revenue procedure is published as a revenue procedure in the Internal Revenue Bulletin, taxpayers may rely on the safe harbor described in the proposed revenue procedure for purposes of determining whether a qualified residential living facility, as defined in section 3.01 of the proposed revenue procedure, is eligible to be an electing real property trade or business solely for purposes of section 163(j).

SECTION 5. DRAFTING INFORMATION

The principal authors of this notice are Susie Bird, Charles Gorham, and Justin Grill of the Office of Associate Chief Counsel (Income Tax & Accounting) and

Adrienne Mikolashek and William Kostak of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact Mr. Grill at (202) 317-7003, or Mr. Kostak at (202) 317-5279 (not toll-free calls).

SECTION 6. FORM OF PROPOSED REVENUE PROCEDURE

Set forth below is the form of the proposed revenue procedure that is proposed in this notice:

FORM OF PROPOSED REVENUE PROCEDURE

26 CFR 601.601. Rules and regulations.
(Also Part I, §163(j).)

Rev. Proc. 2020-[]

SECTION 1. PURPOSE

This revenue procedure provides a safe harbor that allows a trade or business that manages or operates a qualified residential living facility, as defined in section 3.01 of this revenue procedure, to be treated as a real property trade or business, solely for purposes of qualifying as an electing real property trade or business under section 163(j)(7)(B) of the Internal Revenue Code (Code).

SECTION 2. BACKGROUND

.01 On December 22, 2017, section 163(j) of the Code was amended by § 13301 of Pubic Law No. 115-97, 131 Stat. 2054, commonly referred to as the Tax Cuts and Jobs Act (TCJA). Section 163(j), as amended by the TCJA, provides rules limiting the amount of business interest expense that can be deducted for taxable years beginning after December 31, 2017. *See* TCJA § 13301(a).

.02 On March 27, 2020, section 163(j) of the Code was further amended by § 2306 of the Coronavirus Aid, Relief, and Economic Security Act, Public Law No. 116-136, 134 Stat. 281 (CARES Act), to provide special rules for applying section 163(j) to taxable years beginning in 2019 or 2020.

.03 Under section 163(j)(1) of the Code, the amount allowed as a deduction for business interest expense is limited to the sum of: (1) the taxpayer's business interest income, as defined in section 163(j)(6), for the taxable year; (2) 30 percent of the taxpayer's adjusted taxable income, as defined in section 163(j)(8), for such taxable year, or 50 percent of the taxpayer's adjusted taxable income (if applicable, as provided in section 163(j)(10)); and (3) the taxpayer's floor plan financing interest, as defined in section 163(j)(9), for such taxable year.

.04 The limitation under section 163(j) of the Code on the deductibility of business interest expense applies to all taxpayers with business interest, as defined in section 163(j)(5), except for taxpayers, other than tax shelters under section 448(a)(3), that meet the gross receipts test in section 448(c).

.05 Section 163(j)(5) of the Code generally provides that the term "business interest" means any interest properly allocable to a trade or business. Section 163(j)(7)(A)(ii) provides that, for purposes of the limitation on the deduction for business interest, the term "trade or business" does not include an "electing real property trade or business." Thus, interest expense that is properly allocable to an electing real property trade or business is not properly allocable to a trade or business for purposes of section 163(j), and is not business interest expense that is subject to section 163(j)(1).

.06 The term "electing real property trade or business" under section 163(j)(7)(B) of the Code means any trade or business that is described in section 469(c)(7)(C) that makes an election to be an electing real property trade or business.

.07 Section 168(g)(1)(F) of the Code provides that an electing real property trade or business within the meaning of section 163(j)(7)(B) must use the alternative depreciation system for property described in section 168(g)(8). *See* section 163(j)(11)(A).

.08 The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) published (1) proposed regulations under section 163(j) of the Code in a notice of proposed rulemaking (REG-106089-18) (proposed regulations) in the Federal Register (83 FR

67490) on December 28, 2018, (2) final regulations on September 14, 2020 (final regulations) in the Federal Register (85 FR 56686), and (3) concurrently with the publication of the final regulations, a notice of proposed rulemaking providing additional proposed regulations under section 163(j) (REG-107911-18) (85 FR 56846).

.09 Section 1.163(j)-9 of the Income Tax Regulations provides the rules and procedures for making an election under section 163(j)(7)(B) of the Code to be an electing real property trade or business. In addition, the Treasury Department and the IRS released Rev. Proc. 2020-22, 2020-18 I.R.B. 745, (April 27, 2020) to provide the time and manner of making a late election, or withdrawing an election under section 163(j)(7)(B) to be an electing real property trade or business for taxable years beginning in 2018, 2019, or 2020. Rev. Proc. 2020-22 also provides the time and manner of making or revoking elections provided by the CARES Act under section 163(j)(10) for taxable years beginning in 2019 or 2020. *See* Rev. Proc. 2020-22 for more information regarding the time and manner of making, revoking, or withdrawing elections under section 163(j)(7) and section 163(j)(10).

.10 Section 469(c)(7)(C) of the Code defines a real property trade or business as any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business.

.11 In response to the proposed regulations, commenters expressed concern as to whether a trade or business that manages or operates a residential living facility and also provides supplemental assistive, nursing or routine medical services to its customers or patients is eligible to make the election to be an electing real property trade or business under section 163(j)(7)(B) of the Code.

.12 In light of these comments in the context of section 163(j) of the Code, this revenue procedure provides a safe harbor that allows a taxpayer engaged in a trade or business that manages or operates a qualified residential living facility, as defined in section 3.01 of this revenue procedure, to treat the trade or business as a real property trade or business solely for purposes of qualifying to make an elec-

tion to be an electing real property trade or business under sections 163(j)(7)(B) and 168(g)(1)(F) (residential living facility safe harbor).

SECTION 3. DEFINITIONS FOR RESIDENTIAL LIVING FACILITY SAFE HARBOR

The following definitions apply for purposes of this revenue procedure:

.01 *Qualified Residential Living Facility.* A qualified residential living facility is a facility that:

(1) Consists of multiple rental dwelling units within one or more buildings or structures that generally serve as primary residences on a permanent or semi-permanent basis to individual customers or patients;

(2) Includes the provision of supplemental assistive, nursing, or other routine medical services; and

(3) Has an average period of customer or patient use of the individual rental dwelling units that is 90 days or more.

.02 *Average period of customer or patient use.*

(1) *In general.* The average period of customer or patient use is determined by dividing (i) the sum of the total number of days in the taxable year that each customer or patient resides in a rental dwelling unit of the residential living facility (which may be determined by reference to a rental contract or other formal written lease agreement); by (ii) the total number of individual residential customers or patients that reside in all of the rental dwelling units of the facility for the taxable year. For this purpose, a married couple residing in a single rental dwelling unit of the residential living facility will be counted as one individual customer or patient, unless each spouse is separately properly treated as an individual customer or patient of the residential living facility that receives supplemental assistive, nursing, or other routine medical services from or on behalf of the residential living facility.

(2) *Example.* Facility has 100 rental dwelling units. Of the 100 units, 60 units are occupied by the same customer or patient for the entire year, 25 units are occupied by each customer or patient for three months (90 days) of the year, and 15 units are occupied for only 10 months

(300 days) of the year (for a total of 100 customers for the year). Of the 15 units occupied for only 10 months of the year, 10 units are occupied by customers or patients for 5 months (150 days) each (for a total of 20 customers for the 10-month period). For the remaining 5 of 15 units that are occupied for only 10 months of the year, 5 customers or patients occupy the units for 8 months (240 days) of the year, and 5 other customers or patients occupy the units for 2 months (60 days) of the year. The average period of customer or patient use is determined by dividing the sum of the total number of days in the taxable year that each customer resides in a rental dwelling unit, by the total number of individual residential customers or patients that reside in all of the rental dwelling units for the taxable year. The total number of days in the taxable year that the customers or patients reside in the rental dwelling unit is 35,400 days [21,900 days (60 units that are occupied for the entire year x 365 days per year) + 9,000 days (25 units that are occupied for 90 days each x 90 days x 4 90-day periods in a year) + 4,500 days (15 units that are occupied for only 10 months x 300 days)]. The total number of individual residential customers or patients is 190 [60 customers or patients occupying a unit for the entire year + 100 (25 customers or patients occupying units for 90 days each x 4 90-day periods in a year) + 20 customers or patients that occupy a unit for a 5-month period + 5 customers or patients that occupy a unit for a 8-month period + 5 customers or patients that occupy a unit for a 2-month period]. Accordingly, the average period of customer or patient use is approximately 186 days (35,400/190).

.03 *Supplemental assistive, nursing, or other routine medical services.* Supplemental assistive, nursing, or other routine medical services are personal and professional services that are customarily and routinely provided to individual residential customers or patients of nursing homes, assisted living facilities, memory care residences, continuing care retirement communities, skilled nursing facilities, or similar facilities, as needed, on a day-to-day basis. Such services generally do not include surgical, radiological, or other intensive or specialized medical services that are usually only provided

in emergency or short-term in-patient or out-patient hospital or surgical settings.

.04 *Permanent or semi-permanent basis.* The rental dwelling units of a residential living facility serve as primary residences on a permanent or semi-permanent basis to customers or patients whose use of the units is generally long-term (more than 90 days) in nature, even though some customers or patients may arrive at the residential living facility with significantly shortened life expectancies due to advanced age or terminal medical conditions, and some customers or patients otherwise may be expected to periodically reside away from the residential living facility (such as at the primary residence of a spouse or other relative) for short periods or durations of time.

SECTION 4. RESIDENTIAL LIVING FACILITY SAFE HARBOR

.01 *Safe harbor for certain residential living facility trades or businesses.* A taxpayer engaged in a trade or business that manages or operates a qualified residential living facility, as defined in section 3.01 of this revenue procedure, may treat such trade or business as a real property trade or business solely for purposes of the election to be an electing real property trade or business under sections 163(j)(7)(B) and 168(g)(1)(F) of the Code. Satisfying the requirements of the safe harbor is not a determination that the taxpayer is engaged in a real property trade or business under section 469 of the Code.

.02 *Effect of election and how to make the election.* If a taxpayer makes the election pursuant to this safe harbor, the provisions in § 1.163(j)-9 of the regulations apply, and the taxpayer must use the alternative depreciation system of section 168(g) of the Code to depreciate the property described in section 168(g)(8). The taxpayer makes the election at the time, and in the manner prescribed by § 1.163(j)-9(d). See also Rev. Proc. 2020-22.

.03 *Substantiation.* A trade or business that manages or operates a residential living facility to which this revenue procedure applies must retain books and records to substantiate that all the requirements of this section 4 have been met in accordance with section 6001 of the Code.

.04 *Anti-abuse.* Arrangements entered into with a principal purpose of avoiding the rules of section 163(j) of the Code or the regulations under section 163(j) may be disregarded or re-characterized by the Commissioner of Internal Revenue to the extent necessary to carry out the purposes of section 163(j). See § 1.163(j)-2(j).

SECTION 5. APPLICABILITY

This revenue procedure applies to taxable years beginning after December 31, 2017.

SECTION 6. PAPERWORK REDUCTION ACT

.01 This revenue procedure does not impose any additional information collection requirements in the form of reporting, recordkeeping requirements or third-party disclosure requirements to the burden that is accounted for in the final regulations. However, this revenue procedure provides that qualified residential living facilities, as defined in section 3.01 of this revenue procedure, may be treated as real property trades or businesses, within the meaning of section 469(c)(7)(C) of the Code, solely for purposes of qualifying as an electing real property trade or business under section 163(j)(7)(B). Taxpayers taking advantage of this revenue procedure must file a statement with their return under the procedures set forth in and containing the information required by § 1.163(j)-9 of the regulations and Rev. Proc. 2020-22, if applicable. That collection of information has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-0123.

.02 This information is required to be collected and retained for compliance purposes, namely, to determine whether the taxpayer has made an election for one of its trades or businesses to be an electing real property trade or business.

.03 The Treasury Department and the IRS estimate that approximately 30,210 respondents are likely. This number was determined by examining, for the 2017 tax year, Form 1120, Form 1120-S, Form 1065, and Form 1120-REIT filers with

NAICS codes of 623110 (nursing care facilities (skilled nursing facilities)), 623311 (continuing care retirement communities), 623312 (assisted living facilities for the elderly) and 623990 (other residential care facilities) with gross receipts of at least \$10 million.

.04 The estimated number of respondents is 30,210. The estimated annual burden per respondent/recordkeeper varies from 0 to 30 minutes, depending on individual circumstances, with an estimated average of 15 minutes. The estimated total annual reporting and/or recordkeeping burden is 7,552.5 hours (30,210 respondents x 15 minutes). The estimated annual cost burden to respondents is \$95 per hour. Accordingly, we expect the total annual cost burden for the election statements to be \$717,487.50 (30,210 * .25 * \$95). The estimated annual frequency of responses is once because the statements only have to be filed once.

SECTION 7. DRAFTING INFORMATION

The principal authors of this revenue procedure are Susie Bird, Charles Gorham, and Justin Grill of the Office of Associate Chief Counsel (Income Tax & Accounting) and Adrienne Mikolashek and William Kostak of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure, contact Mr. Grill at (202) 317-7003, or Mr. Kostak at (202) 317-5279 (not toll-free numbers).

Guidance regarding the premium tax credit and Medicaid coverage of COVID-19 testing and diagnostic services

Notice 2020-66

SECTION 1. PURPOSE

This notice provides interim guidance addressing whether certain Medicaid coverage of Coronavirus Disease 2019 (COVID-19) testing and diagnostic services

is minimum essential coverage for purposes of the premium tax credit under section 36B of the Internal Revenue Code (Code). This notice also announces that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to amend § 1.5000A-2 of the Income Tax Regulations to add Medicaid coverage of COVID-19 testing and diagnostic services to the list of health care coverage that is not minimum essential coverage under a government-sponsored program.

SECTION 2. BACKGROUND

Section 6004(a)(3) of the Families First Coronavirus Response Act (Families First Act), Pub. L. No. 116-127, 134 Stat. 178 (March 18, 2020), authorizes states to provide COVID-19 testing and diagnostic services to uninsured individuals under the Medicaid program in Title XIX of the Social Security Act.

Beginning in 2014, under the Patient Protection and Affordable Care Act, Public Law 111-148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111-152 (124 Stat. 1029 (2010)) (collectively, PPACA), eligible individuals who purchase coverage under a qualified health plan through a Health Insurance Exchange (Exchange) established under section 1311 of the PPACA may claim a premium tax credit under section 36B. Section 36B and § 1.36B-3(a) of the Income Tax Regulations provide that a taxpayer is allowed a premium tax credit only for months that are coverage months for individuals in the taxpayer's family, as defined in § 1.36B-1(d). Under § 1.36B-3(c)(1)(ii), a coverage month for an individual includes only those months the individual is not eligible for minimum essential coverage, except coverage in the individual market.

Minimum essential coverage is defined in section 5000A(f) of the Code and generally includes coverage under government-sponsored programs, including Medicaid coverage under title XIX of the Social Security Act. However, the Treasury Department and the IRS have determined that certain health care coverage providing limited benefits is not minimum essential coverage under a government-sponsored program. See § 1.5000A-2(b)(2).

SECTION 3. INTERIM GUIDANCE

The Treasury Department and the IRS have determined that Medicaid coverage limited to COVID-19 testing and diagnostic services under section 6004(a)(3) of the Families First Act is not minimum essential coverage under a government-sponsored program. Thus, an individual's eligibility for this coverage for one or more months does not prevent those months from qualifying as coverage months for purposes of determining eligibility for the premium tax credit under section 36B.

SECTION 4. EFFECTIVE/ APPLICABILITY DATE

This notice applies to taxable years beginning in or after 2020. Until further guidance is issued, taxpayers may rely on the interim guidance described in this notice.

Pursuant to Section IV. of the Policy Statement on the Tax Regulatory Process issued by the Treasury Department and the IRS on March 5, 2019, if no proposed regulations or other guidance is released within 18 months after September 28, 2020, taxpayers may continue to rely on the interim guidance described in this notice but, until additional guidance is issued, the Treasury Department and the IRS will not assert a position adverse to any taxpayer, including an applicable large employer under section 4980H, based in whole or in part on this notice.

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is Steve Toomey of the Office of Chief Counsel (Income Tax and Accounting). For further information regarding this

notice, contact Steve Toomey at 202-317-4718 (not a toll-free number).

2020-2021 Special Per Diem Rates

Notice 2020-71

SECTION 1. PURPOSE

This annual notice provides the 2020-2021 special *per diem* rates for taxpayers to use in substantiating the amount of ordinary and necessary business expenses incurred while traveling away from home, specifically (1) the special transportation industry meal and incidental expenses (M&IE) rates, (2) the rate for the incidental expenses only deduction, and (3) the rates and list of high-cost localities for purposes of the high-low substantiation method.

SECTION 2. BACKGROUND

Rev. Proc. 2019-48, 2019-51 I.R.B. 1392 (or successor), provides rules for using a *per diem* rate to substantiate, under § 274(d) of the Internal Revenue Code and § 1.274-5 of the Income Tax Regulations, the amount of ordinary and necessary business expenses paid or incurred while traveling away from home. Taxpayers using the rates and list of high-cost localities provided in this notice must comply with Rev. Proc. 2019-48 (or successor). Notice 2019-55, 2019-42 I.R.B. 937, provides the rates and list of high-cost localities for the period October 1, 2019, to September 30, 2020.

SECTION 3. SPECIAL M&IE RATES FOR TRANSPORTATION INDUSTRY

The special M&IE rates for taxpayers in the transportation industry are \$66 for any locality of travel in the continental United States (CONUS) and \$71 for any locality of travel outside the continental United States (OCONUS). See section 4.04 of Rev. Proc. 2019-48 (or successor).

SECTION 4. RATE FOR INCIDENTAL EXPENSES ONLY DEDUCTION

The rate for any CONUS or OCONUS locality of travel for the incidental expenses only deduction is \$5 per day. See section 4.05 of Rev. Proc. 2019-48 (or successor).

SECTION 5. HIGH-LOW SUBSTANTIATION METHOD

1. Annual high-low rates. For purposes of the high-low substantiation method, the *per diem* rates in lieu of the rates described in Notice 2019-55 (the *per diem* substantiation method) are \$292 for travel to any high-cost locality and \$198 for travel to any other locality within CONUS. The amount of the \$292 high rate and \$198 low rate that is treated as paid for meals for purposes of § 274(n) is \$71 for travel to any high-cost locality and \$60 for travel to any other locality within CONUS. See section 5.02 of Rev. Proc. 2019-48 (or successor). The *per diem* rates in lieu of the rates described in Notice 2019-55 (the meal and incidental expenses only substantiation method) are \$71 for travel to any high-cost locality and \$60 for travel to any other locality within CONUS.

2. High-cost localities. The following localities have a federal *per diem* rate of \$245 or more, and are high-cost localities for the specified portion of the calendar year.

Key City	County or Other Defined Location	Portion of Calendar Year
Arizona		
Sedona	City Limits of Sedona	October 1 – December 1, March 1 – April 30, and September 1 – September 30
California		
Los Angeles	Los Angeles, Orange, Ventura, Edwards AFB less the city of Santa Monica	October 1 - October 31 and January 1 - September 30
Mill Valley/San Rafael/Novato	Marin	October 1 – October 31 and June 1 – September 30
Monterey	Monterey	June 1 – August 31
Napa	Napa	October 1 – November 30 and April 1 – September 30
Oakland	Alameda	October 1 – September 30
San Diego	San Diego	February 1 – July 31
San Francisco	San Francisco	October 1 – September 30
San Mateo/Foster City/Belmont	San Mateo	October 1 – September 30
Santa Barbara	Santa Barbara	October 1 – September 30
Santa Monica	City limits of Santa Monica	October 1 – September 30
Sunnyvale/Palo Alto/San Jose	Santa Clara	October 1 – September 30
Colorado		
Aspen	Pitkin	October 1 – March 31 and June 1 – September 30
Crested Butte/Gunnison	Gunnison	December 1 – March 31
Denver/Aurora	Denver, Adams, Arapahoe, and Jefferson	October 1 – October 31 and April 1 – September 30
Grand Lake	Grand	December 1 – March 31
Silverthorne/Breckenridge	Summit	December 1 – March 31
Telluride	San Miguel	October 1 – September 30
Vail	Eagle	October 1 – September 30
Delaware		
Lewes	Sussex	July 1 – August 31
District of Columbia		
Washington D.C. (also the cities of Alexandria, Falls Church, and Fairfax, and the counties of Arlington and Fairfax, in Virginia; and the counties of Montgomery and Prince George's in Maryland) (See also Maryland and Virginia)		October 1 – September 30
Florida		
Boca Raton/Delray Beach/Jupiter	Palm Beach and Hendry	December 1 – April 30
Fort Lauderdale	Broward	January 1 – April 30
Fort Meyers	Lee	February 1 – March 31
Fort Walton Beach/De Funiak Springs	Okaloosa and Walton	June 1 – July 31
Gulf Breeze	Santa Rosa	June 1 – July 31
Key West	Monroe	October 1 – July 31
Miami	Miami-Dade	December 1 – March 31
Naples	Collier	December 1 – April 30
Vero Beach	Indian River	December 1 – April 30

Key City	County or Other Defined Location	Portion of Calendar Year
Georgia		
Jekyll Island/Brunswick	Glynn	March 1 – July 31
Illinois		
Chicago	Cook and Lake	October 1 – November 30 and April 1 – September 30
Maine		
Bar Harbor/Rockport	Hancock and Knox	July 1 – August 31
Kennebunk/Kittery/Sanford	York	July 1 – August 31
Maryland		
Ocean City	Worcester	July 1 – August 31
Washington, DC Metro Area	Montgomery and Prince George's	October 1 – September 30
Massachusetts		
Boston/Cambridge	Suffolk, City of Cambridge	October 1 – September 30
Falmouth	City limits of Falmouth	July 1 – August 31
Hyannis	Barnstable less the city of Falmouth	July 1 – August 31
Martha's Vineyard	Dukes	June 1 – September 30
Nantucket	Nantucket	June 1 – September 30
Michigan		
Petoskey	Emmet	July 1 – August 31
Traverse City	Grand Traverse	July 1 – August 31
Montana		
Big Sky/West Yellowstone/ Gardiner	Gallatin and Park	June 1 – September 30
New Mexico		
Carlsbad	Eddy	October 1 – September 30
New York		
Lake Placid	Essex	July 1 – August 31
New York City	Bronx, Kings, New York, Queens, and Richmond	October 1 – December 31 and March 1 – September 30
Oregon		
Portland	Multnomah	October 1 – October 31 and June 1 – September 30
Seaside	Clatsop	July 1 – August 31
Pennsylvania		
Hershey	Hershey	June 1 – August 31
Philadelphia	Philadelphia	October 1 – November 30, March 1 – June 30, and Sep- tember 1 – September 30
Rhode Island		
Jamestown/Middletown/Newport	Newport	October 1 – October 31 and June 1 – September 30
South Carolina		
Charleston	Charleston, Berkeley, and Dorchester	October 1 – November 30 and March 1 – September 30
Tennessee		
Nashville	Davidson	October 1 – September 30
Utah		
Park City	Summit	December 1 – March 31

Key City	County or Other Defined Location	Portion of Calendar Year
Virginia		
Virginia Beach	City of Virginia Beach	June 1 – August 31
Wallop Island	Accomack	July 1 – August 31
Washington, DC Metro Area	Cities of Alexandria, Fairfax, and Falls Church; Counties of Arlington and Fairfax	October 1 – September 30
Washington		
Seattle	King	October 1 – September 30
Vancouver	Clark, Cowlitz, and Skamania	October 1 – October 31 and June 1 – September 30
Wyoming		
Cody	Park	June 1 – September 30
Jackson/Pinedale	Teton and Sublette	June 1 – September 30

3. *Changes in high-cost localities.* The list of high-cost localities in this notice differs from the list of high-cost localities in section 5 of Notice 2019-55.

- a. The following localities have been added to the list of high-cost localities: Los Angeles, California; San Diego, California; Gulf Breeze, Florida; Kennebunk/Kittery/Sanford, Maine; Virginia Beach, Virginia.
- b. The following localities have changed the portion of the year in which they are high-cost localities: Sedona, Arizona; Monterey, California; Santa Barbara, California; District of Columbia (see also Maryland and Virginia); Naples, Florida; Jekyll Island/Brunswick, Georgia; Boston/Cambridge, Massachusetts; Philadelphia, Pennsylvania; Jamestown/Middletown/Newport, Rhode Island; Charleston, South Carolina.
- c. The following localities have been removed from the list of high-cost localities: Midland/Odessa, Texas; Pecos, Texas.

SECTION 6. EFFECTIVE DATE

This notice is effective for *per diem* allowances for lodging, meal and incidental expenses, or for meal and incidental expenses only, that are paid to any employee on or after October 1, 2020, for travel away from home on or after October 1, 2020. For purposes of computing the

amount allowable as a deduction for travel away from home, this notice is effective for meal and incidental expenses or for incidental expenses only paid or incurred on or after October 1, 2020. See sections 4.06 and 5.04 of Rev. Proc. 2019-48 (or successor) for transition rules for the last 3 months of calendar year 2020.

SECTION 7. EFFECT ON OTHER DOCUMENTS

Notice 2019-55 is superseded.

DRAFTING INFORMATION

The principal author of this notice is James Liechty of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this notice contact James Liechty at (202) 317-7005 (not a toll-free number).

Update for Weighted Average Interest Rates, Yield Curves, and Segment Rates

Notice 2020-72

This notice provides guidance on the corporate bond monthly yield curve, the

corresponding spot segment rates used under § 417(e)(3), and the 24-month average segment rates under § 430(h)(2) of the Internal Revenue Code. In addition, this notice provides guidance as to the interest rate on 30-year Treasury securities under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning before 2008 and the 30-year Treasury weighted average rate under § 431(c)(6)(E)(ii)(I).

YIELD CURVE AND SEGMENT RATES

Section 430 specifies the minimum funding requirements that apply to single-employer plans (except for CSEC plans under § 414(y)) pursuant to § 412. Section 430(h)(2) specifies the interest rates that must be used to determine a plan's target normal cost and funding target. Under this provision, present value is generally determined using three 24-month average interest rates ("segment rates"), each of which applies to cash flows during specified periods. To the extent provided under § 430(h)(2)(C)(iv), these segment rates are adjusted by the applicable percentage of the 25-year average segment rates for the period ending September 30 of the year preceding the calendar year in which the plan year begins.¹ However, an election may be made under § 430(h)(2)(D)(ii) to use the monthly yield curve in place of the segment rates.

¹ Pursuant to § 433(h)(3)(A), the 3rd segment rate determined under § 430(h)(2)(C) is used to determine the current liability of a CSEC plan (which is used to calculate the minimum amount of the full funding limitation under § 433(c)(7)(C)).

Notice 2007-81, 2007-44 I.R.B. 899, provides guidelines for determining the monthly corporate bond yield curve, and the 24-month average corporate bond segment rates used to compute the target normal cost and the funding target. Consistent with the methodology specified in Notice 2007-81, the monthly corporate bond yield curve derived from August 2020 data is in Table 2020-8 at the end of this notice. The spot first, second, and third segment rates for the month of August 2020 are, respectively, 0.52, 2.22, and 3.03.

The 24-month average segment rates determined under § 430(h)(2)(C)(i)

through (iii) must be adjusted pursuant to § 430(h)(2)(C)(iv) to be within the applicable minimum and maximum percentages of the corresponding 25-year average segment rates. For plan years beginning before 2021, the applicable minimum percentage is 90% and the applicable maximum percentage is 110%. The 25-year average segment rates for plan years beginning in 2019 and 2020 were published in Notice 2018-73, 2018-40 I.R.B. 526, and Notice 2019-51, 2019-41 I.R.B. 866, respectively. For plan years beginning in 2021, the applicable minimum percentage is 85% and the applicable maximum percentage is 115%. For

plan years beginning in 2021, based on the segment rates applicable for October 1995 to September 2020, the 25-year averages for the period ending September 30, 2020, of the first, second, and third segment rates are 3.90, 5.64, and 6.43 percent, respectively.

24-MONTH AVERAGE CORPORATE BOND SEGMENT RATES

The three 24-month average corporate bond segment rates applicable for September 2020 without adjustment for the 25-year average segment rate limits are as follows:

24-Month Average Segment Rates Without 25-Year Average Adjustment			
Applicable Month	First Segment	Second Segment	Third Segment
September 2020	2.22	3.38	3.92

Based on § 430(h)(2)(C)(iv), the 24-month averages applicable for Sep-

tember 2020, adjusted to be within the applicable minimum and maximum percent-

ages of the corresponding 25-year average segment rates, are as follows:

Adjusted 24-Month Average Segment Rates				
For Plan Years Beginning In	Applicable Month	First Segment	Second Segment	Third Segment
2019	September 2020	3.74	5.35	6.11
2020	September 2020	3.64	5.21	5.94
2021	September 2020	3.32	4.79	5.47

30-YEAR TREASURY SECURITIES INTEREST RATES

Section 431 specifies the minimum funding requirements that apply to multiemployer plans pursuant to § 412. Section 431(c)(6)(B) specifies a minimum amount for the full-funding limitation described in § 431(c)(6)(A), based on the plan's current liability. Section 431(c)(6)(E)(ii)(I) provides that the interest rate used to calculate current liability for this

purpose must be no more than 5 percent above and no more than 10 percent below the weighted average of the rates of interest on 30-year Treasury securities during the four-year period ending on the last day before the beginning of the plan year. Notice 88-73, 1988-2 C.B. 383, provides guidelines for determining the weighted average interest rate. The rate of interest on 30-year Treasury securities for August 2020 is 1.36 percent. The Service determined this rate as the average

of the daily determinations of yield on the 30-year Treasury bond maturing in May 2050 determined each day through August 12, 2020 and the yield on the 30-year Treasury bond maturing in August 2050 determined each day for the balance of the month. For plan years beginning in September 2020, the weighted average of the rates of interest on 30-year Treasury securities and the permissible range of rates used to calculate current liability are as follows:

Treasury Weighted Average Rates		
For Plan Years Beginning In	30-Year Treasury Weighted Average	Permissible Range
September 2020	2.47	90% to 105%
		2.22 to 2.59

MINIMUM PRESENT VALUE SEGMENT RATES

In general, the applicable interest rates

under § 417(e)(3)(D) are segment rates computed without regard to a 24-month average. Notice 2007-81 provides guidelines for determining the minimum pres-

ent value segment rates. Pursuant to that notice, the minimum present value segment rates determined for August 2020 are as follows:

Month	<i>Minimum Present Value Segment Rates</i>		
	First Segment	Second Segment	Third Segment
August 2020	0.52	2.22	3.03

DRAFTING INFORMATION

The principal author of this notice is Tom Morgan of the Office of the Asso-

ciate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the IRS participated in the development

of this guidance. For further information regarding this notice, contact Mr. Morgan at 202-317-6700 or Paul Stern at 202-317-8702 (not toll-free numbers).

Table 2020-8
 Monthly Yield Curve for August 2020
 Derived from August 2020 Data

Maturity	Yield								
0.5	0.19	20.5	2.85	40.5	3.05	60.5	3.13	80.5	3.17
1.0	0.30	21.0	2.86	41.0	3.06	61.0	3.13	81.0	3.17
1.5	0.40	21.5	2.87	41.5	3.06	61.5	3.13	81.5	3.17
2.0	0.47	22.0	2.88	42.0	3.06	62.0	3.13	82.0	3.17
2.5	0.52	22.5	2.88	42.5	3.06	62.5	3.14	82.5	3.17
3.0	0.55	23.0	2.89	43.0	3.07	63.0	3.14	83.0	3.17
3.5	0.59	23.5	2.90	43.5	3.07	63.5	3.14	83.5	3.17
4.0	0.64	24.0	2.90	44.0	3.07	64.0	3.14	84.0	3.17
4.5	0.71	24.5	2.91	44.5	3.07	64.5	3.14	84.5	3.17
5.0	0.79	25.0	2.92	45.0	3.08	65.0	3.14	85.0	3.18
5.5	0.89	25.5	2.92	45.5	3.08	65.5	3.14	85.5	3.18
6.0	1.01	26.0	2.93	46.0	3.08	66.0	3.14	86.0	3.18
6.5	1.13	26.5	2.93	46.5	3.08	66.5	3.14	86.5	3.18
7.0	1.26	27.0	2.94	47.0	3.09	67.0	3.15	87.0	3.18
7.5	1.40	27.5	2.94	47.5	3.09	67.5	3.15	87.5	3.18
8.0	1.53	28.0	2.95	48.0	3.09	68.0	3.15	88.0	3.18
8.5	1.66	28.5	2.96	48.5	3.09	68.5	3.15	88.5	3.18
9.0	1.78	29.0	2.96	49.0	3.09	69.0	3.15	89.0	3.18
9.5	1.90	29.5	2.97	49.5	3.10	69.5	3.15	89.5	3.18
10.0	2.01	30.0	2.97	50.0	3.10	70.0	3.15	90.0	3.18
10.5	2.11	30.5	2.98	50.5	3.10	70.5	3.15	90.5	3.18
11.0	2.20	31.0	2.98	51.0	3.10	71.0	3.15	91.0	3.18
11.5	2.28	31.5	2.99	51.5	3.10	71.5	3.15	91.5	3.18
12.0	2.36	32.0	2.99	52.0	3.10	72.0	3.16	92.0	3.18
12.5	2.42	32.5	3.00	52.5	3.11	72.5	3.16	92.5	3.18
13.0	2.48	33.0	3.00	53.0	3.11	73.0	3.16	93.0	3.18
13.5	2.54	33.5	3.01	53.5	3.11	73.5	3.16	93.5	3.19
14.0	2.58	34.0	3.01	54.0	3.11	74.0	3.16	94.0	3.19
14.5	2.62	34.5	3.01	54.5	3.11	74.5	3.16	94.5	3.19
15.0	2.66	35.0	3.02	55.0	3.11	75.0	3.16	95.0	3.19
15.5	2.69	35.5	3.02	55.5	3.12	75.5	3.16	95.5	3.19
16.0	2.72	36.0	3.02	56.0	3.12	76.0	3.16	96.0	3.19
16.5	2.74	36.5	3.03	56.5	3.12	76.5	3.16	96.5	3.19
17.0	2.76	37.0	3.03	57.0	3.12	77.0	3.16	97.0	3.19
17.5	2.78	37.5	3.04	57.5	3.12	77.5	3.16	97.5	3.19
18.0	2.80	38.0	3.04	58.0	3.12	78.0	3.17	98.0	3.19
18.5	2.81	38.5	3.04	58.5	3.12	78.5	3.17	98.5	3.19
19.0	2.82	39.0	3.04	59.0	3.13	79.0	3.17	99.0	3.19
19.5	2.83	39.5	3.05	59.5	3.13	79.5	3.17	99.5	3.19
20.0	2.84	40.0	3.05	60.0	3.13	80.0	3.17	100.0	3.19

Rev. Proc. 2020-41

SECTION 1. PURPOSE

This revenue procedure provides the domestic asset/liability percentages and domestic investment yields needed by foreign life insurance companies and foreign property and liability insurance companies to compute their minimum effectively connected net investment income under section 842(b) of the Internal Revenue Code for taxable years beginning after December 31, 2018. Instructions are provided for computing foreign insurance companies' liabilities for the estimated tax and installment payments of estimated tax for taxable years beginning after December 31, 2018. For more specific guidance regarding the computation of the amount of net investment income to be included by a foreign insurance company on its U.S. income tax return, see Notice 89-96, 1989-2 C.B. 417. For the domestic asset/liability percentage and domestic investment yield, as well as instructions for computing foreign insurance companies' liabilities for estimated tax and installment payments of estimated tax for taxable years beginning after December 31, 2017, see Rev. Proc. 2019-36, 2019-38 I.R.B. 729.

SECTION 2. PERCENTAGES AND YIELDS

.01 DOMESTIC ASSET/LIABILITY PERCENTAGES FOR 2019. The Secre-

tary determines the domestic asset/liability percentage separately for life insurance companies and property and liability insurance companies. For the first taxable year beginning after December 31, 2018, the relevant domestic asset/liability percentages are:

124.8 percent for foreign life insurance companies, and

197.9 percent for foreign property and liability insurance companies.

.02 DOMESTIC INVESTMENT YIELDS FOR 2019. The Secretary prescribes separate domestic investment yields for foreign life insurance companies and for foreign property and liability insurance companies. For the first taxable year beginning after December 31, 2018, the relevant domestic investment yields are:

4.5 percent for foreign life insurance companies, and

3.4 percent for foreign property and liability insurance companies.

.03 SOURCE OF DATA FOR 2019. The section 842(b) percentages to be used for the 2019 tax year are based on tax return data following the same methodology used for the 2018 year.

SECTION 3. ESTIMATED TAXES

To compute estimated tax and the installment payments of estimated tax due for taxable years beginning after December 31, 2018, a foreign insurance company must compute its estimated tax payments by adding to its income other than net investment income the greater of (i) its net investment income as determined under section 842(b)(5) that is actually effectively connected with the conduct

of a trade or business within the United States for the relevant period, or (ii) the minimum effectively connected net investment income under section 842(b) that would result from using the most recently available domestic asset/liability percentage and domestic investment yield. Thus, for installment payments due after the publication of this revenue procedure, the domestic asset/liability percentages and the domestic investment yields provided in this revenue procedure must be used to compute the minimum effectively connected net investment income. However, if the due date of an installment is less than 20 days after the date this revenue procedure is published in the Internal Revenue Bulletin, the asset/liability percentages and domestic investment yields provided in Rev. Proc. 2019-36 may be used to compute the minimum effectively connected net investment income for such installment. For further guidance in computing estimated tax, see Notice 89-96.

SECTION 4. EFFECTIVE DATE

This revenue procedure is effective for taxable years beginning after December 31, 2018.

SECTION 5. DRAFTING INFORMATION

The principal author of this revenue procedure is Sheila Ramaswamy of the Office of Associate Chief Counsel (International). For further information regarding this revenue procedure contact Sheila Ramaswamy at (202) 317-6938 (not a toll-free number).

Part IV

Due date postponed for reporting and payment of excise taxes relating to minimum required contributions delayed under § 3608(a) of the CARES Act

Announcement 2020-17

The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) are postponing until January 15, 2021, the due dates for reporting and paying the excise taxes under §§ 4971(a)(1) and 4971(f)(1) of the Internal Revenue Code with respect to certain delayed minimum required contributions to a single employer defined benefit plan. This postponement applies with respect to a required contribution to which the extended due date under § 3608(a) of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (134 Stat. 281) (CARES Act), applies.

Section 4971(a)(1) imposes an excise tax on an employer that maintains a single employer defined benefit plan, equal to 10 percent of the aggregate unpaid minimum required contributions (as defined in § 4971(c)(4)) for all plan years remaining unpaid as of the end of any plan year ending with or within a taxable year. Section 4971(f)(1) imposes an excise tax on an employer maintaining such a plan equal to 10 percent of the amount of the liquidity shortfall as of the last day of any quarter that is not paid by the due date for the required installment for that quarter.

Section 54.6011-1(a) provides that any employer liable for tax under § 4971 must file an annual return on Form 5330 and include on it the information required by that form and those instruc-

tions. The § 4971(a)(1) excise tax is reported on line 8a and Schedule D, line 2, of Form 5330. The § 4971(f)(1) excise tax is reported on line 9a and Schedule E, line 4, of Form 5330. Form 5330 and the Form 5330 instructions provide that these taxes must be reported and paid by the last day of the 7th month after the end of the employer's tax year or 8-1/2 months after the last day of the plan year that ends with or within the filer's tax year.

Section 3608(a)(1) of the CARES Act provides that the due date for paying any minimum required contribution under § 430(j) (including quarterly installments) that would otherwise be due during calendar year 2020 is extended until January 1, 2021. Without this extension, the due date for paying the minimum required contribution for a plan year ending December 31, 2019, would be September 15, 2020, and the determination of whether a plan has an unpaid minimum required contribution for that plan year also would be made as of that date. On August 6, 2020, the Treasury Department and the IRS issued Notice 2020-61, 2020-35 IRB 468, which provides guidance regarding § 3608 of the CARES Act, including the extended due date under § 3608(a)(1) for making a minimum required contribution.

As a result of the extension of the due date for making a minimum required contribution under § 3608(a) of the CARES Act, if an employer that is a calendar year taxpayer maintains a single employer defined benefit plan that is subject to § 430 with a calendar year plan year fails to pay the minimum required contribution for the 2019 plan year by the extended due date of January 1, 2021, then there would be an unpaid minimum required contribution for the 2019 plan year and the employer would become subject to the excise tax under § 4971(a). Similarly, if the employer fails to pay a required installment under

§ 430(j)(3) to satisfy a liquidity shortfall by the delayed due date of January 1, 2021, the excise tax under § 4971(f) would apply. However, absent the relief provided in this announcement, the due date for the employer's reporting and payment obligations for the excise taxes with respect to these unpaid contributions would be September 15, 2020.

In order to coordinate the due date for reporting and paying the §§ 4971(a)(1) and 4971(f)(1) excise taxes with the extended due date for paying the minimum required contributions to which those excise taxes apply (January 1, 2021, pursuant to § 3608(a) of the CARES Act), the Treasury Department and the IRS are postponing the reporting and payment due date for those taxes. The new due date for reporting and paying the §§ 4971(a)(1) and 4971(f)(1) excise taxes with respect to a minimum required contribution to which § 3608(a) of the CARES Act applies is January 15, 2021.

This announcement overrides the due date provided on Form 5330 and under the Form 5330 instructions for reporting and paying the excise taxes under §§ 4971(a)(1) and 4971(f)(1) with respect to a minimum required contribution to which § 3608(a) of the CARES Act applies. This announcement does not apply to the due dates for other excise taxes required to be reported on Form 5330.

The principal author of this announcement is Diane S. Bloom of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the IRS participated in the development of this guidance. For further information regarding this announcement, please contact Ms. Bloom at 202-317-6700 (not a toll-free number).

Notice of Proposed Rulemaking

Limitation on Deduction for Business Interest Expense; Allocation of Interest Expense by Passthrough Entities; Dividends Paid by Regulated Investment Companies; Application of Limitation on Deduction for Business Interest Expense to United States Shareholders of Controlled Foreign Corporations and to Foreign Persons with Effectively Connected Income

REG-107911-18

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking provides rules concerning the limitation on the deduction for business interest expense after amendment of the Internal Revenue Code (Code) by the provisions commonly known as the Tax Cuts and Jobs Act, which was enacted on December 22, 2017, and the Coronavirus Aid, Relief, and Economic Security Act, which was enacted on March 27, 2020. Specifically, these proposed regulations address application of the limitation in contexts involving passthrough entities, regulated investment companies (RICs), United States shareholders of controlled foreign corporations, and foreign persons with effectively connected income in the United States. These proposed regulations also provide guidance regarding the definitions of real property development, real property redevelopment, and a syndicate. These proposed regulations affect taxpayers that have business interest expense, particularly passthrough entities, their partners and shareholders, as well

as foreign corporations and their United States shareholders and foreign persons with effectively connected income. These proposed regulations also affect RICs that have business interest income, RIC shareholders that have business interest expense, and members of a consolidated group.

DATES: Written or electronic comments and requests for a public hearing must be received by November 2, 2020, which is 60 days after the date of filing for public inspection with the Office of the Federal Register.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-107911-18) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and when practicable on paper, to its public docket.

Send paper submissions to: CC:PA:LP-D:PR (REG-107911-18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044.

FOR FURTHER INFORMATION CONTACT: Concerning §1.163(j)-1, Steven Harrison, (202) 317-6842, Michael Chin, (202) 317-6842 or John Lovelace, (202) 317-5363; concerning §1.163(j)-2, Sophia Wang, (202) 317-4890 or John Lovelace, (202) 317-5363, concerning §1.163-14, §1.163(j)-6, or §1.469-9, William Kostak, (202) 317-5279 or Anthony McQuillen, (202) 317-5027; concerning §1.163-15, Sophia Wang, (202) 317-4890; concerning §1.163(j)-7 or §1.163(j)-8, Azeka J. Abramoff, (202) 317-3800 or Raphael J. Cohen, (202) 317-6938, concerning §1.1256(e)-2, Sophia Wang, (202) 317-4890 or Pamela Lew, (202) 317-7053;

concerning submissions of comments and/or requests for a public hearing, Regina L. Johnson, (202) 317-5177 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under sections 163 (in particular section 163(j)), 469 and 1256(e) of the Code. Section 163(j) was amended as part of Public Law No. 115-97, 131 Stat. 2054 (December 22, 2017), commonly referred to as the Tax Cuts and Jobs Act (TCJA), and the Coronavirus Aid, Relief, and Economic Security Act, Public Law No. 116-136 (2020) (CARES Act). Section 13301(a) of the TCJA amended section 163(j) by removing prior section 163(j)(1) through (9) and adding section 163(j)(1) through (10). The provisions of section 163(j) as amended by section 13301 of the TCJA are effective for tax years beginning after December 31, 2017. The CARES Act further amended section 163(j) by redesignating section 163(j)(10), as amended by the TCJA, as new section 163(j)(11), and adding a new section 163(j)(10) providing special rules for applying section 163(j) to taxable years beginning in 2019 or 2020.

Section 163(j) generally limits the amount of business interest expense (BIE) that can be deducted in the current taxable year (also referred to in this Preamble as the current year). Under section 163(j)(1), the amount allowed as a deduction for BIE is limited to the sum of (1) the taxpayer's business interest income (BII) for the taxable year; (2) 30 percent of the taxpayer's adjusted taxable income (ATI) for the taxable year (30 percent ATI limitation); and (3) the taxpayer's floor plan financing interest expense for the taxable year (in sum, the section 163(j) limitation). As further described later in this Background section, section 163(j)(10), as amended by the CARES Act, provides special rules relating to the ATI limitation for taxable years beginning in 2019 or 2020. Under section 163(j)(2), the amount of any BIE that is not allowed as a deduction in a taxable year due to the section 163(j) limita-

tion is treated as business interest paid in the succeeding taxable year.

The section 163(j) limitation applies to all taxpayers, except for certain small businesses that meet the gross receipts test in section 448(c) and certain trades or businesses listed in section 163(j)(7). Section 163(j)(3) provides that the section 163(j) limitation does not apply to any taxpayer that meets the gross receipts test under section 448(c), other than a tax shelter prohibited from using the cash receipts and disbursements method of accounting under section 448(a)(3).

Section 163(j)(4) provides special rules for applying section 163(j) in the case of passthrough entities. Section 163(j)(4)(A) requires that the section 163(j) limitation be applied at the partnership level, and that a partner's ATI be increased by the partner's share of excess taxable income, as defined in section 163(j)(4)(C), but not by the partner's distributive share of income, gain, deduction, or loss. Section 163(j)(4)(B) provides that the amount of partnership BIE limited by section 163(j)(1) (EBIE) is carried forward at the partner level. Section 163(j)(4)(B)(ii) provides that EBIE allocated to a partner and carried forward is available to be deducted in a subsequent year only to the extent that the partnership allocates excess taxable income to the partner. As further described later in this Background section, section 163(j)(10), as amended by the CARES Act, provides a special rule for excess business interest expense allocated to a partner in a taxable year beginning in 2019. Section 163(j)(4)(B)(iii) provides rules for the adjusted basis in a partnership of a partner that is allocated EBIE. Section 163(j)(4)(D) provides that rules similar to the rules of section 163(j)(4)(A) and (C) apply to S corporations and S corporation shareholders.

Section 163(j)(5) and (6) define "business interest" and "business interest income," respectively, for purposes of section 163(j). Generally, these terms include interest expense and interest includible in gross income that is properly allocable to a trade or business (as defined in section 163(j)(7)) and do not include investment income or investment expense within the meaning of section 163(d). The legislative history states that "a corporation has neither investment interest nor investment

income within the meaning of section 163(d). Thus, interest income and interest expense of a corporation is properly allocable to a trade or business, unless such trade or business is otherwise explicitly excluded from the application of the provision." H. Rept. 115-466, at 386, fn. 688 (2017).

Under section 163(j)(7), the limitation on the deduction for business interest expense in section 163(j)(1) does not apply to certain trades or businesses (excepted trades or businesses). The excepted trades or businesses are the trade or business of providing services as an employee, electing real property businesses, electing farming businesses, and certain regulated utility businesses.

Section 163(j)(8) defines ATI as the taxable income of the taxpayer without regard to the following: items not properly allocable to a trade or business; business interest and business interest income; net operating loss (NOL) deductions; and deductions for qualified business income under section 199A. ATI also generally excludes deductions for depreciation, amortization, and depletion with respect to taxable years beginning before January 1, 2022, and it includes other adjustments provided by the Secretary of the Treasury.

Section 163(j)(9) defines "floor plan financing interest" as interest paid or accrued on "floor plan financing indebtedness." These provisions allow taxpayers incurring interest expense for the purpose of securing an inventory of motor vehicles held for sale or lease to deduct the full expense without regard to the section 163(j) limitation.

Under section 163(j)(10)(A)(i), the amount of business interest that is deductible under section 163(j)(1) for taxable years beginning in 2019 or 2020 is computed using 50 percent, rather than 30 percent, of the taxpayer's ATI for the taxable year (50 percent ATI limitation). A taxpayer may elect not to apply the 50 percent ATI limitation to any taxable year beginning in 2019 or 2020, and instead apply the 30 percent ATI limitation. This election must be made separately for each taxable year. Once the taxpayer makes the election, the election may not be revoked without the consent of the Secretary of the Treasury or his delegate. See section 163(j)(10)(A)(iii).

Sections 163(j)(10)(A)(ii)(I) and 163(j)(10)(A)(iii) provide that, in the case of a partnership, the 50 percent ATI limitation does not apply to partnerships for taxable years beginning in 2019, and the election to not apply the 50 percent ATI limitation may be made only for taxable years beginning in 2020, and may be made only by the partnership. Under section 163(j)(10)(A)(ii)(II), however, a partner treats 50 percent of its allocable share of a partnership's excess business interest expense for 2019 as a business interest expense in the partner's first taxable year beginning in 2020 that is not subject to the section 163(j) limitation (50 percent EBIE rule). The remaining 50 percent of the partner's allocable share of the partnership's excess business interest expense remains subject to the section 163(j) limitation applicable to excess business interest expense carried forward at the partner level. A partner may elect out of the 50 percent EBIE rule.

Section 163(j)(10)(B)(i) allows a taxpayer to elect to substitute its ATI for the last taxable year beginning in 2019 (2019 ATI) for the taxpayer's ATI for a taxable year beginning in 2020 (2020 ATI) in determining the taxpayer's section 163(j) limitation for the taxable year beginning in 2020.

Section 163(j)(11) provides cross-references to provisions requiring that electing farming businesses and electing real property businesses excepted from the section 163(j) limitation use the alternative depreciation system (ADS), rather than the general depreciation system, for certain types of property. The required use of ADS results in the inability of these electing trades or businesses to use the additional first-year depreciation deduction under section 168(k) for those types of property.

On December 28, 2018, the Department of the Treasury (Treasury Department) and the IRS (1) published proposed regulations under section 163(j), as amended by the TCJA, in a notice of proposed rulemaking (REG-106089-18) (2018 Proposed Regulations) in the **Federal Register** (83 FR 67490), and (2) withdrew the notice of proposed rulemaking (1991-2 C.B. 1040) published in the **Federal Register** on June 18, 1991 (56 FR 27907 as corrected by 56 FR 40285 (August 14, 1991)) to implement rules

under section 163(j) before amendment by the TCJA. The 2018 Proposed Regulations were issued following guidance announcing and describing regulations intended to be issued under section 163(j). See Notice 2018-28, 2018-16 I.R.B. 492 (April 16, 2018).

A public hearing on the 2018 Proposed Regulations was held on February 27, 2019. The Treasury Department and the IRS also received written comments responding to the 2018 Proposed Regulations (available at <http://www.regulations.gov>). In response to certain comments, the Treasury Department and the IRS are publishing this notice of proposed rulemaking to provide additional proposed regulations (these Proposed Regulations) under section 163(j).

Concurrently with the publication of these Proposed Regulations, the Treasury Department and the IRS are publishing in the Rules and Regulations section of this edition of the **Federal Register** (RIN 1545-BO73) final regulations under section 163(j) (the Final Regulations).

On April 10, 2020, the Treasury Department and the IRS released Revenue Procedure 2020-22, 2020-18 I.R.B. 745, to provide the time and manner of making a late election, or withdrawing an election, under section 163(j)(7)(B) to be an electing real property trade or business or section 163(j)(7)(C) to be an electing farming business for taxable years beginning in 2018, 2019, or 2020. Revenue Procedure 2020-22 also provides the time and manner of making or revoking elections provided by the CARES Act under section 163(j)(10) for taxable years beginning in 2019 or 2020. As described earlier in this Background section, these elections are: (1) to not apply the 50 percent ATI limitation under section 163(j)(10)(A)(iii); (2) to use the taxpayer's 2019 ATI to calculate the taxpayer's section 163(j) limitation for any taxable year beginning in 2020 under section 163(j)(10)(B); and (3) for a partner to elect out of the 50 percent EBIE rule under section 163(j)(10)(A)(ii)(II).

Explanation of Provisions

These Proposed Regulations would provide guidance in addition to the Final Regulations regarding the section 163(j) limitation. These Proposed Regulations

would also add or amend regulations under certain other provisions of the Code where necessary to provide conformity across the Income Tax Regulations. A significant number of the terms used throughout these Proposed Regulations are defined in §1.163(j)-1 of the Final Regulations and discussed in the Explanation of Provisions section of the 2018 Proposed Regulations and the Summary of Comments and Explanation of Revisions section of the Final Regulations. Some of these terms are further discussed in this Explanation of Provisions section as they relate to specific provisions of these Proposed Regulations.

Part I of this Explanation of Provisions describes proposed rules that would allocate interest expense for purposes of sections 469, 163(d), 163(h), and 163(j) in connection with certain transactions involving passthrough entities. Part II provides proposed rules relating to distributions of debt proceeds from any taxpayer account or from cash so that interest expense may be allocated for purposes of sections 469, 163(d), 163(h), and 163(j). Part III describes proposed modifications to the definitions and general guidance in §1.163(j)-1, including proposed rules permitting taxpayers to apply a different computational method in determining adjustments to tentative taxable income to address sales or other dispositions of depreciable property, stock of a consolidated group member, or interests in a partnership, and proposed rules allowing RIC shareholders to treat certain RIC dividends as interest income for purposes of section 163(j). Part IV describes proposed modifications to §1.163(j)-6, relating to the applicability of the section 163(j) limitation to passthrough entities, including proposed rules on the applicability of the section 163(j) limitation to trading partnerships and publicly traded partnerships, the application of the section 163(j) limitation in partnership self-charged lending transactions, proposed rules relating to the treatment of excess business interest expense in tiered partnerships, proposed rules relating to partnership basis adjustments upon partner dispositions, proposed rules regarding the election to substitute 2019 ATI for the partnership's 2020 ATI in determining the partnership's section 163(j) limitation for a taxable year beginning in 2020, and proposed rules re-

garding excess business interest expense allocated to a partner in a taxable year beginning in 2019.

Part V discusses re-proposed rules regarding the application of the section 163(j) limitation to foreign corporations and United States shareholders (as defined in section 951(b)) (U.S. shareholders) of controlled foreign corporations (as defined in section 957(a)) (CFCs). Part VI discusses re-proposed rules regarding the application of the section 163(j) limitation to nonresident alien individuals and foreign corporations with effectively connected income in the United States. Part VII describes proposed modifications to the definition of a real property trade or business under §1.469-9 for purposes of the passive activity loss rules and the definition of an electing real property trade or business under section 163(j)(7)(B). Part VIII describes proposed rules regarding the definition of a "tax shelter" for purposes of §1.163(j)-2 and section 1256(e), as well as proposed rules regarding the election to use 2019 ATI in determining the taxpayer's section 163(j) limitation for a taxable year beginning in 2020. Part IX describes proposed modifications regarding the application of the corporate look-through rules to tiered structures.

I. Proposed §1.163-14: Allocation of Interest Expense with Respect to Passthrough Entities

Section 1.163-8T provides rules regarding the allocation of interest expense for purposes of applying the passive activity loss limitation in section 469, the investment interest limitation in section 163(d), and the personal interest limitation in section 163(h) (such purposes, collectively, §1.163-8T purposes). Under §1.163-8T, debt generally is allocated by tracing disbursements of the debt proceeds to specific expenditures and interest expense associated with debt is allocated for §1.163-8T purposes in the same manner as the debt to which such interest expense relates. When debt proceeds are deposited to the borrower's account, and the account also contains unborrowed funds, §1.163-8T(c) provides that the debt generally is allocated to expenditures by treating subsequent expenditures from the account as made first from the debt proceeds to the

extent thereof. The rules further provide that if the proceeds of two or more debts are deposited in the account, the proceeds are treated as expended in the order in which they were deposited. In addition to these rules, §1.163-8T also provides specific rules to address reallocation of debt, repayments and refinancing.

The preamble to §1.163-8T (52 FR 24996) stated that “interest expense of partnerships and S corporations, and of partners and S corporation shareholders, is generally allocated in the same manner as the interest expense of other taxpayers.” The preamble acknowledged the need for special rules for debt financed distributions to owners of partnerships and S corporations, and for cases in which taxpayers incur debt to acquire or increase their capital interest in the passthrough entity, but reserved on these issues and requested comments.

In a series of notices, the Treasury Department and the IRS provided further guidance with respect to the allocation of interest expense in connection with certain transactions involving passthrough entities and owners of passthrough entities. See Notice 88-20, 1988-1 C.B. 487, Notice 88-37, 1988-1 C.B. 522, and Notice 89-35, 1989-1 C.B. 675. Specifically, Notice 89-35 provides, in part, rules addressing the treatment of (1) a passthrough entity owner’s debt allocated to contributions to, or purchases of, interests in a passthrough entity (debt-financed contributions or acquisitions), and (2) passthrough entity debt allocated to distributions by the entity to its owners (debt-financed distributions).

In the case of a debt-financed acquisition of an interest in a passthrough entity by purchase (rather than by way of a contribution to the capital of the entity), Notice 89-35 provides that the interest expense of the owner of the passthrough entity, for §1.163-8T purposes, is allocated among the assets of the entity using any reasonable method. A reasonable method for this purpose includes, for example, allocating the debt among all of the assets of the passthrough entity based on the fair market value, the book value, or the adjusted basis of the assets, reduced by the amount of any debt of the entity or the amount of any debt that the owner of the entity allocates to such assets. Notice 89-

35 also provides that interest expense on debt proceeds allocated to a contribution to the capital of a passthrough entity shall be allocated using any reasonable method for §1.163-8T purposes. For this purpose, any reasonable method includes allocating the debt among the assets of the passthrough entity or tracing the debt proceeds to the expenditures of the passthrough entity.

In the case of debt-financed distributions, Notice 89-35 provides a general allocation rule and an optional allocation rule. The general allocation rule applies the principles of §1.163-8T to interest expense associated with debt-financed distributions by applying a tracing approach to determine the character of the interest expense for §1.163-8T purposes. Under this approach, the debt proceeds and the associated interest expense related to a debt-financed distribution are allocated under §1.163-8T in accordance with the use of the distributed debt proceeds by the distributee owner of the passthrough entity. To the extent an owner’s share of a passthrough entity’s interest expense related to the debt-financed distribution exceeds the entity’s interest expense on the portion of the debt proceeds distributed to that particular owner, Notice 89-35 provides that the passthrough entity may allocate such excess interest expense using any reasonable method.

The optional allocation rule applicable to debt-financed distributions allows a passthrough entity to allocate distributed debt proceeds and the associated interest expense to one or more expenditures, other than distributions, of the entity that are made during the same taxable year of the entity as the distribution, to the extent that debt proceeds, including other distributed debt proceeds, are not otherwise allocated to such expenditures. Under the optional allocation rule, distributed debt proceeds are traced to the owner’s use of the borrowed funds to the extent that such distributed debt proceeds exceed the entity’s expenditures, not including distributions, for the taxable year to which debt proceeds are not otherwise allocated.

While the 2018 Proposed Regulations did not include rules to further address the application of §1.163-8T to passthrough entities, the Treasury Department and the IRS received comments indicating that, for purposes of section 163(j), a tracing

rule based on how a passthrough entity owner uses the proceeds of a debt-financed distribution does not align well with the statutory mandate in section 163(j)(4) to apply section 163(j) at the passthrough entity level. Based on these comments and a review of the rules under §1.163-8T, the Treasury Department and the IRS have determined that additional rules, specific to passthrough entities and their owners, are needed to clarify how the rules under §1.163-8T work when applied to a passthrough entity and to account for the entity-level limitation under section 163(j)(4).

A. In General

The rules of §1.163-8T generally apply to partnerships, S corporations, and their owners and the rules in proposed §1.163-14 would provide additional rules for purposes of applying the §1.163-8T rules to passthrough entities. As with the rules under §1.163-8T, proposed §1.163-14 would provide that interest expense on a debt incurred by a passthrough entity is allocated in the same manner as the debt to which such interest relates is allocated, and that debt is generally allocated by tracing disbursements of the debt proceeds to specific expenditures.

The Treasury Department and the IRS have determined that the scope of §1.163-8T(a)(4) and (b) is not appropriate in the passthrough entity context. Section 1.163-8T(a)(4) generally provides rules regarding the treatment of interest expense allocated to specific expenditures, which are described in §1.163-8T(b). However, the list of expenditures described in §1.163-8T(b) is based on an allocation of interest for purposes of applying sections 163(d), 163(h), and 469, and does not adequately account for the uses of debt proceeds by a passthrough entity (for example, distributions to owners).

To more accurately account for the types of expenditures made by passthrough entities, proposed §1.163-14(b) would provide rules tailored to passthrough entities. In addition, the framework that proposed §1.163-14(b) would provide is needed for a passthrough entity to determine how much of its interest expense is allocable to a trade or business for purposes of applying section 163(j). These proposed reg-

ulations would apply before a passthrough entity applies any of the rules in section 163(j) (including §1.163(j)-10).

In application, a passthrough entity would continue to apply the operative rules in §1.163-8T to allocate debt and the interest expense associated with such debt. However, instead of generally tracing debt proceeds to the types of expenditures described under §1.163-8T(b) and treating any interest expense associated with such debt proceeds in the manner described under §1.163-8T(a)(4), a passthrough entity would generally trace debt proceeds to the types of expenditures described under proposed §1.163-14(b)(2) and treat any interest expense associated with such debt proceeds in the manner provided under proposed §1.163-14(b)(1).

B. Debt Financed Distributions

Proposed §1.163-14 would provide that when debt proceeds of a passthrough entity are allocated under §1.163-8T to distributions to owners of the entity, the debt proceeds distributed to any owner and the associated interest expense shall be allocated under proposed §1.163-14(d). In general, proposed §1.163-14(d) would adopt a rule similar to Notice 89-35, but with the following modifications. First, instead of providing that passthrough entities may use the optional allocation rule, proposed §1.163-14(d) would generally provide that passthrough entities are required to apply a rule that is similar to the optional allocation rule. Second, instead of providing that the passthrough entity may allocate excess interest expense using any reasonable method, proposed §1.163-14(d) would generally provide that the passthrough entity must allocate excess interest expense based on the adjusted tax basis of the passthrough entity's assets.

Specifically, proposed §1.163-14(d)(1) would provide a rule based in principle on the optional allocation rule in Notice 89-35. Under this proposed rule, distributed debt proceeds (debt proceeds of a passthrough entity allocated under §1.163-8T to distributions to owners of the entity) would first be allocated under proposed §1.163-14(d)(1)(i) to the passthrough entity's available expenditures. Available expenditures are those expenditures of a passthrough entity

made in the same taxable year as the distribution, but only to the extent that debt proceeds (including other distributed debt proceeds) are not otherwise allocated to such expenditure. This approach is consistent with the concept that money is fungible (a passthrough entity may be fairly treated as distributing non-debt proceeds rather than debt proceeds and using debt proceeds rather than non-debt proceeds to finance its non-distribution expenditures) and seeks to coordinate the interest allocation rules with the entity-level approach to passthroughs adopted in section 163(j). Where the distributed debt proceeds exceed the passthrough entity's available expenditures, this excess amount of distributed debt proceeds would be allocated to distributions to owners of the passthrough entity (debt financed distributions) under proposed §1.163-14(d)(1)(ii).

After determining the amount of its distributed debt proceeds allocated to available expenditures and debt financed distributions, a passthrough entity would use this information to determine the tax treatment of each owner's allocable interest expense (that is, an owner's share of interest expense associated with the distributed debt proceeds allocated under section 704(b) or 1366(a)). To aid the passthrough entity and owner in determining the tax treatment of each owner's allocable interest expense, proposed §1.163-14(d)(2) would provide rules for determining the portion of each owner's allocable interest expense that is (1) debt financed distribution interest expense, (2) expenditure interest expense, and (3) excess interest expense. These three categories of allocable interest expense are mutually exclusive – e.g., a given dollar of allocable interest expense cannot simultaneously be both debt financed distribution interest expense and expenditure interest expense. The computations in proposed §1.163-14(d)(2) would ensure this outcome.

Once a passthrough entity categorizes each owner's allocable interest expense as described earlier, it would apply proposed §1.163-14(d)(3) to determine the tax treatment of such interest expense. The manner in which the tax treatment of allocable interest expense is determined depends on how such allocable interest expense was categorized under proposed §1.163-14(d)(2).

Conceptually, each of the three categories described earlier, as well as the prescribed tax treatment of interest expense in each category, is discussed in Notice 89-35. Debt financed distribution interest expense is referred to in Notice 89-35 as an owner's share of a passthrough entity's interest expense on debt proceeds allocated to such owner. Similar to Notice 89-35, proposed §1.163-14(d)(3)(i) would generally provide that such interest expense is allocated under §1.163-8T in accordance with the owner's use of the debt proceeds. Further, expenditure interest expense is referred to in Notice 89-35 as interest expense allocated under the optional allocation rule. Similar to Notice 89-35, proposed §1.163-14(d)(3)(ii) would generally provide that the tax treatment of such interest expense is determined based on how the distributed debt proceeds were allocated among available expenditures. Finally, both Notice 89-35 and proposed §1.163-14(d) would use the term excess interest expense to refer to an owner's share of allocable interest expense in excess of the entity's interest expense on the portion of the debt proceeds distributed to that particular owner. Unlike Notice 89-35, which generally allows any reasonable method for determining the tax treatment of excess interest expense, proposed §1.163-14(d)(3)(iii) would generally provide that the tax treatment of excess interest expense is determined by allocating the distributed debt proceeds among all the assets of the passthrough entity, pro-rata, based on the adjusted basis of such assets.

Proposed §1.163-14(d)(4) also would provide rules addressing the tax treatment of the interest expense of a transferee owner where the transferor had previously been allocated debt financed distribution interest expense. In the case of a transfer of an interest in a passthrough entity, any debt financed distribution interest expense of the transferor generally shall be treated as excess interest expense by the transferee. However, in the case of a transfer of an interest in a passthrough entity to a person who is related to the transferor, any debt financed distribution interest expense of the transferor shall continue to be treated as debt financed distribution interest expense by the related party transferee, and the tax treatment of such debt financed distribution expense shall be the same to

the related party transferee as it was to the transferor. The term related party means any person who bears a relationship to the taxpayer which is described in section 267(b) or 707(b)(1).

The proposed regulations also would include an anti-avoidance rule to recharacterize arrangements entered into with a principal purpose of avoiding the rules of proposed §1.163-14(d), including the transfer of an interest in a passthrough entity by an owner who treated a portion of its allocable interest expense as debt financed distribution interest expense to an unrelated party pursuant to a plan to transfer the interest back to the owner who received the debt financed distribution interest expense or to a party who is related to the owner who received the debt financed distribution interest expense.

C. Operational Rules

Proposed §1.163-14 also would include several operational rules that clarify the application of certain rules under §1.163-8T as they apply to passthrough entities. Proposed §1.163-14(e) would provide an ordering rule applicable to repayment of debt by passthrough entities similar to the rules in §1.163-8T(d)(1). Proposed §1.163-14(g) would provide that any transfer of an ownership interest in a passthrough entity is not a reallocation event for purposes of § 1.163-8T(j), except as provided for in §1.163-14(d)(4).

D. Debt-Financed Acquisitions

Proposed §1.163-14(f) would adopt a rule providing that the tax treatment of an owner's interest expense associated with a debt financed acquisition (either by purchase or contribution) will be determined by allocating the debt proceeds among the assets of the entity. The owner would allocate the debt proceeds (1) in proportion to the relative adjusted tax basis of the entity's assets reduced by any debt allocated to such assets, or (2) based on the adjusted basis of the entity's assets in accordance with the rules in §1.163(j)-10(c)(5)(i) reduced by any debt allocated to such assets. The Treasury Department and the IRS request comments regarding whether asset basis (either adjusted tax basis or adjusted tax basis based on the rules in §1.163(j)-

10(c)(5)(i)) less the amount of debt allocated to assets under §§1.163-14 and 1.163-8T is appropriate as the sole method for allocating interest expense in this context.

II. Proposed §1.163-15: Debt Proceeds Distributed from Any Taxpayer Account or from Cash

Proposed §1.163-15 supplements the rules in §1.163-8T regarding debt proceeds distributed from any taxpayer account or from cash proceeds. Section 1.163-8T(c)(4)(iii)(B) provides that a taxpayer may treat any expenditure made from an account within 15 days after the debt proceeds are deposited in such account as being made from such proceeds, regardless of any other rules in §1.163-8T(c)(4). Under §1.163-8T(c)(5)(i), if a taxpayer receives debt proceeds in cash, the taxpayer may treat any cash expenditure made within 15 days after receiving the cash as being made from such debt proceeds, and may treat such expenditure as being made on the date the taxpayer received the cash. Commenters have suggested that the 15-day limit in §1.163-8T could encourage taxpayers to keep separate accounts, rather than commingled accounts for tracing purposes.

In Notice 88-20, 1988-1 C.B. 487, the IRS announced the intention to issue regulations providing that, for debt proceeds deposited in an account on or before December 31, 1987, taxpayers could treat any expenditure made from any account of the taxpayer or from cash within 30 days before or after debt proceeds are deposited in such account or any other account of the taxpayer as made from such proceeds. The Notice states that the regulations also would provide that for debt proceeds received in cash on or before December 31, 1987, taxpayers may treat any expenditure made from any account of the taxpayer or from cash within 30 days before or after debt proceeds are received in cash as made from such proceeds. Section VI of Notice 89-35 adopts the standard described in Notice 88-20 without the date limitation, although no regulations have been issued.

Consistent with Notice 89-35, proposed §1.163-15 provides that taxpayers may treat any expenditure made from an

account of the taxpayer or from cash within 30 days before or after debt proceeds are deposited in any account of the taxpayer or received in cash as made from such proceeds.

III. Proposed Modifications to §1.163(j)-1(b): Definitions

A. Adjustments to Tentative Taxable Income

Section 1.163(j)-1(b)(1) requires taxpayers to make certain adjustments to tentative taxable income in computing ATI, including adjustments to address certain sales or other dispositions of depreciable property, stock of a consolidated group member (member stock), or interests in a partnership. More specifically, §1.163(j)-1(b)(1)(ii)(C) provides that, if property is sold or otherwise disposed of, the greater of the allowed or allowable depreciation, amortization, or depletion of the property for the taxpayer (or, if the taxpayer is a member of a consolidated group, the consolidated group) for taxable years beginning after December 31, 2017, and before January 1, 2022 (such years, the EBITDA period), with respect to such property is subtracted from tentative taxable income. Section 1.163(j)-1(b)(1)(ii)(D) provides that, with respect to the sale or other disposition of stock of a member of a consolidated group by another member, the investment adjustments under §1.1502-32 with respect to such stock that are attributable to deductions described in §1.163(j)-1(b)(1)(ii)(C) are subtracted from tentative taxable income. Section 1.163(j)-1(b)(1)(ii)(E) provides that, with respect to the sale or other disposition of an interest in a partnership, the taxpayer's distributive share of deductions described in §1.163(j)-1(b)(1)(ii)(C) with respect to property held by the partnership at the time of such sale or other disposition is subtracted from tentative taxable income to the extent such deductions were allowable under section 704(d). See the preamble to the Final Regulations for a discussion of the rationale for these adjustments.

The preamble to the Final Regulations noted that, in the 2018 Proposed Regulations, §1.163(j)-1(b)(1)(ii)(C) incorporated a "lesser of" standard. In other words, the lesser of (i) the amount of gain on

the sale or other disposition of property, or (ii) the amount of depreciation deductions with respect to such property for the EBITDA period, was required to be subtracted from tentative taxable income to determine ATI. As explained in the preamble to the Final Regulations, commenters raised several questions regarding this “lesser of” standard. The Final Regulations removed the “lesser of” approach due in part to concerns that this approach would be more difficult to administer than the approach reflected in the Final Regulations.

However, the Treasury Department and the IRS recognize that, in certain cases, the “lesser of” approach might not create administrative difficulties for taxpayers. Thus, these Proposed Regulations permit taxpayers to choose whether to compute the amount of their adjustment using a “lesser of” standard. While the 2018 Proposed Regulations applied this standard solely to dispositions of property, these Proposed Regulations extend this standard to dispositions of partnership interests and member stock to eliminate the discontinuity between the amount of the adjustment for these different types of dispositions. Taxpayers opting to use this alternative computation method must do so for all sales or other dispositions that otherwise would be subject to §1.163(j)-1(b)(1)(ii) (C), (D), or (E) when the taxpayer computes tentative taxable income.

The Treasury Department and the IRS request comments on the “lesser of” approach, including how such an approach should apply to dispositions of member stock and partnership interests.

B. Dividends from Regulated Investment Company (RIC) Shares

Some commenters on the 2018 Proposed Regulations recommended that dividend income from a RIC be treated as interest income for a shareholder in a RIC, to the extent that the income earned by the RIC is interest income. Because a RIC is a subchapter C corporation, section 163(j) applies at the RIC level, and any BIE that is disallowed at the RIC level is carried forward to subsequent years at the RIC level. Furthermore, because a RIC is a subchapter C corporation, a shareholder in a RIC generally does not take into

account a share of the RIC’s items of income, deduction, gain, or loss. Thus, if a RIC’s BII exceeds its BIE in a taxable year, the RIC may not directly allocate the excess amount to its shareholders (unlike a partnership, which may allocate excess BII to its partners).

Under part 1 of subchapter M and other Code provisions, however, a RIC that has certain items of income or gain may pay dividends that a shareholder in the RIC may treat in the same manner (or a similar manner) as the shareholder would treat the underlying items of income or gain if the shareholder realized the items directly. Although this treatment differs fundamentally from the passthrough treatment of partners or trust beneficiaries, this Explanation of Provisions refers to this treatment as “conduit treatment.” For example, under sections 871(k)(1) and 881(e)(1), a RIC that has qualified interest income within the meaning of section 871(k)(1)(E) may pay interest-related dividends, and no tax generally would be imposed under sections 871(a)(1)(A) or 881(a)(1) on an interest-related dividend paid to a nonresident alien individual or foreign corporation. Section 871(k)(1) provides necessary limits and procedures that apply to interest-related dividends. The Code provides similar conduit treatment for capital gain dividends in section 852(b)(3), exempt-interest dividends in section 852(b)(5), short-term capital gain dividends in section 871(k)(2), dividends eligible for the dividends received deduction in section 854(b)(1)(A), and qualified dividend income in section 854(b)(1)(B).

In response to comments, these Proposed Regulations provide rules under which a RIC that earns BII may pay section 163(j) interest dividends. A shareholder that receives a section 163(j) interest dividend may treat the dividend as interest income for purposes of section 163(j), subject to holding period requirements and other limitations. A section 163(j) interest dividend that meets these requirements is treated as BII if it is properly allocable to a non-exempt trade or business of the shareholder. A section 163(j) interest dividend is treated as interest income solely for purposes of section 163(j).

The rules under which a RIC may report section 163(j) interest dividends are based on the rules for reporting exempt-interest

dividends in section 852(b)(5) and interest-related dividends in section 871(k)(1). The total amount of a RIC’s section 163(j) interest dividends for a taxable year is limited to the excess of the RIC’s BII for the taxable year over the sum of the RIC’s BIE for the taxable year and the RIC’s other deductions for the taxable year that are properly allocable to the RIC’s BII. For some types of income and gain to which conduit treatment applies, the gross amount of the RIC’s income or gain of that type serves as the limit on the RIC’s corresponding dividends. It would be inconsistent with the purposes of section 163(j) to permit a RIC to pay section 163(j) interest dividends in an amount based on the RIC’s gross BII, unreduced by the RIC’s BIE. Further reducing the limit on a RIC’s section 163(j) interest dividends by the amount of the RIC’s other deductions that are properly allocable to the RIC’s BII is consistent with the provisions of the Code that provide conduit treatment for types of interest earned by a RIC. For example, the limit on interest-related dividends in section 871(k)(1)(D) is reduced by the deductions properly allocable to the RIC’s qualified interest income. Similarly, the limit on exempt-interest dividends in section 852(b)(5)(A)(iv)(V) is reduced by the amounts disallowed as deductions under sections 265 and 171(a)(2). Taking into account the appropriate share of deductions also reduces the likelihood that the sum of a RIC’s items that are eligible for conduit treatment and that are relevant to a particular shareholder will exceed the amount of the dividend distribution paid to the particular shareholder.

These Proposed Regulations contain an additional limit to prevent inconsistent treatment of RIC dividends by RIC shareholders. Revenue Ruling 2005-31, 2005-1 C.B. 1084, allows a RIC to report the maximum amount of capital gain dividends, exempt-interest dividends, interest-related dividends, short-term capital gain dividends, dividends eligible for the dividends received deduction, and qualified dividend income for a taxable year, even if the sum of the reported amounts exceeds the amount of the RIC’s dividends for the taxable year. The ruling allows different categories of shareholders (United States persons and nonresident aliens) to report the dividends they receive by giving effect to

the conduit treatment of the items relevant to them. A single shareholder, however, generally does not benefit from the conduit treatment of amounts in excess of the dividend paid to that shareholder, because to do so would require the shareholder to include in its taxable income amounts exceeding the dividend it received. Conduit treatment of BII, however, differs from the conduit treatment of other items, because a section 163(j) interest dividend is treated as interest income only for purposes of section 163(j). Thus, absent a limit, a RIC shareholder could obtain an inappropriate benefit by treating a portion of a RIC dividend as interest income for purposes of section 163(j) while treating the same portion of the dividend as another non-interest type of income, such as a dividend eligible for the dividends received deduction under sections 243 and 854(b). Therefore, these Proposed Regulations limit the amount of a section 163(j) interest dividend that a shareholder may treat as interest income for purposes of section 163(j) to the excess of the amount of the RIC dividend that includes the section 163(j) interest dividend over the sum of the portions of that dividend affected by conduit treatment in the hands of that shareholder, other than interest-related dividends under section 871(k)(1)(C) and section 163(j) interest dividends.

Under these Proposed Regulations, a shareholder generally may not treat a section 163(j) interest dividend as interest income unless it meets certain holding period and similar requirements. The holding period requirements do not apply to (i) dividends paid by a RIC regulated as a money market fund under 17 CFR 270.2a-7 or (ii) certain regular dividends paid by a RIC that declares section 163(j) interest dividends on a daily basis and distributes such dividends on a monthly or more frequent basis. The Treasury Department and the IRS request comments on whether there are other categories of section 163(j) interest dividends for which the holding period requirements should not apply or should be modified. The Treasury Department and the IRS also request comments on whether any payments that are substitutes for section 163(j) interest dividends (for example, in a securities lending or sale-repurchase transaction with respect to RIC shares) should be treated for pur-

poses of section 163(j) as interest expense of taxpayers making the payments or interest income to taxpayers receiving the payments. Cf. §1.163(j)-1(b)(22)(iii)(C) (addressing certain payments that are substitutes for interest).

These Proposed Regulations, to the extent they concern the payment of section 163(j) interest dividends by a RIC and the treatment of such dividends as interest by a RIC shareholder, are proposed to apply to taxable years beginning on or after the date that is 60 days after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. Solely in the case of section 163(j) interest dividends that would be exempt from the holding period rules under these Proposed Regulations, the RIC paying such dividends and the shareholders receiving such dividends may rely on the provisions of these Proposed Regulations pertaining to section 163(j) interest dividends for taxable years ending on or after September 14, 2020, and beginning before the date that is 60 days after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**.

IV. Proposed §1.163(j)-6: Application of the Business Interest Expense Deduction Limitations to Partnerships and Subchapter S Corporations

A. Trading Partnerships

The preamble to the 2018 Proposed Regulations states that the business interest expense of certain passthrough entities, including S corporations, allocable to trade or business activities that are described in section 163(d)(5)(A)(ii) (i.e., activities that are per se non-passive under section 469 in which the taxpayer does not materially participate) and illustrated in Revenue Ruling 2008-12, 2008-1 C.B. 520 (March 10, 2008) (trading activities), will be subject to section 163(j) at the entity level, even if the interest expense is later subject to limitation under section 163(d) at the individual partner or shareholder level. Accordingly, at least with respect to partnerships, to the extent that interest expense from a trading activity is limited under section 163(j) and becomes a carryover item of partners who do not

materially participate in the trading activity, the interest expense will be treated as investment interest in the hands of those partners for purposes of section 163(d) once the interest expense is no longer limited under section 163(j). As a result, the interest expense would be subject to two section 163 limitations.

The Treasury Department and the IRS received multiple comments questioning this interpretation of section 163(j)(5) and its interaction with section 163(d)(5)(A)(ii). Specifically, commenters stated that the interpretation improperly results in the application of section 163(j) to partnerships engaged in a trade or business activity of trading personal property (including marketable securities) for the account of owners of interests in the activity, as described in §1.469-1T(e)(6) (trading partnerships). At issue is the extent to which BIE of trading partnerships should be subject to limitation under section 163(j). This issue involves the definition of BIE under section 163(j)(5) and, more specifically, the second sentence of section 163(j)(5), which generally provides that BIE shall not include investment interest within the meaning of section 163(d).

The approach described in the preamble to the 2018 Proposed Regulations interprets section 163(j)(5) as simply providing that interest expense cannot be both BIE and investment interest expense in the hands of the same taxpayer. Under this interpretation, section 163(j)(5) will treat interest as investment interest where conflicting provisions may otherwise subject an amount of interest expense to limitation under both section 163(j) and section 163(d) with respect to the same taxpayer (for example, interest expense allocable to business assets comprising “working capital” as that term is used in section 469(e)(1)(B)). In addition, this approach views the partnership as an entity separate from its partners for purposes of section 163(j) to the partnership and section 163(d) at the individual partner level. Several commenters disagreed with this interpretation of section 163(j)(5), asserting that the second sentence of section 163(j)(5) unequivocally provides that interest expense can never be subject to limitation under both section 163(j) and section 163(d) under any circumstances. Based on these comments, the Treasury

Department and the IRS considered three alternative approaches for interpreting section 163(j)(5).

One approach would require a partnership engaged in a trading activity to apply section 163(j) at the partnership level to all of the partnership's interest expense from the trading activity. Under this approach, any deductible interest expense from the partnership's trading activity would not be subject to any further limitation under section 163(d) at the individual partner level. This interpretation would respect the partnership as an entity separate from its partners for purposes of section 163(j), but would treat section 163(j)(4) and (5) as superseding section 163(d)(5)(A)(ii).

A second approach would require a partnership engaged in a trading activity to bifurcate its interest expense from a trading activity between partners that materially participate in the trading activity and partners that are passive investors in the activity, and subject only the portion that is allocable to the materially participating partners to limitation under section 163(j). Under this approach, to the extent any interest expense is allocable to passive investors in the trading activity, the interest expense would be subject only to section 163(d) at the partner level and would never be subject to section 163(j) at the partnership level.

A third approach would require a partnership to treat all of the interest expense from a trading activity as investment interest under section 163(d), regardless of whether any individual partners materially participate in the trading activity. Under this approach, the interest expense properly allocable to materially participating partners would never be subject to limitation under section 163(j), even though interest expense allocable to materially participating partners would also not be subject to limitation under section 163(d) at the individual partner level.

After considering the comments, Treasury Department and the IRS have concluded that the approach described in the preamble to the 2018 Proposed Regulations is inconsistent with the statutory language and intent of section 163(j)(5) because the second sentence of section 163(j)(5) specifically states that BIE shall not include investment interest expense. In addition, the Treasury Department and

the IRS have determined that the second alternative approach, as described earlier, appears to be the most consistent with the intent of sections 163(d) and 163(j). Accordingly, these Proposed Regulations would interpret section 163(j)(5) as requiring a trading partnership to bifurcate its interest expense from a trading activity between partners that materially participate in the trading activity and partners that are passive investors, and as subjecting only the portion of the interest expense that is allocable to the materially participating partners to limitation under section 163(j) at the partnership level. The portion of interest expense from a trading activity allocable to passive investors will be subject to limitation under section 163(d) at the partner level, as provided in section 163(d)(5)(A)(ii).

In addition, these Proposed Regulations require that a trading partnership bifurcate all of its other items of income, gain, loss and deduction from its trading activity between partners that materially participate in the partnership's trading activity and partners that are passive investors. The portion of the partnership's other items of income, gain, loss or deduction from its trading activity properly allocable to the passive investors in the partnership will not be taken into account at the partnership level as items from a trade or business for purposes of applying section 163(j) at the partnership level. Instead, all such partnership items properly allocable to passive investors will be treated as items from an investment activity of the partnership, for purposes of sections 163(j) and 163(d).

This approach, in order to be effective, adopts the presumption that a trading partnership generally will possess knowledge regarding whether its individual partners are material participants in its trading activity. No rules currently exist requiring a partner to inform the partnership whether the partner has grouped activities of the partnership with other activities of the partner outside of the partnership. Therefore, the partnership might possess little or no knowledge regarding whether an individual partner has made such a grouping. Without this information, a trading partnership may presume that an individual partner is a passive investor in the partnership's trading activity based solely on the

partnership's understanding as to the lack of work performed by the partner in that activity, whereas the partner may in fact be treated as a material participant in the partnership's trading activity by grouping that activity with one or more activities of the partner in which the partner materially participates. In order to avoid this result and the potential for abuse, a new rule is proposed for the section 469 activity grouping rules to provide that any activity described in section 163(d)(5)(A)(ii) may not be grouped with any other activity of the taxpayer, including any other activity described in section 163(d)(5)(A)(ii). The Treasury Department and the IRS invite comments regarding whether other approaches may be feasible and preferable to a special rule that prohibits the grouping of trading activities with other activities of a partner, such as adoption of a rule or reporting regime requiring all partners in the partnership to annually certify or report to the partnership whether they are material participants in a grouped activity that includes the partnership's trading activity.

The Treasury Department and the IRS further invite comments regarding whether similar rules should be adopted with respect to S corporations that may also be involved in trading activities, and whether such rules would be compatible with Subchapter S (for example, whether the bifurcation of items from the S corporation's trading activity between material participants and passive investors would run afoul of the second class of stock prohibition).

B. Fungibility of Publicly Traded Partnerships

In order to be freely marketable, each unit of a publicly traded partnership (PTP), as defined in §1.7704-1, must have identical economic and tax characteristics so that such PTP units are fungible. For PTP units to be fungible, the section 704(b) capital account associated with each unit must be economically equivalent to the section 704(b) capital account of all other units of the same class, and a PTP unit buyer must receive equivalent tax allocations regardless of the specific unit purchased. In other words, from the perspective of a buyer, a PTP unit cannot have variable tax attributes depending

on the identity of the PTP unit seller. In general, to achieve fungibility, a PTP (1) makes a section 754 election, pursuant to which a purchaser can insulate itself from its predecessor's allocable section 704(c) gain or loss through a section 743(b) basis adjustment, and (2) adopts the remedial allocation method under section 704(c) for all of its assets.

Pursuant to §1.704-3(d)(1), a partnership adopts the section 704(c) remedial allocation method to eliminate distortions caused by the application of the ceiling rule, as defined in §1.704-3(b)(1), under the section 704(c) traditional method. A partnership adopting the remedial allocation method eliminates ceiling rule distortions by creating remedial items and allocating those items to its partners. Under the remedial allocation method, a partnership first determines the amount of section 704(b) book items under §1.704-3(d)(2) and the partners' section 704(b) distributive shares of such items. The partnership then allocates the corresponding tax items recognized by the partnership, if any, using the traditional method described in §1.704-3(b)(1). If the ceiling rule causes the section 704(b) book allocation of an item to a noncontributing partner to differ from the tax allocation of the same item to the noncontributing partner, the partnership creates a remedial item of income, gain, loss, or deduction equal to the full amount of the difference and allocates it to the noncontributing partner. The partnership simultaneously creates an offsetting remedial item in an identical amount and allocates it to the contributing partner. In sum, by coupling the remedial allocation method with a section 754 election, PTP units remain fungible from a net tax perspective, regardless of the PTP unit seller's section 704(c) position.

However, even when the remedial allocation method is coupled with a section 754 election, the application of section 163(j) in the partnership context results in variable tax attributes for a buyer depending upon the tax characteristics of the interest held by the seller. The Treasury Department and the IRS have determined this is an inappropriate result for PTPs because PTPs, unlike other partnerships, always require that tax attributes be proportionate to economic attributes to retain the fungibility of their units. The Treasury

Department and the IRS have determined that the manner in which section 163(j) applies in the partnership context should not result in the non-fungibility of PTP units. Accordingly, these Proposed Regulations provide a method, solely for PTPs, for applying section 163(j) in a manner that does not result in PTP units lacking fungibility.

Specifically, commenters identified three ways in which the 2018 Proposed Regulations may cause PTP units to be non-fungible. First, the method for allocating excess items may cause PTP units to be non-fungible. In general, under §1.163(j)-6(f)(2), the allocation of the components of ATI dictate the allocation of a partnership's deductible BIE and section 163(j) excess items. Consequently, the unequal sharing of inside basis, including cost-recovery deductions, amortization, gain, and loss affects the ratio in which a partnership's section 163(j) excess items, as defined in §1.163(j)-6(b)(6), are shared. A partner's share of section 163(j) excess items affects the tax treatment and economic consequences of the partner. For example, a greater share of excess taxable income enables a partner subject to section 163(j) to deduct more interest.

The Treasury Department and the IRS recognize that a non-pro rata sharing of inside basis could result in a non-pro rata allocation of excess items, which may result in PTP units lacking fungibility. Therefore, these Proposed Regulations would amend §1.163(j)-6(f)(1)(iii) to provide that, solely for purposes of section 163(j), a PTP allocates section 163(j) excess items in accordance with the partners' shares of corresponding section 704(b) items that comprise ATI.

Second, the required adjustments to partner ATI for partner basis items (e.g., section 743(b) income and loss) may cause PTP units to lack fungibility. A non-pro rata sharing of inside basis may result in a different allocation of partner basis items, as defined in §1.163(j)-6(b)(2), and section 704(c) remedial items, as defined in §1.163(j)-6(b)(3), among partners. Pursuant to §1.163(j)-6(d)(2), partner basis items and remedial items are not taken into account in determining a partnership's ATI under §1.163(j)-1(b)(1). Instead, partner basis items and section 704(c) remedial items affect the tax

treatment and economic consequences of the partner. Similar to the disproportionate sharing of excess items discussed earlier, the disproportionate sharing of partner basis items and section 704(c) remedial items among partners may cause PTP units to lack fungibility.

The Treasury Department and the IRS recognize that a non-pro rata sharing of inside basis could result in different partner basis items and remedial items being allocated to different partners. Therefore, these Proposed Regulations would amend §1.163(j)-6(e)(2)(ii) to provide that, solely for the purpose of determining remedial items under section 163(j), a PTP either allocates gain or loss that would otherwise be allocated under section 704(c) to a specific partner to all partners based on each partner's section 704(b) sharing ratio, or, for purposes of allocating cost recovery deductions under section 704(c), determines each partner's remedial items based on an allocation of the partnership's inside basis items among its partners in proportion to their share of corresponding section 704(b) items, rather than applying the traditional method as described in §1.704-3(b).

Third, the treatment of section 704(c) remedial income allocations for taxable years beginning before 2022 may cause PTP units to lack fungibility. For taxable years beginning before January 1, 2022, when tentative taxable income is not reduced by depreciation and amortization deductions for purposes of determining ATI, a buyer acquiring PTP units with section 704(c) remedial income allocations (and an offsetting section 743(b) adjustment) will have an increase to its ATI that exceeds that of a buyer of the same number of otherwise fungible units that is not stepping into section 704(c) remedial income (with no corresponding section 743(b) deduction). While the net amount of the section 743(b) and section 704(c) remedial items is the same to both buyers, for taxable years beginning before January 1, 2022, different units would affect a buyer's ATI differently. The section 704(c) remedial income of a buyer of units with section 704(c) remedial income would be included in its ATI, while the section 743(b) deductions would not. Thus, a buyer of units with section 704(c) remedial income would increase its ATI each year

(before 2022). A buyer of units with no section 704(c) remedial income, however, would add back any remedial depreciation and amortization deductions before 2022, and its ATI would be unaffected by the remedial deductions for such years.

The Treasury Department and the IRS recognize that, before 2022, a buyer of PTP units with inherent section 704(c) gain would include any remedial income and would not include section 743(b) deductions in its ATI. Therefore, these Proposed Regulations would amend §1.163(j)-6(d)(2)(ii) to provide that, solely for purposes of section 163(j), a PTP treats the amount of any section 743(b) adjustment of a purchaser of a partnership unit that relates to a remedial item that the purchaser inherits from the seller as an offset to the related section 704(c) remedial item. The Treasury Department and the IRS request comments as to whether the approaches outlined adequately resolves the fungibility issues created by section 163(j).

C. Treatment of Business Interest Income and Business Interest Expense with Respect to Lending Transactions Between a Partnership and a Partner (Self-Charged Lending Transactions)

The 2018 Proposed Regulations reserved on the treatment of BII and BIE with respect to lending transactions between a partnership and a partner (self-charged lending transactions). The preamble to the 2018 Proposed Regulations requested comments regarding self-charged lending transactions. One commenter recommended the final regulations include rules under §1.163(j)-6(n) akin to those contained in §1.469-7 to identify self-charged interest income and expense and further allow such self-charged interest income and expense to be excluded from the definition of BIE and BII under section 163(j)(5) and (6), respectively. The same commenter recommended that the final regulations retain the rule in §1.163(j)-3(b)(4), as set forth in the 2018 Proposed Regulations, which applies the section 163(j) limitation prior to the application of the passive activity loss rules of section 469. Other commenters recommended the Final Regulations exclude BIE and BII from the section 163(j) calculation where

a partner or S-corporation shareholder lends to, or borrows from, a passthrough entity. These commenters recommended that the amount excluded be based on the amount of income or expense recognized by partners or shareholders that are lenders or borrowers, as well as partners or shareholders that are related to a lender or borrower partner within the meaning of section 267(b) because it would be appropriate to exclude the BII and BIE realized by the related parties for purposes of the section 163(j) calculation.

In response to these comments, the Treasury Department and the IRS propose adding a rule in proposed §1.163(j)-6(n) to provide that, in the case of a lending transaction between a partner (lending partner) and partnership (borrowing partnership) in which the lending partner owns a direct interest (self-charged lending transaction), any BIE of the borrowing partnership attributable to the self-charged lending transaction is BIE of the borrowing partnership for purposes of §1.163(j)-6. If in a given taxable year the lending partner is allocated EBIE from the borrowing partnership and has interest income attributable to the self-charged lending transaction (interest income), the lending partner shall treat such interest income as an allocation of excess business interest income (EBII) from the borrowing partnership in such taxable year, but only to the extent of the lending partner's allocation of EBIE from the borrowing partnership in such taxable year. To prevent the double counting of BII, the lending partner includes interest income that was re-characterized as EBII pursuant to proposed §1.163(j)-6(n) only once when calculating the lending partner's own section 163(j) limitation. In cases where the lending partner is not a C corporation, to the extent that any interest income exceeds the lending partner's allocation of EBIE from the borrowing partnership for the taxable year, and such interest income otherwise would be properly treated as investment income of the lending partner for purposes of section 163(d) for that year, such excess amount of interest income will continue to be treated as investment income of the lending partner for that year for purposes of section 163(d).

The Treasury Department and the IRS generally agree that lending partners

should not be adversely affected by the fact that, without special rules, the interest income received at the partner level from such lending transactions generally will be treated as investment income if the partner is not engaged in the trade or business of lending money, while the BIE of the partnership will be subject to section 163(j) and potentially limited at the partner level as EBIE. This situation would create a mismatch between the character of the interest income and of the interest expense at the partner level from the same lending transaction. These proposed rules would apply only to items of interest income attributable to the lending transaction and EBIE from the same partnership that arise in the same taxable year of the lending partner. By applying these proposed rules only to correct a mismatch in character that may occur at the partner level during a single taxable year, these proposed rules otherwise ensure that a partnership engaged in a self-charged lending transaction will be subject to the rules of section 163(j) to the same extent regardless of the sources of its loans.

These proposed rules will not apply in the case of an S corporation because BIE of an S corporation is carried over by the S corporation as a corporate-level attribute rather than immediately passed through to its shareholders. In the year such disallowed BIE is deductible at the corporate level, it is not separately stated, and it is not subject to further limitation under section 163(j) at either the S corporation or shareholder level. Therefore, a limited self-charged rule to ensure proper matching of the character of interest income and BIE at the shareholder level is not necessary. This approach is consistent with the treatment of S corporations as separate entities from their owners, both generally and specifically with respect to section 163(j).

However, the Treasury Department and the IRS recognize that issues analogous to the issues faced by partnerships in self-charged lending transactions exist with respect to lending transactions between S corporations and their shareholders. The Treasury Department and the IRS request comments on whether a similar rule is appropriate for S corporations in light of section 163(j)(4)(B) not applying and, if so, how such rule should be structured.

D. Partnership Basis Adjustments upon Partner Dispositions

In general, a partnership's disallowed BIE is allocated to its partners as EBIE rather than carried forward at the partnership level in order to prevent the trafficking of deductions for BIE carryforwards in the partnership context. To achieve this, section 163(j)(4)(B)(iii)(I) provides that the adjusted basis of a partner in a partnership interest is reduced (but not below zero) by the amount of EBIE allocated to the partner. If a partner disposes of a partnership interest, section 163(j)(4)(B)(iii)(II) provides that the adjusted basis of the partner in the partnership interest is increased immediately before the disposition by the amount of any EBIE that was not treated as BIE paid or accrued by the partner prior to the disposition. Further, under section 163(j)(4)(B)(iii)(II), no deduction shall be allowed to the transferor or transferee for any EBIE resulting in a basis increase.

The Treasury Department and the IRS have determined that the basis increase required by section 163(j)(4)(B)(iii)(II) is not fully descriptive of what is occurring when a partner with EBIE disposes of its partnership interest. If EBIE is not treated as BIE paid or accrued by the partner pursuant to §1.163(j)-6(g) prior to the partner disposing of its partnership interest (nondeductible EBIE), section 163(j)(4)(B)(iii)(II) treats such nondeductible EBIE as though it were a nondeductible expense of the partnership.

This nondeductible expense is not a nondeductible, non-capitalizable expense under section 705(a)(2)(B). If it were, the partner's basis in its partnership interest at the time of the disposition would already reflect such an expense. Instead, section 163(j)(4)(B)(iii)(II) requires the partner to increase its basis immediately before the disposition – in effect, treating the partner as though the partnership made a payment that decreased the value of the partnership interest but did not affect the partner's basis in its partnership interest. Thus, upon a disposition, section 163(j)(4) treats nondeductible EBIE as though it were a nondeductible, capitalizable expense of the partnership.

While the statute is clear that a partner increases the basis in its partnership

interest immediately prior to a disposition by any nondeductible EBIE, it does not specifically state that there must also be a corresponding increase to the basis of partnership assets to account for the nondeductible, capitalized expense (i.e., the nondeductible EBIE). The absence of a corresponding increase to the partnership's basis immediately before the partner's disposition would create distortions that are inconsistent with the intent of both section 163(j) and subchapter K of the Code.

For example, the basis increase attributable to nondeductible EBIE immediately before a liquidating distribution results in less gain recognized under section 731(a)(1) (or more loss recognized under section 731(a)(2)) for the partner disposing of its partnership interest. Consequently, following a liquidating distribution to a partner with EBIE, section 163(j)(4)(B)(iii)(II) causes a reduced section 734(b) adjustment if the partnership has a section 754 election in effect (versus the partner basis increase not occurring), resulting in basis disparity between the partnership's basis in its assets and the aggregate outside basis of the remaining partners.

To illustrate, consider the following example. In Year 1, A, B, and C formed partnership PRS by each contributing \$1,000 cash. PRS borrowed \$900, causing each partner's basis in PRS to increase by \$300. Also in Year 1, PRS purchased Capital Asset X for \$200. In Year 2, PRS pays \$300 of BIE, all of which is disallowed and treated as EBIE. PRS allocated the \$300 of EBIE to its partners, \$100 each. Pursuant to §1.163(j)-6(h)(2), each partner reduced its outside basis by its \$100 allocation of EBIE to \$1,200. In Year 3, when the fair market value of Capital Asset X is \$3,200 and no partner's basis in PRS has changed, PRS distributed \$1,900 to C in complete liquidation of C's partnership interest. PRS has a section 754 election in effect in Year 3.

Pursuant to §1.163(j)-6(h)(3), C increases the adjusted basis of its partnership interest by \$100 immediately before the disposition. Thus, C's section 731(a)(1) gain recognized on the disposition of its partnership interest is \$900 (($\$1,900$ cash + \$300 relief of liabilities) – (\$1,200 outside basis + \$100 EBIE add-back)). Because the election under section 754

is in effect, PRS has a section 734(b) increase to the basis of its assets of \$900 (the amount of section 731(a)(1) gain recognized by C). Under section 755, the entire adjustment is allocated to Capital Asset X. As a result, PRS's basis for Capital Asset X is \$1,100 (\$200 + \$900 section 734(b) adjustment). Following the liquidation of C, PRS's basis in its assets (\$1,500 of cash + \$1,100 of Capital Asset X) does not equal the aggregate outside basis of partners A and B (\$2,700).

The Treasury Department and the IRS have determined that basis disparity resulting from the absence of a corresponding inside basis increase, as described earlier, is an inappropriate result. Accordingly, these Proposed Regulations would provide for a corresponding inside basis increase that would serve as the partnership analog of section 163(j)(4)(B)(iii)(II). Specifically, proposed §1.163(j)-6(h)(5) would provide that if a partner (transferor) disposes of its partnership interest, the partnership shall increase the adjusted basis of partnership property by an amount equal to the amount of the increase required under §1.163(j)-6(h)(3), if any, to the adjusted basis of the partnership interest being disposed of by the transferor. Such increase in the adjusted basis of partnership property (§1.163(j)-6(h)(5) basis adjustment) shall be allocated among partnership properties in the same manner as a positive section 734(b) adjustment. Because a §1.163(j)-6(h)(5) basis adjustment is taken into account when determining the gain or loss upon a sale of the asset, a §1.163(j)-6(h)(5) basis adjustment prevents the shifting of built-in gain to the remaining partners.

These Proposed Regulations would adopt an approach that treats the increase in the adjusted basis of any partnership property resulting from a §1.163(j)-6(h)(5) basis adjustment as not depreciable or amortizable under any section of the Code, regardless of whether the partnership property allocated such §1.163(j)-6(h)(5) basis adjustment is otherwise generally depreciable or amortizable. This approach perceives EBIE as a deduction that was disallowed to the partnership (consistent with section 163(j)(4)(B)(iii)(II)), and thus should not result in a depreciable section 734(b) basis adjustment.

The Treasury Department and the IRS request comments on this approach. An alternative approach considered by the Treasury Department and the IRS would treat a §1.163(j)-6(h)(5) basis adjustment as depreciable or amortizable if it is allocated to depreciable or amortizable property. However, section 163(j)(4)(B)(iii)(II) provides that no deduction shall be allowed to the transferor or transferee for any EBIE resulting in a basis increase to the partner that disposed of its interest. If a §1.163(j)-6(h)(5) basis adjustment were depreciable or amortizable, a partnership – which can arguably be viewed as a transferee in a transaction in which a partner receives a distribution in complete liquidation of its partnership interest – could effectively deduct an expense that section 163(j)(4)(B)(iii)(II) states is permanently disallowed. The Treasury Department and the IRS request comments on whether treating a §1.163(j)-6(h)(5) basis adjustment as potentially depreciable or amortizable is consistent with section 163(j)(4)(B)(iii)(II).

E. Treatment of Excess Business Interest Expense in Tiered Partnerships

1. Entity Approach

The preamble to the 2018 Proposed Regulations reserved and requested comments on the application of section 163(j)(4) to tiered partnership structures. Specifically, the preamble to the 2018 Proposed Regulations requested comments regarding whether, in a tiered partnership structure, EBIE should be allocated through an upper-tier partnership to the partners of upper-tier partnership. Additionally, comments were requested regarding how and when the basis of an upper-tier partnership partner should be adjusted when a lower-tier partnership has BIE that is limited under section 163(j).

In response, commenters recommended approaches that, in general, either (1) allocated EBIE through upper-tier partnership to the partners of upper-tier partnership (Aggregate Approach), or (2) did not allocate EBIE through upper-tier partnership to the partners of upper-tier partnership (Entity Approach). Commenters stated that both approaches reasonably implement Congressional intent of apply-

ing section 163(j) at the partnership level; however, the Entity Approach reflects a stronger allegiance to entity treatment of partnerships for purposes of section 163(j). Commenters noted that the ultimate determination of which approach is more appropriate should rest, in large part, on whether partnerships or partners are more able to comply with the provision. The Entity Approach places more of that burden on partnerships, and the Aggregate Approach places more of the burden on partners. Commenters recommended that partnerships are better able to comply with an Entity Approach than partners are able to comply with an Aggregate Approach. Further, because the Entity Approach centers a significant portion of the compliance effort with partnerships, the Entity Approach may increase compliance and simplify Service review.

The Treasury Department and the IRS have concluded that an Entity Approach is the most consistent with the approach taken to partnerships under section 163(j)(4). Further, the Treasury Department and the IRS agree with commenters that partnerships are better able to comply with section 163(j) tiered partnership rules than partners. Accordingly, proposed §1.163(j)-6(j)(3) would provide that if lower-tier partnership allocates excess business interest expense to upper-tier partnership, then upper-tier partnership reduces its basis in lower-tier partnership pursuant to §1.163(j)-6(h)(2). Upper-tier partnership partners do not, however, reduce the bases of their upper-tier partnership interests pursuant to §1.163(j)-6(h)(2) until upper-tier partnership treats such excess business interest expense as business interest expense paid or accrued pursuant to §1.163(j)-6(g).

Although proposed §1.163(j)-6(j)(3) would provide that EBIE allocated from a lower-tier partnership to an upper-tier partnership is not subject to further allocation by the upper-tier partnership, such EBIE necessarily reflects a reduction in the value of lower-tier partnership by the amount of the economic outlay that resulted in such EBIE. Accordingly, proposed §1.163(j)-6(j)(2) would provide that if lower-tier partnership pays or accrues business interest expense and allocates such business interest expense to upper-tier partnership, then both upper-tier part-

nership and any direct or indirect partners of upper-tier partnership shall, solely for purposes of section 704(b) and the regulations thereunder, treat such business interest expense as a section 705(a)(2)(B) expenditure. Any section 704(b) capital account reduction resulting from such treatment occurs regardless of whether such business interest expense is characterized under this section as excess business interest expense or deductible business interest expense by lower-tier partnership. If upper-tier partnership subsequently treats any excess business interest expense allocated from lower-tier partnership as business interest expense paid or accrued pursuant to §1.163(j)-6(g), the section 704(b) capital accounts of any direct or indirect partners of upper-tier partnership are not further reduced.

2. Basis and Carryforward Component of EBIE

Some commenters stated that an Entity Approach – that is, the approach these Proposed Regulations would adopt – would result in basis disparity between upper-tier partnership's basis in its assets and the aggregate basis of the upper-tier partners' interests in upper-tier partnership. The Treasury Department and the IRS do not agree. EBIE is neither an item of deduction nor a section 705(a)(2)(B) expense. If an allocation of EBIE from lower-tier partnership results in a reduction of the upper-tier partnership's basis in its lower-tier partnership interest, there is not a net reduction in the tax attributes of the upper-tier partnership. Rather, in such an event, upper-tier partnership merely exchanges one tax attribute (tax basis in its lower-tier partnership interest) for a different tax attribute (EBIE, which, in a subsequent year, could result in either a deduction or a basis adjustment). Thus, basis is preserved in this exchange.

Accordingly, proposed §1.163(j)-6(j)(4) would provide that if lower-tier partnership allocates excess business interest expense to upper-tier partnership and such excess business interest expense is not suspended under section 704(d), then upper-tier partnership shall treat such excess business interest expense (UTP EBIE) as a nondepreciable capital asset, with a fair market value of zero and basis equal to the

amount by which upper-tier partnership reduced its basis in lower-tier partnership pursuant to §1.163(j)-6(h)(2) due to the allocation of such excess business interest expense. The fair market value of UTP EBIE, described in the preceding sentence, is not adjusted by any revaluations occurring under §1.704-1(b)(2)(iv)(f).

In addition to generally treating UTP EBIE as having a basis component in excess of fair market value and, thus, built-in loss property, proposed §1.163(j)-6(j)(4) would also provide that upper-tier partnership shall also treat UTP EBIE as having a carryforward component associated with it. The carryforward component of UTP EBIE shall equal the amount of excess business interest expense allocated from lower-tier partnership to upper-tier partnership under §1.163(j)-6(f)(2) that is treated as such under §1.163(j)-6(h)(2) by upper-tier partnership.

The carryforward component of UTP EBIE and the basis component of such UTP EBIE will always be equal immediately following the allocation of such EBIE from lower-tier partnership to upper-tier partnership if, at the time of such allocation, upper-tier partnership was required to reduce its section 704(b) capital account pursuant to proposed §1.163(j)-6(j)(2) due to such allocation. However, subsequent to such initial allocation of EBIE from lower-tier partnership to upper-tier partnership, disparities between the carryforward component of UTP EBIE and the basis component of such UTP EBIE may arise as a result of proposed §1.163(j)-6(j)(7).

Similar to the treatment of partner basis items (which do not affect the ATI of a partnership), proposed §1.163(j)-6(j)(7)(i) would provide that negative basis adjustments under sections 734(b) and 743(b) allocated to UTP EBIE do not affect the carryforward component of such UTP EBIE; rather, negative basis adjustments under sections 734(b) and 743(b) affect only the basis component of such UTP EBIE. Although section 734(b) adjustments do affect a partnership's computation of ATI, the Treasury Department and the IRS have determined that negative section 734(b) adjustments, if allocated to UTP EBIE, should not reduce the carryforward component of such UTP EBIE. The purpose of proposed §1.163(j)-6(j)(7)

– in addition to preventing the duplication of loss – is to make partners indifferent for section 163(j) purposes as to whether a partner exiting upper-tier partnership sells its interest or receives a liquidating distribution from upper-tier partnership. Excluding negative section 734(b) adjustments from proposed §1.163(j)-6(j)(7) would frustrate this purpose.

3. UTP EBIE Conversion Events

Proposed §1.163(j)-6(j)(4) would further provide that if an allocation of excess business interest expense from lower-tier partnership is treated as UTP EBIE of upper-tier partnership, upper-tier partnership shall treat such allocation of excess business interest expense from lower-tier partnership as UTP EBIE until the occurrence of an UTP EBIE conversion event described in proposed §1.163(j)-6(j)(5). In the non-tiered context, EBIE generally has two types of conversion events. The first EBIE conversion event is when EBIE is treated as BIE paid or accrued pursuant to §1.163(j)-6(g). The second EBIE conversion event is the basis addback that occurs pursuant to proposed §1.163(j)-6(h)(3) when a partner disposes of its interest in a partnership. Proposed §1.163(j)-6(j)(5)(i) and (ii), respectively, would provide guidance regarding these two types of conversion events in the tiered partnership context.

a. First Type of Conversion Event - UTP EBIE Treated as Paid or Accrued

Regarding the first type of conversion event, proposed §1.163(j)-6(j)(5)(i) would provide that to the extent upper-tier partnership is allocated excess taxable income (or excess business interest income) from lower-tier partnership, or §1.163(j)-6(m)(3) applies, upper-tier partnership shall apply proposed §1.163(j)-6(j)(5)(i)(A) through (C). First, proposed §1.163(j)-6(j)(5)(i)(A) requires upper-tier partnership to apply the rules in §1.163(j)-6(g) to its UTP EBIE, using any reasonable method (including, for example, FIFO and LIFO) to determine which UTP EBIE is treated as business interest expense paid or accrued pursuant to §1.163(j)-6(g). If §1.163(j)-6(m)(3) applies, upper-tier partnership shall treat all

of its UTP EBIE from lower-tier partnership as paid or accrued.

Proposed §1.163(j)-6(j)(5)(i)(A) would provide that upper-tier partnership must determine which of its UTP EBIE is treated as paid or accrued, as opposed to just providing that upper-tier partnership reduces its UTP EBIE, because UTP EBIE is not necessarily a unified tax attribute of upper-tier partnership. UTP EBIE of upper-tier partnership could have been allocated in different years, have different bases, and have different specified partners (defined in the next paragraph). For example, assume \$30 of UTP EBIE was allocated a negative \$10 section 734(b) adjustment, resulting in the aggregate of upper-tier partnership's UTP EBIE having a carryforward component of \$30 and basis component of \$20. Thus, such UTP EBIE could, at most, result in \$20 of deduction (the basis of such UTP EBIE). However, upper-tier partnership does not necessarily need \$100 of ETI (or \$30 of EBII) to deduct such \$20. Rather, if upper-tier partnership was allocated \$20 of EBII, upper-tier partnership could deduct \$20 of business interest expense if, using a reasonable method, it determined the \$20 of UTP EBIE with full basis was the UTP EBIE treated as business interest expense paid or accrued pursuant to §1.163(j)-6(j)(5)(i)(A). Following such treatment, upper-tier partnership would still have \$10 of UTP EBIE with \$0 basis remaining (that is, \$10 of carryforward component and \$0 of basis component).

Second, with respect to any UTP EBIE treated as business interest expense paid or accrued in proposed §1.163(j)-6(j)(5)(i)(A), proposed §1.163(j)-6(j)(5)(i)(B) would require upper-tier partnership to allocate any business interest expense that was formerly such UTP EBIE to its specified partner. For purposes of proposed §1.163(j)-6(j), the term specified partner refers to the partner of upper-tier partnership that, due to the initial allocation of excess business interest expense from lower-tier partnership to upper-tier partnership, was required to reduce its section 704(b) capital account pursuant to proposed §1.163(j)-6(j)(2). Similar principles apply if the specified partner of such business interest expense is itself a partnership.

Proposed §1.163(j)-6(j)(6) would provide rules if a specified partner disposes of its interest. Specifically, proposed §1.163(j)-6(j)(6)(i) would provide that if a specified partner (transferor) disposes of an upper-tier partnership interest (or an interest in a partnership that itself is a specified partner), the portion of any UTP EBIE to which the transferor's status as specified partner relates is not reduced pursuant to proposed §1.163(j)-6(j)(5)(ii). Stated otherwise, if a partner of an upper-tier partnership disposes of its interest in the upper-tier partnership, an interest in the lower-tier partnership held by upper-tier partnership is not deemed to have been similarly disposed of for purposes of proposed §1.163(j)-6(j)(5)(ii). See Rev. Rul. 87-115. Rather, such UTP EBIE attributable to the interest disposed of is retained by upper-tier partnership and the transferee is treated as the specified partner for purposes of proposed §1.163(j)-6(j) with respect to such UTP EBIE. Thus, upper-tier partnership must allocate any business interest expense that was formerly such UTP EBIE to the transferee.

Additionally, proposed §1.163(j)-6(j)(6)(ii) would provide special rules regarding the specified partner of UTP EBIE following certain nonrecognition transactions. Proposed §1.163(j)-6(j)(6)(ii)(A) would provide that if a specified partner receives a distribution of property in complete liquidation of an upper-tier partnership interest, the portion of UTP EBIE of upper-tier partnership attributable to the liquidated interest shall not have a specified partner. If a specified partner (transferee) receives a distribution of an interest in upper-tier partnership in complete liquidation of a partnership interest, the transferee is the specified partner with respect to UTP EBIE of upper-tier partnership only to the same extent it was prior to the distribution. Similar principles apply where an interest in a partnership that is a specified partner is distributed in complete liquidation of a transferee's partnership interest.

Proposed §1.163(j)-6(j)(6)(ii)(B) would further provide that if a specified partner (transferor) contributes an upper-tier partnership interest to a partnership (transferee), the transferee is treated as the specified partner for purposes of proposed §1.163(j)-6(j) with respect to

the portion of the UTP EBIE attributable to the contributed interest. Following the transaction, the transferor continues to be the specified partner with respect to the UTP EBIE attributable to the contributed interest. Similar principles apply where an interest in a partnership that is a specified partner is contributed to a partnership.

Finally, after determining the specified partner of the UTP EBIE treated as business interest expense paid or accrued in proposed §1.163(j)-6(j)(5)(i)(A) and allocating such business interest expense to its specified partner pursuant to proposed §1.163(j)-6(j)(5)(i)(B), proposed §1.163(j)-6(j)(5)(i)(C) would require upper-tier partnership to, in the manner provided in proposed §1.163(j)-6(j)(7)(ii) (or (iii), as the case may be), take into account any negative basis adjustments under section 734(b) previously made to the UTP EBIE treated as business interest expense paid or accrued in (A) earlier. Additionally, persons treated as specified partners with respect to the UTP EBIE treated as business interest expense paid or accrued in (A) earlier shall take any negative basis adjustments under section 743(b) into account in the manner provided in proposed §1.163(j)-6(j)(7)(ii) (or (iii), as the case may be).

Proposed §1.163(j)-6(j)(7)(ii) would provide that if UTP EBIE that was allocated a negative section 734(b) adjustment is subsequently treated as deductible business interest expense, then such deductible business interest expense does not result in a deduction to the upper-tier partnership or the specified partner of such deductible business interest expense. If UTP EBIE that was allocated a negative section 743(b) adjustment is subsequently treated as deductible business interest expense, the specified partner of such deductible business interest expense recovers any negative section 743(b) adjustment attributable to such deductible business interest expense (effectively eliminating any deduction for such deductible business interest expense).

Proposed §1.163(j)-6(j)(7)(iii) would provide that if UTP EBIE that was allocated a negative section 734(b) or 743(b) adjustment is subsequently treated as excess business interest expense, the specified partner's basis decrease in its upper-tier partnership interest required under pro-

posed §1.163(j)-6(h)(2) is reduced by the amount of the negative section 734(b) or 743(b) adjustment previously made to such excess business interest expense. If such excess business interest expense is subsequently treated as business interest expense paid or accrued by the specified partner, no deduction shall be allowed for any of such business interest expense. If the specified partner of such excess business interest expense is a partnership, such excess business interest expense is considered UTP EBIE that was previously allocated a negative section 734(b) adjustment for purposes of proposed §1.163(j)-6(j).

b. Second Type of Conversion Event - UTP EBIE Reduction

Regarding the second type of conversion event, proposed §1.163(j)-6(j)(5)(ii) would provide that if upper-tier partnership disposes of a lower-tier partnership interest (transferred interest), upper-tier partnership shall apply proposed §1.163(j)-6(j)(5)(ii)(A) through (C).

First, proposed §1.163(j)-6(j)(5)(ii)(A) would require upper-tier partnership to apply the rules in §1.163(j)-6(h)(3) (except as provided in (B) and (C) later), using any reasonable method (including, for example, FIFO and LIFO) to determine which UTP EBIE is reduced pursuant to §1.163(j)-6(h)(3). Stated otherwise, proposed §1.163(j)-6(j)(5)(ii)(A) would require upper-tier partnership to apply all of the rules in §1.163(j)-6(h)(3), except for the rule that determines the amount of the basis increase immediately before the disposition to the disposed of interest (the first sentence of §1.163(j)-6(h)(3)). In lieu of applying the first sentence of §1.163(j)-6(h)(3), upper-tier partnership would apply proposed §1.163(j)-6(j)(5)(ii)(B) and (C) to determine the amount of such basis increase.

Second, proposed §1.163(j)-6(j)(5)(ii)(B) would require upper-tier partnership to increase the adjusted basis of the transferred interest immediately before the disposition by the total amount of the UTP EBIE that was reduced in (A) earlier (the amount of UTP EBIE proportionate to the transferred interest). For example, if upper-tier partnership disposed of half of its lower-tier partnership interest while it held \$40 of UTP EBIE allocated from

lower tier partnership, upper-tier partnership would increase the adjusted basis of the disposed of lower-tier partnership interest by \$20. However, immediately before the disposition, such \$20 increase may be reduced pursuant to proposed §1.163(j)-6(j)(5)(ii)(C).

Third, proposed §1.163(j)-6(j)(5)(ii)(C) would require upper-tier partnership to, in the manner provided in proposed §1.163(j)-6(j)(7)(iv), take into account any negative basis adjustments under sections 734(b) and 743(b) previously made to the UTP EBIE that was reduced in (A) earlier. Proposed §1.163(j)-6(j)(7)(iv) would provide that if UTP EBIE that was allocated a negative section 734(b) or 743(b) adjustment is reduced pursuant to proposed §1.163(j)-6(j)(5)(ii)(A), the amount of upper-tier partnership's basis increase under proposed §1.163(j)-6(j)(5)(ii)(B) to the disposed of lower-tier partnership interest is reduced by the amount of the negative section 734(b) or 743(b) adjustment previously made to such UTP EBIE.

Continuing with the previous example, assume that \$5 of the \$20 of UTP EBIE reduced pursuant to proposed §1.163(j)-6(j)(5)(ii)(A) was previously allocated a \$5 negative section 743(b) adjustment. Pursuant to proposed §1.163(j)-6(j)(5)(ii)(C), upper-tier partnership would reduce the \$20 increase it determined under proposed §1.163(j)-6(j)(5)(ii)(B) by \$5. Thus, the adjusted basis of the lower-tier partnership interest being disposed of would be increased by \$15 immediately before the disposition. Consequently, lower-tier partnership would have a corresponding §1.163(j)-6(h)(5) basis adjustment to its property of \$15.

4. Anti-loss Trafficking Rules

Proposed §1.163(j)-6(j) generally relies on negative sections 734(b) and 743(b) adjustments to prevent a partner from deducting business interest expense that was formerly UTP EBIE if such partner did not bear the economic cost of such business interest expense payment. To the extent a negative section 734(b) or 743(b) adjustment fails to prohibit such a deduction (or basis increase under proposed §1.163(j)-6(j)(5)(ii)), the anti-loss trafficking rules in proposed §1.163(j)-6(j)(8)

would prohibit such a deduction (or basis addback under proposed §1.163(j)-6(j)(5)(ii)).

The anti-loss trafficking rule under proposed §1.163(j)-6(j)(8)(i) would prohibit the trafficking of business interest expense by providing that no deduction shall be allowed to any transferee specified partner for any business interest expense derived from a transferor's share of UTP EBIE. For purposes of proposed §1.163(j)-6(j), the term transferee specified partner refers to any specified partner that did not reduce its section 704(b) capital account upon the initial allocation of excess business interest expense from lower-tier partnership to upper-tier partnership pursuant to proposed §1.163(j)-6(j)(2). However, the transferee described in proposed §1.163(j)-6(j)(ii)(B) is not a transferee specified partner for purposes of proposed §1.163(j)-6(j).

Proposed §1.163(j)-6(j)(8)(i) would also provide the mechanism for disallowing such BIE. Proposed §1.163(j)-6(j)(8)(i) would provide that if, pursuant to proposed §1.163(j)-6(j)(5)(i)(B), a transferee specified partner is allocated business interest expense derived from a transferor's share of UTP EBIE (business interest expense to which the partner's status as transferee specified partner relates), the transferee specified partner is deemed to recover a negative section 743(b) adjustment with respect to, and in the amount of, such business interest expense and takes such negative section 743(b) adjustment into account in the manner provided in proposed §1.163(j)-6(j)(7)(ii) (or (iii), as the case may be), regardless of whether a section 754 election was in effect or a substantial built-in loss existed at the time of the transfer by which the transferee specified partner acquired the transferred interest. However, to the extent a negative section 734(b) or 743(b) adjustment was previously made to such business interest expense, the transferee specified partner does not recover an additional negative section 743(b) adjustment pursuant to this paragraph.

Additionally, the anti-loss trafficking rule under proposed §1.163(j)-6(j)(8)(ii) would prohibit the trafficking of BIE that was formerly the UTP EBIE of a specified partner that received a distribution in complete liquidation of its upper-tier part-

nership interest. Specifically, proposed §1.163(j)-6(j)(8)(ii) would provide that if UTP EBIE does not have a specified partner (as the result of a transaction described in proposed §1.163(j)-6(j)(6)(ii)(A)), upper-tier partnership shall not allocate any business interest expense that was formerly such UTP EBIE to its partners. Rather, for purposes of applying §1.163(j)-6(f)(2), upper-tier partnership shall treat such business interest expense as the allocable business interest expense (as defined in §1.163(j)-6(f)(2)(ii)) of a §1.163(j)-6(j)(8)(ii) account.

Any deductible business interest expense and excess business interest expense allocated to a §1.163(j)-6(j)(8)(ii) account at the conclusion of the eleven-step computation set forth in §1.163(j)-6(f)(2) is not tracked in future years. Treating such business interest expense as the allocable business interest expense of a separate account for purposes of applying §1.163(j)-6(f)(2)(ii) ensures that partners of upper-tier partnership do not support a deduction for such business interest expense (for which no deduction will be allowed) using their shares of allocable ATI and allocable business interest income before supporting a deduction for their own shares of allocable business interest expense (for which a deduction may be allowed).

Additionally, if UTP EBIE that does not have a specified partner (as the result of a transaction described in proposed §1.163(j)-6(j)(6)(ii)(A)) is treated as paid or accrued pursuant to §1.163(j)-6(g), upper-tier partnership shall make a §1.163(j)-6(h)(5) basis adjustment to its property in the amount of the adjusted basis (if any) of such UTP EBIE at the time such UTP EBIE is treated as business interest expense paid or accrued pursuant to §1.163(j)-6(g). The purpose of this §1.163(j)-6(h)(5) basis adjustment is to preserve basis in the system.

Thus, any time upper-tier partnership treats UTP EBIE as business interest expense paid or accrued pursuant to proposed §1.163(j)-6(j)(5)(i)(A) it must apply proposed §1.163(j)-6(j)(8)(i) and (ii). In application, upper-tier partnership would generally undertake the following analysis when applying proposed §1.163(j)-6(j)(8)(i) and (ii). With respect to any UTP EBIE treated as business interest expense paid or accrued pursuant

to proposed §1.163(j)-6(j)(5)(i)(A) (UTP BIE), upper-tier partnership must first determine whether such UTP BIE has a specified partner. If it does not have a specified partner, upper-tier partnership must apply proposed §1.163(j)-6(j)(8)(ii), which, in general, requires upper-tier partnership to capitalize the basis (if any) of such UTP BIE into the basis of upper-tier partnership property via a §1.163(j)-6(h)(5) basis adjustment.

If UTP BIE does have a specified partner, upper-tier partnership must next determine whether the specified partner of such UTP BIE reduced its section 704(b) capital account upon the initial allocation of such excess business interest expense from lower-tier partnership to upper-tier partnership pursuant to proposed §1.163(j)-6(j)(2). If the specified partner did reduce its section 704(b) capital account upon such initial allocation, then any deduction for such UTP BIE is not disallowed under proposed §1.163(j)-6(j)(8)(i). However, if the specified partner did not reduce its section 704(b) capital account upon such initial allocation, upper-tier partnership must next determine whether such specified partner is a transferee described in proposed §1.163(j)-6(j)(6)(ii)(B). If it is, then any deduction for such UTP BIE is not disallowed under proposed §1.163(j)-6(j)(8)(i). However, if the specified partner is not a transferee described in proposed §1.163(j)-6(j)(6)(ii)(B), then it is a transferee specified partner, as defined in proposed §1.163(j)-6(j)(8)(i). As a result, any deduction for such UTP BIE is disallowed under proposed §1.163(j)-6(j)(8)(i). If there are multiple tiers of partnerships, each tier must apply these rules.

Finally, proposed §1.163(j)-6(j)(8)(iii) would provide a similar mechanism to proposed §1.163(j)-6(j)(8)(i) for disallowing basis addbacks under §1.163(j)-6(h)(3) for certain UTP EBIE. Specifically, proposed §1.163(j)-6(j)(8)(iii) would provide that no basis increase under proposed §1.163(j)-6(j)(5)(ii) shall be allowed to upper-tier partnership for any disallowed UTP EBIE. For purposes of §1.163(j)-6, the term disallowed UTP EBIE refers to any UTP EBIE that has a specified partner that is a transferee specified partner (as defined in proposed §1.163(j)-6(j)(8)(i)) and any UTP EBIE that does not have a

specified partner (as the result of a transaction described in proposed §1.163(j)-6(j)(6)(ii)(A)). For purposes of applying proposed §1.163(j)-6(j)(5)(ii), upper-tier partnership shall treat any disallowed UTP EBIE in the same manner as UTP EBIE that has previously been allocated a negative section 734(b) adjustment. However, upper-tier partnership does not treat disallowed UTP EBIE as though it were allocated a negative section 734(b) adjustment pursuant to this paragraph to the extent a negative section 734(b) or 743(b) adjustment was previously made to such disallowed UTP EBIE.

5. Foundational Determinations

In general, the rules under proposed §1.163(j)-6(j) are derived from the following three foundational determinations made by the Treasury Department and the IRS. First, basis is preserved when upper-tier partnership exchanges basis in its lower-tier partnership for EBIE allocated from lower-tier partnership (UTP EBIE). Thus, upper-tier partnership generally must treat UTP EBIE in the same manner as built-in loss property. Second, UTP EBIE has two components – a basis component and a carryforward component. In general, negative basis adjustments under section 734(b) and 743(b) reduce the basis component of UTP EBIE (and thus, any possible deduction for UTP EBIE), but do not reduce the carryforward component of UTP EBIE; only the two conversion events in proposed §1.163(j)-6(j)(5) are capable of reducing the carryforward component of UTP EBIE. Third, upper-tier partnership must allocate any business interest expense that was formerly UTP EBIE to its specified partner – that is, the partner that reduced its section 704(b) capital account at the time of the initial allocation of the UTP EBIE from lower-tier partnership to upper-tier partnership. If there is a transfer of a partnership interest, the transferor generally steps into the shoes of the transferee's status as specified partner, but may not deduct any business interest expense derived from the transferor's share of UTP EBIE.

The Treasury Department and the IRS request comments on this approach. Specifically, the Treasury Department and the IRS request comments on whether further

guidance on the treatment of UTP EBIE under the rules of subchapter K of the Code is necessary.

F. Partner Basis Adjustments upon a Distribution

Under the 2018 Proposed Regulations, if a partner disposed of all or substantially all of its partnership interest, the adjusted basis of the partnership interest was increased immediately before the disposition by the entire amount of the EBIE not previously treated as paid or accrued by the partner. If a partner disposed of less than substantially all of its interest in a partnership, the partner could not increase its basis by any portion of the EBIE not previously treated as paid or accrued by the partner. The Treasury Department and the IRS requested comments on this approach in the preamble to the 2018 Proposed Regulations.

As discussed in the preamble to Final Regulations, commenters cited multiple concerns with the approach adopted in the 2018 Proposed Regulations and recommended that the Final Regulations adopt a proportionate approach. Under such an approach, a partial disposition of a partnership interest would trigger a proportionate EBIE basis addback and corresponding decrease in such partner's EBIE carryover. The Treasury Department and the IRS agreed with commenters. Accordingly, §1.163(j)-6(h)(3) provides for a proportionate approach.

In general, a distribution from a partnership is either a current distribution or a liquidating distribution; the concept of a redemptive distribution does not exist in the partnership context. Accordingly, proposed §1.163(j)-6(h)(4) would provide that, for purposes of §1.163(j)-6(h)(3), a disposition includes a distribution of money or other property by the partnership to a partner in complete liquidation of the partner's interest in the partnership. Proposed §1.163(j)-6(h)(4) would further provide that, for purposes of §1.163(j)-6(h)(3), a current distribution of money or other property by the partnership to a continuing partner is not a disposition for purposes of §1.163(j)-6(h)(3). The Treasury Department and the IRS request comments on whether a current distribution of money or other property by the

partnership to a continuing partner as consideration for an interest in the partnership should also trigger an addback and, if so, how to determine the appropriate amount of the addback.

G. Allocable ATI and Allocable Business Interest Income of Upper-tier Partnership Partners

Section 1.163(j)-6(f)(2) provides an eleven-step computation necessary for properly allocating a partnership's deductible BIE and section 163(j) excess items among its partners. Pursuant to §1.163(j)-6(f)(2)(ii), a partnership must determine each of its partner's allocable share of each section 163(j) item under section 704(b) and the regulations under section 704 of the Code, including any allocations under section 704(c), other than remedial items. Further, §1.163(j)-6(f)(2)(ii) provides that the term allocable ATI means a partner's distributive share of the partnership's ATI (that is, a partner's distributive share of gross income and gain items comprising ATI less such partner's distributive share of gross loss and deduction items comprising ATI), and the term allocable business interest income means a partner's distributive share of the partnership's business interest income.

In general, if a partnership is not a partner in a partnership, each dollar of taxable income that is properly allocable to a trade or business will have a corresponding dollar of ATI associated with it. Accordingly, in the non-tiered partnership context, if a partner's share of gross income and gain items comprising ATI less such partner's share of gross loss and deduction items comprising ATI equals \$1, such partner will have \$1 of allocable ATI for purposes of §1.163(j)-6(f)(2)(ii).

However, if a partnership is a partner in a partnership, each dollar of taxable income that is properly allocable to a trade or business may not have a full dollar of ATI associated with it. Section 163(j)(4)(A)(ii)(I) provides that the ATI of a partner in a partnership is determined without regard to such partner's distributive share of any items of income, gain, deduction, or loss of such partnership. Further, section 163(j)(4)(A)(ii)(II) provides that a partner only increases its ATI by its distributive share of a partnership's ETI.

To illustrate, consider the following example. LTP has \$100 of income and \$100 of loss properly allocable to a trade or business. Thus, LTP has \$0 of ATI. LTP specially allocates the \$100 of income to partner UTP. Under section 163(j)(4)(A)(ii)(I), UTP does not treat such \$100 of income as ATI. Additionally, UTP has \$300 of income properly allocable to a trade or business, which UTP properly treats as ATI. Here, UTP's taxable income that is properly allocable to a trade or business (\$400) does not equal the amount of its ATI (\$300).

The Treasury Department and the IRS recognize that a special rule is necessary to coordinate situations like the one illustrated earlier with the general requirement under §1.163(j)-6(f)(2)(ii) for partnerships to determine a partner's allocable ATI based on such partner's allocation of items comprising the ATI of the partnership. Accordingly, proposed §1.163(j)-6(j)(9) would provide that, when applying §1.163(j)-6(f)(2)(ii), an upper-tier partnership determines the allocable ATI and allocable business interest income of each of its partners in the manner provided in proposed §1.163(j)-6(j)(9). Specifically, if an upper-tier partnership's net amount of tax items that comprise (or have ever comprised) ATI is greater than or equal to its ATI, upper-tier partnership applies the rules in paragraph (j)(9)(ii)(A) to determine each partner's allocable ATI. However, if an upper-tier partnership's net amount of tax items that comprise (or have ever comprised) ATI is less than its ATI, upper-tier partnership applies the rules in proposed §1.163(j)-6(j)(9)(ii)(B) to determine each partner's allocable ATI. To determine each partner's allocable business interest income, an upper-tier partnership applies the rules in proposed §1.163(j)-6(j)(9)(iii).

H. Qualified Expenditures

The 2018 Proposed Regulations provided that partnership ATI is reduced by deductions claimed under sections 173 (relating to circulation expenditures), 174(a) (relating to research and experimental expenditures), 263(c) (relating to intangible drilling and development expenditures), 616(a) (relating to mine development expenditures), and 617(a) (re-

lating to mining exploration expenditures) (collectively "qualified expenditures"). As a result, deductions for qualified expenditures reduced the amount of business interest expense a partnership could potentially deduct.

A partner may elect to capitalize its distributive share of any qualified expenditures of a partnership under section 59(e)(4)(C) or may be required to capitalize a portion of its distributive share of certain qualified expenditures of a partnership under section 291(b). As a result, the taxable income reported by a partner in a taxable year attributable to the ownership of a partnership interest may exceed the amount of taxable income reported to the partner on a Schedule K-1.

Commenters on the 2018 Proposed Regulations recommended that a distributive share of partnership deductions capitalized by a partner under section 59(e) or section 291(b) increase the ATI of the partner because qualified expenditures reduce both partnership ATI and excess taxable income, but may not reduce the taxable income of a partner. Two different approaches for achieving this result were suggested: (1) adjust the excess taxable income of the partnership, resulting in an increase to partner ATI, and (2) increase the ATI of the partner directly, without making any adjustments to partnership excess taxable income.

The Treasury Department and IRS agree that a distributive share of partnership deductions capitalized by a partner under section 59(e) should increase the ATI of the partner and adopt the recommended approach of increasing the ATI of the partner directly, without making any adjustments to partnership excess taxable income. The approach of increasing partner ATI by adjusting partnership excess taxable income is rejected, as it would result in partnerships with more excess taxable income than ATI – a result not possible under the current statutory conceptual framework. The Treasury Department and IRS have the authority to adjust ATI, but do not have a similar grant of authority to make adjustments to partnership excess taxable income, which is explicitly defined by statute.

Accordingly, proposed §1.163(j)-6(e)(6) would provide that the ATI of a partner is increased by the portion of such

partner's allocable share of qualified expenditures (as defined in section 59(e)(2)) to which an election under section 59(e) applies. Any deduction allowed under section 59(e)(1) would be taken into account in determining a partner's ATI pursuant to §1.163(j)-1(b). Proposed §1.163(j)-6(l)(4)(iv) would provide a similar rule in the S corporation context.

The Treasury Department and IRS are aware that a similar issue exists in the context of depletion and request comments as to whether a similar partner level add-back is appropriate. The Treasury Department and IRS are also aware that a partner may be required to capitalize certain qualified expenditures of a partnership under section 291(b) and request comments as to whether a similar partner level add-back is appropriate.

I. CARES Act Partnership Rules

As stated in the Background section of this preamble, section 163(j)(10), as enacted by the CARES Act, provides special rules for partners and partnerships for taxable years beginning in 2019 or 2020. Under sections 163(j)(10)(A)(i) and 163(j)(10)(A)(ii)(I), for partnerships, the amount of business interest that may be deductible under section 163(j)(1) for taxable years beginning in 2020 is computed using the 50 percent ATI limitation. The 50 percent ATI limitation does not apply to partnerships for taxable years beginning in 2019. See section 163(j)(10)(A)(ii)(I). Under section 163(j)(10)(A)(iii), a partnership may elect to not apply the 50 percent ATI limitation and, instead, to apply the 30 percent ATI limitation. This election is made by the partnership.

Under section 163(j)(10)(A)(ii)(II), a partner treats 50 percent of its allocable share of a partnership's excess business interest expense for 2019 as a business interest expense in the partner's first taxable year beginning in 2020 that is not subject to the section 163(j) limitation (50 percent EBIE rule). The remaining 50 percent of the partner's allocable share of the partnership's 2019 excess business interest expense remains subject to the section 163(j) limitation applicable to excess business interest expense carried forward at the partner level. A partner may elect

out of the 50 percent EBIE rule. Proposed §1.163(j)-6(g)(4) provides further guidance on the 50 percent EBIE rule.

Additionally, section 163(j)(10)(B)(i) allows a taxpayer to elect to substitute its 2019 ATI for the taxpayer's 2020 ATI in determining the taxpayer's section 163(j) limitation for any taxable year beginning in 2020. Section 1.163(j)-2(b)(3) and (4) of the Final Regulations provide general rules regarding this election. Proposed §1.163(j)-6(d)(5) provides further guidance on this election in the partnership context. The Treasury Department and the IRS request comments on these proposed rules and on whether further guidance is necessary.

V. Proposed §1.163(j)-7: Application of the Section 163(j) Limitation to Foreign Corporations and United States Shareholders

Proposed §1.163(j)-7 in these Proposed Regulations (Proposed §1.163(j)-7) provides general rules regarding the application of the section 163(j) limitation to foreign corporations and U.S. shareholders of CFCs. This section V describes proposed §1.163(j)-7 contained in the 2018 Proposed Regulations, the comments received on proposed §1.163(j)-7 contained in the 2018 Proposed Regulations, and Proposed §1.163(j)-7.

A. Overview of Proposed §1.163(j)-7 Contained in the 2018 Proposed Regulations

1. General Application of Section 163(j) Limitation to Applicable CFCs

The 2018 Proposed Regulations clarify that, consistent with §1.952-2, section 163(j) and the section 163(j) regulations apply to determine the deductibility of an applicable CFC's BIE in the same manner as these provisions apply to determine the deductibility of a domestic C corporation's BIE. The 2018 Proposed Regulations define an applicable CFC as a CFC in which at least one U.S. shareholder owns stock within the meaning of section 958(a). However, in certain cases, the 2018 Proposed Regulations allow certain applicable CFCs to make a CFC group election and be treated as part of a CFC

group for purposes of computing the applicable CFC's section 163(j) limitation.

2. Limitation on Amount of Business Interest Expense of a CFC Group Member Subject to the Section 163(j) Limitation

Under the 2018 Proposed Regulations, if a CFC group election is in effect, the amount of BIE of a CFC group member that is subject to the section 163(j) limitation is limited to the amount of the CFC group member's allocable share of the CFC group's applicable net BIE (which is equal to the sum of the BIE of all CFC group members, reduced by the BII of all CFC group members). Thus, for example, if a CFC group has no debt other than loans between CFC group members, no portion of the BIE of a CFC group member would be subject to the section 163(j) limitation. A CFC group member's allocable share is computed by multiplying the applicable net BIE of the CFC group by a fraction, the numerator of which is the CFC group member's net BIE (computed on a separate company basis), and the denominator of which is the sum of the amounts of the net BIE of each CFC group member with net BIE (computed on a separate company basis).

After applying the CFC group rules to determine each CFC group member's allocable share of the CFC group's applicable net BIE, each CFC group member that has BIE is required to perform a stand-alone section 163(j) calculation to determine whether any BIE is disallowed under the section 163(j) limitation.

3. Membership in a CFC Group

Under the 2018 Proposed Regulations, in general, a CFC group means two or more applicable CFCs if at least 80 percent of the value of the stock of each applicable CFC is owned, within the meaning of section 958(a), by a single U.S. shareholder or, in the aggregate, by related U.S. shareholders that own stock of each member in the same proportion. The 2018 Proposed Regulations also generally treat a controlled partnership (in general, a partnership in which CFC group members own, in the aggregate, at least 80 percent of the interests) as a CFC group member.

For purposes of identifying a CFC group, members of a consolidated group are treated as a single person, as are individuals filing a joint return, and stock owned by certain passthrough entities is treated as owned proportionately by the owners or beneficiaries of the passthrough entity.

The 2018 Proposed Regulations exclude from the definition of a CFC group member an applicable CFC that has any income that is effectively connected with the conduct of a trade or business in the United States. In addition, if one or more CFC group members conduct a financial services business, those entities are treated as comprising a separate subgroup.

Under the 2018 Proposed Regulations, a CFC group election is made by applying the rules applicable to CFC groups for purposes of computing each CFC group member's deduction for BIE. Once made, the CFC group election is irrevocable.

4. Roll-up of CFC Excess Taxable Income to Other CFC Group Members and U.S. Shareholders

Under the 2018 Proposed Regulations, if a CFC group election is in effect with respect to a CFC group, then an upper-tier CFC group member takes into account a proportionate share of any "CFC excess taxable income" of a lower-tier CFC group member in which it directly owns stock for purposes of computing the upper-tier member's ATI. The meaning of the term "CFC excess taxable income" is analogous to the meaning of the term "excess taxable income" in the context of a partnership and S corporation, and, in general, means the amount of a CFC group member's ATI in excess of the amount needed to prevent any BIE of the CFC group member from being disallowed under section 163(j).

Under the 2018 Proposed Regulations, a U.S. shareholder is not permitted to include in its ATI amounts included in gross income under section 951(a) (subpart F inclusions), section 951A(a) (GILTI inclusions), or section 78 (section 78 inclusions) that are properly allocable to a non-exempted trade or business (collectively, deemed income inclusions). However, the 2018 Proposed Regulations provide that a portion of CFC excess taxable income of the highest-tier applicable CFC

is permitted to be used to increase the ATI of its U.S. shareholders. That portion is equal to the U.S. shareholder's interest in the highest-tier applicable CFC multiplied by its specified ETI ratio. The numerator of the specified ETI ratio is the sum of the U.S. shareholder's income inclusions under sections 951(a) and 951A(a) with respect to the specified highest-tier member and specified lower-tier members, and the denominator is the sum of the taxable income of the specified highest-tier member and specified lower-tier members.

B. Summary of Comments on Proposed §1.163(j)-7 Contained in the 2018 Proposed Regulations

The Treasury Department and the IRS requested comments in the preamble to the 2018 Proposed Regulations regarding whether it would be appropriate to further modify the application of section 163(j) to applicable CFCs and whether there are particular circumstances in which it may be appropriate to exempt an applicable CFC from the application of section 163(j). Some commenters recommended that section 163(j) not apply to applicable CFCs. Those comments are addressed in part VIII of the Summary of Comments and Explanation of Revisions section in the Final Regulations.

A number of commenters broadly requested changes to the roll-up of CFC excess taxable income. Many of these commenters expressed concern about the administrability of rolling up CFC excess taxable income. Some commenters suggested that the CFC group election be available to a stand-alone applicable CFC in order to allow its CFC excess taxable income to be used to increase the ATI of a U.S. shareholder, or that an applicable CFC be permitted to use any CFC excess taxable income to increase the ATI of a shareholder without regard to whether it is a CFC group member. Furthermore, some commenters asserted that the nature of the roll-up compels multinationals to restructure their operations in order to move CFCs with relatively high amounts of ATI and low amounts of interest expense to the bottom of the ownership chain and CFCs with relatively low amounts of ATI and high amounts of interest expense to the top of the ownership chain, in order

to maximize the benefits of the roll-up of CFC excess taxable income.

Some commenters asserted that because multinational organizations may own hundreds of CFCs, applying the section 163(j) limitation on a CFC-by-CFC basis, without regard to whether a CFC group election has been made under the 2018 Proposed Regulations, represents a significant administrative burden. Many comments suggested that CFC groups should be permitted to apply section 163(j) on a group basis, with a single group-level section 163(j) calculation similar to the rules applicable to a consolidated group. A few commenters suggested that this rule should be applied in addition to the roll-up of CFC excess taxable income, but most commenters recommended that the group rule be applied instead of the roll-up.

A number of commenters asserted that the requirements to be a member of a CFC group under the 2018 Proposed Regulations are overly restrictive. Some of these commenters recommended that the 80-percent ownership threshold be replaced with the ownership requirements of affiliated groups under section 1504(a), the rules of which are well-known and understood. Others recommended that the 80-percent ownership requirement be reduced to 50 percent, consistent with the standard for treatment of a foreign corporation as a CFC. Still others asserted that U.S. shareholders owning stock in applicable CFCs should not each be required to own the same proportion of stock in each applicable CFC in order for their ownership interests to count towards the 80-percent ownership requirement, or that the attribution rules of section 958(b), rather than section 958(a), should apply for purposes of determining whether the ownership requirements are met. Finally, some of these commenters requested that a CFC group election be permitted when one applicable CFC meets the ownership requirements for other applicable CFCs, even if no U.S. shareholder meets the ownership requirements for a highest-tier applicable CFC.

Some commenters requested the CFC financial services subgroups not be segregated from the CFC group and their BIE and BII be included in the general CFC group.

Some commenters requested that an applicable CFC with effectively connected income be permitted to be a member of a CFC group and that only its effectively connected income items should be excluded. Alternatively, commenters requested a de minimis rule that would permit an applicable CFC to be a member of a CFC group if the applicable CFC's effectively connected income is below a certain threshold of total income, such as 10 percent.

Some commenters requested that the CFC group election be revocable. The commenters proposed either making the CFC group election an annual election or providing that the election applies for a certain period, for example, three or five years, before it can be revoked.

Finally, commenters requested a safe harbor or exclusion providing that if a CFC group would not be limited under section 163(j) either because the CFC group has no net BIE or because its BIE does not exceed 30 percent of the CFC group's ATI, a U.S. shareholder would not have to apply section 163(j) for the applicable CFC or be subject to applicable CFC section 163(j) reporting requirements.

C. Proposed §1.163(j)-7

1. Overview

As noted in the preamble to the Final Regulations, the Treasury Department and the IRS have determined, based on a plain reading of section 163(j) and §1.952-2, that section 163(j) applies to foreign corporations where relevant under current law and has applied to such corporations since the effective date of the new provision.¹ Congress expressly provided that section 163(j) should not apply to certain small businesses or to certain excepted trades or businesses. Nothing in the Code or legislative history indicates that Congress intended to except other persons with trades or businesses, as defined in section 163(j)(7), from the application of section 163(j). Accordingly, the Treasury Department

and the IRS have determined that, consistent with a plain reading of section 163(j) and §1.952-2, it is appropriate for section 163(j) to apply to applicable CFCs and other foreign corporations whose taxable income is relevant for Federal tax purposes (other than by reason of having ECI or income described in section 881 (FDAP)) (relevant foreign corporations).² In the case of CFCs with ECI, see proposed §1.163(j)-8. For further discussion of the Treasury Department and the IRS's determination that there is not a statutory basis for exempting applicable CFCs from the application of section 163(j), see part VIII of the Summary of Comments and Explanation of Revisions section of the Final Regulations.

A number of comments were received asserting that there are other mechanisms that eliminate the policy need for section 163(j) to apply to limit leverage in CFCs. For example, some commenters have cited tax rules in foreign jurisdictions limiting interest deductions, including thin capitalization rules (or similar rules intended to implement the Organisation for Economic Co-operation and Development (OECD) recommendations under Action 4 of the Base Erosion and Profits Shifting Project). The Treasury Department and the IRS disagree with these assertions. The Treasury Department and the IRS note that these rules are not universally applied in other jurisdictions, that many jurisdictions do not have any meaningful interest expense limitation rules, and that some jurisdictions have no interest expense limitation rules of any kind.

Even if some CFCs owned by a U.S. shareholder are in foreign jurisdictions with meaningful thin capitalization rules, in the absence of section 163(j), it would still be possible to use leverage to reduce or eliminate a U.S. shareholder's global intangible low-taxed income (GILTI) under section 951A for these CFCs. This is because for purposes of computing a U.S. shareholder's GILTI under section 951A, tested income of CFCs may be offset by tested losses of CFCs owned by the U.S.

shareholder. See section 951A(c). The ability to deduct interest without limitation under section 163(j) would result in tested losses in CFCs with significant leverage. Because of this aggregation, one overleveraged CFC in a single jurisdiction that does not have rules limiting interest expense can, without the application of section 163(j), reduce or eliminate tested income from all CFCs owned by a U.S. shareholder regardless of jurisdiction.

Other comments suggested that, to the extent that debt of a CFC is held by a related party, transfer pricing principles would discipline the amount of interest expense. Comments also note that to the extent that debt of a CFC is held by a third party, market forces would discipline the leverage present in the CFC. While both of these concepts may discipline the amount of leverage present in a CFC, they would also discipline the amount of leverage in any entity. If Congress believed that market forces and transfer pricing principles were sufficient disciplines to prevent overleverage, section 163(j) would not have been amended as part of TCJA to clearly apply to interest expense paid or accrued to both third parties and related parties. In addition, if transfer pricing were sufficient to police interest expense in the related party context, old section 163(j) (as enacted in 1989 and subsequently revised prior to TCJA) would not have been necessary.

However, the Treasury Department and the IRS also have determined that it is appropriate, while still carrying out the provisions of the statute and the policies of section 163(j), to reduce the administrative and compliance burdens of applying section 163(j) to applicable CFCs. Accordingly, Proposed §1.163(j)-7 allows for an election to be made to apply section 163(j) on a group basis with respect to applicable CFCs that are "specified group members" of a "specified group." If the election is made, the specified group members are referred to as "CFC group members" and all of the CFC group members collectively are referred to as a "CFC

¹ Section 1.952-2(b) generally provides that the taxable income for a foreign corporation is determined by treating the foreign corporation as a domestic corporation but with certain enumerated exceptions. Section 1.952-2(c) provides for a number of exceptions, but none of the exceptions affects the application of section 163(j).

² For purposes of Proposed §1.163(j)-7, the term effectively connected income (or ECI) means income or gain that is ECI, as defined in §1.884-1(d)(1)(iii), and deduction or loss that is allocable to, ECI, as defined in §1.884-1(d)(1)(iii).

group.” The rules for determining a specified group and specified group members are discussed in part V.C.3. of this Explanation of Provisions section. The rules and procedures for treating specified group members as CFC group members and for determining a CFC group are discussed in part V.C.4. of this Explanation of Provisions section.

In addition, Proposed §1.163(j)-7 provides a safe harbor election that exempts certain applicable CFCs from application of section 163(j). The safe-harbor election is available for stand-alone applicable CFCs (which is an applicable CFC that is not a specified group member of a specified group) and CFC group members. The election is not available for an applicable CFC that is a specified group member but not a CFC group member because a CFC group election is not in effect. See part V.C.7. of this Explanation of Provisions section.

Proposed §1.163(j)-7 also provides an anti-abuse rule that increases ATI in certain circumstances.

Finally, Proposed §1.163(j)-7 allows a U.S. shareholder of a stand-alone applicable CFC or a CFC group member of a CFC group to include a portion of its deemed income inclusions attributable to the applicable CFC in the U.S. shareholder’s ATI. This rule does not apply with respect to an applicable CFC that is a specified group member but not a CFC group member because a CFC group election is not in effect. See part V.C.9. of this Explanation of Provisions section.

The Treasury Department and the IRS anticipate that, in many instances, Proposed §1.163(j)-7 will significantly reduce the administrative and compliance burdens of applying section 163(j) to applicable CFCs relative to the 2018 Proposed Regulations.

Unlike Proposed §1.163(j)-8, which provides rules for allocating disallowed BIE to ECI and non-ECI, Proposed §1.163(j)-7 does not allocate disallowed BIE among classes of income. The Treasury Department and the IRS request comments on appropriate methods of allocating disallowed BIE among classes of income, such as subpart F income, as defined in section 952, and tested income, as defined in section 951A(c)(2)(A) and §1.951A-2(b)(1), as well as comments

on whether and the extent to which rules implementing such methods may be necessary.

In addition, the Treasury Department and the IRS request comments on appropriate methods of allocating disallowed BIE for other purposes, including between items described in §1.163(j)-1(b)(22)(i) and other items described in §1.163(j)-1(b)(22) (defining interest), as well as comments on whether and the extent to which rules implementing such methods may be necessary.

The Treasury Department and the IRS do not anticipate that section 163(j) will affect the tax liability of a passive foreign investment company, within the meaning of section 1297(a) (PFIC), or its shareholders, solely because the PFIC is a relevant foreign corporation. See §1.163(j)-4(c)(1) (providing that section 163(j) does not affect earnings and profits). The Treasury Department and the IRS request comments on whether any additional guidance is needed to reduce the compliance burden of section 163(j) on PFICs and their shareholders.

2. Application of Section 163(j) to CFC Group Members

a. Single Section 163(j) Limitation for a CFC Group

Proposed §1.163(j)-7(c) provides rules for applying section 163(j) to CFC group members of a CFC group. Under the Proposed Regulations, a single section 163(j) limitation is computed for a CFC group. See proposed §1.163(j)-7(c)(2). For this purpose, the current-year BIE, disallowed BIE carryforwards, BII, floor plan financing interest expense, and ATI of a CFC group are equal to the sums of the current-year amounts of such items for each CFC group member for its specified taxable year with respect to the specified period. (The terms “specified taxable year” and “specified period” are discussed in part V.C.3. of this Explanation of Provisions section.) A CFC group member’s current-year BIE, BII, floor plan financing interest expense, and ATI for a specified taxable year are generally determined on a separate-company basis before being included in the CFC group calculation.

b. Allocation of CFC Group’s Section 163(j) Limitation to Business Interest Expense of CFC Group Members

The extent to which a CFC group’s section 163(j) limitation is allocated to a particular CFC group member’s current-year BIE and disallowed BIE carryforwards is determined using the rules that apply to consolidated groups under §1.163(j)-5(a)(2) and (b)(3)(ii) (consolidated BIE rules), subject to certain modifications. See proposed §1.163(j)-7(c)(3)(i). Because many CFC groups will be owned by consolidated groups, many taxpayers will be familiar with the consolidated BIE rules.

If the sum of the CFC group’s current-year BIE and disallowed BIE carryforwards exceeds the CFC group’s section 163(j) limitation, then current-year BIE is deducted first. If the CFC group’s current-year BIE exceeds the CFC group’s section 163(j) limitation, then each CFC group member deducts the amount of its current-year BIE not in excess of the sum of its BII and floor plan financing interest expense, if any. Then, if the CFC group has any section 163(j) limitation remaining for the current year, each applicable CFC with remaining current-year BIE deducts a pro rata portion thereof.

If the CFC group’s section 163(j) limitation exceeds its current-year BIE, then CFC group members may deduct all of their current-year BIE and may deduct disallowed BIE carryforwards not in excess of the CFC group’s remaining section 163(j) limitation. The disallowed BIE carryforwards are deducted in the order of the taxable years in which they arose, beginning with the earliest taxable year, and disallowed BIE carryforwards that arose in the same taxable year are deducted on a pro rata basis. This taxable year ordering rule is consistent with the consolidated BIE rules. However, Proposed §1.163(j)-7 provides special rules for disallowed BIE carryforwards when CFC group members have different taxable years, or a CFC group member has multiple taxable years with respect to the specified period of the CFC group. Unlike members of a consolidated group, not all CFC group members will have the same taxable years, and not all CFC group members will have the same taxable year as the parent of the CFC group. As discussed in part V.C.3 of this

Explanation of Provisions section, a CFC group member is included in a CFC group for its entire taxable year that ends with or within a specified period.³

c. Limitation on Pre-Group Disallowed Business Interest Expense Carryforwards

The disallowed BIE carryforwards of a CFC group member when it joins a CFC group (pre-group disallowed BIE carryforwards) are subject to the same CFC group section 163(j) limitation and are deducted pro rata with other CFC group disallowed BIE carryforwards. However, pre-group disallowed BIE carryforwards are subject to additional limitations, similar to the limitations on deducting the disallowed BIE carryforwards of a consolidated group arising in a SRLY, as defined in §1.1502-1(f), or treated as arising in a SRLY under the principles of §1.1502-21(c) and (g). The policy of the limitation imposed on pre-group BIE carryforwards is analogous to the policy of the SRLY limitation for consolidated groups.

The rules and principles of §1.163(j)-5(d)(1)(B), which applies SRLY subgroup principles to disallowed BIE carryforwards of a consolidated group, apply to pre-group subgroups. If a CFC group member with pre-group disallowed BIE carryforwards (loss member) leaves one CFC group (former group) and joins another CFC group (current group), the loss member and each other CFC group member that left the former group and joined the current group for a specified taxable year with respect to the same specified period consists of a “pre-group subgroup.” Unlike SRLY subgroups, it is not required that all members of a pre-group subgroup join the CFC group at the same time, since each applicable CFC that joins a CFC group is treated as joining on the first day of its taxable year. As a result, even if multiple applicable CFCs are acquired on the same day in a single transaction, they would join the CFC group on different days if they have different taxable years.

d. Special Rules for Specified Periods Beginning in 2019 or 2020

Proposed §1.163(j)-7(c)(5) provides special rules for applying section 163(j)(10) to CFC groups. The proposed regulations provide that elections under section 163(j)(10) are made for a CFC group (rather than for each CFC group member). For a specified period of a CFC group beginning in 2019 or 2020, unless the election described in §1.163(j)-2(b)(2)(ii)(A) is made, the CFC group section 163(j) limitation is determined by using 50 percent (rather than 30 percent) of the CFC group’s ATI for the specified period, without regard to whether the taxable years of CFC group members begin in 2019 or 2020. If the election described in §1.163(j)-2(b)(2)(ii)(A) is made for a specified period of a CFC group, the CFC group section 163(j) limitation is determined by using 30 percent (rather than 50 percent) of the CFC group’s ATI for the specified period, without regard to whether the taxable years of CFC group members begin in 2019 or 2020. The election is made for the CFC group by each designated U.S. person.

The election under §1.163(j)-2(b)(3)(i) to use 2019 ATI (that is, ATI for the last taxable year beginning in 2019) rather than 2020 ATI (that is, ATI for a taxable year beginning in 2020) is made for a specified period of a CFC group beginning in 2020 (2020 specified period) and applies to the specified taxable years of CFC group members with respect to the 2020 specified period. Accordingly, if a specified taxable year of a CFC group member with respect to a CFC group’s 2020 specified period begins in 2020, then the election is applied to such taxable year using the CFC group member’s ATI for its last taxable year beginning in 2019. In some cases, the specified taxable year of a CFC group member with respect to a CFC group’s 2020 specified period will begin in 2019 or 2021. If the specified taxable year of the CFC group member begins in

2019, then the election is applied to such taxable year using the CFC group member’s ATI for its last taxable year beginning in 2018; if the specified taxable year of the CFC group member begins in 2021, then the election is applied to such taxable year using the CFC group member’s ATI for its last taxable year beginning in 2020.

For example, assume a CFC group has two CFC group members, CFC1 and CFC2, and has a specified period that is the calendar year. CFC1 has a taxable year that is the calendar year, and CFC2 has a taxable year that ends November 30. The election under §1.163(j)-2(b)(3)(i) is in effect for the specified period beginning January 1, 2020, and ending December 31, 2020 (which is the 2020 specified period). As a result, the ATI of the CFC group for the 2020 specified period is determined by reference to the specified taxable year of CFC1 beginning January 1, 2019, and ending December 31, 2019 (the last taxable year beginning in 2019), and the specified taxable year of CFC2 beginning December 1, 2018, and ending November 30, 2019 (the last taxable year beginning in 2018).

Alternatively, assume (i) the same CFC group instead has a 2020 specified period that begins on December 1, 2020, and ends on November 30, 2021; (ii) in 2019 and 2020, CFC1 has a taxable year that is the calendar year, but in 2021, CFC1 has a short taxable year that begins on January 1, 2021, and ends on June 30, 2021; and (iii) CFC2 has a taxable year ending November 30 (for all years). Further assume that the election under §1.163(j)-2(b)(3)(i) is in effect for the 2020 specified period. In this case, the election applies to the specified taxable year of CFC1 that begins on January 1, 2020, and ends on December 31, 2020; the specified taxable year of CFC1 that begins on January 1, 2021, and ends on June 30, 2021; and the specified taxable year of CFC2 that begins on December 1, 2020, and ends on November 30, 2021. As a result of the election, the ATI of the CFC group for the 2020 spec-

³For example, assume a U.S. multinational group parented by a consolidated group with a taxable year that is the calendar year includes applicable CFCs with November 30 taxable years and other applicable CFCs with calendar year taxable years. In this case, as discussed in more detail in part V.C.3.b. of the Explanation of Provisions section, the specified period of the CFC group for 2020 would begin on January 1, 2020, and end on December 31, 2020. Furthermore, the specified taxable year of a CFC group member with a taxable year that is the calendar year is its taxable year ending December 31, 2020, and the specified taxable year of a CFC group member with a November 30 taxable year is its taxable year ending November 30, 2020 (the taxable years that end with or within the specified period). A CFC group member can also have multiple taxable years with respect to a specified period. For example, a CFC group member may have a short taxable year due to an election under §1.245A-5T(e)(3)(i) (elective exception to close a CFC’s taxable year in the case of an extraordinary reduction).

ified period is determined by reference to the specified taxable year of CFC1 beginning January 1, 2019, and ending December 31, 2019, the specified taxable year of CFC1 beginning January 1, 2020, and ending December 31, 2020, and the specified taxable year of CFC2 beginning December 1, 2019, and ending November 30, 2020.

If the election under §1.163(j)-2(b)(3)(i) to use 2019 ATI rather than 2020 ATI is made for a CFC group, the CFC group's ATI for the 2020 specified period is determined by reference to the 2019 ATI of all CFC group members (except to the extent that 2018 or 2020 ATI is used, as described earlier), including any CFC group member that joins the CFC group during the 2020 specified period. Therefore, a CFC group's ATI for the 2020 specified period may be determined by reference to a prior taxable year of a new CFC group member even though the CFC group member was not a CFC group member in the prior taxable year. If a CFC group member leaves the CFC group during the 2020 specified period, the ATI of the CFC group for the 2020 specified period is determined without regard to the ATI of the departing CFC group member.

As stated in the Background section of this preamble, Revenue Procedure 2020-22 generally provides the time and manner of making or revoking elections under section 163(j)(10), including elections with respect to applicable CFCs. References in Revenue Procedure 2020-22 to CFC groups and CFC group members are to CFC groups and applicable CFCs for which a CFC group election is made under the 2018 Proposed Regulations. The rules described in this part V.C.2.d of this Explanation of Provisions section and proposed §1.163(j)-7(c)(5) modify the application of Revenue Procedure 2020-22 and the elections under section 163(j)(10) for CFC groups and applicable CFCs for which a CFC group election is made under Proposed §1.163(j)-7.

Thus, for example, if a CFC group has two designated U.S. persons that are U.S. corporations, pursuant to proposed §1.163(j)-7(c)(5), the election to not apply the 50 percent ATI limitation to the CFC group for a specified period beginning in 2020 is made for the specified period of the CFC group by each designated

U.S. person, and pursuant to Revenue Procedure 2020-22, section 6.01(2), the election to not apply the 50 percent ATI limitation is made by each designated U.S. person timely filing a Federal income tax return, including extensions, using the 30 percent ATI limitation for purposes of determining the taxable income of the CFC group.

For purposes of applying §1.964-1(c), the elections described in proposed §1.163(j)-7(c)(5) are treated as if made for each CFC group member. Thus, the requirements to provide a statement and written notice as provided under §1.964-1(c)(3)(i)(B) and (C) apply.

3. Specified Groups and Specified Group Members

a. In General

Proposed §1.163(j)-7(d) provides rules for determining a specified group and specified group members. The determination of a specified group and specified group members is the basis for determining a CFC group and CFC group members. This is because a CFC group member is a specified group member of a specified group for which a CFC group election is in effect, and a CFC group consists of all the CFC group members. See proposed §1.163(j)-7(e)(2).

b. Specified Group

Under proposed §1.163(j)-7(d)(2), a specified group includes one or more chains of applicable CFCs connected through stock ownership with a specified group parent, but only if the specified group parent owns stock meeting the requirements of section 1504(a)(2)(B) (pertaining to value) in at least one applicable CFC, and stock meeting the requirements of section 1504(a)(2)(B) in each of the applicable CFCs (except the specified group parent) is owned by one or more of the other applicable CFCs or the specified group parent.

Unlike the general rules in section 1504, in order to avoid breaking affiliation with a partnership or foreign trust or foreign estate, for purposes of determining whether stock in an applicable CFC meeting the requirements of section

1504(a)(2)(B) is owned by the specified group parent or other applicable CFCs, proposed §1.163(j)-7(d)(2) takes into account both stock owned directly and stock owned indirectly under section 318(a)(2)(A) through a domestic or foreign partnership or under section 318(a)(2)(A) or (a)(2)(B) through a foreign estate or trust (the look-through rule). For example, assume CFC1 and CFC2 is each an applicable CFC and a specified group member of a specified group. If CFC1 and CFC2 each own 50 percent of the capital and profits interests in a partnership, and the partnership wholly owns CFC3, an applicable CFC, then, by reason of the look-through rule, CFC3 is also included in the specified group, although the partnership is not.

The specified group rules also differ from the affiliated group rules in section 1504 in that they require only that 80 percent of the total value (pursuant to section 1504(a)(2)(B)), not 80 percent of both vote and value (pursuant to section 1504(a)(2)(A) and (a)(2)(B)), of an applicable CFC be owned by the specified group parent or other applicable CFCs in the specified group in order for the applicable CFC to be included in the specified group. The Treasury Department and the IRS determined that limiting the 80-percent threshold to value is appropriate to prevent taxpayers from breaking affiliation by diluting voting power below 80 percent.

The specified group has a single specified group parent, which may be either a qualified U.S. person or an applicable CFC. However, the specified group parent is included in the specified group only if it is an applicable CFC. For this purpose, a *qualified U.S. person* means a U.S. person that is a citizen or resident of the United States or a domestic corporation. For purposes of determining the specified group parent, members of a consolidated group are treated as a single corporation and individuals whose filing status is "married filing jointly" are treated as a single individual (aggregation rule). The Treasury Department and the IRS have determined that the aggregation rule is appropriate because all deemed inclusions with respect to applicable CFCs included in gross income of members of a consolidated group or of individuals filing a joint return, as

applicable, are reported on a single U.S. tax return. The Treasury Department and the IRS determined that it is appropriate for an S corporation to be a qualified U.S. person because an S corporation can have only a single class of stock and therefore the economic rights of its shareholders in all applicable CFCs owned by the S corporation are proportionate to share ownership. On the other hand, the Treasury Department and the IRS have determined that it is not appropriate for a domestic partnership to be a qualified U.S. person because of the ability of partnerships to make disproportionate or special allocations and therefore the economic rights of partners in the partnership with respect to all applicable CFCs owned by a partnership will not necessarily be proportionate to ownership. However, if, for example, a domestic partnership wholly owns an applicable CFC, which wholly owns multiple other applicable CFCs, and no qualified U.S. person owns stock in the top-tier CFC meeting the requirements of section 1504(a)(2)(B), taking into account the look-through rule, then the applicable CFCs are included in a specified group of which the top-tier CFC is the specified group parent.

The Treasury Department and the IRS request comments regarding whether, and to what extent, the definition of a “qualified U.S. person” should be expanded to include domestic estates and trusts or whether and to what extent the look-through rule should apply if stock of applicable CFCs is owned by domestic estates and trusts.

Each specified group has a specified period. A specified period is similar to a taxable year but determined with respect to a specified group. A specified group does not have a taxable year because the specified group members may not have

the same taxable year. If the specified group parent is a qualified U.S. person, the specified period generally ends on the last day of the taxable year of the specified group parent and begins on the first day after the last day of the prior specified period. Thus, for example, if the specified group parent is a domestic corporation with a calendar year taxable year, the specified period generally begins on January 1 and ends on December 31. If the specified group parent is an applicable CFC, the specified period generally ends on the last day of the required year of the specified group parent, determined under section 898(c)(1), without regard to section 898(c)(2), and begins on the first day after the last day of the prior specified period. However, a specified period never begins before the first day on which the specified group exists or ends after the last day on which the specified group exists. Like a taxable year, a specified period can never be longer than 12 months.

The principles of §1.1502-75(d)(1), (d)(2)(i) through (d)(2)(ii), and (d)(3)(i) through (d)(3)(iv) (regarding when a consolidated group remains in existence) (§1.1502-75(d) principles) apply for purposes of determining when a specified group ceases to exist. Solely for purposes of applying the §1.1502-75(d) principles, each applicable CFC that is treated as a specified group member for a taxable year of the applicable CFC with respect to a specified period is treated as affiliated with the specified group parent from the beginning to the end of the specified period, without regard to the beginning or end of its taxable year. This rule does not affect the general rule that, for purposes other than §1.1502-75(d) (such as the application of section 163(j) to a CFC group), an applicable CFC is a specified group member with respect to a specified

period for its taxable year ending with or within the specified period.⁴

The Treasury Department and the IRS request comments as to whether any modifications to the §1.1502-75(d) principles should be made for specified groups.

c. Specified Group Members

Proposed §1.163(j)-7(d)(3) provides rules for determining specified group members with respect to a specified group. The determination as to whether an applicable CFC is a specified group member is made with respect to a taxable year of the applicable CFC and specified period of a specified group. Specifically, if the applicable CFC is included in a specified group on the last day of its taxable year that ends with or within the specified period, the applicable CFC is a specified group member with respect to the specified period for the entire taxable year.⁵

The Treasury Department and the IRS are concerned about the potential for abuse that may arise if taxpayers cause an applicable CFC that otherwise would be treated as a specified group member and a CFC group member to avoid being treated as a CFC group member. For example, the Treasury Department and the IRS have determined that it is not appropriate for taxpayers to prevent an applicable CFC with high ATI and low BIE from being part of a CFC group with a goal of increasing its CFC excess taxable income and its U.S. shareholders’ ATI inclusions, rather than allowing the applicable CFC’s ATI to be used by the CFC group. The Treasury Department and the IRS request comments on appropriate methods of preventing an applicable CFC from avoiding being a CFC group member for purposes of increasing the ATI of its U.S. shareholders. The Treasury Department and the

⁴For example, assume a specified group parent with a specified period that is the calendar year acquires all of the stock of CFC1, an applicable CFC, on June 30, Year 1, and sells all of the stock of CFC1 on June 30, Year 3. CFC1 has a November 30 taxable year, and the specified period is the calendar year. CFC1 is included in the specified group on November 30, Year 1, and November 30, Year 2 (but not November 30, Year 3). As a result, CFC1 is a specified group member for its taxable year ending November 30, Year 1, with respect to the specified period ending December 31, Year 1, and for its taxable year ending November 30, Year 2, with respect to the specified period ending December 31, Year 2. Solely for purposes of applying the §1.1502-75(d) principles, CFC1 is treated as affiliated with the specified group parent from the beginning to the end of the specified period ending December 31, Year 1, and from the beginning to the end of the specified period ending December 31, Year 2. In other words, CFC1 is treated as affiliated with the specified group parent from January 1, Year 1, to December 31, Year 2.

⁵For example, assume CFC1, an applicable CFC, has a taxable year beginning December 1, Year 1, and ending November 30, Year 2, and a specified group has a specified period beginning January 1, Year 2, and ending December 31, Year 2. If CFC1 is included in the specified group on November 30, Year 2, then CFC1 is a specified group member with respect to the specified period for its entire taxable year ending November 30, Year 2. This is the case even if CFC1 is not included in the specified group during part of its taxable year ending November 30, Year 2 (for example, because all of the stock of CFC2 is purchased by the specified group on June 1, Year 2, and its taxable year does not close as a result of joining the specified group), or if CFC1 ceases to be included in the specified group after November 30, Year 2, but before December 31, Year 2 (for example, because all of the stock of CFC1 is sold by the specified group on December 15, Year 2).

IRS also request comments on whether a rule similar to the rule in section 1504(a)(3), which prevents domestic corporations from rejoining a consolidated group for 60 months, should apply to prevent applicable CFCs from rejoining a CFC group.

4. CFC Groups and CFC Group Members

a. In General

Proposed §1.163(j)-7(e) provides rules and procedures for treating specified group members as CFC group members and for determining a CFC group. A CFC group member means a specified group member of a specified group for which a CFC group election is in effect. The specified group member is a CFC group member for a specified taxable year with respect to a specified period. A CFC group means all CFC group members for their specified taxable years with respect to a specified period. See proposed §1.163(j)-7(e)(2) (defining CFC group and CFC group member). Thus, if a CFC group election is in place, the terms “specified group members,” “CFC group members,” and a “CFC group” refer to the same applicable CFCs. The term “specified group,” which is determined at any moment in time, may not necessarily refer to the exact same applicable CFCs.

Once a CFC group election is made, the CFC group continues until the CFC group election is revoked or until the end of the last specified period with respect to the specified group. See proposed §1.163(j)-7(e)(3). When a CFC group election is in effect, if an applicable CFC becomes a specified group member with respect to a specified period of the specified group, the CFC group election applies to the applicable CFC and it becomes a CFC group member. When an applicable CFC ceases to be a specified group member with respect to a specified period of a specified group, the CFC group election terminates solely with respect to the applicable CFC. See proposed §1.163(j)-7(e)(4) (joining or leaving a CFC group).

b. Making or Revoking a CFC Group Election

Proposed §1.163(j)-7(e)(5) provides rules for making and revoking a CFC group election. Proposed §1.163(j)-7(e)

(5)(i) provides that a CFC group election applies with respect to a specified period of a specified group. Accordingly, the CFC group election applies to each specified group member for its entire specified taxable year that ends with or within the specified period. In response to comments to the 2018 Proposed Regulations, the CFC group election is not irrevocable. Instead, once made, a CFC group election cannot be revoked with respect to any specified period of the specified group that begins during the 60-month period following the last day of the first specified period for which the election was made. Similarly, once revoked, a CFC group election cannot be made again with respect to any specified period of the specified group that begins during the 60-month period following the last day of the first specified period for which the election was revoked.

The Treasury Department and the IRS request comments regarding whether a specified group that does not make a CFC group election when it first comes into existence (or for the first specified period following 60 days after the date of publication of the Treasury decision adopting these regulations as final in the **Federal Register**) should be prohibited from making the CFC group election for any specified period beginning during the 60-month period following that specified period.

Thus, under the Proposed Regulations, in the case of a specified group, taxpayers choose to apply section 163(j) to specified group members on a CFC group basis or on a stand-alone basis for no less than a 60-month period. The Treasury Department and the IRS have determined that a 60-month period is an appropriate balance between making the choice irrevocable and providing an annual election, the latter of which may facilitate inappropriate tax planning (in this regard, see, for example, the discussion in part C.7 of this part V of the Explanation of Provisions section).

c. Specified Financial Services Subgroup Rules

In response to comments, Proposed §1.163(j)-7 does not provide for CFC financial services subgroups. Instead, applicable CFCs that otherwise qualify as CFC group members are treated as part of the same CFC group.

d. Interaction of the CFC Group Election in Proposed §1.163(j)-7 with the CFC Group Election in the 2018 Proposed Regulations

The CFC group election can be made only in accordance with the method prescribed in proposed §1.163(j)-7(e)(5). The 2018 Proposed Regulations also contained an election called a “CFC group election” (old CFC group election). The old CFC group election is a different election than the CFC group election contained in Proposed §1.163(j)-7. Accordingly, the old CFC group election may be relied on only for taxable years in which the taxpayer relies on the 2018 Proposed Regulations. Whether an old CFC group election was made under the 2018 Proposed Regulations has no effect on whether a CFC group election under proposed §1.163(j)-7(e)(5) is in effect for any taxable year in which the taxpayer relies on Proposed §1.163(j)-7.

5. Exclusion of ECI from Application of Section 163(j) to a CFC Group

In response to comments, proposed §1.163(j)-7 provides that an applicable CFC with ECI is not precluded from being a CFC group member. However, under proposed §1.163(j)-7(f), only the ATI, BII, BIE, and floor plan financing of the applicable CFC that are not attributable to ECI are included in the CFC group’s section 163(j) calculations. The ECI items of the applicable CFC are not included in the CFC group calculations. Instead, the ECI of the applicable CFC is treated as income of a separate CFC, an “ECI deemed corporation,” that has the same taxable year and shareholders as the applicable CFC, but that is not a CFC group member. The ECI deemed corporation must do a separate section 163(j) calculation for its ECI in accordance with Proposed §1.163(j)-8. See Proposed §1.163(j)-8 and part VI of this Explanation of Provisions section for rules applicable to foreign corporations with ECI.

6. Treatment of Foreign Taxes for Purposes of Computing ATI

Proposed §1.163(j)-7(g)(3) provides that, for purposes of computing its ATI, tentative taxable income of a relevant foreign corporation is determined by taking into

account a deduction for foreign taxes. This rule is consistent with §1.952-2, which provides that the taxable income of a foreign corporation for any taxable year is determined by treating the foreign corporation as a domestic corporation, and section 164(a), which allows a deduction for foreign taxes. The Treasury Department and the IRS request comments regarding whether, and the extent to which, the ATI of a relevant foreign corporation should be determined by adding to tentative taxable income any deductions for foreign income taxes.

7. Anti-abuse Rule

The Treasury Department and the IRS are concerned that, in certain situations, U.S. shareholders may inappropriately affirmatively plan to limit BIE deductions as part of a tax-planning transaction, including by not making a CFC group election for purposes of increasing the disallowed BIE of a specified group member or of a partnership substantially owned by specified group members of the same specified group. For example, in a taxable year in which a U.S. shareholder would otherwise have foreign tax credits in the section 951A category in excess of the section 904 limitation, a U.S. shareholder might inappropriately cause one specified group member to pay interest to another specified group member in an amount in excess of the borrowing specified group member's section 163(j) limitation. As a result, the U.S. shareholder's pro rata share of tested income of the borrowing specified group member for the taxable year would be increased without increasing the U.S. shareholder's Federal income tax because excess foreign tax credits in the section 951A category in the taxable year that cannot be carried forward to a future taxable year would offset the Federal income tax on the incremental increase in the U.S. shareholder's pro rata share of tested income, while also enabling the borrowing specified group member to generate a disallowed BIE carryforward that may be used in a subsequent taxable year.

Accordingly, under proposed §1.163(j)-7(g)(4), if certain conditions are met, when one specified group member or applicable

partnership (specified borrower) pays interest to another specified group member or applicable partnership (specified lender), and the payment is BIE to the specified borrower and income to the specified lender, then the ATI of the specified borrower is increased by the amount necessary such that the BIE of the specified borrower is not limited under section 163(j). This amount is determined by multiplying the lesser of the payment amount or the disallowed BIE (computed without regard to this ATI adjustment) by 3 1/3 (or by 2, in the case of taxable years or specified taxable years with respect to a specified period for which the section 163(j) limitation is determined by reference to 50 percent of ATI). A partnership is an applicable partnership if at least 80 percent of the capital or profits interests is owned, in aggregate, by direct or direct partners that are specified group members of the same specified group. The conditions for this rule to apply are as follows: (i) the BIE is incurred with a principal purpose of reducing the Federal income tax liability of a U.S. shareholder (including over multiple taxable years); (ii) the effect of the specified borrower treating the payment amount as disallowed BIE would be to reduce the Federal income tax of a U.S. shareholder; and (iii) either no CFC group election is in effect or the specified borrower is an applicable partnership.

8. The Safe-harbor Election

Proposed §1.163(j)-7(h) provides a safe-harbor election for stand-alone applicable CFCs and CFC groups. If the safe-harbor election is in effect for a taxable year, no portion of the BIE of the stand-alone applicable CFC or of each CFC group member, as applicable, is disallowed under the section 163(j) limitation. The safe-harbor election is an annual election. If the election is made, then no portion of any CFC excess taxable income is included in a U.S. shareholder's ATI. See proposed §1.163(j)-7(j)(2)(iv).

The safe-harbor election cannot be made with respect to any foreign corporation that is not a stand-alone applicable CFC or a CFC group member. As a result,

if a CFC group election is not in effect for a specified period, a specified group member of the specified group is not eligible for the safe-harbor election.

In the case of a stand-alone applicable CFC, the safe-harbor election may be made for a taxable year of the stand-alone applicable CFC if its BIE does not exceed 30 percent of the lesser of (i) its tentative taxable income attributable to non-exempt trades or businesses (referred to as "qualified tentative taxable income"), and (ii) its "eligible amount" for the taxable year. In the case of a CFC group, the safe-harbor election may be made for the specified taxable years of each CFC group member with respect to a specified period if the CFC group's BIE does not exceed 30 percent of the lesser of (i) the sum of the qualified tentative taxable income of each CFC group member, and (ii) the sum of the eligible amounts of each CFC group member. For taxable years of a stand-alone applicable CFC or specified periods of a CFC group beginning in 2019 or 2020, the 30 percent limitation is replaced with a 50 percent limitation, consistent with the change in the section 163(j) limitation to take into account 50 percent, rather than 30 percent, of ATI for such taxable years or specified periods.

The "eligible amount" is a CFC-level determination. In general, the eligible amount is the sum of the applicable CFC's subpart F income plus the approximate amount of GILTI inclusions its U.S. shareholders would have were the applicable CFC wholly owned by domestic corporations that had no tested losses and that were not subject to the section 250(a)(2) limitation on the section 250(a)(1) deduction. Amounts used in the determination of the eligible amount are computed without regard to the application of section 163(j) and the section 163(j) regulations. While the eligible amount of an applicable CFC cannot be negative, qualified tentative taxable income can be negative. Thus, limiting the safe-harbor to 30 percent of qualified tentative taxable income ensures that losses of a stand-alone applicable CFC or a CFC group are taken into account in determining whether the stand-alone applicable CFC or the CFC group qualifies for the safe-harbor.⁶

⁶For example, assume that, before taking into account BIE, a stand-alone applicable CFC has net income of \$0x, consisting of \$100x of subpart F income, a \$100x loss attributable to foreign oil and gas extraction income, as defined in section 907(c)(1). It also has \$20x of BIE, no BII, and no floor plan financing interest expense. The ATI of the CFC is zero and the section 163(j) limitation would be zero. However, the eligible amount of the CFC is \$100x. Thus, absent a rule limiting the safe harbor to 30 percent of qualified tentative taxable income, the CFC would be permitted to deduct its \$20x of business interest expense under the safe harbor, even though none of the BIE would be deductible under the section 163(j) limitation.

The safe-harbor election does not apply to EBIE, as described in §1.163(j)-6(f)(2), and EBIE is not taken into account for purposes of determining whether the safe-harbor election is available for a stand-alone applicable CFC or a CFC group, until such business interest expense is treated as paid or accrued by an applicable CFC in a succeeding year (that is, until the applicable CFC is allocated excess taxable income or excess business interest income from such partnership in accordance with §1.163(j)-6(g)(2)(i)).

The safe-harbor election is intended to reduce the compliance burden on applicable CFCs that would not have disallowed BIE if they applied the section 163(j) calculation. However, the Treasury Department and the IRS are concerned that the safe-harbor election might be used to deduct pre-group disallowed BIE carryforwards that would be limited under proposed §1.163(j)-7(c)(3)(iv) (rules similar to the consolidated SRLY rules). Accordingly, the proposed regulations provide that a safe-harbor election cannot be made for a CFC group that has pre-group disallowed BIE carryforward. The Treasury Department and the IRS request comments on whether the safe-harbor election should be available for CFC groups with pre-group disallowed BIE carryforwards and, if so, appropriate methods of preventing pre-group disallowed BIE carryforwards that would be limited under proposed §1.163(j)-7(c)(3)(iv) from being deductible by CFC group members of CFC groups that apply the safe-harbor election.

The Treasury Department and the IRS also request comments on appropriate modifications, if any, to the safe-harbor election that would further the goal of reducing the compliance burden on stand-alone applicable CFCs and CFC groups that would not have disallowed BIE if they applied the section 163(j) limitation.

9. Increase in Adjusted Taxable Income of U.S. Shareholders

As a general matter, a U.S. shareholder does not include in its ATI any portion of its specified deemed inclusions. Specified deemed inclusions include the U.S. shareholder's deemed income inclusions attributable to an applicable CFC and a non-excepted trade or business of the U.S. shareholder. See §1.163(j)-1(b)(2)(ii)(G). Specified deemed inclusions also include amounts included in a domestic C corporation's allocable share of a domestic partnership's gross income inclusions under sections 951(a) and 951A(a) with respect to an applicable CFC that are investment income to the partnership, to the extent that such amounts are treated as properly allocable to a non-excepted trade or business of the domestic C corporation under §§1.163(j)-4(b)(3) and 1.163(j)-10.⁷ However, consistent with comments received, proposed §1.163(j)-7(j) allows a U.S. shareholder to include in its ATI a portion of its specified deemed inclusions that are attributable to either a stand-alone applicable CFC or a CFC group member, except to the extent attributable to section 78 "gross-up" inclusions. That portion is equal to the ratio of the applicable CFC's CFC excess taxable income over its ATI.

In the case of a stand-alone applicable CFC, CFC excess taxable income is equal to an amount that bears the same ratio to the applicable CFC's ATI as (i) the excess of 30 percent of the applicable CFC's ATI over the amount, if any, by which its BIE exceeds its BII and floor plan financing interest expense, bears to (ii) 30 percent of its ATI. In the case of a CFC group, each applicable CFC's CFC excess taxable income is determined by calculating the excess taxable income of the CFC group and allocating it to each CFC group member pro rata on the basis of the CFC group member's ATI. For any taxable year or

specified period to which the 50 percent (rather than 30 percent) limitation applies under section 163(j)(10), the formula for calculating CFC excess taxable income is adjusted accordingly.

The Treasury Department and the IRS are concerned that taxpayers may inappropriately attempt to aggregate debt in certain specified group members for which a CFC group election is not in effect, thereby overleveraging some specified group members and artificially creating CFC excess taxable income in other specified group members for purposes of increasing the ATI of a U.S. shareholder.⁸ Accordingly, the Treasury Department and the IRS have determined that any excess taxable income of a specified group member should not become available to increase the ATI of a U.S. shareholder unless a CFC group election is in effect and the CFC group has not exceeded its section 163(j) limitation. Accordingly, under proposed §1.163(j)-7(j)(4)(ii), only U.S. shareholders of stand-alone applicable CFCs and CFC group members can increase their ATI for a portion of their specified deemed inclusion. To the extent that a CFC group election is not in effect, a U.S. shareholder may not increase its ATI for any portion of its specified deemed inclusion attributable to a specified group member of the specified group.

In addition, if a safe-harbor election is in effect with respect to the taxable year of a stand-alone applicable CFC or the specified period of a CFC group, CFC excess taxable income is not calculated for the stand-alone applicable CFC or the CFC group members. As a result, proposed §1.163(j)-7(j)(4)(i) provides that a U.S. shareholder of a stand-alone applicable CFC or of a CFC group member for which the safe-harbor election is in effect does not increase its ATI for any portion of its specified deemed inclusion attributable to the stand-alone applicable CFC or CFC group member.

⁷The Treasury Department and the IRS anticipate that a domestic partnership's gross income inclusions under sections 951(a) and 951A(a) will virtually always be investment income to the partnership. See section 163(j)(5), excluding "investment interest" subject to section 163(d) from the definition of business interest, and sections 163(d)(3)(A) and (d)(5), treating as investment interest any interest properly allocable to "property which produces income of a type described in section 469(e)(1)." See also §1.469-2T(c)(3).

⁸For example, assume a U.S. shareholder wholly owns CFC1, which wholly owns CFC2. CFC1 and CFC2 each have \$100x of ATI and no business interest income or floor plan financing interest expense. CFC1 and CFC2 have not made a CFC group election. If CFC1 and CFC2 each have \$35x of business interest expense, under section 163(j), CFC1 and CFC2 could each deduct \$30x of business interest expense and have a \$5x disallowed business interest expense carryforward. Neither CFC1 nor CFC2 would have CFC excess taxable income. As a result, the U.S. shareholder would have no ATI inclusion from CFC1 or CFC2. However, if the CFCs move all of CFC2's debt to CFC1, CFC1 would deduct \$30x of business interest expense and have a \$40x disallowed business interest expense carryforward. Absent rules providing otherwise, CFC2 would have \$100x of CFC excess taxable income and \$100x of ATI, allowing the U.S. shareholder to include in its ATI its CFC income inclusion attributable to CFC2 (to the extent attributable to a non-excepted trade or business and not attributable to section 78 "gross-up" inclusions).

VI. Section 1.163(j)-8: Application of the Business Interest Deduction Limitation to Foreign Persons with Effectively Connected Income

A. Proposed §1.163(j)-8 Contained in the 2018 Proposed Regulations

The 2018 Proposed Regulations under §1.163(j)-8 provide rules for how section 163(j) applies to a nonresident alien individual or foreign corporation that is not an applicable CFC (specified foreign person) with ECI. Although the regulations under section 163(j) generally apply to specified foreign persons, a number of the general rules under section 163(j) need to be adjusted to take into account the fact that a specified foreign person is taxed only on its ECI rather than all of its income. Accordingly, the definitions for ATI, BIE, BII, and floor plan financing interest expense are modified to limit such amounts to items that are, or are allocable to, ECI. The 2018 Proposed Regulations also modify §1.163(j)-10(c) to provide that a specified foreign person's interest expense and interest income are only allocable to excepted or non-excepted trades or businesses that have ECI.

Under the 2018 Proposed Regulations, a specified foreign person that is a partner in a partnership that has ECI (specified foreign partner) is required to modify the application of the general allocation rules in §1.163(j)-6 with respect to ETI, EBIE, and EBII of the partnership to take into account only the partnership's items that are, or are allocable to, ECI. Although the section 163(j) limitation is determined on an entity basis by a partnership, the Treasury Department and the IRS determined that excess items of a partnership should only be used by the specified foreign partner to the extent that the excess items arise from partnership items that are ECI with respect to the specified foreign partner. The amount of ETI and EBIE to be used by a specified foreign partner was determined by multiplying the amount of the ETI or the EBIE allocated under §1.163(j)-6 to the specified foreign partner by a fraction, the numerator of which is the ATI

of the partnership, with the adjustments described previously to limit such amount to only items that are ECI, and the denominator of which is the ATI of the partnership determined under §1.163(j)-6(d). The amount of EBII that could be used by a specified foreign partner was limited to the amount of allocable BII that is ECI from the partnership that exceeds allocable BIE that is allocable to income that is ECI from the partnership.

Lastly, the 2018 Proposed Regulations provide that an applicable CFC that has ECI must first apply the general rules of section 163(j) and the section 163(j) regulations to determine how section 163(j) applies to the applicable CFC. If the applicable CFC has disallowed BIE, the applicable CFC then must apportion a part of its disallowed BIE to BIE allocable to income that is ECI. The amount of disallowed BIE allocable to income that is ECI is equal to the disallowed BIE multiplied by a fraction, the numerator of which is the applicable CFC's ECI ATI, and the denominator of which is the CFC's ATI.

No comments were received on the 2018 Proposed Regulations under §1.163(j)-8. Nonetheless, the Treasury Department and the IRS have become aware of certain distortions that can result under the 2018 Proposed Regulations. Accordingly, proposed §1.163(j)-8 has been revised, and re-proposed, to alleviate these distortions and to provide additional guidance and clarity on the manner in which these rules apply to specified foreign partners and CFCs with ECI.

B. Proposed §1.163(j)-8 in the Proposed Regulations

Proposed §1.163(j)-8 in the Proposed Regulations (Proposed §1.163(j)-8) provides rules concerning the application of section 163(j) to foreign persons with ECI.⁹ Similar to proposed §1.163(j)-8(b) in the 2018 Proposed Regulations, proposed §1.163(j)-8(b)(1)-(5) provides that, for purposes of applying section 163(j) and the section 163(j) regulations to a specified foreign person, certain definitions (ATI, BIE, BII, and floor plan financ-

ing interest expense) are modified to take into account only ECI items. Additionally, proposed §1.163(j)-8(b)(6) provides that, for purposes of applying §1.163(j)-10(c) to a specified foreign person, only ECI items and assets that are U.S. assets are taken into account in determining the amount of interest income and interest expense allocable to a trade or business.

Proposed §1.163(j)-8(c) determines the portion of a specified foreign partner's allocable share of ETI, EBIE, and EBII (as determined under §1.163(j)-6) that is treated as ECI and the portion that is not treated as ECI. The portion of the specified foreign partner's allocable share of ETI that is ECI is equal to its allocable share of ETI multiplied by a fraction, the specified ATI ratio (which compares the specified foreign partner's distributive share of the partnership's ECI to its distributive share of the partnership's total income). The remainder of the specified foreign partner's allocable share of ETI is not ECI. See proposed §1.163(j)-8(c)(1). Similar to ETI, the portion of the specified foreign partner's allocable share of EBII that is ECI is equal to its allocable share of EBII multiplied by a fraction, the specified BII ratio (which compares the specified foreign partner's allocable share of BII that is ECI to its allocable share of total BII). See proposed §1.163(j)-8(c)(4).

The portion of the specified foreign partner's allocable share of EBIE that is ECI is determined by subtracting the portion of the specified foreign partner's allocable share of deductible BIE that is characterized as ECI from the amount of the specified foreign partner's allocable share of BIE that is characterized as ECI. See proposed §1.163(j)-8(c)(2). A similar rule applies for purposes of determining the portion of EBIE that is not ECI. A specified foreign partner's allocable share of deductible BIE that is characterized as ECI or not ECI is determined by allocating the deductible BIE pro rata between the respective amounts of deductible BIE that the specified foreign partner would have if the specified foreign partner's allocable share of the ECI items of the partnership and the non-ECI items of the partnership

⁹For purposes of Proposed §1.163(j)-8, the term *effectively connected income* (or *ECI*) means income or gain that is ECI, as defined in §1.884-1(d)(1)(iii), and deduction or loss that is allocable to, ECI, as defined in §1.884-1(d)(1)(iii).

were treated as separate partnerships and a 163(j) limitation was applied to each hypothetical partnership. However, no more deductible BIE can be characterized as ECI or not ECI than the specified foreign partner's allocable share of BIE that is ECI or the specified foreign partner's allocable share of BIE that is not ECI, respectively. Any deductible BIE in excess of the hypothetical partnership limitations is characterized as ECI or not ECI pro rata in proportion to the remaining amounts of the specified foreign partner's allocable share of BIE that is ECI and not ECI.

Proposed §1.163(j)-8(d) determines the portion of deductible and disallowed BIE of a relevant foreign corporation (as defined in §1.163(j)-1(b)(33)) that is characterized as ECI or not ECI. These rules are similar to the rules in proposed §1.163(j)-8(c) for characterizing a specified foreign partner's allocable share of excess items of a partnership as ECI or not ECI in that they calculate the hypothetical section 163(j) limitation for two hypothetical foreign corporations—a foreign corporation with ECI and a foreign corporation with non-ECI—and allocate the deductible BIE between the two hypothetical limitations. The portion of the relevant foreign corporation's disallowed BIE that is ECI is determined by subtracting the portion of the relevant foreign corporation's deductible BIE that is characterized as ECI from the relevant foreign corporation's BIE that is ECI. A similar rule applies for purposes of determining the portion of disallowed BIE that is characterized as not ECI.

Proposed §1.163(j)-8(e) provides rules regarding disallowed BIE. These rules provide that disallowed BIE is characterized as ECI or not ECI in the year in which it arises and retains its characterization in subsequent years. Additionally, an ordering rule determines the EBIE that is treated as paid or accrued by a specified foreign partner in a subsequent year. Specifically, the specified foreign partner's allocable share of EBIE is treated as paid or accrued by the specified foreign partner in a subsequent year pursuant to §1.163(j)-6(g)(2)(i) in the order of the taxable years in which the allocable EBIE arose and pro rata between the specified foreign partner's allocable share of EBIE that is ECI and not ECI that arose in the same taxable year.

Proposed §1.163(j)-8(e)(2) provides that, for purposes of characterizing deductible BIE and EBIE as ECI or not ECI, a specified foreign partner's BIE is deemed to include its allocable share of EBIE of partnerships in which it is a direct or indirect partner. As a result, EBIE of both top-tier partnerships and lower-tier partnerships is characterized as ECI or not ECI in the year in which it arises, even if it is not included in the specified foreign partner's allocable share of EBIE.

Proposed §1.163(j)-8(f) provides rules coordinating the application of section 163(j) with §1.882-5 and similar rules and with the branch profits tax. Proposed §1.163(j)-8(f)(1)(i) provides that a foreign corporation first determines its interest expense on liabilities that are allocable to ECI under §1.882-5 before applying section 163(j). Similarly, interest expense, as defined in §1.163(j)-1(b)(23), that is not allocable to ECI under §1.882-5 must be allocable to income that is ECI under the regulations under section 861 before section 163(j) is applied.

Proposed §1.163(j)-8(f)(1)(ii) provides rules for determining the portion of a specified foreign partner's BIE that is ECI, as determined under §1.882-5(b) through (d) or §1.882-5(e) (§1.882-5 interest expense), that is treated as attributable to a partner's allocable share of interest expense of a partnership. As a general matter, the determination as to whether a partnership's items of income and expense are allocable to ECI is made by the partnership. However, the determination as to the amount of interest expense that is allocable to ECI is made by a partner, not the partnership. Because section 163(j) applies separately to partnerships and their partners, a determination must be made as to the source of §1.882-5 interest expense. If the BIE is attributable to BIE of the partnership, it is subject to the rules of §§1.163(j)-6 and 1.163(j)-8(c).

The §1.882-5 interest expense is first treated as attributable to interest expense on U.S. booked liabilities, determined under §1.882-5(d)(2)(vii), of the partner or a partnership. Any remaining §1.882-5 interest expense (excess §1.882-5 interest expense) is treated as attributable to interest expense on liabilities of the partner in proportion to its U.S. assets (other than partnership interests) over all of its U.S.

assets, and as attributable to interest expense on liabilities of the partner's direct or indirect partnership interests in proportion to the portion of the partnership interest that is a U.S. asset over all of the partner's U.S. assets. The total amount of §1.882-5 interest expense attributed to the partner or a partnership (taking into account both interest expense on U.S. booked liabilities and excess §1.882-5 interest expense) and interest expense on a liability described in §1.882-5(a)(1)(ii) (A) or (B) (direct allocations) may never exceed the amount of the partner's interest expense on liabilities or the partner's allocable share of the partnership's interest expense on liabilities (the interest expense limitation). The interest expense limitation prevents more §1.882-5 interest expense from being attributed to the partner or the partner's allocable share of interest expense of a partnership than the actual amount of such interest expense. Any excess §1.882-5 interest expense that would have been attributed to the partner or a partnership, but for the interest expense limitation, is re-attributed in accordance with these attribution rules.

When excess §1.882-5 interest expense has been attributed to all of the interest expense on liabilities of the foreign corporation and its allocable share of partnership interests that have U.S. assets, the remaining excess §1.882-5 interest expense, if any, is first attributed to interest expense on liabilities of the foreign corporation (but not in excess of the interest expense limitation), and then, pro rata, to its allocable share of interest expense on liabilities of its partnership interests that do not have U.S. assets, subject to the interest expense limitation. See proposed §1.163(j)-8(f)(1)(iii). These rules merely characterize interest expense of the foreign corporation and its partnership interests as ECI or not ECI. These rules do not change the amount of interest expense of the foreign corporation or its partnership interests.

The rule in proposed §1.163(j)-8(f)(1) of 2018 Proposed Regulations providing that the disallowance and carryforwards of BIE does not affect effectively connected earnings and profits of a foreign corporation is not retained in Proposed §1.163(j)-8. This rule is not necessary in Proposed §1.163(j)-8 because the general rule regarding the effect of section 163(j)

on earnings and profits in §1.163(j)-4(c)(1) applies to effectively connected earnings and profits.

VII. Proposed §1.469-9: Definition of Real Property Trade or Business

Section 469(c)(7)(C) defines real property trade or business by reference to eleven undefined terms. The Final Regulations amended §1.469-9 to define two of the eleven terms – management and operations. In response to questions received about the application of section 469(c)(7)(C) to timberlands, these proposed regulations would provide definitions for two additional terms – development and redevelopment – to further clarify what constitutes a real property trade or business.

The Treasury Department and IRS have determined that real property development and redevelopment trades or businesses should be defined to include business activities that involve the preservation, maintenance, and improvement of forest-covered areas (timberland). Congress most likely intended and expected that such business activities would be excepted from section 163(j), through election, similar to other real property and farming businesses. However, because timber is specifically excluded from the definition of farming under other Code provisions (such as section 464(e)), the Treasury Department and IRS have determined that such business activities are more properly described by and should be included in the definition of real property trade or business for this purpose. These proposed regulations would clarify that “real property development” is the maintenance and improvement of raw land to make the land suitable for subdivision, further development, or construction of residential or commercial buildings, or to establish, cultivate, maintain or improve timberlands (generally defined as parcels of land covered by forest). Similarly, these proposed regulations would clarify that “real property redevelopment” is the demolition, deconstruction, separation, and removal of existing buildings, landscaping, and infrastructure on a parcel of land to return the land to a raw condition or otherwise prepare the land for new development or construction, or for the establishment and cultivation of new timberlands.

VIII. Proposed §1.163(j)-2 and §1.1256(e)-2: Section 1256 and Determination of Tax Shelter Status; Election to use 2019 ATI to Determine 2020 Section 163(j) Limitation

A. Section 1256 and Determination of Tax Shelter Status

Several commenters raised questions regarding the exclusion of “a tax shelter that is not permitted to use a cash method of accounting” from the small business exemption provided in section 163(j)(3). Section 448 and §1.448-1T describe limitations on the use of the cash method of accounting, including an explicit prohibition on the use of the cash method of accounting by a tax shelter. Section 448(d)(3) defines a tax shelter by cross reference to section 461(i)(3), which defines a tax shelter, in part, as a syndicate within the meaning of section 1256(e)(3)(B). Under §1.448-1T(b)(3), a syndicate is defined as an entity that is not a C corporation if more than 35 percent of the losses of such entity during the taxable year are *allocated* to limited partners or limited entrepreneurs. Section 1256(e)(3)(B) refers instead to losses that are *allocable* to limited partners or limited entrepreneurs. As a result, the scope of the small business exemption in section 163(j)(3) is unclear. To provide clarity, and to make these rules consistent, the Treasury Department and the IRS would define the term syndicate for purposes of section 1256 using the actual allocation rule from the definition in §1.448-1T(b)(3). This proposed definition is also consistent with the definition of a syndicate used in a number of private letter rulings that were issued under section 1256. See proposed §1.1256(e)-2(a).

One commenter asked for clarification on how to compute the amount of losses to be allocated for purposes of determining syndicate status under section 1256(e)(3)(A). The commenter provided a particular fact pattern in which a small business would be caught in an iterative loop of (a) having net losses due to an interest deduction, (b) which would trigger disallowance of the exemption in section 163(j)(3), (c) which would trigger the application of section 163(j)(1) to reduce the amount of the interest deduction, (d) which would then lead to the taxpayer having no net losses

and therefore being eligible for the application of section 163(j)(3). To address this fact pattern, the Treasury Department and the IRS have added rules providing that, for purposes of section 1256(e)(3)(B), losses are determined without regard to section 163(j). See proposed §§1.163(j)-2(d)(3) and 1.1256(e)-2(b).

Several commenters requested that the exemption in section 163(j)(3) be broadened to apply to all small businesses without regard to the parenthetical that denies the section 163(j)(3) exemption for a small business that is “a tax shelter that is not permitted to use a cash method of accounting.” See section 163(j)(3). One commenter specifically requested that, for a small business meeting the gross receipts test in section 448(c), all interests held by limited partners or limited entrepreneurs be treated as held by owners actively managing the business even if those interests would not qualify for the active management exception under section 1256(e)(3)(C). After considering the comments, the Treasury Department and the IRS have determined that the requests are contrary to both the statutory language in section 163(j)(3) and the accompanying legislative history and therefore decline to adopt the comments.

B. Election to use 2019 ATI to Determine 2020 Section 163(j) Limitation

As stated in the Background section of this preamble, section 163(j)(10)(B)(i) allows a taxpayer to elect to use its 2019 ATI in determining the taxpayer’s section 163(j) limitation for its taxable year beginning in 2020. Section 1.163(j)-2(b)(3) and (4) of the Final Regulations provide general rules regarding this election.

These proposed regulations clarify that, if the acquiring corporation in a transaction to which section 381 applies makes an election under section 163(j)(10)(B)(i), the acquiring corporation’s 2019 ATI for purposes of section 163(j)(10)(B)(i) is its ATI for its last taxable year beginning in 2019 (subject to the limitation for short taxable years in section 163(j)(10)(B)(ii)). For example, assume that T’s 2019 ATI is \$100 and A’s 2019 ATI is \$200. If T merges into A during A’s 2020 taxable year in a transaction described in section 368(a)(1)(A), and if A makes an election

under section 163(j)(10)(B)(i), A's 2019 ATI for purposes of this election is \$200. Similarly, these proposed regulations clarify that a consolidated group's 2019 ATI for purposes of section 163(j)(10)(B)(i) is the consolidated group's ATI for its last taxable year beginning in 2019 (subject to the limitation in section 163(j)(10)(B)(ii)). The Treasury Department and the IRS request comments on these proposed rules. The Treasury Department and the IRS also request comments on (1) whether the 2019 ATI of an acquired corporation in a transaction to which section 381 applies should be included in the acquiring corporation's 2019 ATI for purposes of section 163(j)(10)(B)(i) and (2) how such a rule would address more complex fact patterns, such as situations where the acquiring corporation is acquired in a subsequent transaction described in section 381, or where the acquired corporation and the acquiring corporation have different tax years.

IX. Proposed §1.163(j)-10: Application of Corporate Look-Through Rules to Tiered Structures

For purposes of determining the extent to which a shareholder's basis in the stock of a domestic non-consolidated C corporation or CFC is allocable to an excepted or non-excepted trade or business, §1.163(j)-10(c)(5)(ii)(B) provides several look-through rules whereby the shareholder "looks through" to the corporation's basis in its assets.

A commenter pointed out that the application of these look-through rules may produce distortive results in certain situations. For example, assume Corporation X's basis in its assets is split equally between X's excepted and non-excepted trades or businesses, and that (as a result) X has a 50 percent exempt percentage applied to its interest expense. However, rather than operate its excepted trade or business directly, X operates its excepted trade or business through a wholly owned, non-consolidated subsidiary (Corporation Y), and each of X and Y borrows funds from external lenders. Assuming for purposes of this example that neither the anti-avoidance rule in §1.163(j)-2(h) nor the anti-abuse rule in §1.163(j)-10(c)(8) applies, Y's interest expense would not be

subject to the section 163(j) limitation because Y is engaged solely in an excepted trade or business. Moreover, a portion of X's interest expense also would be allocable to an excepted trade or business by virtue of the application of the look-through rule in proposed §1.163(j)-10(c)(5)(ii)(B)(2) to X's basis in Y's stock.

The anti-avoidance rule in proposed §1.163(j)-2(h) and the anti-abuse rule in proposed §1.163(j)-10(c)(8) would preclude the foregoing result in certain circumstances. However, these proposed regulations would modify the look-through rule for domestic non-consolidated C corporations and CFCs to limit the potentially distortive effect of this look-through rule on tiered structures in situations to which the anti-avoidance and anti-abuse rules do not apply. More specifically, these proposed regulations would modify the look-through rule for non-consolidated C corporations to provide that, for purposes of determining a taxpayer's basis in its assets used in excepted and non-excepted trades or businesses, any such corporation whose stock is being looked through may not itself apply the look-through rule.

For example, P wholly and directly owns S1, which wholly and directly owns S2. Each of these entities is a non-consolidated C corporation to which the small business exemption does not apply. In determining the extent to which its interest expense is subject to the section 163(j) limitation, S1 may look through the stock of S2 for purposes of allocating S1's basis in its S2 stock between excepted and non-excepted trades or businesses. However, in determining the extent to which P's interest expense is subject to the section 163(j) limitation, S1 may not look through the stock of S2 for purposes of allocating P's basis in its S1 stock between excepted and non-excepted trades or businesses.

However, the Treasury Department and the IRS are aware that taxpayers are organized into multi-tiered structures for legitimate, non-tax reasons. The Treasury Department and the IRS request comments on the proposed limitation on the application of the corporate look-through rules. The Treasury Department and the IRS also request comments on whether there are other situations in which the look-through rules for domestic non-con-

solidated C corporations or CFCs should apply and whether there are other approaches for addressing the distortions that these proposed rules are intended to minimize.

Proposed Applicability Dates

These Proposed Regulations are proposed to apply to taxable years beginning on or after 60 days after the date the Treasury Decision adopting these rules as final regulations is published in the **Federal Register**.

Taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may rely on §1.163-14, 1.163-15, 1.163(j)-2(d)(3), or §1.1256(e)-2 of these Proposed Regulations for a taxable year beginning after December 31, 2017, and before 60 days after the date the Treasury Decision adopting these rules as final regulations is published in the **Federal Register**, provided taxpayers and their related parties consistently follow all of the rules of the relevant section of the Proposed Regulations for that taxable year and for each subsequent taxable year. Taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply §1.163-14, 1.163-15, 1.163(j)-2(d)(3), or 1.1256(e)-2 of the final version of these Proposed Regulations for a taxable year beginning after December 31, 2017, and before 60 days after the date the Treasury Decision adopting these rules as final regulations is published in the **Federal Register**, provided that taxpayers and their related parties consistently apply all of the rules of the relevant section, as applicable, to that taxable year and each subsequent taxable year. See also §§1.163-14(i), 1.163-15(b), 1.163(j)-2(k)(2), and 1.1256(e)-2(d) of these Proposed Regulations.

Taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), who apply the Final Regulations (as defined in the Explanation of Provisions) published elsewhere in this issue of the **Federal Register** to a taxable year beginning after December 31, 2017, and before 60 days after the Treasury Decision adopting these rules as final regulations is published in the **Federal Register** may rely on §§1.163(j)-1(b)(1)(iv)(B) and 1.163(j)-1(b)(1)(iv)(E) of these Proposed

Regulations for a taxable year beginning after December 31, 2017, and before 60 days after the Treasury Decision adopting these rules as final regulations is published in the **Federal Register**, provided that taxpayers and their related parties consistently apply the rules of both §§1.163(j)-1(b)(1)(iv)(B) and 1.163(j)-1(b)(1)(iv)(E) of these Proposed Regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year and each subsequent taxable year. See also §1.163(j)-1(c)(4)(i) of these Proposed Regulations.

Taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), who apply the Final Regulations published elsewhere in this issue of the **Federal Register** to a taxable year beginning after December 31, 2017, and before 60 days after the Treasury Decision adopting these rules as final regulations is published in the **Federal Register**, may rely on the rules in §1.163(j)-2(b)(3)(iii) and (iv) of these Proposed Regulations for such taxable year, provided that taxpayers and their related parties consistently follow the rules of both §1.163(j)-2(b)(3)(iii) and (iv) for that taxable year and for each subsequent taxable year beginning before 60 days after the Treasury Decision adopting these rules as final regulations is published in the **Federal Register**. Taxpayers not applying the Final Regulations to taxable years beginning before November 13, 2020 may not rely on the rules in §1.163(j)-2(b)(3)(iii) and (iv) of these Proposed Regulations for those taxable years. See also §1.163(j)-2(k)(2) of these Proposed Regulations.

Taxpayers and their related parties, within the meaning of sections 267(b) and 707(b), who apply the Final Regulations published elsewhere in this issue of the **Federal Register** to a taxable year beginning after December 31, 2017, and before 60 days after the Treasury Decision adopting these rules as final regulations is published in the **Federal Register** may rely on the rules in §1.163(j)-10(c)(5)(ii)

(D)(2), 1.469-4(d)(6), or 1.469-9(b)(2) of these Proposed Regulations for a taxable year beginning after December 31, 2017, and before 60 days after the Treasury Decision adopting these rules as final regulations is published in the **Federal Register**, provided that taxpayers and their related parties consistently follow the rules of §1.163(j)-10(c)(5)(ii)(D)(2), 1.469-4(d)(6), or 1.469-9(b)(2) of these Proposed Regulations, as applicable, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-4, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, for that taxable year and for each subsequent taxable year. See also §§1.163(j)-10(f)(2) and 1.469-11(a)(1) and (4) of these Proposed Regulations.

Taxpayers and their related parties, within the meaning of sections 267(b) and 707(b), may rely on the rules in §1.163(j)-6 of these Proposed Regulations for a taxable year beginning after December 31, 2017, and before 60 days after the Treasury Decision adopting these rules as final regulations is published in the **Federal Register**, provided that taxpayers and their related parties also apply the rules of §1.163(j)-6 in the Final Regulations and consistently follow all of those rules for that taxable year and for each subsequent taxable year. See also §1.163(j)-6(p)(2) of these Proposed Regulations.

Taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), who apply the Final Regulations published elsewhere in this issue of the **Federal Register** to a taxable year beginning after December 31, 2017, and before 60 days after the date the Final Regulations are published in the **Federal Register**, may rely on §§1.163(j)-7 and 1.163(j)-8 of these Proposed Regulations for that taxable year, provided the taxpayers and their related parties also rely on §§1.163(j)-7 and 1.163(j)-8 of these Proposed Regulations and apply the Final Regulations for each subsequent taxable year. Taxpayers who choose not to apply the Final Regulations to a taxable year beginning after December 31, 2017, and

before 60 days after the date the Final Regulations are published in the **Federal Register** may not rely on either §1.163(j)-7 or 1.163(j)-8 of these Proposed Regulations for that taxable year. For any taxable year beginning on or after 60 days after the date the Final Regulations are published in the **Federal Register** and before 60 days after the date the Treasury Decision adopting these Proposed Regulations as final regulations is published in the **Federal Register**, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may rely on §§1.163(j)-7 and 1.163(j)-8 of these Proposed Regulations provided they consistently follow all of the rules of §§1.163(j)-7 and 1.163(j)-8 for such taxable year and for each subsequent taxable year beginning before 60 days after the Treasury Decision adopting these Proposed Regulations as final regulations is published in the **Federal Register**. See also §§1.163(j)-7(m) and 1.163(j)-8(j) of these Proposed Regulations. Taxpayers and their related parties who rely on §1.163(j)-7 of these Proposed Regulations for any taxable year ending before November 13, 2020 can make a CFC group election or a safe-harbor election even if the deadline provided in §1.163(j)-7(e)(5)(iii) or (h)(5)(i) of these Proposed Regulations has passed. Such taxpayers and their related parties are permitted to make the election on an amended Federal income tax return filed on or before the due date (taking into account extensions, if any) of the original Federal income tax return for the first taxable year ending after November 13, 2020.

See part III.B of the Explanation of Provisions for rules concerning reliance on these Proposed Regulations with respect to section 163(j) interest dividends.

Special Analyses

I. Regulatory Planning and Review – Economic Analysis

Executive Orders 13771, 13563, and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equi-

ty. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Executive Order 13771 designation for any final rule resulting from these proposed regulations will be informed by comments received. The preliminary Executive Order 13771 designation for this proposed rule is regulatory.

These proposed regulations have been designated by the Office of Information and Regulatory Affairs as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (MOA, April 11, 2018) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations. OMB has designated the proposed regulations as economically significant under section 1(c) of the MOA. Accordingly, the proposed regulations have been reviewed by OMB's Office of Information and Regulatory Affairs.

A. Background and Need for these Proposed Regulations

Section 163(j), substantially revised by the Tax Cuts and Jobs Act (TCJA), provides a set of relatively complex statutory rules that impose a limitation on the amount of business interest expense that a taxpayer may deduct for Federal tax purposes. This limitation does not apply to businesses with gross receipts of \$25 million or less (inflation adjusted). This provision has the general effect of putting debt-financed investment by businesses on a more equal footing with equity-financed investment, a treatment that Congress believed will lead to a more efficient capital structure for firms. See Senate Budget Explanation of the Bill as Passed by SFC (2017-11-20) at pp. 163-4.

As described in the Background section earlier, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) amended section 163(j) to provide special rules relating to the adjusted taxable income (ATI) limitation for taxable years beginning in 2019 or 2020.

Because this limitation on deduction for business interest expense is new, taxpayers would benefit from regulations that explain key terms and calculations. The Treasury Department and the IRS published proposed regulations in December 2018 (2018 Proposed Regulations) and are issuing final regulations simultaneously with the current proposed regulations. This current set of proposed regulations covers topics that were reserved in the 2018 Proposed Regulations, were raised by commenters to the proposed regulations, or need to be re-proposed.

B. Overview of the Proposed Regulations

The proposed regulations provide guidance on the definition of interest as it relates to income flowing through regulated investment companies (RICs); debt-financed distributions from pass-through entities; the treatment of business interest expense for publicly traded partnerships and trading partnerships¹⁰; the application of the section 163(j) limitation in the context of self-charged interest; and the treatment of excess business interest expense in tiered-partnership structures. The proposed regulations also modify the definition of real property development and real property redevelopment in section 1.469-9 of the regulations and the definition of syndicate for purposes of applying the small business exception in section 163(j)(3). The proposed regulations also re-propose rules regarding the application of the interest limitation to foreign corporations (including controlled foreign corporations as defined in section 957(a)) and United States shareholders of controlled foreign corporations, and the applicability of the section 163(j) limitation to foreign persons with U.S. effectively connected income.

C. Economic Analysis

1. Baseline

The Treasury Department and the IRS have assessed the benefits and costs of

these proposed regulations relative to a no-action baseline that reflects anticipated Federal income tax-related behavior in the absence of these regulations.

2. Summary of Economic Effects

The proposed regulations provide certainty and clarity to taxpayers regarding terms and calculations that are contained in section 163(j), which was substantially modified by TCJA. In the absence of this clarity, the likelihood that different taxpayers would interpret the rules regarding the deductibility of business interest expense differently would be exacerbated. In general, overall economic performance is enhanced when businesses face more uniform signals about tax treatment. Certainty and clarity over tax treatment also reduce compliance costs for taxpayers.

For those situations where taxpayers would generally adopt similar interpretations of the statute even in the absence of guidance, the proposed regulations provide value by helping to ensure that those interpretations are consistent with the intent and purpose of the statute. For example, the proposed regulations may specify a tax treatment that few or no taxpayers would adopt in the absence of specific guidance.

The Treasury Department and the IRS project that the proposed regulations will have an annual economic effect greater than \$100 million (\$2019). This determination is based on the substantial volume of business interest payments in the economy¹¹ and the general responsiveness of business investment to effective tax rates,¹² one component of which is the deductibility of interest expense. Based on these two magnitudes, even modest changes in the deductibility of interest payments (and in the certainty of that deductibility) provided by the proposed regulations, relative to the no-action baseline, can be expected to have annual effects greater than \$100 million. This claim is particularly likely to hold for the first set of general section 163(j) guidance that is promulgated following major legislation, such as TCJA, and for other

¹⁰A trading partnership is a partnership engaged in the per se non-passive activity of trading personal property (including market securities) for the account of owners of interests in the activity, as described in section 1.469-1T(e)(6)(trading partnerships).

¹¹Interest deductions in tax year 2013 for corporations, partnerships, and sole proprietorships were approximately \$800 billion.

¹²See E. Zwick and J. Mahon, "Tax Policy and Heterogeneous Investment Behavior," at *American Economic Review* 2017, 107(1): 217-48 and articles cited therein.

major guidance, which we have determined includes these proposed regulations.

Regarding the nature of the economic effects, the Treasury Department and the IRS project that the proposed regulations will increase investment in the United States and increase the proportion that is debt-financed, relative to the no-action baseline. We have further determined that these effects are consistent with the intent and purpose of the statute. Because taxpayer favorable provisions will lead to a decrease in Federal tax revenue relative to the no-action baseline, there may be an increase in the Federal deficit relative to the no-action baseline. This may lead to a decrease in investment by taxpayers not directly affected by these proposed regulations, relative to the no-action baseline. This effect should be weighed against the enhanced efficiency arising from the clarity and enhanced consistency with the intent and purpose of the statute provided by these regulations. The Treasury Department and the IRS have determined that the proposed regulations provide a net benefit to the U.S. economy.

The Treasury Department and the IRS have not undertaken more precise quantitative estimates of these effects because many of the definitions and calculations under 163(j) are new and many of the economic decisions that are implicated by these proposed regulations involve highly specific taxpayer circumstances. We do not have readily available data or models to estimate with reasonable precision the types and volume of different financing arrangements that taxpayers might undertake under the proposed regulations versus the no-action baseline.

In the absence of such quantitative estimates, the Treasury Department and the IRS have undertaken a qualitative analysis of the economic effects of the proposed regulations relative to the no-action baseline and relative to alternative regulatory approaches. This analysis is presented in Part I.C.3 of this Special Analyses.

The Treasury Department and the IRS solicit comments on these findings and more generally on the economic effects of these proposed regulations. The Treasury Department and the IRS particularly solicit data, other evidence, or models that could be used to enhance the rigor of the process by which the final regulations might be developed.

3. Economic Effects of Specific Provisions

a. Definition of Interest

The final regulations set forth several categories of amounts and transactions that generate interest for purposes of section 163(j). The proposed regulations provide further guidance on the definition of interest relevant to the calculation of interest expense and interest income. In particular, the proposed regulations provide rules under which the dividends paid by a RIC that earns net business interest income (referred to as section 163(j) interest dividends) are to be treated as interest income by the RIC's shareholders. That is, under the proposed regulations, certain interest income earned by the RIC and paid to a shareholder as a dividend is treated as if the shareholder earned the interest income directly for purposes of section 163(j).

To the extent that taxpayers believed, in the absence of the proposed regulations, that dividends paid by RICs are not treated as business interest income for the purposes of the section 163(j) limitation, then taxpayers will likely respond to the proposed regulations by reducing their holding of other debt instruments and increasing investment in RICs. The Treasury Department and the IRS have determined that this treatment is consistent with the intent and purpose of the statute.

Number of Affected Taxpayers. The Treasury Department and the IRS have determined that the rules regarding section 163(j) interest dividends will potentially affect approximately 10,000 RICs. The Treasury Department and the IRS do not have readily available data on the number of RIC shareholders that would receive section 163(j) interest dividends that the shareholder could treat as business interest income for purposes of the shareholder's section 163(j) limitation.

b. Provisions related to Partnerships

i. Trading Partnerships

Section 163(j) limits the deductibility of interest expense at the partnership level. These proposed regulations address commenter concerns about the interaction

between this section 163(j) limitation and the section 163(d) partner level limitation on interest expense that existed prior to TJCA. Under logic described in the preamble to the 2018 Proposed Regulations, section 163(j) limitations would apply at the partnership level while section 163(d) limitations would apply at the partner level and these tests would be applied independently. Commenters suggested and Treasury has agreed that the correct interpretation of the statute is to exempt interest expense that is limited at the partner level by section 163(d) from the partnership level section 163(j) limitation in accordance with the language of section 163(j)(5).

These proposed regulations provide that interest expense at the partnership level that is allocated to non-materially participating partners subject to section 163(d) is not included in the section 163(j) limitation calculation of the partnership. Generally, the section 163(d) limitation is more generous than the section 163(j) limitation. Relative to the 2018 Proposed Regulations, this change may encourage these partners to incur additional interest expense because they will be less likely to be limited in their ability to use it to offset other income. Commenters argued that exempting from section 163(j) any interest expense allocated to non-materially participating partners subject to section 163(d) will treat this interest expense in the same way as the interest expense generated through separately managed accounts, which are not subject to section 163(j) limitations.

The Treasury Department and the IRS project that these proposed regulations will result in additional investment in trading partnerships and generally higher levels of debt in any given trading partnership relative to the 2018 Proposed Regulations. Because investments in trading partnerships may be viewed as economically similar to investments in separately managed accounts arrangements, we further project that the proposed regulations, by making the tax treatments of these two arrangements generally similar, will improve U.S. economic performance relative to the no-action baseline.

Number of Affected Taxpayers. The Treasury Department and the IRS have determined that the rules regarding trad-

ing partnerships will potentially affect approximately 275,000 taxpayers. This number was reached by determining, using data for the 2017 taxable year, the number of Form 1065 and Form 1065-B filers that (1) completed Schedule B to Form 1065 and marked box b, c, or d in question 1 to denote limited partnership, limited liability company, or limited liability partnership status; and (2) have a North American Industry Classification System (NAICS) code starting with 5231 (securities and commodity contracts intermediation and brokerage), 5232 (securities and commodity exchanges), 5239 (other financial investment activities), or 5259 (other investment pools and funds).

Additionally, the Treasury Department and the IRS have determined that the rules regarding publicly traded partnerships will potentially affect approximately 80 taxpayers. This number was reached by determining, using data for the 2017 taxable year, the number of Form 1065 and 1065-B filers with gross receipts exceeding \$25 million that answered “yes” to question 5 on Schedule B to Form 1065 denoting that the entity is a publicly traded partnership. The Treasury Department and the IRS do not have readily available data on the number of filers that are tax shelters that are potentially affected by these provisions.

ii. Debt-financed Distributions

Prior to TCJA, partners were responsible for determining the applicability of any limitations on the use of proceeds from debt because limitations on interest expense deductibility were determined at the partner level. Under section 163(j) as amended by TCJA, the partnership is required to complete a calculation to determine its limitation on trade or business interest expense. These proposed regulations provide guidance on the method that partnerships and partners should use to allocate interest expense in cases where a partner receives a distribution financed from debt. The Treasury Department and the IRS project that this guidance will reduce taxpayer uncertainty regarding the application of section 163(j) in this situation relative to the no-action baseline.

The proposed regulations require that partnerships allocate the interest expense

of the partners not receiving a debt-financed distribution first. This interest expense is allocated to trade or business expense to the extent of the partnership's expenses. The character of any remaining interest expense is determined based on the partnership's asset basis. Next, the proposed regulations allocate the interest expense of the partner receiving the debt-financed distribution. If there is any remaining business expense that was not used by the other partners it is used first to allocate the interest expense. Then the partner receiving the debt financed distribution looks to the use of the proceeds of the distribution to determine the character of any additional interest expense.

This procedure provides lower compliance costs relative to alternative regulatory approaches. Any alternative method that required information on the partner's use of the proceeds to determine the partnership level section 163(j) limitation would have increased compliance costs for partnerships and partners because it would require a new reporting from partners to partnerships. In cases of tiered partnerships, this reporting could become extremely complex. The method outlined in these proposed regulations avoids the need for partnerships and other partners to have information about the use the debt-financed distribution proceeds. However, it maintains that interest expense allocated to the partner receiving the debt-financed distribution could still be subject to other limitations besides section 163(j) based on the use of the proceeds. For example, proceeds used for personal expenditures would still be subject to section 163(h) limitations on interest expense, which may be seen as an important existing anti-abuse provision.

The proposed procedure bases the allocation rules on optional and general allocation rules outlined in a previously issued notice, Notice 89-35, which will minimize compliance costs to partnerships (relative to the no-action baseline) to the extent that they are already familiar with allocating interest expense first to the partnership's business expenses and subsequently based on assets. Relative to the no-action baseline, the Treasury Department and the IRS expect these proposed regulations will reduce taxpayer uncertainty regarding the application of section

163(j). Treasury and IRS expect that this resolution of uncertainty itself will reduce taxpayer compliance costs and encourage similarly situated taxpayers to interpret section 163(j) similarly.

Number of Affected Taxpayers. The Treasury Department and the IRS are not currently able to determine the number of taxpayers affected by rules regarding debt financed distributions because debt financed distributions are not separately identified on tax forms, and therefore using the numbers of entities reporting interest on a Form K-1, Schedule C or Schedule E would produce overly broad results.

iii. Tiered Partnerships

Section 163(j) does not explicitly address how the interest deduction limitation should be applied to tiered partnerships. The 2018 Proposed Regulations requested comments on the treatment of tiered partnership structures. Suppose that an upper-tier partnership (UTP) is a partner of a lower-tier partnership (LTP), and that the LTP has business interest expense that is limited under section 163(j). Under the 2018 Proposed Regulations, the UTP would receive an excess business interest expense (EBIE) carryforward from the LTP. In response to comments received, these proposed regulations adopt the Entity Approach and specify that this EBIE carryforward should not be allocated to the partners of the UTP for purposes of section 163(j).

While some commenters favored the Entity Approach that these proposed regulations adopt, others favored an alternative under which the EBIE carryforward would be allocated to the UTP's partners (Aggregate Approach). Additionally, if the UTP's partner were itself a partnership, the EBIE would again be allocated to that partnership's partners. This would continue until the EBIE is eventually allocated to a non-partnership partner. Relative to the Entity Approach, the Aggregate Approach generally places greater compliance burden on partners. Under the Aggregate Approach, partners would be required to keep records linking separate amounts of EBIE to the partnerships that generated them. In simple partnership structures, this is not onerous; however, in a partnership structure with many tiers

and many partners, this would prove cumbersome. In contrast, under the Entity Approach, only the UTP keeps a record of the EBIE carryforward.

In summary, the Treasury Department and the IRS project lower record-keeping requirements, higher compliance rates, and easier compliance monitoring of tiered partnerships under the Entity Approach relative to the Aggregate Approach, with no meaningful difference in the economic decisions that taxpayers would make under the two approaches.

Moreover, relative to the no-action baseline, the Treasury Department and the IRS expect these proposed regulations for tiered partnerships will reduce taxpayer uncertainty regarding the application of section 163(j). Treasury and IRS expect that this resolution of uncertainty itself will reduce taxpayer compliance costs and encourage similarly situated taxpayers to interpret section 163(j) similarly.

iv. Self-charged Lending

The 2018 Proposed Regulations requested comments on the treatment of lending transactions between a partnership and a partner (self-charged lending transactions). Suppose that a partnership receives a loan from a partner and allocates the resulting interest expense to that partner. Prior to the TCJA, the interest income and interest expense from this loan would net precisely to zero on the lending partner's tax return. Under section 163(j) as revised by TCJA, however, the partnership's interest expense deduction may now be limited. Therefore, in absence of specific regulatory guidance, the lending partner may receive interest income from the partnership accompanied by less-than-fully-offsetting interest expense. Instead, the lending partner would receive EBIE, which would not be available to offset his personal interest income. This outcome has the effect of increasing the cost of lending transactions between partners and their partnerships relative to otherwise similar financing arrangements.

To avoid this outcome, these proposed regulations treat the lending partner's interest income from the loan as excess business interest income (EBII) from the partnership, but only to the extent of the partner's share of any EBIE from the part-

nership for the taxable year. This allows the interest income from the loan to be offset by the EBIE. The business interest expense (BIE) of the partnership attributable to the lending transaction will thus be treated as BIE of the partnership for purposes of applying section 163(j) to the partnership.

The Treasury Department and the IRS expect that these proposed regulations will lead a higher proportion of self-charged lending transactions in partnership financing, relative to the no-action baseline. We further project that these proposed regulations will increase the proportion of partnership financing that is debt-financed relative to the no-action baseline. We have determined that these effects are consistent with the intent and purpose of the statute.

Number of Affected Taxpayers. The Treasury Department and the IRS do not have readily available data to determine the number of taxpayers affected by rules regarding self-charged interest because no reporting modules currently connect these payments by and from partnerships.

c. Provisions related to Controlled Foreign Corporations (CFCs)

i. How to Apply Section 163(j) when CFCs have shared ownership

The Final Regulations clarify that section 163(j) and the section 163(j) regulations apply to determine the deductibility of a CFC's business interest expense for tax purposes in the same manner as these provisions apply to a domestic corporation. These proposed regulations provide further rules and guidance on how section 163(j) applies to CFCs when CFCs have shared ownership and are eligible to be members of CFC groups.

The Treasury Department and the IRS considered three options with respect to the application of section 163(j) to CFC groups. The first option was to apply the 163(j) limitation to CFCs on an individual basis, regardless of whether CFCs have shared ownership. However, if section 163(j) is applied on an individual basis, business interest deductions of individual CFCs may be limited by section 163(j) even when, if calculated on a group basis, business interest deductions would not

be limited. Taxpayers could restructure or "self-help" to mitigate the effects of the section 163(j) limitation, but that option involves economically restructuring costs for the taxpayer (relative to the third option, described subsequently) with no corresponding economically productive activity.

The second option, which was proposed in the 2018 Proposed Regulations, was to allow an election to treat related CFCs and their U.S. shareholders as a group. Under this option, while the section 163(j) rules would still be computed at the individual CFC level, the "excess taxable income" of a CFC could be passed up from lower-tier CFCs to upper-tier CFCs and U.S. shareholders in the same group. Excess taxable income is the amount of income by which a CFC's adjusted taxable income (ATI) exceeds the threshold amount of ATI below which there would be disallowed business expense.

Many comments suggested that computing a section 163(j) limitation for each CFC and rolling up CFC excess taxable income would be burdensome for taxpayers, especially since some multinational organizations have hundreds of CFCs. In addition, comments noted that the ability to pass up excess taxable income would encourage multinational organizations to restructure such that CFCs with low interest payments and high ATI are lower down the ownership chain and CFCs with high interest payments and low ATI are higher up in the chain of ownership. Similar to the first option, this restructuring would be expensive to taxpayers without any corresponding productive economic activity.

The third option was to allow taxpayers to elect to apply the section 163(j) rules to CFC groups on an aggregate basis, similar to the rules applicable to U.S. consolidated groups. This option was suggested by many comments and is the approach taken in the proposed regulations. Under this option, a single 163(j) limitation is computed for a CFC group by summing the items necessary for this computation (e.g., current-year business interest expense and ATI) across all CFC group members. The CFC group's limitation is then allocated to each CFC member using allocation rules similar to those that apply to U.S. consolidated groups.

This option reduces the compliance burden on taxpayers in comparison to applying the section 163(j) rules on an individual CFC basis and calculating the excess taxable income to be passed up from lower tier CFCs to higher tier CFCs. In comparison to the first and second options, this option also removes the incentive for taxpayers to undertake costly restructuring, since the location of interest payments and ATI among CFC group members will not affect the interest disallowance for the group.

The proposed regulations also set out a number of rules to govern membership in a CFC group. These rules specify which CFCs can be members of the same CFC group, how CFCs with U.S. effectively connected income (ECI) should be treated, and the timing for making or revoking a CFC group election. These rules provide clarity and certainty to taxpayers regarding the CFC group election for section 163(j). In the absence of these regulations, taxpayers would face uncertainty regarding CFC group membership, and may make financing decisions or undertake restructuring that would be inefficient relative to the proposed regulations.

Number of Affected Taxpayers. The population affected by this proposed rule includes any taxpayer with ownership in a CFC group, consisting of two or more CFCs that has average gross receipts over a three year period in excess of \$25 million. The Treasury Department and the IRS estimate that there are approximately 7,500 taxpayers with two or more CFCs based on counts of e-filed tax returns for tax years 2015-2017. This estimate includes C corporations, S corporations, partnerships, and individuals with CFC ownership.

ii. CFC excess taxable income and ATI of U.S. shareholders

Generally, for the purposes of computing interest expense disallowed under section 163(j), deemed income inclusions, such as subpart F and GILTI inclusions, are excluded from a U.S. shareholder's ATI under the Final Regulations. The proposed regulations allow a U.S. shareholder to add back to its ATI a percentage of its deemed income inclusions attributable

to an applicable CFC. That percentage is equal to the ratio of the CFC's excess taxable income to its ATI.

The Treasury Department and the IRS considered three options with respect to the addition of deemed income inclusions to a U.S. shareholder's ATI. The first option is to allow such inclusions to be added to ATI with respect to any of a taxpayer's applicable CFCs regardless of whether a CFC group election is made. However, under this option, taxpayers with a number of highly leveraged CFCs would have the incentive to not make a CFC group election and concentrate debt in certain CFCs. The taxpayer could thereby reduce the leverage of other CFCs in order to create excess taxable income in those CFCs. This excess taxable income could be then passed up to increase the U.S. shareholder's ATI. This incentive could lead to costly debt shifting among CFCs with no corresponding productive economic activity.

The second option considered was to allow such income inclusions to be added to ATI with respect to CFC group members only. Deemed income attributable to CFCs that are not members of groups would not be allowed to be added to a U.S. shareholder's ATI. This would remove the incentive for taxpayers to aggregate debt in certain CFCs, since if CFCs are treated as members of a group, then the distribution of interest payments across members will not affect the total excess taxable income of the group. However, comments noted that this option would not allow deemed income from stand-alone CFCs, which do not meet the requirements to join a CFC group, to increase shareholders' ATI.

The third option, which is proposed by the Treasury Department and the IRS, is to allow such income inclusions to be added to ATI with respect to both CFC group members and stand-alone CFCs. Under this option, if CFCs are eligible to be members of a CFC group, then the group election must be made in order for deemed inclusions attributable to these CFCs to increase shareholder ATI. The ATI of a U.S. shareholder can also be increased with respect to CFCs that are not eligible to be members of CFC groups. In this way, the rule does not penalize, relative to shareholders of CFC groups, shareholders

which own only one CFC or own CFCs which for other reasons are not eligible for group membership.

Number of Affected Taxpayers. The population of affected taxpayers includes any taxpayer with a CFC since the proposed rule affects both stand-alone CFCs as well as CFC groups. The Treasury Department and the IRS estimate that there are approximately 10,000 to 11,000 affected taxpayers based on a count of e-filed tax returns for tax years 2015-2017. These counts include C corporations, S corporations, partnerships, and individuals with CFC ownership that meet a \$25 million three-year average gross receipts threshold. The Treasury Department and the IRS do not have readily available data on the number of filers that are tax shelters that are potentially affected by these provisions.

d. Election to use 2019 ATI to determine 2020 section 163(j) limitation for consolidated groups

The proposed regulations provide that if a taxpayer filing as a consolidated group elects to substitute its 2019 ATI for its 2020 ATI, that group can use the consolidated group ATI for the 2019 taxable year, even if membership of the consolidated group changed in the 2020 taxable year. For example, suppose consolidated group C has three members in the 2019 taxable year, P, the common parent of the consolidated group, and S1 and S2, which are both wholly owned by P. In the 2019 taxable year, each member of consolidated group C had \$100 of ATI on a stand-alone basis, for a total of \$300 of ATI for the consolidated group C. In the 2020 taxable year, consolidated group C sells all of the stock of S2 and acquires all of the stock of a new member, S3. In the 2019 taxable year, S3 had \$50 in ATI on a stand-alone basis. Under the proposed regulations, consolidated group C may elect to use \$300 in ATI from 2019 as a substitute for its ATI in the 2020 taxable year.

The Treasury Department and the IRS considered as an alternative basing the 2019 ATI on the membership of the consolidated group in the 2020 taxable year. In the example in the previous paragraph, this approach would subtract out the \$100 in ATI from S2 and add the \$50 in ATI

from S3, for a total of \$250 in 2019 ATI that could potentially be substituted for 2020 ATI for consolidated group C. This approach would add burden to taxpayers relative to the proposed regulations by requiring additional calculations and tracking of ATI on a member-by-member basis to determine the amount of 2019 ATI that can be used in the 2020 taxable year without providing any general economic benefit.

In addition, the 2019 tax year will have closed for many taxpayers by the time these proposed regulations will be published. This implies that proposed rule of basing the consolidated group composition on the 2019 taxable year to calculate the amount of 2019 ATI that can be used in the 2020 taxable year will, relative to the alternative approach of using the composition in the 2020 taxable year, reduce the incentive for taxpayers to engage in costly mergers, acquisitions, or divestitures to achieve a favorable tax result.

Number of Affected Taxpayers. The Treasury Department and the IRS estimate that approximately 34,000 corporate taxpayers filed a consolidated group tax return for tax year 2017. This represents an upper-bound of the number of taxpayers affected by the proposed rule as not all consolidated groups would need to calculate the amount of section 163(j) interest limitation in tax years 2019 and 2020.

D. Paperwork Reduction Act

The collection of information in these Proposed Regulations has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The collection of information in these Proposed Regulations has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)).

Books or records relating to a collection of information must be retained as long as their contents may become mate-

rial in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

1. Collections of Information

The collections of information subject to the Paperwork Reduction Act in these Proposed Regulations are in proposed §§1.163(j)-6(d)(5), 1.163(j)-6(g)(4), and 1.163(j)-7.

The collections of information in proposed §§1.163(j)-6(d)(5) and 1.163(j)-6(g)(4) are required to make two elections relating to changes made to section 163(j) by the CARES Act. The election under proposed §1.163(j)-6(d)(5) is for a passthrough taxpayer to use the taxpayer's ATI for the last taxable year beginning in 2019 as its ATI for any taxable year beginning in 2020, in accordance with section 163(j)(10)(B). The election under proposed §1.163(j)-6(g)(4) relates to excess business interest expense of a partnership for any taxable year beginning in 2019 that is allocated to a partner. Section 163(j)(10)(A)(ii)(II) provides that, unless the partner elects out, in 2020, the partner treats 50 percent of the excess business interest expense as not subject to the section 163(j) limitation. If the partner elects out, the partner treats all excess business interest expense as subject to the same limitations as other excess business interest expense allocated to the partner.

Revenue Procedure 2020-22 describes the time and manner for making these elections. For both elections, taxpayers make the election by timely filing a Federal income tax return or Form 1065, including extensions, an amended Federal income tax return, amended Form 1065, or administrative adjustment request, as applicable. More specifically, taxpayers complete the Form 8990, "Limitation on Business Interest Expense under Section 163(j)," using the taxpayer's 2019 ATI and/or not applying the rule in section 163(j)(10)(ii)(II), as applicable. No formal statements are required to make these elections. Accordingly, the reporting burden associated with the collections of information in proposed §1.163(j)-6(d)(5) and -6(g)(4) will be reflected in the IRS Form 8990 Paperwork Reduction

Act Submissions (OMB control number 1545-0123).

The collections of information in proposed §1.163(j)-7 are required for taxpayers to make an election to apply section 163(j) to a CFC group (CFC group election) or an annual election to exempt a CFC or CFC group from the section 163(j) limitation (safe-harbor election). The elections are made by attaching a statement to the US shareholder's annual return. The CFC group election remains in place until revoked and may not be revoked for any period beginning prior to 60 months following the period for which it is made. The safe-harbor election is made on an annual basis.

Under §1.964-1(c)(3)(i), no election of a foreign corporation is effectuated unless the controlling domestic shareholder provides a statement with their return and notice of the election to the minority shareholders under §1.964-1(c)(3)(ii) and (iii). See also, §1.952-2(b)-(c). These collections are necessary to ensure that the election is properly effectuated, and that taxpayers properly report the amount of interest that is potentially subject to the limitation.

2. Future Modifications to Forms to Collect Information

At this time, no modifications to any forms, including the Form 8990, "Limitation on Business Interest Expense IRC 163(j)," are proposed with regard to the elections under section 163(j)(10), or the CFC group or safe-harbor elections. The Treasury Department and the IRS are considering revisions to the Instructions for Form 8990 to reflect changes made to section 163(j)(10) regarding the elections under proposed §§1.163(j)-6(d)(5) and 1.163(j)-6(g)(4). For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the reporting burden of Form 8990 is associated with OMB control number 1545-0123. In the 2018 Proposed Regulations, Form 8990 was estimated to be required by fewer than 92,500 taxpayers.

If an additional information collection requirement is imposed through these regulations in the future, for purposes of the Paperwork Reduction Act, any reporting burden associated with these regulations will be reflected in the aggregated burden

estimates and the OMB control numbers for general income tax forms or the Form

8990, “Limitation on Business Interest Expense Under Section 163(j)”.

The forms are available on the IRS website at:

Form	OMB Number	IRS Website Link
Form 1040	1545-0074	https://www.irs.gov/pub/irs-pdf/f1040.pdf (Instructions: https://www.irs.gov/pub/irs-pdf/i1040gi.pdf)
Form 1120		https://www.irs.gov/pub/irs-pdf/f1120.pdf (Instructions: https://www.irs.gov/pub/irs-pdf/i1120.pdf)
Form 1120S		https://www.irs.gov/pub/irs-pdf/f1120s.pdf (Instructions: https://www.irs.gov/pub/irs-pdf/i1120s.pdf)
Form 1065	1545-0123	https://www.irs.gov/pub/irs-pdf/f1065.pdf (Instructions: https://www.irs.gov/pub/irs-pdf/i1065.pdf)
Form 1120-REIT		https://www.irs.gov/pub/irs-prior/f1120rei—2018.pdf (Instructions: https://www.irs.gov/pub/irs-pdf/i1120rei.pdf)
Form 8990		https://www.irs.gov/pub/irs-access/f8990_accessible.pdf (Instructions: https://www.irs.gov/pub/irs-pdf/i8990.pdf)

In addition, when available, drafts of IRS forms are posted for comment at <https://apps.irs.gov/app/picklist/list/draft-TaxForms.htm>. IRS forms are available at <https://www.irs.gov/forms-instructions>. Forms will not be finalized until after they have been approved by OMB under the PRA.

3. Burden Estimates

The following estimates for the collections of information in these proposed regulations are based on the most recently available Statistics of Income (SOI) tax data.

For the collection of income in proposed §1.163(j)-6(d)(5), where a passthrough taxpayer elects to use the taxpayer’s ATI for the last taxable beginning in 2019 as the taxpayer’s ATI for any taxable year beginning in 2020, the most recently available 2017 SOI tax data indicates that, on the high end, the estimated number of respondents is 49,202. This number was determined by examining, for the 2017 tax year, Form 1065 and Form 1120-S filers with greater than \$26 million in gross receipts that have reported interest expense, and do not have an NAICS code that is associated with a trade or business that normally would be excepted from the section 163(j) limitation.

For the collection of information under §1.163(j)-6(g)(4), in which a partner elects out of treating 50 percent of any ex-

cess business interest expense allocated to the partner in 2019 as not subject to a limitation in 2020, the Treasury Department and the IRS estimate that only taxpayers that actively want to reduce their deductions will make this election. The application of the base erosion minimum tax under section 59A depends, in part, on the amount of a taxpayer’s deductions. Accordingly, the Treasury Department and the IRS estimate that taxpayers that are subject to both the base erosion minimum tax under section 59A and section 163(j) are the potential filers of this election. Using the 2017 SOI tax data, the Treasury Department estimate that 1,182 firms will make the election. This estimate was determined by examining three criteria: first, the number of taxpayers subject to section 59A, namely, C corporations with at least \$500,000,000 in gross receipts, second, the portion of those taxpayers that do not have an NAICS code associated with a trade or business that is generally not subject to the section 163(j) limitation (2211 (electric power generation, transmission and distribution), 2212 (natural gas distribution), 2213 (water, sewage and other systems), 111 or 112 (farming), 531 (real property)), and, third, the portion of taxpayers satisfying the first two criteria that received a Form K-1, “Partner’s Share of Income, Deductions, Credits, etc.”

For the collections of information in proposed §1.163(j)-7, namely the CFC and safe-harbor elections, and the corre-

sponding notice under §1.964-1(c)(3)(iii), the most recently available 2017 SOI tax data indicates that, on the high end, the estimated number of respondents is 4,980 firms. This number was determined by examining, for the 2017 tax year, Form 1040, Form 1120, Form 1120-S, and Form 1065 filers with greater than \$26 million in gross receipts that filed a Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations, where an interest expense amount was reported on Schedule C of the Form 5471.

The estimated number of respondents that could be subject to the collection of information for the CFC group or safe-harbor election is 4,980. The estimated annual burden per respondent/record-keeper varies from 0 to 30 minutes, depending on individual circumstances, with an estimated average of 15 minutes. The estimated total annual reporting and/or recordkeeping burden is 1,245 hours (4,980 respondents x 15 minutes). The estimated annual cost burden to respondents is \$95 per hour. Accordingly, we expect the total annual cost burden for the CFC group election and safe-harbor election statements to be \$118,275 (4,980 * .25 * \$95).

The Treasury Department and the IRS request comment on the assumptions, methodology, and burden estimates related to this information collection. Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for

the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by November 2, 2020, which is 60 days after the date of filing for public inspection with the Office of the Federal Register.

Comments are specifically requested concerning—

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

II. *Regulatory Flexibility Act*

It is hereby certified that these Proposed Regulations, if adopted as final, will not have a significant economic impact on a substantial number of small entities.

This certification can be made because the Treasury Department and the IRS have determined that the number of small entities that are affected as a result of the regulations is not substantial. These rules do not disincentivize taxpayers from their operations, and any burden imposed is not significant because the cost of implementing the rules, if any, is low.

As discussed in the 2018 Proposed Regulations, section 163(j) provides exceptions for which many small entities will qualify. First, under section 163(j)(3), the limitation does not apply to any taxpayer, other than a tax shelter under section 448(a)(3), which meets the gross receipts

test under section 448(c) for any taxable year. A taxpayer meets the gross receipts test under section 448(c) if the taxpayer has average annual gross receipts for the 3-taxable year period ending with the taxable year that precedes the current taxable year that do not exceed \$26,000,000. The gross receipts threshold is indexed annually for inflation. Because of this threshold, the Treasury Department and the IRS project that entities with 3-year average gross receipts below \$26 million will not be affected by these regulations except in rare cases.

Section 163(j) provides that certain trades or businesses are not subject to the limitation, including the trade or business of performing services as an employee, electing real property trades or businesses, electing farming businesses, and certain utilities as defined in section 163(j)(7)(A)(iv). Under the 2018 Proposed Regulations, taxpayers that otherwise qualified as real property trades or businesses or farming businesses that satisfied the small business exemption in section 448(c) were not eligible to make an election to be an electing real property trade or business or electing farming business. Under the Final Regulations, however, those taxpayers are eligible to make an election to be an electing real property trade or business or electing farming business. Additionally, the Final Regulations provide that certain utilities not otherwise excepted from the limitation can elect for a portion of their non-excepted utility trade or business to be excepted from the limitation. Any economic impact on any small entities as a result of the requirements in these Proposed Regulations, not just the requirements that impose a Paperwork Reduction Act burden, is not expected to be significant because the cost of implementing the rules, if any, is low.

The Treasury Department and the IRS do not have readily available data on the number of filers that are tax shelters, as defined in section 448(a)(3), that are potentially affected by these provisions. As described in more detail earlier in this Preamble, these Proposed Regulations cover several topics, including, but not limited to, debt financed distributions from passthrough entities, self-charged interest, the treatment of section 163(j) in rela-

tion to trader funds, the impact of section 163(j) on publicly traded partnerships, and the application of section 163(j) to United States shareholders of controlled foreign corporations and to foreign persons with effectively connected income in the United States.

The Treasury Department and the IRS do not have readily available data to determine the number of taxpayers affected by rules regarding self-charged interest because no reporting modules currently connect these payments by and from partnerships.

The Treasury Department and the IRS likewise do not have precise data on the number of taxpayers affected by rules regarding debt financed distributions. The Treasury Department and the IRS estimate that the number of taxpayers affected by the rules regarding debt-financed distributions is 50,036. This number was reached first by adding the number of Form 1065 filers that reported code W on line 13b of schedule K of the Form 1065, or approximately 410,996 using 2018 taxable year data, and the number of Form 1120-S filers that reported code S on line 12d of schedule K of the Form 1120-S, or approximately 89,367 using 2018 taxable year data. Those codes are used to report interest expense allocated to debt financed distributions. Using the result of the two numbers, 500,363 (410,996 + 89,367), produces overly broad results because the codes referenced above are used to report more than just interest expense allocated to debt financed distributions. Code W on line 13b of schedule K of the Form 1065 also is used to report at least nine other items, including, but not limited to, itemized deductions that Form 1040 or 1040-SR filers report on Schedule A, soil and water conservation expenditures, and the domestic production activities deductions. Code S on line 12d of schedule K of the Form 1120-S also is used to report at least eleven other items, including, but not limited to, itemized deductions that Form 1040 or 1040-SR filers report on Schedule A, expenditures for the removal of architectural and transportation barriers for the elderly and disabled that the corporation elected to treat as a current expense, and film, television, and live theatrical production expenses. Considering the number of other items reported under those codes,

the Treasury Department and the IRS estimate that approximately 10% of the filers using those codes report interest expense allocated to debt financed distributions ($500,363 * 0.10 = 50,036$).

Despite not having precise data, these rules do not impose a significant paperwork or implementation cost burden on taxpayers. Under Notice 89-35, taxpayers have been required to maintain books and records to properly report the tax treatment of interest associated with debt financed acquisitions and contributions by partners, and debt financed distributions to partners. Additional reporting requirements are needed to allow passthrough entities and their owners to comply with the interest tracing rules under § 1.163-8T. Without additional reporting, the mechanism for determining the tax treatment of interest under § 1.163-8T is

burdensome and unclear. For example, in some cases, partners would need to report back to the partnership how they used debt financed distribution to allow the partnership to properly report its interest expense. This notice of proposed rules would provide consistent reporting and compliance by passthrough entities and their owners, which would reduce their overall burden. The estimated time to determine whether a distribution is a debt financed distribution and to comply with these rules would be 0 minutes to 30 minutes per taxpayer, depending on individual circumstances, for an average of 15 minutes. The 2018 monetization rates for this group of filers is \$57.53. Accordingly, the Treasury Department and the IRS estimate the burden to be \$719,642.77 ($50,036$ respondents * 0.25 hours * \$57.53).

The Treasury Department and the IRS have determined that, on the high end, the rules regarding trading partnerships might affect approximately 309 small entities. This number was reached by determining, using data for the 2017 taxable year, the number of Form 1065 and Form 1065-B filers with more than \$26 million in gross receipts, that (1) completed Schedule B to Form 1065 and marked box b, c, or d in question 1 to denote limited partnership, limited liability company or limited liability partnership status; (2) have a North American Industry Classification System (NAICS) code starting with 5231, 5232, 5239 or 5259, and (3) do not have gross receipts exceeding the small business thresholds for the various NAICS codes. The following table provides a breakdown of the potentially affected taxpayers by NAICS code.

NAICS Code	Titles	Gross Receipts Threshold	Number of Respondents
5231	Securities and Commodity Contracts Intermediation and Brokerage, including Investment Bank and Securities Dealing; Securities Brokerage; Commodity Contract Dealing; Commodity Contracts Brokerage	\$41.5M	42
5232	Securities and Commodities Exchanges	\$41.5M	0
5239	Other Financial Investment Activities, including Miscellaneous Intermediation; Portfolio Management; Investment Advice; Trust, Fiduciary, and Custody Activities; Miscellaneous Financial Investment Activities	\$41.5M	267
5259	Other Investment Pools and Funds, including Open-End Investment Funds; Trusts, Estates, and Agency Accounts; Other Financial Vehicles	\$35M	[d]
Total Respondents			309

Source: SOI Partnership Study, 2017

[d] Data is suppressed based on disclosure rules detailed in Publication 1075.

Additionally, the Treasury Department and the IRS have determined that the rules regarding publicly traded partnerships might affect approximately 83 taxpayers. This number was reached by determining, using data for the 2017 taxable year, the number of Form 1065 and Form 1065-B filers with gross receipts exceeding \$25 million that answered “yes” to question 5 on Schedule B to Form 1065 denoting that the entity is a publicly traded partnership.

As noted earlier, these Proposed Regulations do not impose any new collection

of information on these entities. These Proposed Regulations actually assist small entities in meeting their filing obligations by providing definitive advice on which they can rely.

For the section 163(j)(10) elections for passthrough taxpayers under proposed §§ 1.163(j)-6(d)(5) and 1.163(j)-6(g)(4), most small taxpayers do not need to make the elections because, as discussed earlier, they are not subject to the section 163(j) limitation. For small taxpayers that are subject to the limitation, the cost

to implement the election is low. Pursuant to Revenue Procedure 2020-22, these passthrough taxpayers simply complete the Form 8990 as if the election has been made. Accordingly, the burden of complying with the elections, if needed, is no different than for taxpayers who do not make the elections.

The persons potentially subject to proposed § 1.163(j)-7 are U.S. shareholders in one or more CFCs for which BIE is reported, and that (1) have average annual gross receipts for the 3-taxable year

period ending with the taxable year that precedes the current taxable year exceeding \$26,000,000, and (2) want to make the CFC group election or safe-harbor election. Proposed §1.163(j)-7 requires such taxpayers to attach a statement to their return providing basic information regarding the CFC group or standalone CFC.

As discussed in the Paperwork Reduction Act section of this Preamble, the reporting burden for both statements is estimated at 0 to 30 minutes, depending on individual circumstances, with an estimated average of 15 minutes for all affected entities, regardless of size. The estimated monetized burden for compliance is \$95 per hour.

For these reasons, the Treasury Department and the IRS have determined that these Proposed Regulations will not have a significant economic impact on a substantial number of small entities. Notwithstanding this certification, the Treasury Department and the IRS invite comments from interested members of the public on both the number of small entities affected and the economic impact on those small entities.

E. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. In 2019, that threshold was approximately \$154 million. These Proposed Regulations do not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

F Executive Order 13132: Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not

required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. These Proposed Regulations do not have federalism implications and do not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Comments and Requests for a Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the “ADDRESSES” section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at www.regulations.gov or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are also encouraged to be made electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020-4, 2020-17 I.R.B. 667 (April 20, 2020), provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

Drafting Information

The principal authors of these regulations are Susie Bird, Charles Gorham, Jaime Park, Joanna Trebat and Sophia Wang (Income Tax & Accounting), Anthony McQuillen, Adrienne M. Mikolashek, and William Kostak (Passthroughs and Special Industries), Azeka J. Abramoff (International), Russell Jones, and John Lovelace (Corporate), and Pamela Lew, Steven Harrison, and Michael Chin (Financial Institutions & Products). Other personnel from the Treasury Department and the IRS participated in their development.

Effect on Other Documents

Notice 89-35, 1989-1 C.B. 675, is proposed to be obsoleted.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings notices, and other guidance cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <http://www.irs.gov>.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and record-keeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1 – INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.163-14 is added to read as follows:

§1.163-14 Allocation of interest expense among expenditures – Passthrough Entities.

(a) *In general*—(1) *Application*. This section prescribes rules for allocating interest expense associated with debt proceeds of a partnership or S corporation (a *passthrough entity*). In general, interest expense on a debt of a passthrough entity 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 of a passthrough entity.

(2) *Cross-references*. This paragraph provides the general manner in which interest expense of a passthrough entity is

allocated. See paragraph (b) of this section for the treatment of interest expense allocated under the rules of this section, paragraph (c) for the manner in which debt proceeds of a passthrough entity are allocated and the manner in which interest expense allocated under this section is treated, paragraph (d) for rules relating to debt allocated under the rules of §1.163-8T to distributions to owners of a passthrough entity, paragraph (e) for rules relating to debt repayments, paragraph (f) for rules relating to debt allocated under the rules of §1.163-8T to expenditures for interests in passthrough entities, paragraph (g) for change of ownership rules for interest expense allocation purposes, and paragraph (h) for examples.

(b) *Treatment of interest expense*—(1) *General rule*. Except as otherwise provided in section §1.163(j)-8T(m), interest expense allocated under the rules of this section is treated in the following manner:

(i) Interest expense allocated to trade or business expenditures (as defined in paragraph (b)(2)(v) of this section) is taken into account under section 163(j) by the passthrough entity;

(ii) Interest expense allocated to other trade or business expenditures (as defined in paragraph (b)(2)(ii) of this section) is taken into account under the rules of §1.163-8T, as applicable, by the passthrough entity owner allocated such interest expense;

(iii) Interest expense allocated to rental expenditures (as defined in paragraph (b)(2)(iv) of this section) is taken into account under the rules of §1.163-8T, as applicable, by the passthrough entity owner allocated such interest expense;

(iv) Interest expense allocated to investment expenditures (as defined in paragraph (b)(2)(i) of this section) is taken into account under the rules of §1.163-8T, as applicable, by the passthrough entity owner allocated such interest expense;

(v) Interest expense allocated to personal expenditures (as defined in paragraph (b)(2)(iii) of this section) is taken into account under the rules of §1.163-8T, as applicable, by the passthrough entity owner allocated such interest expense;

(vi) Interest expense allocated to distributions to owners of a passthrough entity is taken into account in the manner provided under paragraph (d) of this section.

(2) *Definitions*. For purposes of this section—

(i) *Investment expenditure* means an expenditure defined in §1.163-8T(b)(3), including any expenditure made with respect to a trade or business described in section 163(d)(5)(A)(ii) to the extent such expenditure is properly allocable under section 704(b) to partners that do not materially participate (within the meaning and for purposes of section 469) in the trade or business.

(ii) *Other trade or business expenditure* means an expenditure made with respect to any activity described in §1.469-4(b)(1) (ii) and (iii).

(iii) *Personal expenditure* means an expenditure (other than a distribution) not described in paragraphs (b)(2)(i), (ii), (iv) and (v) of this section.

(iv) *Rental expenditure* means an expenditure made with respect to any activity described in §1.469-4(b)(2) that is not a trade or business, as defined in §1.163(j)-1(b)(44).

(v) *Trade or business expenditure* means an expenditure made with respect to a trade or business, as defined in §1.163(j)-1(b)(44), except for an expenditure made with respect to a trade or business described in section 163(d)(5)(A)(ii) to the extent such expenditure is properly allocable under section 704(b) to partners that do not materially participate (within the meaning and for purposes of section 469) in the trade or business.

(c) *Allocation of debt and interest expense*. Except as otherwise provided in this section, the rules of §1.163-8T apply to partnerships, S Corporations, and their owners.

(d) *Debt allocated to distributions by passthrough entities*—(1) *Allocation of distributed debt proceeds*—(i) *Available expenditures*. To the extent a passthrough entity has available expenditures (as defined in paragraph (d)(5)(ii) of this section), the passthrough entity shall first allocate distributed debt proceeds (as defined in paragraph (d)(5)(iii) of this section) to such available expenditures. If a passthrough entity has multiple available expenditures, the passthrough entity shall allocate distributed debt proceeds to such available expenditures in proportion to the amount of each expenditure.

(ii) *Debt financed distributions*. If a passthrough entity's distributed debt proceeds exceeds its available expenditures, the passthrough entity shall allocate such excess amount of distributed debt proceeds to distributions to owners of the passthrough entity (debt financed distributions).

(2) *Allocation of interest expense*—

(i) *Interest expense allocated to debt financed distributions*. If distributed debt proceeds are allocated to distributions to owners of the passthrough entity (pursuant to paragraph (d)(1)(ii) of this section), the passthrough entity shall determine the portion of each passthrough entity owner's allocable interest expense that is debt financed distribution interest expense. The amount of a passthrough entity owner's *debt financed distribution interest expense* equals the lesser of such passthrough entity owner's allocable interest expense (as defined in paragraph (d)(5)(i) of this section) or the product of—

(A) The portion of the debt proceeds distributed to that particular passthrough entity owner; multiplied by

(B) A fraction, the numerator of which is the portion of the passthrough entity's distributed debt proceeds allocated to debt financed distributions (determined under paragraph (d)(1)(ii) of this section), and the denominator of which is the passthrough entity's total amount of distributed debt proceeds; multiplied by

(C) The distributed debt proceeds interest rate (as defined in paragraph (d)(5)(iv) of this section).

(ii) *Interest expense allocated to available expenditures*. If distributed debt proceeds are allocated to available expenditures (pursuant to paragraph (d)(1)(i) of this section), the passthrough entity shall determine the portion of each passthrough entity owner's allocable interest expense that is expenditure interest expense. The amount of a passthrough entity owner's *expenditure interest expense* equals the product of—

(A) The portion of the passthrough entity's distributed debt proceeds allocated to available expenditures (determined under paragraph (d)(1)(i) of this section); multiplied by

(B) The distributed debt proceeds interest rate; multiplied by

(C) A fraction, the numerator of which is the excess of that particular passthrough

entity owner's allocable interest expense over its debt financed distribution interest expense (determined under paragraph (d)(2)(i) of this section) (remaining interest expense), and the denominator of which is aggregate of all the passthrough owners' remaining interest expense amounts.

(iii) *Excess interest expense.* To the extent a passthrough entity owner's allocable interest expense is not treated as either debt financed distribution interest expense (determined under paragraph (d)(2)(i) of this section) or expenditure interest expense (determined under paragraph (d)(2)(ii) of this section), such allocable interest expense is *excess interest expense*.

(3) *Tax treatment of interest expense—*

(i) *Debt financed distribution interest expense.* The tax treatment of a passthrough entity owner's debt financed distribution interest expense (determined under paragraph (d)(2)(i) of this section), if any, shall be determined by the passthrough entity owner under the rules of §1.163-8T, as applicable, in accordance with such passthrough entity owner's use of its portion of the passthrough entity's distributed debt proceeds. The passthrough entity shall separately state the amount of each owner's debt financed distribution interest expense. Debt financed distribution interest expense is not treated as interest expense of the entity for purposes of this section.

(ii) *Expenditure interest expense.* The tax treatment of a passthrough entity owner's expenditure interest expense (determined under paragraph (d)(2)(ii) of this section), if any, shall be determined based on how the distributed debt proceeds were allocated among available expenditures (pursuant to paragraph (d)(1)(i) of this section). For example, if distributed debt proceeds are allocated to a rental activity under paragraph (d)(1)(i) of this section, the interest expense associated with such debt should be taken into account by the passthrough entity in computing income or loss from the rental activity that is reported to the owner.

(iii) *Excess interest expense.* The tax treatment of a passthrough entity owner's excess interest expense (determined under paragraph (d)(2)(iii) of this section), if any, shall be determined by allocating the distributed debt proceeds among all the assets of the passthrough entity, pro-rata,

based on the adjusted basis of such assets. For purposes of the preceding sentence, the passthrough entity shall use either the adjusted tax bases of its assets reduced by any debt of the passthrough entity allocated to such assets, or determine its adjusted basis in its assets in accordance with the rules in §1.163(j)-10(c)(5)(i), reduced by any debt of the passthrough entity allocated to such assets. Once a passthrough entity chooses a method for determining its adjusted basis in its assets for this purpose, the passthrough entity must consistently apply the same method in all subsequent tax years. Any assets purchased in the same taxable year as the distribution (such that the expenditure for those assets was taken into account in §1.163-14(b)(1)) are not included in this allocation.

(4) *Treatment of transfers of interests in a passthrough entity by an owner that received a debt financed distribution—(i) In general.* In the case of a transfer of an interest in a passthrough entity, any debt financed distribution interest expense of the transferor shall be treated as excess interest expense by the transferee. However, in the case of a transfer of an interest in a passthrough entity to a person who is related to the transferor, any debt financed distribution interest expense of the transferor shall continue to be treated as debt financed distribution interest expense by the related party transferee, and the tax treatment of such debt financed distribution expense under paragraph (d)(3) of this section shall be the same to the related party transferee as it was to the transferor. The term related party means any person who bears a relationship to the taxpayer which is described in section 267(b) or 707(b)(1).

(ii) *Anti-avoidance rule.* Arrangements entered into with a principal purpose of avoiding the rules of this paragraph, including the transfer of an interest in a passthrough entity by an owner who treated a portion of its allocable interest expense as debt financed distribution interest expense to an unrelated party pursuant to a plan to transfer the interest back to the owner who received the debt financed distribution interest expense or to a party who is related to the owner who received the debt financed distribution interest expense, may be disregarded or recharacterized by the Commissioner to the

the extent necessary to carry out the purposes of this paragraph.

(5) *Definitions.* For purposes of this paragraph—

(i) *Allocable interest expense* means a passthrough entity owner's share of interest expense associated with the distributed debt proceeds allocated under section 704 or section 1366(a).

(ii) *Available expenditure* means an expenditure of a passthrough entity described in paragraph (b)(2) of this section made in the same taxable year of the entity as the distribution, to the extent that debt proceeds (including other distributed debt proceeds) are not otherwise allocated to such expenditure.

(iii) *Distributed debt proceeds* means debt proceeds of a passthrough entity that are allocated under §1.163-8T and this section to distributions to owners of the passthrough entity in a taxable year. If debt proceeds from multiple borrowings are allocated under §1.163-8T to distributions to owners of the passthrough entity in a taxable year, then all such borrowings are treated as a single borrowing for purposes of this section.

(iv) *Distributed debt proceeds interest rate* means a fraction, the numerator of which is the amount of interest expense associated with distributed debt proceeds, and the denominator of which is the amount of distributed debt proceeds.

(e) *Repayment of passthrough entity debt—(1) In general.* If any portion of passthrough entity debt is repaid at a time when 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 one or more expenditures described in paragraph (b)(2)(iii);

(ii) Amounts allocated to one or more expenditures described in paragraph (b)(2)(i) (relating to investment expenditures as defined in §1.163-8T(b)(3));

(iii) Amounts allocated to one or more expenditures described in paragraphs (b)(2)(ii) and (iv) (relating to expenditures with respect to any activities described in §1.469-4(b)(1)(ii) and (iii), and §1.469-4(b)(2)); and

(iv) Amounts allocated to one or more expenditures described in paragraph (b)(2)(v) (generally relating to expenditures

made with respect to a trade or business as defined in §1.163(j)-1(b)(44)).

(2) *Repayment of debt used to finance a distribution.* Any repayment of debt of a passthrough entity that has been allocated to debt financed distributions under paragraph (d)(1)(ii) of this section and to one or more available expenditures under paragraph (d)(1)(i) of this section may, at the option of the passthrough entity, be treated first as a repayment of the portion of the debt that had been allocated to such debt financed distributions.

(f) *Debt allocated to expenditures for interests in passthrough entities.* In the case of debt proceeds allocated under the rules of §1.163-8T and this section to contributions to the capital of or to the purchase of an interest in a passthrough entity, the character of the debt proceeds and any associated interest expense shall be determined by allocating the debt proceeds among the adjusted tax bases of the entity's assets. For purposes of this paragraph, the owner must allocate the debt proceeds either in proportion to the relative adjusted tax basis of the entity's assets reduced by any debt allocated to such assets, or based on the adjusted basis of the entity's assets in accordance with the rules in §1.163(j)-10(c)(5)(i) reduced by any debt allocated to such assets. Once the owner chooses a method for allocating the debt proceeds for this purpose, the owner must consistently apply the same method in all subsequent tax years. Individuals shall report interest expense paid or incurred in connection with debt-financed

acquisitions on their individual income tax return in accordance with the asset to which the interest expense is allocated under this paragraph.

(g) *Change in ownership.* Any transfer of an ownership interest in a passthrough entity is not a reallocation event for purposes of §1.163-8T(j), except as provided for in paragraph (d)(4) of this section.

(h) *Examples—(1) Example 1—(i) Facts.* A (an individual) and B (an individual) are partners in partnership PRS. PRS conducts two businesses; a manufacturing business, which is a trade or business as defined in §1.163(j)-1(b)(44) (manufacturing), and a separate commercial real estate leasing business, which is an activity described in §1.469-4(b)(2) (leasing). In Year 1, PRS borrowed \$100,000 from an unrelated third-party lender (the loan). Other than the loan, PRS does not have any outstanding debt. During Year 1, PRS paid \$80,000 in manufacturing expenses, \$120,000 in leasing expenses, and made a \$100,000 distribution to A, the proceeds of which A used to make a personal expenditure. Under §1.163-8T, PRS treated the \$100,000 of loan proceeds as having been distributed to A. As a result, in Year 1 PRS had \$200,000 of available expenditures (as defined in paragraph (d)(5)(ii) of this section) and \$100,000 of distributed debt proceeds (as defined in paragraph (d)(5)(iii) of this section). PRS paid \$10,000 in interest expense that accrued during Year 1 on the loan, and allocated such interest expense under section 704(b) equally to A and B (\$5,000 each). Thus, A and B each had \$5,000 of allocable interest expense (as defined in paragraph (d)(5)(i) of this section).

(ii) *Applicability.* Because PRS treated all \$100,000 of the loan proceeds as having been distributed under §1.163-8T, PRS allocated all \$10,000 of the interest expense associated with the loan to the distribution. Thus, pursuant to paragraph (b)(1)(vi) of this section, PRS must determine the tax treatment of such \$10,000 of interest expense in the manner provided in paragraph (d) of this section.

(iii) *Debt allocated to distributions.* Under paragraph (d)(1)(i) of this section, to the extent PRS has available expenditures (as defined under paragraph (d)(5)(ii) of this section), it must allocate any distributed debt proceeds (as defined under paragraph (d)(5)(iii) of this section) to such available expenditures. Here, PRS has distributed debt proceeds of \$100,000 and available expenditures of \$200,000 (manufacturing expenditures of \$80,000, plus leasing expenditures of \$120,000). Thus, PRS allocates all \$100,000 of the distributed debt proceeds to available expenditures as follows: \$40,000 to manufacturing expenditures ($\$100,000 \times (\$80,000/\$200,000)$) and \$60,000 to leasing expenditures ($\$100,000 \times (\$120,000/\$200,000)$). Because the amount of PRS's distributed debt proceeds is less than its available expenditures, none of the distributed debt proceeds are allocated to debt financed distributions pursuant to paragraph (d)(1)(ii) of this section.

(iv) *Allocation of interest expense.* Because all of PRS's distributed debt proceeds are allocated to available expenditures (pursuant to paragraph (d)(1)(i) of this section), A and B each treat all \$5,000 of their allocable interest expense as expenditure interest expense.

(v) *Tax treatment of interest expense.* Pursuant to paragraph (d)(3)(ii) of this section, each partner treats its expenditure interest expense (determined under paragraph (d)(2)(ii) of this section) in the same manner as the distributed debt proceeds that were allocated to available expenditures under paragraph (d)(1)(i) of this section. Thus, A's \$5,000 of expenditure interest expense comprises of \$2,000 of business interest expense ($\$5,000 \times (\$40,000/\$100,000)$) and \$3,000 of interest expense allocated to rental expenditures ($\$5,000 \times (\$60,000/\$100,000)$). B's \$5,000 of expenditure interest expense similarly comprises of \$2,000 of business interest expense and \$3,000 of interest expense allocated to rental expenditures. As a result, \$4,000 of interest expense associated with the distributed debt proceeds (A's \$2,000 plus B's \$2,000 of expenditure interest expense treated as business interest expense) is business interest expense of PRS, subject to section 163(j) at the PRS level.

Table 1 to paragraph (h)(2)(vii)

	Partner A	Partner B
Allocable interest expense		
Debt financed distribution interest expense		
N/A	\$0	\$0
Expenditure interest expense		
Business interest (to PRS)	\$2,000	\$2,000
Rental activity interest expense	\$3,000	\$3,000
Excess interest expense		
N/A	\$0	\$0
Total	\$5,000	\$5,000

(2) *Example 2—(i) Facts.* The facts are the same as in *Example 1* in paragraph (h)(1)(i) of this section, except PRS did not have any rental expenditures in Year 1. As a result, in Year 1 PRS had \$80,000 of available expenditures (as defined in paragraph (d)(5)(ii) of this

section) and \$100,000 of distributed debt proceeds (as defined in paragraph (d)(5)(iii) of this section).

(ii) *Applicability.* Because PRS treated all \$100,000 of the loan proceeds as having been distributed to A under §1.163-8T, PRS allocated all

\$10,000 of the interest expense associated with the loan to the distribution. Thus, pursuant to paragraph (b)(1)(vi) of this section, PRS must determine the tax treatment of such \$10,000 of interest expense in the manner provided in paragraph (d) of this section.

(iii) *Debt allocated to distributions.* Under paragraph (d)(1)(i) of this section, to the extent PRS has available expenditures (as defined under paragraph (d)(5)(ii) of this section), it must allocate any distributed debt proceeds (as defined under paragraph (d)(5)(i) of this section) to such available expenditures. Here, PRS has distributed debt proceeds of \$100,000 and available expenditures of \$80,000. Thus, \$80,000 of the distributed debt proceeds are allocated to such available expenditures. Pursuant to paragraph (d)(1)(ii) of this section, PRS allocates the

remaining \$20,000 of the distributed debt proceeds to debt financed distributions.

(iv) *Allocation of interest expense – debt financed distribution interest expense.* Pursuant to paragraph (d)(2)(i) of this section, A treats \$2,000 of its allocable interest expense as debt financed distribution interest expense, which is the lesser of \$5,000 or \$2,000 ((A) the portion of debt proceeds distributed to A (\$100,000), multiplied by (B) a fraction, the numerator of which is the portion of PRS's distributed debt proceeds allocated to debt financed distributions pur-

suant to paragraph (d)(1)(ii) of this section (\$20,000), and the denominator of which is PRS's total amount of distributed debt proceeds (\$100,000), multiplied by (C) the distributed debt proceeds interest rate, as defined in paragraph (d)(5)(iii) of this section, of 10% (the amount of interest expense associated with distributed debt proceeds (\$10,000), divided by the amount of distributed debt proceeds (\$100,000))) and B treats \$0 of its allocable interest expense as debt financed distribution interest expense, which is the lesser of \$5,000 or \$0 ((A) \$0 x (B) 20% x (C) 10%).

Table 2 to paragraph (h)(2)(iv)

The portion of partner A's allocable interest expense that is debt financed distribution interest expense equals the lesser of:

Partner A's allocable interest expense; or	=	\$5,000
(d)(2)(i)(A)	Portion of debt proceeds allocated to partner A	= \$100,000
(d)(2)(i)(B)	Debt financed distributions Distributed debt proceeds	= \$20,000 \$100,000
(d)(2)(i)(C)	Distributed debt proceeds interest rate	= \$10,000 \$100,000
The product of (d)(2)(i)(A), (B), and (C).	=	\$2,000

Table 3 to paragraph (h)(2)(iv)

The portion of partner B's allocable interest expense that is debt financed distribution interest expense equals the lesser of:

Partner B's allocable interest expense; or	=	\$5,000
(d)(2)(i)(A)	Portion of debt proceeds allocated to partner B	= \$0
(d)(2)(i)(B)	Debt financed distributions Distributed debt proceeds	= \$20,000 \$100,000
(d)(2)(i)(C)	Distributed debt proceeds interest rate	= \$10,000 \$100,000
The product of (d)(2)(i)(A), (B), and (C).	=	\$0

(v) *Allocation of interest expense – expenditure interest expense.* Pursuant to paragraph (d)(2)(ii) of this section, A treats \$3,000 of its allocable interest expense as expenditure interest expense ((A) the portion of PRS's distributed debt proceeds allocated to available expenditures pursuant to paragraph (d)(1)

(i) of this section (\$80,000), multiplied by (B) the distributed debt proceeds interest rate (10%), multiplied by (C) a fraction, the numerator of which is A's remaining interest expense (that is, the excess of A's allocable interest expense (\$5,000) over its debt financed distribution interest expense as determined

under paragraph (d)(2)(i) of this section (\$2,000)), and the denominator of which is the aggregate of A's and B's remaining interest expense amounts (\$3,000 + \$5,000)) and B treats \$5,000 of its allocable interest expense as expenditure interest expense ((A) \$80 x (B) 10% x (C) 62.5%).

Table 4 to paragraph (h)(2)(v)

The portion of partner A's allocable interest expense that is expenditure interest expense equals the product of:

(d)(2)(ii)(A)	Distributed debt proceeds allocated to available expenditures	=	\$80,000
(d)(2)(ii)(B)	Distributed debt proceeds interest rate	=	\$10,000
(d)(2)(ii)(C)	Partner A's remaining interest expense Aggregate remaining interest expense	=	\$3,000 \$8,000
		=	\$3,000

The product of (d)(2)(ii)(A), (B), and (C).

Table 5 to paragraph (h)(2)(v)

The portion of partner B's allocable interest expense that is expenditure interest expense equals the product of:

(d)(2)(ii)(A)	Distributed debt proceeds allocated to available expenditures	=	\$80,000
(d)(2)(ii)(B)	Distributed debt proceeds interest rate	=	\$10,000
(d)(2)(ii)(C)	Partner B's remaining interest expense Aggregate remaining interest expense	=	\$5,000 \$8,000
		=	\$5,000

The product of (d)(2)(ii)(A), (B), and (C).

(vi) *Allocation of interest expense – excess interest expense.* Neither partner treats any of its allocable interest expense as excess interest expense under paragraph (d)(2)(iii) of this section.

(vii) *Tax treatment of interest expense.* Pursuant to paragraph (d)(3)(i) of this section, each partner determines the tax treatment of its debt financed distribution interest expense (determined under paragraph (d)(2)(i) of this section) based on its use of the dis-

tributed debt proceeds. Because A used its \$100,000 of distributed debt proceeds on a personal expenditure, A's \$2,000 of debt financed distribution interest expense is personal interest subject to section 163(h) at A's level. Pursuant to paragraph (d)(3)(ii) of this section, each partner treats its expenditure interest expense (determined under paragraph (d)(2)(ii) of this section) in the same manner as the distributed debt proceeds that were allocated to available ex-

penditures under paragraph (d)(1)(i) of this section. Thus, all \$3,000 of A's expenditure interest expense and all \$5,000 of B's expenditure interest expense is business interest expense. As a result, \$8,000 interest expense associated with the distributed debt proceeds (A's \$3,000 plus B's \$5,000 of expenditure interest expense treated as business interest expense) is business interest expense of PRS, subject to section 163(j) at the PRS level.

Table 6 to paragraph (h)(2)(vii)

	Partner A	Partner B
Allocable interest expense		
Debt financed distribution interest expense		
Personal interest	\$2,000	\$0
Expenditure interest expense		
Business interest (to PRS)	\$3,000	\$5,000
Excess interest expense		
N/A	\$0	\$0
Total	\$5,000	\$5,000

(3) *Example 3—(i) Facts.* The facts are the same as in *Example 2* in paragraph (h)(2)(i) of this section, except PRS paid \$20,000 in manufacturing expenses, made a distribution of \$75,000 to A (the proceeds of which A used on a personal expenditure), and made a distribution of \$25,000 to B (the proceeds of which B used on a trade or business expenditure). As a result, in Year 1 PRS had \$20,000 of available expenditures (as defined in paragraph (d)(5)(ii) of this section) and \$100,000 of distributed debt proceeds (as defined in paragraph (d)(5)(iii) of this section). The \$20,000 manufacturing expenditure was to acquire assets used in PRS's manufacturing business. At the end of Year 1, the adjusted tax basis of PRS's assets used in manufacturing was \$720,000 and the adjusted tax basis of PRS's assets used in leasing was \$200,000. In addition, at the

end of Year 1, the adjusted basis of PRS's assets held for investment (within the meaning of section 163(d)(5)) was \$100,000.

(ii) *Applicability.* Because PRS treated all \$100,000 of the loan proceeds as having been distributed under §1.163-8T, PRS allocated all \$10,000 of the interest expense associated with the loan to the distribution. Thus, pursuant to paragraph (b)(1)(vi) of this section, PRS must determine the tax treatment of such \$10,000 of interest expense in the manner provided in paragraph (d) of this section.

(iii) *Debt allocated to distributions.* Under paragraph (d)(1)(i) of this section, to the extent PRS has available expenditures (as defined under paragraph (d)(5)(ii) of this section), it must allocate any distributed debt proceeds (as defined under paragraph (d)(5)(i) of this section) to such available expenditures.

Here, PRS has distributed debt proceeds of \$100,000 and available expenditures of \$20,000. Thus, PRS allocates \$20,000 of the distributed debt proceeds to available expenditures. Pursuant to paragraph (d)(1)(ii) of this section, PRS allocates the remaining \$80,000 of distributed debt proceeds to debt financed distributions.

(iv) *Allocation of interest expense – debt financed distribution interest expense.* Pursuant to paragraph (d)(2)(i) of this section, A treats \$5,000 of its allocable interest expense as debt financed distribution interest expense, which is the lesser of \$5,000 or \$6,000 ((A) \$75,000 x (B) 80% x (C) 10%) and B treats \$2,000 of its allocable interest expense as debt financed distribution interest expense, which is the lesser of \$5,000 or \$2,000 ((A) \$25,000 x (B) 80% x (C) 10%).

Table 7 to paragraph (h)(3)(iv)

The portion of partner A's allocable interest expense that is debt financed distribution interest expense equals the lesser of:

Partner A's allocable interest expense; or	=	\$5,000
(d)(2)(i)(A)	Portion of debt proceeds allocated to partner A	= \$75,000
(d)(2)(i)(B)	Debt financed distributions Distributed debt proceeds	= \$80,000 \$100,000
(d)(2)(i)(C)	Distributed debt proceeds interest rate	= \$10,000 \$100,000
The product of (d)(2)(i)(A), (B), and (C).	=	\$6,000

Table 8 to paragraph (h)(3)(iv)

The portion of partner B's allocable interest expense that is debt financed distribution interest expense equals the lesser of:

Partner B's allocable interest expense; or	=	\$5,000
(d)(2)(i)(A)	Portion of debt proceeds allocated to partner B	= \$25,000
(d)(2)(i)(B)	Debt financed distributions Distributed debt proceeds	= \$80,000 \$100,000
(d)(2)(i)(C)	Distributed debt proceeds interest rate	= \$10,000 \$100,000
The product of (d)(2)(i)(A), (B), and (C).	=	\$2,000

(v) *Allocation of interest expense – expenditure interest expense.* Pursuant to paragraph (d)(2)(ii) of this section, A does not treat any of its allocable in-

terest expense as expenditure interest expense ((A) \$20,000 x (B) 10% x (C) 0%) and B treats \$2,000 of

its allocable interest expense as expenditure interest expense ((A) \$20,000 x (B) 10% x (C) 100%).

Table 9 to paragraph (h)(3)(v)

The portion of partner A's allocable interest expense that is expenditure interest expense equals the product of:

(d)(2)(ii)(A)	Distributed debt proceeds allocated to available expenditures	=	\$20,000
(d)(2)(ii)(B)	Distributed debt proceeds interest rate	=	\$10,000 \$100,000
(d)(2)(ii)(C)	Partner A's remaining interest expense Aggregate remaining interest expense	=	\$0 \$3,000
		=	\$0

The product of (d)(2)(ii)(A), (B), and (C).

Table 10 to paragraph (h)(3)(v)

The portion of partner B's allocable interest expense that is expenditure interest expense equals the product of:

(d)(2)(ii)(A)	Distributed debt proceeds allocated to available expenditures	=	\$20,000
(d)(2)(ii)(B)	Distributed debt proceeds interest rate	=	\$10,000 \$100,000
(d)(2)(ii)(C)	Partner B's remaining interest expense Aggregate remaining interest expense	=	\$3,000 \$3,000
		=	\$2,000

The product of (d)(2)(ii)(A), (B), and (C).

(vi) *Allocation of interest expense – excess interest expense.* Pursuant to paragraph (d)(2)(iii) of this section, A does not treat any of its allocable interest expense as excess interest expense (\$5,000 of allocable interest expense, less \$5,000 of debt financed distribution interest expense, less \$0 of expenditure interest expense) and B treats \$1,000 of its allocable interest expense as excess interest expense (\$5,000 of allocable interest expense, less \$2,000 of debt financed distribution interest expense, less \$2,000 of expenditure interest expense).

(vii) *Tax treatment of interest expense.* Pursuant to paragraph (d)(3)(i) of this section, each partner determines the tax treatment of its debt financed distribution interest expense based on its use of the

distributed debt proceeds. A used its share of the distributed debt proceeds to make personal expenditures. Thus, A's \$5,000 of debt financed distribution interest expense is subject to section 163(h) at A's level. B used its share of the distributed debt proceeds to make trade or business expenditures. Thus, B's \$2,000 of debt financed distribution interest expense is subject to section 163(j) at B's level. Pursuant to paragraph (d)(3)(ii) of this section, B treats its \$2,000 of expenditure interest expense in the same manner as the distributed debt proceeds were allocated to available expenditures under paragraph (d)(1)(i) of this section. Thus, B's \$2,000 of expenditure interest expense is business interest expense, subject to section 163(j) at the lev-

el of PRS. Pursuant to paragraph (d)(3)(iii) of this section, B determines the tax treatment of its \$1,000 of excess interest expense by allocating distributed debt proceeds among the adjusted basis of PRS's assets, reduced by any debt allocated to such assets. For purposes of paragraph (d)(3)(iii) of this section, PRS's has \$700,000 (\$720,000 - \$20,000 debt proceeds allocated to such assets) of basis in its manufacturing assets, \$200,000 of basis in its leasing assets, and \$100,000 of basis in its assets held for investment. Thus, B's \$1,000 of excess interest expense is treated as \$700 of business interest expense subject to 163(j) at the PRS level, \$200 of interest expense related to a rental activity, and \$100 of investment interest expense.

Table 11 to paragraph (h)(3)(vii)

	Partner A	Partner B
Allocable interest expense		
Debt financed distribution interest expense		
Personal interest	\$5,000	\$0
Business interest (but not to PRS)	\$0	\$2,000
Expenditure interest expense		
Business interest (to PRS)	\$0	\$2,000
Excess interest expense		
Business interest (to PRS)	\$0	\$700
Rental activity interest expense	\$0	\$200
Investment interest expense	\$0	\$100
Total	<hr/> \$5,000	<hr/> \$5,000

(4) *Example 4.* The facts are the same as in *Example 2* in paragraph (h)(2)(i) of this section. In Year 2, A sells its interest in PRS to C. C is not related to either A or B under the rules of either section 267(b) or section 707(b)(1). No facts have changed with respect to PRS's loan. Under these facts, and only for purposes of this section, C's share of the debt financed distribution interest expense will be treated as excess interest expense pursuant to paragraph (d)(4)(i) of this section. Accordingly, C will determine the character of its share of this interest expense by allocating the debt proceeds associated with this interest expense among the assets of PRS under paragraph (d)(3)(iii) of this section.

(5) *Example 5.* The facts are the same as in *Example 4* in paragraph (h)(4) of this section, except that C is a party that is related to A under the rules of either section 267(b) or section 707(b)(1). Under these facts, and only for purposes of this section, A's \$2,000 of debt financed distribution interest expense shall, pursuant to paragraph (d)(4)(i) of this section, continue to be treated as debt financed distribution interest expense of C, subject to the same tax treatment as it was to the transferor (personal interest expense).

(6) *Example 6.* The facts are the same as in *Example 2* in paragraph (h)(2)(i) of this section, except that in Year 2 B sells its interest in PRS to D. D is not related to either A or B under the rules of either section 267(b) or section 707(b)(1). No other facts have changed with respect to PRS's loan. Under these facts, the tax treatment of the expenditure interest ex-

pense does not change with respect to PRS or any of the partners as a result of the ownership change pursuant to paragraph (g) of this section. Accordingly, the tax treatment of the expenditure interest expense allocable to D under section 704(b) is identical to the expenditure interest expense that had been allocable to B prior to the sale.

(7) *Example 7—(i) Facts.* A (an individual) and B (an individual) are equal shareholders in S corporation X. X conducts a manufacturing business, which is a trade or business as defined in §1.163(j)-1(b)(44) (manufacturing). In Year 1, X borrowed \$100,000 from an unrelated third-party lender (the loan). Other than the loan, X does not have any outstanding debt. During Year 1, X paid \$100,000 in manufacturing expenses and made a \$50,000 distribution to each of its shareholders, A and B, which each shareholder used to make a personal expenditure. Under §1.163-8T, X treated all \$100,000 of the loan proceeds as having been distributed to A and B. As a result, in Year 1 X had \$100,000 of available expenditures (as defined in paragraph (d)(5)(ii) of this section) and \$100,000 of distributed debt proceeds (as defined in paragraph (d)(5)(iii) of this section). X paid \$10,000 in interest expense that accrued during Year 1 on the loan, and allocated such interest expense under section 1366(a) equally to A and B (\$5,000 each). Thus, A and B each had \$5,000 of allocable interest expense (as defined in paragraph (d)(5)(i) of this section).

(ii) *Applicability.* Because X treated all \$100,000 of the loan proceeds as having been distributed to A

and B under §1.163-8T, PRS allocated all \$10,000 of the interest expense associated with the loan to the distributions. Thus, pursuant to paragraph (b)(1)(vi) of this section, PRS must determine the tax treatment of such \$10,000 of interest expense in the manner provided in paragraph (d) of this section.

(iii) *Debt allocated to distributions.* Under paragraph (d)(1)(i) of this section, to the extent X has available expenditures (as defined under paragraph (d)(5)(ii) of this section), it must allocate any distributed debt proceeds (as defined under paragraph (d)(5)(iii) of this section) to such available expenditures. Here, X has distributed debt proceeds of \$100,000 and available expenditures of \$100,000. Thus, PRS allocates all \$100,000 of the distributed debt proceeds to available expenditures.

(iv) *Allocation of interest expense.* Because all of X's distributed debt proceeds are allocated to available expenditures (pursuant to paragraph (d)(1)(i) of this section), A and B each treat all \$5,000 of their allocable interest expense as expenditure interest expense.

(v) *Tax treatment of interest expense.* Pursuant to paragraph (d)(3)(ii) of this section, each partner treats its expenditure interest expense (determined under paragraph (d)(2)(ii) of this section) in the same manner as the distributed debt proceeds that were allocated to available expenditures under paragraph (d)(1)(i) of this section. Thus, A's \$5,000 of expenditure interest expense and B's \$5,000 of expenditure interest expense is treated as business interest expense of X, subject to section 163(j) at X's level.

Table 12 to paragraph (h)(7)(v)

	Partner A	Partner B
Allocable interest expense		
Debt financed distribution interest expense		
N/A	\$0	\$0
Expenditure interest expense		
Business interest (to X)	\$5,000	\$5,000
Excess interest expense		
N/A	\$0	\$0
Total	<hr/> \$5,000	<hr/> \$5,000

(i) *Applicability date.* This section applies to taxable years beginning on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, and before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], provided that they consistently apply the rules of this section to that taxable year and each subsequent taxable year.

Par. 3. Section 1.163-15 is added to read as follows:

§1.163-15 Debt Proceeds Distributed from Any Taxpayer Account or from Cash.

(a) *In general.* Regardless of paragraphs (c)(4) and (5) of §1.163-8T, in the case of debt proceeds deposited in an account, a taxpayer that is applying §1.163-8T or §1.163-14 may treat any expenditure made from any account of the taxpayer, or from cash, within 30 days before or 30 days after debt proceeds are deposited in any account of the taxpayer as made from such proceeds to the extent thereof. Similarly, in the case of debt proceeds received in cash, a taxpayer that is applying §1.163-8T or §1.163-14 may treat any expenditure made from any account of the taxpayer, or from cash, within 30 days before or 30 days after debt proceeds are received in cash as made from such proceeds to the extent thereof. For purposes of this section, terms used have the same meaning as in §1.163-8T(c)(4) and (5).

(b) *Applicability date.* This section applies to taxable years beginning on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, and before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE

FINAL RULE IN THE FEDERAL REGISTER], provided that they consistently apply the rules of this section to that taxable year and each subsequent taxable year.

Par. 4. As added in a final rule published elsewhere in this issue of the Federal Register, effective November 13, 2020, §1.163(j)-0 is amended by:

1. Revising the entries for §1.163(j)-1(b)(1)(iv)(B), (b)(22)(iii)(F), and (b)(35);
 2. Adding entries for §§1.163(j)-1(b)(1)(iv)(E), (c)(4), and (c)(4)(i) and (ii);
 3. Adding an entry for §1.163(j)-2(d)(3);
 4. Revising the entries for §§1.163(j)-2(k) and 1.163(j)-6(c)(1) and (2);
 5. Adding an entry for §1.163(j)-6(d)(3), (4), and (5) and (e)(5);
 6. Revising the entries for §§1.163(j)-6(f)(1)(iii), (g)(4), (h)(4) and (5), (j), and (n) and 1.163(j)-7;
 7. Adding an entry for §1.163(j)-8;
 8. Revising the entries for §1.163(j)-10(c)(5)(ii)(D) and (f).

The revisions and additions read as follows:

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- Par. 5. As added in a final rule published elsewhere in this issue of the Federal Register, effective November 13, 2020, § 1.163(j)-1 is amended by:
1. Revising paragraph (b)(1)(iv)(B).
 2. Adding paragraphs (b)(1)(iv)(E), (b)(22)(iii)(F), and (b)(35)
 3. In paragraph (c)(1), removing “paragraphs (c)(2) and (3)” from the first sentence and adding “paragraphs (c)(2), (3), and (4)” in its place.
 4. Adding paragraph (c)(4).
- The revisions and additions read as follows:
- §1.163(j)-1 Definitions.*
- * * * * *
- (b) * * *
- (1) * * *
- (iv) * * *
- (B) *Deductions by members of a consolidated group—(1) In general.* If paragraph (b)(1)(ii)(C), (D), or (E) of this section applies to adjust the tentative taxable income of a taxpayer, and if the taxpayer does not use the computation method in paragraph (b)(1)(iv)(E) of this section, the amount of the adjustment under paragraph (b)(1)(ii)(C) of this section equals the greater of the allowed or allowable depreciation, amortization, or depletion of the property, as provided under section 1016(a)(2), for any member of the consolidated group for the taxable years beginning after December 31, 2017, and before January 1, 2022, with respect to such property.
- (2) *Application of the alternative computation method.* If paragraph (b)(1)(ii)(C), (D), or (E) of this section applies to adjust the tentative taxable income of a taxpayer, and if the taxpayer uses the computation method in paragraph (b)(1)(iv)(E) of this section, the amount of the

adjustment under paragraph (b)(1)(ii)(C) of this section equals the lesser of

(i) any gain recognized on the sale or other disposition of such property by the taxpayer (or, if the taxpayer is a member of a consolidated group, the consolidated group), and

(ii) the greater of the allowed or allowable depreciation, amortization, or depletion of the property, as provided under section 1016(a)(2), for the taxpayer (or, if the taxpayer is a member of a consolidated group, the consolidated group) for the taxable years beginning after December 31, 2017, and before January 1, 2022, with respect to such property.

* * * *

(E) Alternative computation method.

If paragraph (b)(1)(ii)(C), (D), or (E) of this section applies to adjust the tentative taxable income of a taxpayer, the taxpayer may compute the amount of the adjustments required by such paragraph using the formulas in paragraph (b)(1)(iv)(E)(1), (2), and (3) of this section, respectively, provided that the taxpayer applies such formulas to all dispositions for which an adjustment is required under paragraph (b)(1)(ii)(C), (D), or (E) of this section.

(1) Alternative computation method for property dispositions. With respect to the sale or other disposition of property, the lesser of

(i) any gain recognized on the sale or other disposition of such property by the taxpayer (or, if the taxpayer is a member of a consolidated group, the consolidated group), and

(ii) the greater of the allowed or allowable depreciation, amortization, or depletion of the property, as provided under section 1016(a)(2), for the taxpayer (or, if the taxpayer is a member of a consolidated group, the consolidated group) for the taxable years beginning after December 31, 2017, and before January 1, 2022, with respect to such property.

(2) Alternative computation method for dispositions of member stock. With respect to the sale or other disposition of stock of a member of a consolidated group by another member, the lesser of (i) any gain recognized on the sale or other disposition of such stock, and (ii) the investment adjustments under §1.1502-32 with respect to such stock that are attributable

to deductions described in paragraph (b)(1)(ii)(C) of this section.

(3) Alternative computation method for dispositions of partnership interests. With respect to the sale or other disposition of an interest in a partnership, the lesser of (i) any gain recognized on the sale or other disposition of such interest, and (ii) the taxpayer's (or, if the taxpayer is a consolidated group, the consolidated group's) distributive share of deductions described in paragraph (b)(1)(ii)(C) of this section with respect to property held by the partnership at the time of such sale or other disposition to the extent such deductions were allowable under section 704(d).

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(iii) * * *

(F) Section 163(j) interest dividends—

(1) In general. Except as otherwise provided in this paragraph (b)(22)(iii)(F), a section 163(j) interest dividend is treated as interest income.

(2) Limitation on amount treated as interest income. A shareholder may not treat any part of a section 163(j) interest dividend as interest income to the extent the amount of the section 163(j) interest dividend exceeds the excess of the amount of the entire dividend that includes the section 163(j) interest dividend over the sum of the conduit amounts other than interest-related dividends under section 871(k)(1)(C) and section 163(j) interest dividends that affect the shareholder's treatment of that dividend.

(3) Conduit amounts. For purposes of paragraph (b)(22)(iii)(F)(2) of this section, the term *conduit amounts* means, with respect to any category of income (including tax-exempt interest) earned by a RIC for a taxable year, the amounts identified by the RIC (generally in a designation or written report) in connection with dividends paid by the RIC for that taxable year that are subject to a limit determined by reference to that category of income. For example, a RIC's conduit amount with respect to its net capital gain is the amount of capital gain dividends that the RIC pays under section 852(b)(3)(C).

(4) Holding period. Except as provided in paragraph (b)(22)(iii)(F)(5) of this section, no dividend is treated as interest income under paragraph (b)(22)(iii)(F)(1)

of this section if the dividend is received with respect to a share of RIC stock—

(i) That is held by the shareholder for 180 days or less (taking into account the principles of section 246(c)(3) and (4)) during the 361-day period beginning on the date which is 180 days before the date on which the share becomes ex-dividend with respect to such dividend; or

(ii) To the extent that the shareholder is under an obligation (whether pursuant to a short sale or otherwise) to make related payments with respect to positions in substantially similar or related property.

(5) Exception to holding period requirement for money market funds and certain regularly declared dividends.

Paragraph (b)(22)(iii)(F)(4)(i) of this section does not apply to dividends distributed by any RIC regulated as a money market fund under 17 CFR 270.2a-7 (Rule 2a-7 under the 1940 Act) or to regular dividends paid by a RIC that declares section 163(j) interest dividends on a daily basis in an amount equal to at least 90 percent of its excess section 163(j) interest income, as defined in paragraph (b)(35)(iv)(E) of this section, and distributes such dividends on a monthly or more frequent basis.

* * * *

(35) Section 163(j) interest dividend.

The term *section 163(j) interest dividend* means a dividend paid by a RIC for a taxable year for which section 852(b) applies to the RIC, to the extent described in paragraph (b)(35)(i) or (ii) of this section, as applicable.

(i) In general. Except as provided in paragraph (b)(35)(ii) of this section, a section 163(j) interest dividend is any dividend, or part of a dividend, that is reported by the RIC as a section 163(j) interest dividend in written statements furnished to its shareholders.

(ii) Reduction in the case of excess reported amounts. If the aggregate reported amount with respect to the RIC for the taxable year exceeds the excess section 163(j) interest income of the RIC for such taxable year, the section 163(j) interest dividend is—

(A) The reported section 163(j) interest dividend amount; reduced by

(B) The excess reported amount that is allocable to that reported section 163(j) interest dividend amount.

(iii) *Allocation of excess reported amount*—(A) *In general*. Except as provided in paragraph (b)(35)(iii)(B) of this section, the excess reported amount, if any, that is allocable to the reported section 163(j) interest dividend amount is that portion of the excess reported amount that bears the same ratio to the excess reported amount as the reported section 163(j) interest dividend amount bears to the aggregate reported amount.

(B) *Special rule for noncalendar year RICs*. In the case of any taxable year that does not begin and end in the same calendar year, if the post-December reported amount equals or exceeds the excess reported amount for that taxable year, paragraph (b)(35)(iii)(A) of this section is applied by substituting “post-December reported amount” for “aggregate reported amount,” and no excess reported amount is allocated to any dividend paid on or before December 31 of such taxable year.

(iv) *Definitions*. The following definitions apply for purposes of this paragraph (b)(35):

(A) *Reported section 163(j) interest dividend amount*. The term *reported section 163(j) interest dividend amount* means the amount of a dividend distribution reported to the RIC’s shareholders under paragraph (b)(35)(i) of this section as a section 163(j) interest dividend.

(B) *Excess reported amount*. The term *excess reported amount* means the excess of the aggregate reported amount over the RIC’s excess section 163(j) interest income for the taxable year.

(C) *Aggregate reported amount*. The term *aggregate reported amount* means the aggregate amount of dividends reported by the RIC under paragraph (b)(35)(i) of this section as section 163(j) interest dividends for the taxable year (including section 163(j) interest dividends paid after the close of the taxable year described in section 855).

(D) *Post-December reported amount*. The term *post-December reported amount* means the aggregate reported amount determined by taking into account only dividends paid after December 31 of the taxable year.

(E) *Excess section 163(j) interest income*. The term *excess section 163(j) interest income* means, with respect to a taxable year of a RIC, the excess of the RIC’s

business interest income for the taxable year over the sum of the RIC’s business interest expense for the taxable year and the RIC’s other deductions for the taxable year that are properly allocable to the RIC’s business interest income.

(v) *Example*—(A) *Facts*. X is a domestic C corporation that has elected to be a RIC. For its taxable year ending December 31, 2021, X has \$100x of business interest income (all of which is qualified interest income for purposes of section 871(k)(1)(E)) and \$10x of dividend income (all of which is qualified dividend income within the meaning of section 1(h)(11) and would be eligible for the dividends received deduction under section 243, determined as described in section 854(b)(3)). X has \$10x of business interest expense and \$20x of other deductions. X has no other items for the taxable year. On December 31, 2021, X pays a dividend of \$80x to its shareholders, and reports, in written statements to its shareholders, \$71.82x as a section 163(j) interest dividend; \$10x as dividends that may be treated as qualified dividend income or as dividends eligible for the dividends received deduction; and \$72.73x as interest-related dividends under section 871(k)(1)(C). Shareholder A, a domestic C corporation, meets the holding period requirements in paragraph (b)(22)(iii)(F)(4) of this section with respect to the stock of X, and receives a dividend of \$8x from X on December 31, 2021.

(B) *Analysis*. X determines that \$18.18x of other deductions are properly allocable to X’s business interest income. X’s excess section 163(j) interest income under paragraph (b)(35)(iv)(E) of this section is \$71.82x (\$100x business interest income - (\$10x business interest expense + \$18.18x other deductions allocated) = \$71.82x). Thus, X may report up to \$71.82x of its dividends paid on December 31, 2021, as section 163(j) interest dividends to its shareholders. X may also report up to \$10x of its dividends paid on December 31, 2021, as dividends that may be treated as qualified dividend income or as dividends that are eligible for the dividends received deduction. X determines that \$9.09x of interest expense and \$18.18x of other deductions are properly allocable to X’s qualified interest income. Therefore, X may report up to \$72.73x of its dividends paid on December 31, 2021, as interest-related dividends under section 871(k)(1)(C) (\$100x qualified interest income - \$27.27x deductions allocated = \$72.73x). A treats \$1x of its \$8x dividend as a dividend eligible for the dividends received deduction and no part of the dividend as an interest-related dividend under section 871(k)(1)(C). Therefore, under paragraph (b)(22)(iii)(F)(2) of this section, A may treat \$7x of the section 163(j) interest dividend as interest income for purposes of section 163(j) (\$8x dividend - \$1x conduit amount = \$7x limitation).

* * * *

(c) * * *

(4) *Alternative computation for certain adjustments to tentative taxable income, and section 163(j) interest dividends*—
(i) *Alternative computation for certain adjustments to tentative taxable income*. Paragraphs (b)(1)(iv)(B) and (E) of this

section apply to taxable years beginning on or after **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**. Taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules in paragraphs (b)(1)(iv)(B) and (E) of this section to a taxable year beginning after December 31, 2017, and before **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year and each subsequent taxable year.

(ii) *Section 163(j) interest dividends*. Paragraphs (b)(22)(iii)(F) and (b)(35) of this section apply to taxable years beginning on or after **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**. Taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules in paragraphs (b)(22)(iii)(F) and (b)(35) of this section for a taxable year beginning after December 31, 2017, and before **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations.

Par. 6. As added in a final rule published elsewhere in this issue of the Federal Register, effective November 13, 2020, §1.163(j)-2 is amended by:

1. Adding paragraphs (b)(3)(iii) and (iv) and (d)(3).
2. Redesignating paragraph (k) as paragraph (k)(1).
3. Adding a new subject heading for paragraph (k).
4. Revising the subject heading of redesignated paragraph (k)(1).

5. Adding paragraph (k)(2).

The additions and revision read as follows:

§1.163(j)-2 Deduction for business interest expense limited.

* * * * *

(b) * * *

(3) * * *

(iii) *Transactions to which section 381 applies.* For purposes of the election described in paragraph (b)(3)(i) of this section, and subject to the limitation in paragraph (b)(3)(ii) of this section, the 2019 ATI of the acquiring corporation in a transaction to which section 381 applies equals the amount of the acquiring corporation's ATI for its last taxable year beginning in 2019.

(iv) *Consolidated groups.* For purposes of the election described in paragraph (b)(3)(i) of this section, and subject to the limitation in paragraph (b)(3)(ii) of this section, the 2019 ATI of a consolidated group equals the amount of the consolidated group's ATI for its last taxable year beginning in 2019.

* * * * *

(d) * * *

(3) *Determining a syndicate's loss amount.* For purposes of section 163(j), losses allocated under section 1256(e)(3)(B) and §1.448-1T(b)(3) are determined without regard to section 163(j). See also §1.1256(e)-2(b).

* * * * *

(k) *Applicability dates.*

(1) *In general.* * * *

(2) *Paragraphs (b)(3)(iii), (b)(3)(iv), and (d)(3).* Paragraphs (b)(3)(iii) and (iv) and (d)(3) of this section apply to taxable years beginning on or after **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of paragraphs (b)(3)(iii) and (iv) of this section to a taxable year beginning after December 31, 2017, and before **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**, provided that they consistently apply the rules of paragraphs (b)(3)(iii) and (iv) of this

section and the rules in the section 163(j) regulations for that taxable year and for each subsequent taxable year. Taxpayers and their related parties, within the meaning of sections 267(b) and 707(b), may choose to apply the rules of paragraph (d)(3) of this section to a taxable year beginning after December 31, 2017, and before **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**, provided that they consistently apply the rules of paragraph (d)(3) of this section for that taxable year and for each subsequent taxable year.

Par. 7. As added in a final rule published elsewhere in this issue of the Federal Register, effective November 13, 2020, §1.163(j)-6 is amended by:

1. Adding paragraphs (c)(1) and (2), (d)(3) through (5), (e)(5) and (6), (f)(1)(iii), (g)(4), (h)(4) and (5), (j), (l)(4)(iv), (n), and (o)(24) through (29).

2. Redesignating paragraph (p) as paragraph (p)(1).

3. Adding a new subject heading for paragraph (p).

4. Revising the subject heading of newly redesignated paragraph (p)(1).

5. Adding paragraph (p)(2).

The additions and revision read as follows:

§1.163(j)-6 Application of the business interest deduction limitation to partnerships and subchapter S corporations.

* * * * *

(c) * * *

(1) *Modification of business interest income for partnerships.* The business interest income of a partnership generally is determined in accordance with §1.163(j)-1(b)(3). To the extent that interest income of a partnership that is properly allocable to trades or businesses that are per se non-passive activities and is allocated to partners that do not materially participate (within the meaning of section 469), as described in section 163(d)(5)(A)(ii), such interest income shall not be considered business interest income for purposes of determining the section 163(j) limitation of a partnership pursuant to §1.163(j)-2(b). A per se non-passive activity is an activity that is

not treated as a passive activity for purposes of section 469 regardless of whether the owners of the activity materially participate in the activity.

(2) *Modification of business interest expense for partnerships.* The business interest expense of a partnership generally is determined in accordance with §1.163(j)-1(b)(2). To the extent that interest expense of a partnership that is properly allocable to trades or businesses that are per se non-passive activities is allocated to partners that do not materially participate within the meaning of section 469, as described in section 163(d)(5)(A)(ii), such interest expense shall not be considered business interest expense for purposes of determining the section 163(j) limitation of a partnership pursuant to §1.163(j)-2(b).

* * * * *

(d) * * *

(3) *Section 743(b) adjustments and publicly traded partnerships.* Solely for purposes of §1.163(j)-6, a publicly traded partnership, as defined in §1.7704-1, shall treat the amount of any section 743(b) adjustment of a purchaser of a partnership unit that relates to a remedial item that the purchaser inherits from the seller as an offset to the related section 704(c) remedial item. For this purpose, §1.163(j)-6(e)(2)(ii) applies. See *Example 25* in paragraph (o)(25) of this section.

(4) *Modification of adjusted taxable income for partnerships.* The adjusted taxable income of a partnership generally is determined in accordance with §1.163(j)-1(b)(1). To the extent that the items comprising the adjusted taxable income of a partnership are properly allocable to trades or businesses that are per se non-passive activities and are allocated to partners that do not materially participate (within the meaning of section 469), as described in section 163(d)(5)(A)(ii), such partnership items shall not be considered adjusted taxable income for purposes of determining the section 163(j) limitation of a partnership pursuant to §1.163(j)-2(b).

(5) *Election to use 2019 adjusted taxable income for taxable years beginning in 2020.* In the case of any taxable year beginning in 2020, a partnership may elect to apply this section by substituting its adjusted taxable income for the last taxable

year beginning in 2019 for the adjusted taxable income for such taxable year. See §1.163(j)-2(b)(4) for the time and manner of making or revoking this election. An electing partnership determines each partner's allocable ATI (as defined in paragraph (f)(2)(ii) of this section) pursuant to paragraph (j)(9) of this section in the same manner as an upper-tier partnership. See *Example 34* in paragraph (o)(34) of this section.

* * * * *

(e) * * *

(5) *Partner basis items, remedial items, and publicly traded partnerships.* Solely for purposes of §1.163(j)-6, a publicly traded partnership, as defined in §1.7704-1, shall either allocate gain that would otherwise be allocated under section 704(c) based on a partner's section 704(b) sharing ratios, or, for purposes of allocating cost recovery deductions under section 704(c), determine a partner's remedial items, as defined in §1.163(j)-6(b)(3), based on an allocation of the partnership's asset basis (inside basis) items among its partners in proportion to their share of corresponding section 704(b) items (rather than applying the traditional method, described in §1.704-3(b)). See *Example 24* in paragraph (o)(24) of this section.

(6) *Partnership deductions capitalized by a partner.* The ATI of a partner is increased by the portion of such partner's allocable share of qualified expenditures (as defined in section 59(e)(2)) to which an election under section 59(e) applies.

* * * * *

(f) * * *

(1) * * *

(iii) *Exception applicable to publicly traded partnerships.* Publicly traded partnerships, as defined in §1.7704-1, do not apply the rules in paragraph (f)(2) of this section to determine a partner's share of section 163(j) excess items. Rather, publicly traded partnerships determine a partner's share of section 163(j) excess items by applying the same percentage used to determine the partner's share of the corresponding section 704(b) items that comprise ATI.

* * * * *

(g) * * *

(4) *Special rule for taxable years beginning in 2019 and 2020.* In the case of

any excess business interest expense of a partnership for any taxable year beginning in 2019 that is allocated to a partner under paragraph (f)(2) of this section, 50 percent of such excess business interest expense (§1.163(j)-6(g)(4) business interest expense) is treated as business interest expense that, notwithstanding paragraph (g)(2) of this section, is paid or accrued by the partner in the partner's first taxable year beginning in 2020. Additionally, §1.163(j)-6(g)(4) business interest expense is not subject to the section 163(j) limitation at the level of the partner. For purposes of paragraph (h)(1) of this section, any §1.163(j)-6(g)(4) business interest expense is, similar to deductible business interest expense, taken into account before any excess business interest expense. This paragraph applies after paragraph (n) of this section. If a partner disposes of a partnership interest in the partnership's 2019 or 2020 taxable year, §1.163(j)-6(g)(4) business interest expense is deductible by the partner and thus does not result in a basis increase under paragraph (h)(3) of this section. See *Example 35* and *Example 36* in paragraphs (o)(35) and (o)(36), respectively, of this section. A taxpayer may elect to not have this provision apply. The rules and procedures regarding the time and manner of making, or revoking, such an election are provided in Revenue Procedure 2020-22, 2020-18 I.R.B. 745, and may be further modified through other guidance (see §§601.601(d) and 601.602 of this chapter).

* * * * *

(h) * * *

(4) *Partner basis adjustments upon liquidating distribution.* For purposes of paragraph (h)(3) of this section, a disposition includes a distribution of money or other property by the partnership to a partner in complete liquidation of the partner's interest in the partnership. However, a current distribution of money or other property by the partnership to a continuing partner is not a disposition for purposes of paragraph (h)(3) of this section.

(5) *Partnership basis adjustments upon partner dispositions.* If a partner (transferor) disposes of its partnership interest, the partnership shall increase the adjusted basis of partnership proper-

ty by an amount equal to the amount of the increase required under paragraph (h)(3) (or, if the transferor is a partnership, (j)(5)(ii)) of this section (if any) to the adjusted basis of the partnership interest being disposed of by the transferor. Such increase in the adjusted basis of partnership property (§1.163(j)-6(h)(5) basis adjustment) shall be allocated among capital gain property of the partnership in the same manner as a positive section 734(b) adjustment. However, the increase in the adjusted basis of any partnership property resulting from a §1.163(j)-6(h)(5) basis adjustment is not depreciable or amortizable under any section of the Code, regardless of whether the partnership property allocated such §1.163(j)-6(h)(5) basis adjustment is otherwise generally depreciable or amortizable. In general, a partnership allocates its §1.163(j)-6(h)(5) basis adjustment immediately before the disposition (simultaneous with the transferor's basis increase required under paragraph (h)(3) or (j)(5)(ii) of this section). However, if the disposition was the result of a distribution by the partnership of money or other property to the transferor in complete liquidation of the transferor's interest in the partnership, the partnership allocates its §1.163(j)-6(h)(5) basis adjustment among its properties only after it has allocated its section 734(b) adjustment (if any) among its properties. See *Example 31* in paragraph (o)(31) of this section.

* * * * *

(j) *Tiered partnerships—(1) Purpose.*

The purpose of this section is to provide guidance regarding the treatment of business interest expense of a partnership (lower-tier partnership) that is allocated to a partner that is a partnership (upper-tier partnership). Specifically, this section clarifies that disparities are not created between an upper-tier partner's basis in its upper-tier partnership interest and such partner's share of the adjusted basis of upper-tier partnership's property following the allocation of excess business interest expense from lower-tier partnership to upper-tier partnership. Further, these rules disallow any deduction for business interest expense that was formerly excess business interest expense to any person that is not the specified partner of such business interest expense. See *Example 27* through

Example 30 in paragraphs (o)(27) through (30), respectively.

(2) *Section 704(b) capital account adjustments.* If lower-tier partnership pays or accrues business interest expense and allocates such business interest expense to upper-tier partnership, then both upper-tier partnership and any direct or indirect partners of upper-tier partnership shall, solely for purposes of section 704(b) and the regulations thereunder, treat such business interest expense as a section 705(a)(2)(B) expenditure. Any section 704(b) capital account reduction resulting from such treatment occurs regardless of whether such business interest expense is characterized under this section as excess business interest expense or deductible business interest expense by lower-tier partnership. If upper-tier partnership subsequently treats any excess business interest expense allocated from lower-tier partnership as business interest expense paid or accrued pursuant to paragraph (g) of this section, the section 704(b) capital accounts of any direct or indirect partners of upper-tier partnership are not further reduced.

(3) *Basis adjustments of upper-tier partnership.* If lower-tier partnership allocates excess business interest expense to upper-tier partnership, then upper-tier partnership reduces its basis in lower-tier partnership pursuant to paragraph (h)(2) of this section. Upper-tier partnership partners do not, however, reduce the bases of their upper-tier partnership interests pursuant to paragraph (h)(2) of this section until upper-tier partnership treats such excess business interest expense as business interest expense paid or accrued pursuant to paragraph (g) of this section.

(4) *Treatment of excess business interest expense allocated by lower-tier partnership to upper-tier partnership.* Except as provided in paragraph (j)(7) of this section, if lower-tier partnership allocates excess business interest expense to upper-tier partnership and such excess business interest expense is not suspended under section 704(d), then upper-tier partnership shall treat such excess business interest expense (UTP EBIE) as a nondepreciable capital asset, with a fair market value of zero and basis equal to the amount by which upper-tier partner-

ship reduced its basis in lower-tier partnership pursuant to paragraph (h)(2) of this section due to the allocation of such excess business interest expense. The fair market value of UTP EBIE, described in the preceding sentence, is not adjusted by any revaluations occurring under §1.704-1(b)(2)(iv)(f). In addition to generally treating UTP EBIE as having a basis component in excess of fair market value and, thus, built-in loss property, upper-tier partnership shall also treat UTP EBIE as having a carryforward component associated with it. The carryforward component of UTP EBIE shall equal the amount of excess business interest expense allocated from lower-tier partnership to upper-tier partnership under paragraph (f)(2) of this section that is treated as such under paragraph (h)(2) of this section by upper-tier partnership. If an allocation of excess business interest expense from lower-tier partnership is treated as UTP EBIE of upper-tier partnership, upper-tier partnership shall treat such allocation of excess business interest expense from lower-tier partnership as UTP EBIE until the occurrence of an event described in paragraph (j)(5) of this section.

(5) *UTP EBIE conversion events—(i) Allocation to upper-tier partnership by lower-tier partnership of excess taxable income (or excess business interest income).* To the extent upper-tier partnership is allocated excess taxable income (or excess business interest income) from lower-tier partnership, or paragraph (m)(3) of this section applies, upper-tier partnership shall—

(A) First, apply the rules in paragraph (g) of this section to its UTP EBIE, using any reasonable method (including, for example, FIFO and LIFO) to determine which UTP EBIE is treated as business interest expense paid or accrued pursuant to paragraph (g) of this section. If paragraph (m)(3) of this section applies, upper-tier partnership shall treat all of its UTP EBIE from lower-tier partnership as business interest expense paid or accrued.

(B) Second, with respect to any UTP EBIE treated as business interest expense paid or accrued in paragraph (j)(5)(i)(A) of this section, allocate any business interest expense that was formerly such UTP EBIE to its specified partner. For purposes of this section, the term

specified partner refers to the partner of upper-tier partnership that, due to the initial allocation of excess business interest expense from lower-tier partnership to upper-tier partnership, was required to reduce its section 704(b) capital account pursuant to paragraph (j)(2) of this section. Similar principles apply if the specified partner of such business interest expense is itself a partnership. See paragraph (j)(6) of this section for rules that apply if a specified partner disposes of its partnership interest.

(C) Third, in the manner provided in paragraph (j)(7)(ii) (or (iii), as the case may be) of this section, take into account any negative basis adjustments under section 734(b) previously made to the UTP EBIE treated as business interest expense paid or accrued in paragraph (j)(5)(i)(A) of this section. Additionally, persons treated as specified partners with respect to the UTP EBIE treated as business interest expense paid or accrued in paragraph (j)(5)(i)(A) shall take any negative basis adjustments under section 743(b) into account in the manner provided in paragraph (j)(7)(ii) (or (iii), as the case may be) of this section.

(ii) *Upper-tier partnership disposition of lower-tier partnership interest.* If upper-tier partnership disposes of a lower-tier partnership interest (transferred interest), upper-tier partnership shall—

(A) First, apply the rules in paragraph (h)(3) of this section (except as provided in paragraphs (j)(5)(ii)(B) and (C) of this section), using any reasonable method (including, for example, FIFO and LIFO) to determine which UTP EBIE is reduced pursuant to paragraph (h)(3) of this section.

(B) Second, increase the adjusted basis of the transferred interest immediately before the disposition by the total amount of the UTP EBIE that was reduced in paragraph (j)(5)(ii)(A) of this section (the amount of UTP EBIE proportionate to the transferred interest).

(C) Third, in the manner provided in paragraph (j)(7)(iv) of this section, take into account any negative basis adjustments under sections 734(b) and 743(b) previously made to the UTP EBIE that was reduced in (A) earlier.

(6) *Disposition of a specified partner's partnership interest—(i) General rule.* If a specified partner (transferor) disposes

of an upper-tier partnership interest (or an interest in a partnership that itself is a specified partner), the portion of any UTP EBIE to which the transferor's status as specified partner relates is not reduced pursuant to paragraph (j)(5)(ii) of this section. Rather, such UTP EBIE attributable to the interest disposed of is retained by upper-tier partnership and the transferee is treated as the specified partner for purposes of this section with respect to such UTP EBIE. Thus, upper-tier partnership must allocate any business interest expense that was formerly such UTP EBIE to the transferee. However, see paragraph (j)(8) of this section for rules regarding the deductibility of such transferee's business interest expense that was formerly UTP EBIE.

(ii) *Special rules—(A) Distribution in liquidation of a specified partner's partnership interest.* If a specified partner receives a distribution of property in complete liquidation of an upper-tier partnership interest, the portion of UTP EBIE of upper-tier partnership attributable to the liquidated interest shall not have a specified partner. If a specified partner (transferee) receives a distribution of an interest in upper-tier partnership in complete liquidation of a partnership interest, the transferee is the specified partner with respect to UTP EBIE of upper-tier partnership only to the same extent it was prior to the distribution. Similar principles apply where an interest in a partnership that is a specified partner is distributed in complete liquidation of a transferee's partnership interest. See paragraph (j)(8) of this section for rules regarding the treatment of UTP EBIE that does not have a specified partner.

(B) *Contribution of a specified partner's partnership interest.* If a specified partner (transferor) contributes an upper-tier partnership interest to a partnership (transferee), the transferee is treated as the specified partner with respect to the portion of the UTP EBIE attributable to the contributed interest. Following the transaction, the transferor continues to be the specified partner with respect to the UTP EBIE attributable to the contributed interest. Similar principles apply where an interest in a partnership that is a specified partner is contributed to a partnership.

(7) *Effect of basis adjustments allocated to UTP EBIE—(i) In general.* Negative basis adjustments under sections 734(b) and 743(b) allocated to UTP EBIE do not affect the carryforward component (described in paragraph (j)(4) of this section) of such UTP EBIE. Rather, negative basis adjustments under sections 734(b) and 743(b) affect only the basis component of such UTP EBIE. For purposes of §§1.743-1(d), 1.755-1(b), and 1.755-1(c), the amount of tax loss that would be allocated to a transferee from a hypothetical disposition by upper-tier partnership of its UTP EBIE equals the adjusted basis of the UTP EBIE to which the transferee's status as specified partner relates. Additionally, solely for purposes of §1.755-1(b), upper-tier partnership shall treat UTP EBIE as an ordinary asset of upper-tier partnership.

(ii) *UTP EBIE treated as deductible business interest expense.* If UTP EBIE that was allocated a negative section 734(b) adjustment is subsequently treated as deductible business interest expense, then such deductible business interest expense does not result in a deduction to the upper-tier partnership or the specified partner of such deductible business interest expense. If UTP EBIE that was allocated a negative section 743(b) adjustment is subsequently treated as deductible business interest expense, the specified partner of such deductible business interest expense recovers any negative section 743(b) adjustment attributable to such deductible business interest expense (effectively eliminating any deduction for such deductible business interest expense).

(iii) *UTP EBIE treated as excess business interest expense.* If UTP EBIE that was allocated a negative section 734(b) or 743(b) adjustment is subsequently treated as excess business interest expense, the specified partner's basis decrease in its upper-tier partnership interest required under paragraph (h)(2) of this section is reduced by the amount of the negative section 734(b) or 743(b) adjustment previously made to such excess business interest expense. If such excess business interest expense is subsequently treated as business interest expense paid or accrued by the specified partner, no deduction shall be allowed for any of such business

interest expense. If the specified partner of such excess business interest expense is a partnership, such excess business interest expense is considered UTP EBIE that was previously allocated a negative section 734(b) adjustment for purposes of this section.

(iv) *UTP EBIE reduced due to a disposition.* If UTP EBIE that was allocated a negative section 734(b) or 743(b) adjustment is reduced pursuant to paragraph (j)(5)(ii)(A) of this section, the amount of upper-tier partnership's basis increase under paragraph (j)(5)(ii)(B) of this section to the disposed of lower-tier partnership interest is reduced by the amount of the negative section 734(b) or 743(b) adjustment previously made to such UTP EBIE.

(8) *Anti-loss trafficking—(i) Transferee specified partner.* No deduction shall be allowed to any transferee specified partner for any business interest expense derived from a transferor's share of UTP EBIE. For purposes of this section, the term transferee specified partner refers to any specified partner that did not reduce its section 704(b) capital account due to the initial allocation of excess business interest expense from lower-tier partnership to upper-tier partnership pursuant to paragraph (j)(2) of this section. However, the transferee described in paragraph (j)(6)(ii)(B) of this section is not a transferee specified partner for purposes of this section. If pursuant to paragraph (j)(5)(i)(B) of this section a transferee specified partner is allocated business interest expense derived from a transferor's share of UTP EBIE (business interest expense to which the partner's status as transferee specified partner relates), the transferee specified partner is deemed to recover a negative section 743(b) adjustment with respect to, and in the amount of, such business interest expense and takes such negative section 743(b) adjustment into account in the manner provided in paragraph (j)(7)(ii) (or (iii), as the case may be) of this section, regardless of whether a section 754 election was in effect or a substantial built-in loss existed at the time of the transfer by which the transferee specified partner acquired the transferred interest. However, to the extent a negative section 734(b) or 743(b) adjustment was previously made to such

business interest expense, the transferee specified partner does not recover an additional negative section 743(b) adjustment pursuant to this paragraph.

(ii) *UTP EBIE without a specified partner.* If UTP EBIE does not have a specified partner (as the result of a transaction described in paragraph (j)(6)(ii)(A) of this section), upper-tier partnership shall not allocate any business interest expense that was formerly such UTP EBIE to its partners. Rather, for purposes of applying paragraph (f)(2) of this section, upper-tier partnership shall treat such business interest expense as the allocable business interest expense (as defined in paragraph (f)(2)(ii) of this section) of a §1.163(j)-6(j)(8)(ii) account. Additionally, if UTP EBIE that does not have a specified partner (as the result of a transaction described in paragraph (j)(6)(ii)(A) of this section) is treated as paid or accrued pursuant to paragraph (g) of this section, upper-tier partnership shall make a §1.163(j)-6(h)(5) basis adjustment to its property in the amount of the adjusted basis (if any) of such UTP EBIE at the time such UTP EBIE is treated as business interest expense paid or accrued pursuant to paragraph (g) of this section.

(iii) *Disallowance of addback.* No basis increase under paragraph (j)(5)(ii) of this section shall be allowed to upper-tier partnership for any disallowed UTP EBIE. For purposes of this section, the term disallowed UTP EBIE refers to any UTP EBIE that has a specified partner that is a transferee specified partner (as defined in paragraph (j)(8)(i) of this section) and any UTP EBIE that does not have a specified partner (as the result of a transaction described in paragraph (j)(6)(ii)(A) of this section). For purposes of applying paragraph (j)(5)(ii) of this section, upper-tier partnership shall treat any disallowed UTP EBIE in the same manner as UTP EBIE that has previously been allocated a negative section 734(b) adjustment and take such negative section 734(b) adjustment into account in the manner provided in paragraph (j)(7)(iv) of this section. However, upper-tier partnership does not treat disallowed UTP EBIE as though it were allocated a negative section 734(b) adjustment pursuant to this paragraph to the extent a

negative section 734(b) or 743(b) adjustment was previously made to such disallowed UTP EBIE.

(9) *Determining allocable ATI and allocable business interest income of upper-tier partnership partners—(i) In general.* When applying paragraph (f)(2)(ii) of this section, an upper-tier partnership determines the allocable ATI and allocable business interest income of each of its partners in the manner provided in this paragraph. Specifically, if an upper-tier partnership's net amount of tax items that comprise (or have ever comprised) ATI is greater than or equal to its ATI, upper-tier partnership applies the rules in paragraph (j)(9)(ii)(A) of this section to determine each partner's allocable ATI. See *Example 32* in paragraph (o)(32) of this section. However, if an upper-tier partnership's net amount of tax items that comprise (or have ever comprised) ATI is less than its ATI, upper-tier partnership applies the rules in paragraph (j)(9)(ii)(B) of this section to determine each partner's allocable ATI. See *Example 33* in paragraph (o)(33) of this section. To determine each partner's allocable business interest income, an upper-tier partnership applies the rules in paragraph (j)(9)(iii) of this section.

(ii) *Upper-tier partner's allocable ATI—(A)* If an upper-tier partnership's net amount of tax items that comprise (or have ever comprised) ATI is greater than or equal to its ATI (as determined under §1.163(j)-1(b)(1)), then an upper-tier partner's allocable ATI (for purposes of paragraph (f)(2)(ii) of this section) is equal to the product of—

(1) Such partner's distributive share of gross income and gain items that comprise (or have ever comprised) ATI, minus such partner's distributive share of gross loss and deduction items that comprise (or have ever comprised) ATI; multiplied by

(2) A fraction, the numerator of which is upper-tier partnership's ATI (as determined under §163(j)-1(b)(1)), and the denominator of which is upper-tier partnership's net amount of tax items that comprise (or have ever comprised) ATI.

(B) If an upper-tier partnership's net amount of tax items that comprise (or have ever comprised) ATI is less than its ATI (as determined under §1.163(j)-1(b)(1)), then an upper-tier partner's allocable ATI (for purposes of paragraph (f)(2)(ii) of this section) is equal to the product of—

(1)), then an upper-tier partner's allocable ATI (for purposes of paragraph (f)(2)(ii) of this section) is equal to—

(1) The excess (if any) of such partner's distributive share of gross income and gain items that comprise (or have ever comprised) ATI, over such partner's distributive share of gross loss and deduction items that comprise (or have ever comprised) ATI; increased by

(2) The product of—

(i) Such partner's share of residual profits expressed as a fraction; multiplied by

(ii) Upper-tier partnership's ATI (as determined under §1.163(j)-1(b)(1)), minus the aggregate of all the partners' amounts determined under paragraph (j)(9)(ii)(B) (1) of this section.

(iii) *Upper-tier partner's allocable business interest income.* An upper-tier partner's allocable business interest income (for purposes of paragraph (f)(2)(ii) of this section) is equal to the product of—

(A) Such partner's distributive share of items that comprise (or have ever comprised) business interest income; multiplied by

(B) A fraction, the numerator of which is upper-tier partnership's business interest income (as determined under §1.163(j)-1(b)(4)), and the denominator of which is the upper-tier partnership's amount of items that comprise (or have ever comprised) business interest income.

* * * * *

(1) * * *

(4) * * *

(iv) *S corporation deductions capitalized by an S corporation shareholder.* The ATI of an S corporation shareholder is increased by the portion of such S corporation shareholder's allocable share of qualified expenditures (as defined in section 59(e)(2)) to which an election under section 59(e) applies.

* * * * *

(n) *Treatment of self-charged lending transactions between partnerships and partners.* In the case of a lending transaction between a partner (lending partner) and partnership (borrowing partnership) in which the lending partner owns a direct interest (self-charged lending transaction), any business interest expense of the borrowing partnership attributable to the self-charged lending transaction

is business interest expense of the borrowing partnership for purposes of this section. If in a given taxable year the lending partner is allocated excess business interest expense from the borrowing partnership and has interest income attributable to the self-charged lending transaction (interest income), the lending partner is deemed to receive an allocation of excess business interest income from the borrowing partnership in such taxable year. The amount of the lending partner's deemed allocation of excess business interest income is the lesser of such lending partner's allocation of excess business interest expense from the borrowing partnership in such taxable year or the interest income attributable to the self-charged lending transaction in such taxable year. To prevent the double counting of business interest income, the lending partner includes interest income that was treated as excess business interest income pursuant to this paragraph (n) only once when calculating its own section 163(j) limitation. In cases where the lending partner is not a C corporation, to the extent that any interest income exceeds the lending partner's allocation of excess business interest expense from the borrowing partnership for the taxable year, and such interest income otherwise would be properly treated as investment income of the lending partner for purposes of section 163(d) for that year, such excess amount of interest income will continue to be treated as investment income of the lending partner for that year for purposes of section 163(d). See *Example 26* in paragraph (o)(26) of this section.

(o) * * *

(24) *Example 24—(i) Facts.* On January 1, 2020, L and M form LM, a publicly traded partnership (as defined in §1.7704-1), and agree that each will be allocated a 50 percent share of all LM items. The partnership agreement provides that LM will make allocations under section 704(c) using the remedial allocation method under §1.704-3(d). L contributes depreciable property with an adjusted tax basis of \$4,000 and a fair market value of \$10,000. The property is depreciated using the straight-line method with a 10-year recovery period and has 4 years remaining on its recovery period. M contributes \$10,000 in cash, which LM uses to purchase land. Except for the depreciation deductions, LM's expenses equal its income in each year of the 10 years commencing with the year LM is formed. LM has a valid section 754 election in effect.

(ii) *Section 163(j) remedial items and partner basis items.* LM sells the asset contributed by L in a fully taxable transaction at a time when the adjusted basis of the property is \$4,000. Under §1.163(j)-6(e)(2)(ii), solely for purposes of §1.163(j)-6, the tax gain of \$6,000 is allocated equally between L and M (\$3,000 each). To avoid shifting built-in gain to the non-contributing partner (M) in a manner consistent with the rule in section 704(c), a remedial deduction of \$3,000 is allocated to M (leaving M with no net tax gain), and remedial income of \$3,000 is allocated to L (leaving L with total tax gain of \$6,000).

(25) *Example 25—(i) Facts.* The facts are the same as *Example 24* in paragraph (o)(24) of this section except the property contributed by L had an adjusted tax basis of zero. For each of the 10 years following the contribution, there would be \$500 of section 704(c) remedial income allocated to L and \$500 of remedial deductions allocated to M with respect to the contributed asset. A buyer of M's units would step into M's shoes with respect to the \$500 of annual remedial deductions. A buyer of L's units would step into L's shoes with respect to the \$500 of annual remedial income and would have an annual section 743(b) deduction of \$1,000 (net \$500 of deductions).

(ii) *Analysis.* Pursuant to §1.163(j)-6(d)(2)(ii), solely for purposes of §1.163(j)-6, a buyer of L's units immediately after formation of LM would offset its \$500 annual section 704(c) remedial income allocation with \$500 of annual section 743(b) adjustment (leaving the buyer with net \$500 of section 743(b) deduction). As a result, such buyer would be in the same position as a buyer of M's units. Each buyer would have net deductions of \$500 per year, which would not affect ATI before 2022.

(26) *Example 26—(i) Facts.* X and Y are partners in partnership PRS. In Year 1, PRS had \$200 of excess business interest expense. Pursuant to §1.163(j)-6(f)(2), PRS allocated \$100 of such excess business interest expense to each of its partners. In Year 2, X lends \$10,000 to PRS and receives \$1,000 of interest income for the taxable year (self-charged lending transaction). X is not in the trade or business of lending money. The \$1,000 of interest expense resulting from this loan is allocable to PRS's trade or business assets. As a result, such \$1,000 of interest expense is business interest expense of PRS. X and Y are each allocated \$500 of such business interest expense as their distributive share of PRS's business interest expense for the taxable year. Additionally, in Year 2, PRS has \$3,000 of ATI. PRS allocates the items comprising its \$3,000 of ATI \$0 to X and \$3,000 to Y.

(ii) *Partnership-level.* In Year 2, PRS's section 163(j) limit is 30 percent of its ATI plus its business interest income, or \$900 ($\$3,000 \times 30\%$ percent). Thus, PRS has \$900 of deductible business interest expense, \$100 of excess business interest expense, \$0 of excess taxable income, and \$0 of excess business interest income. Pursuant to §1.163(j)-6(f)(2), \$400 of X's allocation of business interest expense is treated as deductible business interest expense, \$100 of X's allocation of business interest expense is treated as excess business interest expense, and \$500 of Y's allocation of business interest expense is treated as deductible business interest expense.

(iii) *Lending partner.* Pursuant to §1.163(j)-6(n), X treats \$100 of its \$1,000 of interest income as excess business interest income allocated from PRS in Year 2. Because X is deemed to have been allocated \$100 of excess business interest income from PRS, and excess business interest expense from a partnership is treated as paid or accrued by a partner to the extent excess business interest income is allocated from such partnership to a partner, X treats its \$100 allocation of excess business interest expense from PRS in Year 2 as business interest expense paid or accrued in Year 2. X, in computing its limit under section 163(j), has \$100 of business interest income (\$100 deemed allocation of excess business interest income from PRS in Year 2) and \$100 of business interest expense (\$100 allocation of excess business interest expense treated as paid or accrued in Year 2). Thus, X's \$100 of business interest expense is deductible business interest expense. At the end of Year 2, X has \$100 of excess business interest expense from PRS (\$100 from Year 1). X treats \$900 of its \$1,000 of interest income as investment income for purposes of section 163(d).

(27) *Example 27—(i) Formation.* A, B, and C formed partnership UTP in Year 1, each contributing \$1,000 cash in exchange for a one third interest. Also in Year 1, UTP, D, and E formed partnership LTP, each contributing \$1,200 cash in exchange for a one third interest. LTP borrowed \$9,000, resulting in each of its partners increasing its basis in LTP by \$3,000. Further, the partners of UTP each increased their bases in UTP by \$1,000 each as a result of the LTP borrowing.

(ii) *Application of section 163(j) to LTP.* In Year 1, LTP's only item of income, gain, loss, or deduction was \$900 of BIE. As a result, LTP had \$900 of excess business interest expense. Pursuant to §1.163(j)-6(f)(2), LTP allocated \$300 of excess business interest expense to each of its partners.

(iii) *Section 704(b) capital account adjustments.* Solely for purposes of section 704(b) and the regulations thereunder, each direct and indirect partner of LTP treats its allocation of excess business interest expense from LTP as a section 705(a)(2)(B) expenditure pursuant to §1.163(j)-6(j)(2). Further, each indirect partner of LTP that reduced its section 704(b) capital account as a result of the \$300 allocation of excess business interest expense to UTP is the specified partner of such UTP EBIE, as defined in §1.163(j)-6(j)(5)(i)(B). Each partner of UTP reduced its capital account by \$100 as a result of the \$300 allocation of excess business interest expense from LTP to UTP. As a result, A, B, and C are each a specified partner with respect to \$100 of UTP EBIE.

(iv) *Basis adjustments.* Pursuant to §1.163(j)-6(h)(2), D, E, and UTP each reduce its basis in LTP by the amount of its allocation of excess business interest expense from LTP. As a result, each partner's basis in its LTP interest is \$3,900. Pursuant to §1.163(j)-6(j)(3), the direct partners of UTP (A, B, and C) do not reduce the bases of their interests in UTP as a result of the allocation of excess business interest expense from LTP to UTP. UTP treats its \$300 allocation of excess business interest expense from LTP as UTP EBIE, as defined in §1.163(j)-6(j)(4). At the end of Year 1, the section 704(b) and tax basis balance sheets of LTP and UTP are as follows:

Table 60 to paragraph (o)(27)(iv)—UTP Balance Sheet - End of Year 1

	Assets		Liabilities and Capital		
	Tax	Book		Tax	Book
Cash	\$1,800	\$1,800	Liability	\$3,000	\$3,000
LTP	3,900	3,900	Capital:		Basis
UTP EBIE	300	0	A	1,000	900
			B	1,000	900
			C	1,000	900
Total	6,000	5,700	Total	6,000	5,700
					6,000

Table 61 to paragraph (o)(27)(iv)—LTP Balance Sheet - End of Year 1

	Assets		Liabilities and Capital		
	Tax	Book		Tax	Book
Cash	\$11,700	\$11,700	Liability	\$9,000	\$9,000
			Capital:		Basis
			D	900	900
			E	900	900
			UTP	900	900
Total	11,700	11,700	Total	11,700	11,700
					11,700

Table 62 to paragraph (o)(27)(iv)—UTP EBIE - End of Year 1

	Specified partner		Partnership	
	Basis	Carryforward	Basis	Carryforward
A	\$100	\$100	UTP	\$300
B	100	100		
C	100	100		
Total	300	300	Total	300
				300

(28) *Example 28—(i) Facts.* The facts are the same as *Example 27* in paragraph (o)(27) of this section. In Year 2, while a section 754 election was in effect, C sold its UTP interest to D for \$900. In Year 3, LTP's only item of income, gain, loss, or deduction was \$240 of income, which it allocated to UTP. Such \$240 of income resulted in \$240 of excess taxable income, which LTP allocated to UTP pursuant to §1.163(j)-f(2). Further, in Year 3, UTP's only item of income, gain, loss, or deduction was its \$240 allocation of income from LTP. UTP allocated such \$240 of income equally among its partners. In Year 4, UTP sold its interest in LTP to X for \$1,140.

(ii) *Sale of specified partner's UTP interest.* C's section 741 loss recognized on the sale of its partnership interest to D in Year 2 is \$100 (amount realized of \$900 cash, plus \$1,000 relief of liabilities, less \$2,000 basis in UTP). D's initial adjusted basis in the UTP interest acquired from C in Year 2 is \$1,900 (the cash paid for C's interest, \$900, plus \$1,000, D's share of UTP liabilities). D's interest in UTP's previously taxed capital is \$1,000 (\$900, the amount of cash D would receive if PRS liquidated immediately after the hypothetical transaction, decreased by \$0, the amount of tax gain allocated to

D from the hypothetical transaction, and increased by \$100, the amount of tax loss that would be allocated to D from the hypothetical transaction). D's share of the adjusted basis to the partnership of the partnership's property is \$2,000 (\$1,000 share of previously taxed capital, plus \$1,000 share of the partnership's liabilities). Therefore, the amount of the basis adjustment under section 743(b) to partnership property is negative \$100 (the difference between \$1,900 and \$2,000). D's negative \$100 section 743(b) adjustment is allocated among UTP's assets under section 755. Under §1.755-1(b)(2), the amount of D's section 743(b) adjustment allocated to ordinary income property is equal to the total amount of income or loss that would be allocated to D from the sale of all ordinary income property in a hypothetical transaction. Solely for purposes of §1.755-1(b), any UTP EBIE is treated as ordinary income property. Thus, D's negative \$100 section 743(b) basis adjustment is allocated to UTP EBIE.

(iii) *Application of section 163(j) to UTP.* In Year 3, UTP was allocated excess taxable income from LTP. Thus, UTP applies the rules in §1.163(j)-6(j)(5)(i). First, pursuant to §1.163(j)-6(j)(5)(i)(A), UTP

applies the rules in §1.163(j)-6(g) to its UTP EBIE. Because UTP was allocated \$240 of excess taxable income from LTP in Year 3, UTP treats \$240 of its UTP EBIE as business interest expense paid or accrued in Year 3. Specifically, UTP treats \$80 of each partner's share of UTP EBIE as business interest expense paid or accrued. Under these circumstances, UTP's method for determining which UTP EBIE is treated as business interest expense paid or accrued is reasonable. Second, pursuant to §1.163(j)-6(j)(5)(i)(B), UTP allocates such business interest expense that was formerly UTP EBIE to its specified partner. Accordingly, A and B are each allocated \$80 of business interest expense. Pursuant to §1.163(j)-6(j)(6)(i), D is treated as the specified partner with respect to \$100 of UTP EBIE (C's share of UTP EBIE prior to the sale). Further, pursuant to §1.163(j)-6(j)(5)(i)(A), \$80 of the UTP EBIE to which D is the specified partner was treated as business interest expense paid or accrued. Accordingly, D is allocated such \$80 of business interest expense. After determining each partner's allocable share of section 163(j) items used in its own section 163(j) calculation, UTP determines each partner's allocable share of excess items pursuant to §1.163(j)-6(f)(2).

Table 62 to paragraph (o)(28)(iii)—UTP's application of §1.163(j)-6(f)(2)(ii) in Year 3

	A	B	D	Total
Allocable ATI	\$80	\$80	\$80	\$240
Allocable BII	0	0	0	0
Allocable BIE	80	80	80	240

Table 63 to paragraph (o)(28)(iii)—UTP's application of §1.163(j)-6(f)(2)(xi) in Year 3

	A	B	D	Total
Deductible BIE	\$24	\$24	\$24	\$72
EBIE allocated	56	56	56	168
ETI allocated	0	0	0	0
EBII allocated	0	0	0	0

(iv) *Treatment of business interest expense that was formerly UTP EBIE.* After determining each partner's share of deductible business interest expense and section 163(j) excess items, UTP takes into account any basis adjustments under section 734(b) and the partners take into account any basis adjustments under section 743(b) to business interest expense that was formerly UTP EBIE pursuant to §1.163(j)-6(j)(5)(i)(C). None of the UTP EBIE treated as business interest expense paid or accrued in Year 3 was allocated a section 734(b) adjustment. Additionally, neither A's nor B's share of business interest expense that was formerly UTP EBIE was allocated a section 743(b) basis adjustment. Further, neither A nor B is a transferee specified partner, as defined in §1.163(j)-6(j)(8)(i). Therefore, no special adjustments are required to A's or B's \$24 of deductible business interest expense and \$56 of excess business interest expense. At the end of Year 3, A and B each has an

adjusted basis in UTP of \$2,000 and each is the specified partner with respect to \$20 of UTP EBIE. D's share of business interest expense that was formerly UTP EBIE was allocated a negative \$80 section 743(b) adjustment. Pursuant to §1.163(j)-6(j)(7)(ii), D recovers \$24 of the negative section 743(b) adjustment, effectively eliminating the \$24 deduction resulting from its \$24 allocation of deductible business interest expense. Additionally, pursuant to §1.163(j)-6(j)(7)(iii), the \$56 basis decrease required under §1.163(j)-6(h)(2) for D's allocation of excess business interest expense is reduced by the negative section 743(b) adjustment attributable to such excess business interest expense (\$56). Consequently, D does not reduce the basis of its interest in UTP pursuant §1.163(j)-6(h)(2) upon being allocated such excess business interest expense. As a result, D has \$56 of excess business interest expense with a basis of \$0. At the end of Year 3, D has an adjusted basis in UTP of

\$1,980 and is the specified partner with respect to \$20 of UTP EBIE.

(v) *Application of anti-loss trafficking rules.* Although D is a transferee specified partner, as defined in §1.163(j)-6(j)(8)(i), with respect to its \$80 allocation of business interest expense from UTP, no special basis adjustments under §1.163(j)-6(j)(8)(i) are required because all \$80 of such business interest expense was already fully offset by negative section 743(b) adjustment. However, if such \$80 of business interest expense was not fully offset by a negative section 743(b) adjustment, D's status as transferee specified partner would cause such business interest expense to be fully offset by a negative section 743(b) adjustment pursuant to §1.163(j)-6(j)(8)(i), regardless of whether a section 754 election was not in effect with respect to the sale of UTP from C to D. Such negative section 743(b) adjustment would be taken into account in the manner described in §1.163(j)-6(j)(7).

Table 64 to paragraph (o)(28)(v)—UTP EBIE - End of Year 3

	Specified partner			Partnership	
	Basis	743(b)	Carryforward	Basis	Carryforward
A	\$20		\$20	UTP	\$60
B	20		20		
D	20	(20)	20		
Total	60		60	Total	60
					60

(vi) *Sale of LTP interest.* In Year 4, UTP disposed of its interest in LTP. Thus, UTP applies the rules in §1.163(j)-6(j)(5)(ii). First, pursuant to §1.163(j)-6(j)(5)(ii)(A), UTP applies the rules in §1.163(j)-6(h)(3) to its UTP EBIE. Because UTP disposed of all of its LTP interest, UTP reduces its UTP EBIE by \$60. Second, pursuant to §1.163(j)-6(j)(5)(ii)(B), UTP increases the adjusted basis of its LTP interest by \$60 (the total amount of UTP EBIE that was reduced pursuant to §1.163(j)-6(j)(5)(ii)(A)). Third, pursuant to §1.163(j)-6(j)(5)(ii)(C), this \$60 increase is reduced by \$20 to take into account the negative \$20 section 743(b) adjustment allocated in Year 2 to the \$20 of UTP EBIE reduced pursuant to §1.163(j)-6(j)(5)(ii)(A). As a result, UTP's adjusted

basis in its LTP interest immediately prior to the sale to X is \$4,180 (\$3,900 at the end of Year 1, plus \$240 allocation of income from LTP in Year 3, plus \$40 increase immediately prior to the sale attributable to the basis of UTP EBIE). UTP's section 741 loss recognized on the sale is \$40 (amount realized of \$1,140 cash, plus \$3,000 relief of liabilities, less \$4,180 adjusted basis in LTP). No deduction under section 163(j) is allowed to the UTP or X under chapter 1 of subtitle A of the Code for any of such UTP EBIE reduced under §1.163(j)-6(h)(3). Pursuant to §1.163(j)-6(h)(5), LTP has a §1.163(j)-6(h)(5) basis adjustment of \$40. LTP does not own property of the character required to be adjusted. Thus, under §1.755-1(c)(4), the adjustment is made when LTP

subsequently acquires capital gain property to which an adjustment can be made. Regardless of whether a \$20 negative section 743(b) adjustment was allocated to the \$20 of UTP EBIE reduced pursuant to §1.163(j)-6(j)(5)(ii)(A), UTP would only increase its basis in LTP pursuant to §1.163(j)-6(j)(5)(ii) by \$40. The specified partner of such \$20 of UTP EBIE is a transferee specified partner. Therefore, it is treated as disallowed UTP EBIE under §1.163(j)-6(j)(8)(iii) of this section. As a result, UTP would treat such \$20 of UTP EBIE for purposes of §1.163(j)-6(j)(5)(ii) as though it were allocated a negative section 734(b) adjustment of \$20.

(29) *Example 29—(i) Facts.* The facts are the same as *Example 27* in paragraph (o)(27) of this sec-

tion. In Year 2, while a section 754 election was in effect, UTP distributed \$900 to C in complete liquidation of C's partnership interest. In Year 3, UTP's only item of income, gain, loss, or deduction was \$240 of income, which it allocated to UTP. Such \$240 of income resulted in \$240 of excess taxable income, which LTP allocated to UTP pursuant to §1.163(j)-f(2). Further, in Year 3, UTP's only item of income, gain, loss, or deduction was its \$240 allocation of income from LTP. UTP allocated such \$240 of income equally among its partners. In Year 4, UTP sold its interest in LTP to X for \$1,140.

(ii) *Liquidating distribution to specified partner.* C's section 731(a)(2) loss recognized on the disposition of its partnership interest is \$100 (\$2,000 basis in UTP, less amount realized of \$900 cash, plus \$1,000 relief of liabilities). Because the election under section 754 is in effect, UTP has a section 734(b) decrease to the basis of its assets of \$100 (the amount of section 731(a)(2) loss recognized by C). Under section 755, the entire negative \$100 section 734(b)

adjustment is allocated to UTP EBIE. Following the liquidation of C, UTP's basis in its assets (\$900 of cash, plus \$3,900 interest in LTP, plus \$200 basis of UTP EBIE) equals the aggregate outside basis of partners A and B (\$5,000).

(iii) *Application of section 163(j) to UTP.* In Year 3, UTP was allocated excess taxable income from LTP. Thus, UTP applies the rules in §1.163(j)-6(j)(5)(i). First, pursuant to §1.163(j)-6(j)(5)(i)(A), UTP applies the rules in §1.163(j)-6(g) to its UTP EBIE. Because UTP was allocated \$240 of excess taxable income from LTP in Year 3, UTP treats \$240 of its UTP EBIE as business interest expense paid or accrued in Year 3. Specifically, UTP treats \$100 of A's share, \$100 of B's share, and \$40 of the UTP EBIE that does not have a specified partner as business interest expense paid or accrued. Under these circumstances, UTP's method for determining which UTP EBIE is treated as business interest expense paid or accrued is reasonable. Second, pursuant to §1.163(j)-6(j)(5)(i)(B), UTP allocates such

business interest expense that was formerly UTP EBIE to its specified partner. Accordingly, each of A and B is allocated \$100 of business interest expense.

(iv) *Application of anti-loss trafficking rules.*

Following the liquidating distribution to C in Year 2 (a transaction described in §1.163(j)-6(j)(6)(ii)(A)), the \$100 of UTP EBIE to which C was formerly the specified partner does not have a specified partner. Thus, UTP does not allocate any deductible business interest expense or excess business interest expense that was formerly C's share of UTP EBIE to A or B. Rather, pursuant to §1.163(j)-6(j)(8)(ii), UTP treats such business interest expense as the allocable business interest expense, as defined in §1.163(j)-6(f)(2)(ii), of a §1.163(j)-6(j)(8)(ii) account for purposes of applying §1.163(j)-6(f)(2). After determining each partner's allocable share of section 163(j) items used in its own section 163(j) calculation, UTP determines each partner's allocable share of excess items pursuant to §1.163(j)-6(f)(2).

Table 65 to paragraph (o)(29)(iv)—UTP's application of §1.163(j)-6(f)(2)(ii) in Year 3

	A	B	§1.163(j)-6(j)(8)(ii) account	Total
Allocable ATI	\$120	\$120	\$0	\$240
Allocable BII	0	0	0	0
Allocable BIE	100	100	40	240

Table 65 to paragraph (o)(29)(iv)—UTP's application of §1.163(j)-6(f)(2)(xi) in Year 3

	A	B	§1.163(j)-6(j)(8)(ii) account	Total
Deductible BIE	\$36	\$36	\$0	\$72
EBIE allocated	64	64	40	168
ETI allocated	0	0	0	0
EBII allocated	0	0	0	0

(v) *Treatment of business interest expense that was formerly UTP EBIE.* After determining each partner's share of deductible business interest expense and section 163(j) excess items, UTP takes into account any basis adjustments under section 734(b) and the partners take into account any basis under section 743(b) to business interest expense that was formerly UTP EBIE pursuant to §1.163(j)-6(j)(5)(i)(C). None of the UTP EBIE treated as business interest expense paid or

accrued in Year 3 was allocated a section 743(b) adjustment. Further, neither A nor B is a transferee specified partner, as defined in §1.163(j)-6(j)(8)(i). Therefore, no special basis adjustments are required under §1.163(j)-6(j)(8)(i). The \$40 of excess business interest expense allocated to the §1.163(j)-6(j)(8)(ii) account is not allocated to A or B and is not carried over by UTP. Additionally, UTP does not have a §1.163(j)-6(h)(5) basis adjustment because such \$40 of business interest

expense does not have any basis. Thus, A and B each has \$36 of deductible business interest expense and \$64 of excess business interest expense. At the end of Year 3, A and B each has an adjusted basis in UTP of \$2,520 (\$2,500 outside basis, plus \$120 allocation of income, less \$36 of deductible business interest expense, less \$64 of excess business interest expense), and neither A nor B is a specified partner with respect to any of UTP's \$60 of UTP EBIE.

Table 66 to paragraph (o)(29)(v)—UTP EBIE - End of Year 3

	Specified partner		Partnership	
	Basis	Carryforward	Basis	Carryforward
A	\$0	\$0	UTP	\$0
B	0	0		
§1.163(j)-6(j)(8)(ii) account	0	60		
Total	0	60	Total	0
				60

(vi) *Sale of LTP interest.* In Year 4, UTP disposed of its interest in LTP. Thus, UTP applies the rules in §1.163(j)-6(j)(5)(ii). First, pursuant to §1.163(j)-6(j)(5)(ii)(A), UTP applies the rules in §1.163(j)-6(h)(3) to its UTP EBIE. Because UTP disposed of all of

its LTP interest, UTP reduces its UTP EBIE by \$60. Second, pursuant to §1.163(j)-6(j)(5)(ii)(B), UTP increases the adjusted basis of its LTP interest by \$60 (the total amount of UTP EBIE that was reduced pursuant to §1.163(j)-6(j)(5)(ii)(A)). Third, pursuant to

§1.163(j)-6(j)(5)(ii)(C), this \$60 increase is reduced by \$60 to take into account the negative \$60 section 734(b) adjustment allocated in Year 2 to the \$60 of UTP EBIE reduced pursuant to §1.163(j)-6(j)(5)(ii)(A). As a result, UTP's adjusted basis in its LTP in-

terest immediately prior to the sale to X is \$4,140 (\$3,900 at the end of Year 1, plus \$240 allocation of income from LTP in Year 3). UTP has no section 741 gain or loss recognized on the sale (amount realized of \$1,140 cash, plus \$3,000 relief of liabilities, equals \$4,140 adjusted basis in LTP). No deduction under section 163(j) is allowed to the UTP or X under chapter 1 of subtitle A of the Code for any of such UTP EBIE reduced under §1.163(j)-6(h)(3). Regardless of whether the \$60 of UTP EBIE's basis was reduced by a \$60 negative section 734(b) adjustment, UTP would not increase its basis in LTP pursuant to §1.163(j)-6(j)(5)(ii) of this section as a result of the sale to X. The \$60 of UTP EBIE does not have a specified partner. Therefore, it is treated as disallowed UTP EBIE under §1.163(j)-6(j)(8)(ii) of this section. As a result, UTP would treat such \$60 of UTP EBIE for purposes of §1.163(j)-6(j)(5)(ii) as though it were allocated a negative section 734(b) adjustment of \$60.

(30) *Example 30*—(i) X, Y and Z are partners in partnership PRS, PRS and A are partners in UTP, and UTP is a partner in LTP. LTP allocates \$15 of excess business interest expense to UTP. Pursuant to §1.163(j)-6(j)(2), UTP reduces its section 704(b) capital account (capital account) in LTP by \$15, A reduces its capital account in UTP by \$5, PRS reduces its capital account in UTP by \$10, X reduces its capital account in PRS by \$4, and Y reduces its capital account in PRS by \$6. Thus, A, PRS, X, and Y are the specified partner with respect to \$5, \$10, \$4, and \$6 of UTP EBIE, respectively.

(ii) Assume the same facts in (i) except that PRS distributed cash to Y in complete liquidation of Y's interest in PRS. As a result, pursuant to §1.163(j)-6(j)(6)(ii)(A), Y's share of UTP EBIE would not have a specified partner. In a subsequent year, if LTP allocated UTP \$15 of excess business interest income, UTP would apply the rules in §1.163(j)-6(j)(5)(i) and allocate \$5 of deductible business interest expense to A and \$10 of deductible business interest expense to PRS (the specified partners of such deductible business interest expense). Because the \$10 of deductible business interest expense allocated to PRS was formerly UTP EBIE, PRS must also apply the rules in §1.163(j)-6(j)(5)(i). PRS would allocate \$4 of such deductible business interest expense to X (the specified partner of such \$4). However, as a result of the liquidating distribution to Y, the remaining \$6 of deductible business interest expense does not have a specified partner. Thus, pursuant to §1.163(j)-6(j)(8)(ii), PRS would make a §1.163(j)-6(h)(5) basis adjustment to its property in the amount of the adjusted basis (if any) of such \$6 of deductible business interest expense.

(iii) Assume the same facts as in (i) except that PRS distributed its interest in UTP to Y in complete liquidation of Y's interest in PRS. Pursuant to §1.163(j)-6(j)(6)(ii)(A), Y is the specified partner with respect to UTP EBIE of UTP only to the same extent it was prior to the distribution (\$6). As a result, the UTP EBIE of UTP in excess of the UTP EBIE for which Y is the specified partner (X's \$4) does not have a specified partner. If in a subsequent year LTP allocated UTP \$15 of excess business interest income, UTP would apply the rules in §1.163(j)-6(j)(5)(i) and allocate \$5 of deductible business interest expense to A and \$6 of deductible business interest

expense to Y. Regarding the \$4 of DBIE without a specified partner, UTP would apply the rules in §1.163(j)-6(j)(8)(ii) and make a §1.163(j)-6(h)(5) basis adjustment to its property in the amount of the adjusted basis (if any) of such \$4 of deductible business interest expense.

(iv) Assume the same facts as in (i) except that A contributes its UTP interest to a new partnership, PRS2. Following the contribution, PRS2 is treated as the specified partner with respect to the portion of the UTP EBIE attributable to the contributed interest (\$5). Further, A continues to be the specified partner with respect to the UTP EBIE attributable to the contributed interest (\$5). If in a subsequent year LTP allocated UTP \$15 of excess business interest income, UTP would apply the rules in §1.163(j)-6(j)(5)(i) and allocate \$5 of deductible business interest expense to PRS2, and PRS2 would allocate such \$5 of deductible business interest expense to A.

(31) *Example 31*—(i) *Facts*. In Year 1, A, B, and C formed partnership PRS by each contributing \$1,000 cash. PRS borrowed \$900, causing each partner's basis in PRS to increase by \$300 under section 752. Also in Year 1, PRS purchased Capital Asset X for \$200. In Year 2, PRS pays \$300 of business interest expense, all of which is disallowed and treated as excess business interest expense. PRS allocated the \$300 of excess business interest expense to its partners, \$100 each. Pursuant to §1.163(j)-6(h)(2), each partner reduced its adjusted basis in its PRS interest by its \$100 allocation of excess business interest expense to \$1,200. In Year 3, when the fair market value of Capital Asset X is \$3,200 and no partner's basis in PRS has changed, PRS distributed \$1,900 to C in complete liquidation of C's partnership interest in a distribution to which section 737 does not apply. PRS had a section 754 election in effect in Year 3.

(ii) *Consequences to selling partner*. Pursuant to §1.163(j)-6(h)(3), C increases the adjusted basis of its interest in PRS by \$100 immediately before the disposition. Thus, C's section 731(a)(1) gain recognized on the disposition of its interest in PRS is \$900 (\$1,900 cash + \$300 relief of liabilities) – (\$1,200 outside basis + \$100 excess business interest expense add-back).

(iii) *Partnership basis*. Pursuant to §1.163(j)-6(h)(5), PRS has a \$100 increase to the basis of its assets attributable to a §1.163(j)-6(h)(5) basis increase immediately before C's disposition. Under section 755, the entire \$100 adjustment is allocated to Capital Asset X. Pursuant to §1.163(j)-6(h)(5), regardless of whether Capital Asset X is a depreciable or amortizable asset, none of the \$100 of §1.163(j)-6(h)(5) basis increase allocated to Capital Asset X is depreciable or amortizable. Additionally, PRS has a section 734(b) increase to the basis of its assets of \$900 (the amount of section 731(a)(1) gain recognized by C). Under section 755, the entire \$900 adjustment is allocated to Capital Asset X. As a result, PRS's basis in Capital Asset X is \$1,200 (\$200 + \$100 §1.163(j)-6(h)(5) basis increase + \$900 section 734(b) adjustment). Following the liquidation of C, PRS's basis in its assets (\$600 cash + \$1,200 Capital Asset X) equals the aggregate adjusted basis of partners A and B in PRS (\$1,800).

(32) *Example 32*—(i) *Facts*. X and Y are equal partners in partnership UTP, which is a partner in partnership LTP. Further, X and Y share the residual profits of UTP equally. In Year 1, LTP allocated (\$99) of income to UTP. LTP, in computing its limit under section 163(j), treated such (\$99) of income as ATI. Accordingly, in LTP's §1.163(j)-6(f)(2)(ii) calculation, UTP's allocable ATI was (\$99). UTP's only items of income, gain, loss or deduction in Year 1, other than the (\$99) allocation from LTP, were \$100 of trade or business income and \$15 of business interest expense. UTP allocated \$1 of income to X and \$0 to Y pursuant to section 704(c), the (\$99) of loss and remaining \$99 of income equally pursuant to section 704(b), and all \$15 of its business interest expense to X.

come to UTP. LTP, in computing its limit under section 163(j), treated such \$100 of income as ATI. Accordingly, in LTP's §1.163(j)-6(f)(2)(ii) calculation, UTP's allocable ATI was \$100. Additionally, pursuant to §1.163(j)-6(f)(2), LTP allocated \$50 of excess taxable income to UTP. UTP's only items of income, gain, loss or deduction in Year 1, other than the \$100 allocation from LTP, were \$100 of trade or business income and \$30 of business interest expense. UTP allocated its \$200 of income and gain items \$100 to X and \$100 to Y, and all \$30 of its business interest expense to X.

(ii) *Partnership-level*. Pursuant to §1.163(j)-6(e)(1), UTP, in computing its limit under section 163(j), does not increase or decrease any of its section 163(j) items by any of LTP's section 163(j) items. Pursuant to §1.163(j)-6(f)(1), UTP determines it has \$150 of ATI in Year 1 (\$100 of ATI resulting from its \$100 of trade or business income, plus \$50 of excess taxable income from LTP). UTP's section 163(j) limit is 30 percent of its ATI, or \$45 (\$150 x 30 percent). Thus, UTP has \$50 of excess taxable income and \$30 of deductible business interest expense.

(iii) *Partner-level allocations*. UTP allocates its \$50 of excess taxable income and \$30 of deductible business interest expense to X and Y pursuant to §1.163(j)-6(f)(2). To determine each partner's share of the \$50 of excess taxable income, UTP must determine each partner's allocable ATI and allocable business interest expense (as defined in §1.163(j)-6(f)(2)(ii)). X's allocable business interest expense is \$30 and Y's allocable business interest expense is \$0. Because UTP is an upper-tier partnership, UTP determines the allocable ATI of each of its partners in the manner provided in §1.163(j)-6(j)(9). Specifically, because UTP's net amount of tax items that comprise (or have ever comprised) ATI is \$200 (\$100 of trade or business income that UTP treated as ATI, plus UTP's \$100 allocation from LTP of items that comprised ATI to LTP), which is greater than its \$150 of ATI, UTP must apply the rules in §1.163(j)-6(j)(9)(ii)(A) to determine each of its partner's allocable ATI. UTP determines X's allocable ATI is \$75 (X's \$100 distributive share of gross income and gain items that comprise (or have ever comprised) ATI, multiplied by (\$150/\$200), the ratio of UTP's ATI to its tax items that comprise (or have ever comprised) ATI). In a similar manner, UTP determines Y's allocable ATI also equals \$75. Therefore, pursuant to §1.163(j)-6(f)(2), X is allocated \$30 of deductible business interest expense and Y is allocated \$50 of excess taxable income.

(33) *Example 33*—(i) *Facts*. X and Y are equal partners in partnership UTP, which is a partner in partnership LTP. Further, X and Y share the residual profits of UTP equally. In Year 1, LTP allocated (\$99) of income to UTP. LTP, in computing its limit under section 163(j), treated such (\$99) of income as ATI. Accordingly, in LTP's §1.163(j)-6(f)(2)(ii) calculation, UTP's allocable ATI was (\$99). UTP's only items of income, gain, loss or deduction in Year 1, other than the (\$99) allocation from LTP, were \$100 of trade or business income and \$15 of business interest expense. UTP allocated \$1 of income to X and \$0 to Y pursuant to section 704(c), the (\$99) of loss and remaining \$99 of income equally pursuant to section 704(b), and all \$15 of its business interest expense to X.

(ii) *Partnership-level*. Pursuant to §1.163(j)-6(e)(1), UTP, in computing its limit under section 163(j), does not increase or decrease any of its section 163(j) items by any of LTP's section 163(j) items. Pursuant to §1.163(j)-1(b)(1), UTP determines it has \$100 of ATI in Year 1 (\$100 of ATI resulting from its \$100 of trade or business income). UTP's section 163(j) limit is 30 percent of its ATI, or \$30 (\$100 x 30 percent). Thus, UTP has \$50 of excess taxable income and \$15 of deductible business interest expense.

(iii) *Partner-level allocations*. UTP allocates its \$50 of excess taxable income and \$15 of deductible business interest expense to X and Y pursuant to §1.163(j)-6(f)(2). To determine each partner's share of the \$50 of excess taxable income, UTP must determine each partner's allocable ATI and allocable business interest expense (as defined in §1.163(j)-6(f)(2)(ii)). X's allocable business interest expense is \$15 and Y's allocable business interest expense is \$0. Because UTP is an upper-tier partnership, UTP determines the allocable ATI of each of its partners in the manner provided in §1.163(j)-6(j)(9). Specifically, because UTP's net amount of tax items that comprise (or have ever comprised) ATI is \$1 (\$100 of trade or business income that UTP treated as ATI, plus UTP's (\$99) allocation from LTP of items that comprised ATI to LTP), which is less than its \$100 of ATI, UTP must apply the rules in §1.163(j)-6(j)(9)(ii)(B) to determine each of its partner's allocable ATI. UTP determines X's allocable ATI is \$50.50 (\$1, which is the excess of X's distributive share of gross income and gain items that comprise (or have ever comprised) ATI, \$100, over X's distributive share of gross loss and deduction items that comprise (or have ever comprised) ATI, \$99; increased by \$49.50, which is the product of 50 percent, X's residual profit sharing percentage, and \$99, UTP's \$100 of ATI minus \$1, which is the aggregate of all the partners' amounts determined under §1.163(j)-6(j)(9)(ii)(B)(I)). In a similar manner, UTP determines Y's allocable ATI is \$49.50. Therefore, pursuant to §1.163(j)-6(f)(2), X is allocated \$15 of deductible business interest expense and \$0.50 of excess taxable income, and Y is allocated \$49.50 of excess taxable income.

(34) *Example 34—(i) Facts*. X and Y are equal partners in partnership PRS. Further, X and Y share the profits of PRS equally. In 2019, PRS had ATI of \$100. In 2020, PRS's only items of income, gain, loss or deduction was \$1 of trade or business income, which it allocated to X pursuant to section 704(c).

(ii) *Partnership-level*. In 2020, PRS makes the election described in §1.163(j)-6(d)(5) to use its 2019 ATI in 2020. As a result, PRS has \$100 of ATI in 2020. PRS does not have any business interest expense. Therefore, PRS has \$100 of excess taxable income in 2020.

(iii) *Partner-level allocations*. PRS allocates its \$100 of excess taxable income to X and Y pursuant to §1.163(j)-6(f)(2). To determine each partner's share of the \$100 of excess taxable income, PRS must determine each partner's allocable ATI (as defined in §1.163(j)-6(f)(2)(ii)). Because PRS made the election described in §1.163(j)-6(d)(5), PRS must determine the allocable ATI of each of its partners pursuant to paragraph (j)(9) of this section in the same manner as an upper-tier partnership. Specifically, because PRS's amount of tax items that comprise

ATI before the election is \$1, which is less than its \$100 of ATI following the election, PRS must apply the rules in §1.163(j)-6(j)(9)(ii)(B) to determine each of its partner's allocable ATI. PRS determines X's allocable ATI is \$50.50 (\$1, which is the excess of X's distributive share of gross income and gain items that would have comprised ATI had PRS not made the election, \$1, over X's distributive share of gross loss and deduction items that would have comprised ATI had PRS not made the election, \$0; increased by \$49.50, which is the product of 50%, X's residual profit share, and \$99, PRS's \$100 of ATI minus \$1, the aggregate of all the partners' amounts determined under §1.163(j)-6(j)(9)(ii)(B)(I)). In a similar manner, PRS determines Y's allocable ATI is \$49.50. Therefore, pursuant to §1.163(j)-6(f)(2), X is allocated \$50.50 of excess taxable income, and Y is allocated \$49.50 of excess taxable income.

(35) *Example 35—(i) Facts*. X, a partner in partnership PRS, was allocated \$20 of excess business interest expense from PRS in 2018 and \$10 of excess business interest expense from PRS in 2019. In 2020, PRS allocated \$16 of excess taxable income to X.

(ii) *Analysis*. X treats 50 percent of its \$10 of excess business interest expense allocated from PRS in 2019 as §1.163(j)-6(g)(4) business interest expense. Thus, \$5 of §1.163(j)-6(g)(4) business interest expense is treated as paid or accrued by X in 2020 and is not subject to the section 163(j) limitation at X's level. Because X was allocated \$16 of excess taxable income from PRS in 2020, X treats \$16 of its \$25 of excess business interest expense as business interest expense paid or accrued pursuant to §1.163(j)-6(g)(2). X, in computing its limit under section 163(j) in 2020, has \$16 of ATI (as a result of its allocation of \$16 of excess taxable income from PRS), \$0 of business interest income, and \$16 of business interest expense (\$16 of excess business interest expense treated as paid or accrued in 2020). Pursuant to §1.163(j)-2(b)(2)(i), X's section 163(j) limit in 2020 is \$8 (\$16 x 50 percent). Thus, X has \$8 of business interest expense that is deductible under section 163(j). The \$8 of X's business interest expense not allowed as a deduction (\$16 business interest expense subject to section 163(j), less \$8 section 163(j) limit) is treated as business interest expense paid or accrued by X in 2021. At the end of 2020, X has \$9 of excess business interest expense from PRS (\$20 from 2018, plus \$10 from 2019, less \$5 treated as paid or accrued pursuant to §1.163(j)-6(g)(4), less \$16 treated as paid or accrued pursuant to §1.163(j)-6(g)(2)).

(36) *Example 36—(i) Facts*. X is a partner in partnership PRS. At the beginning of 2018, X's outside basis in PRS was \$100. X was allocated \$20 of excess business interest expense from PRS in 2018 and \$10 of excess business interest expense from PRS in 2019. X sold its PRS interest in 2019 for \$70.

(ii) *Analysis*. X treats 50 percent of its \$10 of excess business interest expense allocated from PRS in 2019 as §1.163(j)-6(g)(4) business interest expense. Thus, \$5 of §1.163(j)-6(g)(4) business interest expense is treated as paid or accrued by X in 2020 and is not subject to the section 163(j) limitation at X's level. Pursuant to paragraph (h)(3) of this section, immediately before the disposition, X increases the basis of its PRS interest to \$95. Thus, X has a \$25 section 741 loss recognized on the sale (\$70 - \$95).

(p) *Applicability dates—(1) In general*.
* * *

(2) *Paragraphs (c)(1) and (2), (d)(3) through (5), (e)(5) and (6), (f)(1)(iii), (g)(4), (h)(4) and (5), (j), (l)(4)(iv), (n), and (o)(24) through (29)*. Paragraphs (c)(1) and (2), (d)(3) through (5), (e)(5) and (6), (f)(1)(iii), (g)(4), (h)(4) and (5), (j), (l)(4)(iv), (n), and (o)(24) through (29) of this section apply to taxable years beginning on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of those paragraphs to a taxable year beginning after December 31, 2017, and before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], provided that they also apply the provisions of §1.163(j)-6 in the section 163(j) regulations, and consistently apply all of the rules of §1.163(j)-6 in the section 163(j) regulations to that taxable year and to each subsequent taxable year.

* * * * *

Par. 8. As added in a final rule elsewhere in this issue of the Federal Register, effective November 13, 2020, §1.163(j)-7 is amended by revising paragraph (a), adding paragraphs (c) through (f), (g)(3) and (4), (h), and (j) through (l), and revising paragraph (m) to read as follows:

§1.163(j)-7 Application of the section 163(j) limitation to foreign corporations and United States shareholders.

(a) *Overview*. This section provides rules for the application of section 163(j) to relevant foreign corporations and United States shareholders of relevant foreign corporations. Paragraph (b) of this section provides the general rule regarding the application of section 163(j) to a relevant foreign corporation. Paragraph (c) of this section provides rules for applying section 163(j) to CFC group members of a CFC group. Paragraph (d) of this section provides rules for determining a specified group and specified group members. Paragraph (e) of this section provides rules and procedures for treating a specified group member as a

CFC group member and for determining a CFC group. Paragraph (f) of this section provides rules regarding the treatment of a CFC group member that has ECI. Paragraph (g) of this section provides rules concerning the computation of ATI of an applicable CFC. Paragraph (h) of this section provides a safe-harbor that exempts certain stand-alone applicable CFCs and CFC groups from the application of section 163(j) for a taxable year. Paragraph (i) of this section is reserved. Paragraph (j) of this section provides rules concerning the computation of ATI of a United States shareholder of an applicable CFC. Paragraph (k) of this section provides definitions that apply for purposes of this section. Paragraph (l) of this section provides examples illustrating the application of this section.

* * * * *

(c) *Application of section 163(j) to CFC group members of a CFC group—(1) Scope.* This paragraph (c) provides rules for applying section 163(j) to a CFC group member. Paragraph (c)(2) of this section provides rules for computing a single section 163(j) limitation for a specified period of a CFC group. Paragraph (c)(3) of this section provides rules for allocating a CFC group's section 163(j) limitation to CFC group members for specified taxable years. Paragraph (c)(4) of this section provides currency translation rules. Paragraph (c)(5) of this section provides special rules for specified periods beginning in 2019 or 2020.

(2) *Calculation of section 163(j) limitation for a CFC group for a specified period—(i) In general.* A single section 163(j) limitation is computed for a specified period of a CFC group. For purposes of applying section 163(j) and the section 163(j) regulations, the current-year business interest expense, disallowed business interest expense carryforwards, business interest income, floor plan financing interest expense, and ATI of a CFC group for a specified period equal the sums of each CFC group member's respective amounts for its specified taxable year with respect to the specified period. A CFC group member's current-year business interest expense, business interest income, floor plan financing interest expense, and ATI for a specified taxable year are generally determined on a separate-company basis.

(ii) *Certain transactions between CFC group members disregarded.* Any transaction between CFC group members of a CFC group that is entered into with a principal purpose of affecting a CFC group or a CFC group member's section 163(j) limitation by increasing or decreasing a CFC group or a CFC group member's ATI for a specified taxable year is disregarded for purposes of applying section 163(j) and the section 163(j) regulations.

(iii) *CFC group treated as a single C corporation for purposes of allocating items to an excepted trade or business.* For purposes of allocating items to an excepted trade or business under §1.163(j)-10, all CFC group members of a CFC group are treated as a single C corporation.

(iv) *CFC group treated as a single taxpayer for purposes of determining interest.* For purposes of determining whether amounts, other than amounts in respect of transactions between CFC group members of a CFC group, are treated as interest within the meaning of §1.163(j)-1(b)(22), all CFC group members of a CFC group are treated as a single taxpayer.

(3) *Deduction of business interest expense—(i) CFC group business interest expense—(A) In general.* The extent to which a CFC group member's current-year business interest expense and disallowed business interest expense carryforwards for a specified taxable year that ends with or within a specified period may be deducted under section 163(j) is determined under the rules and principles of §1.163(j)-5(a)(2) and (b)(3)(ii), subject to the modifications described in paragraph (c)(3)(i)(B) of this section.

(B) *Modifications to relevant terms.* For purposes of paragraph (c)(3)(i)(A) of this section, the rules and principles of §1.163(j)-5(b)(3)(ii) are applied by—

(1) Replacing “§1.163(j)-4(d)(2)” in §1.163(j)-5(a)(2)(ii) with “§1.163(j)-7(c)(2)(i)”;

(2) Replacing the term “allocable share of the consolidated group's remaining section 163(j) limitation” with “allocable share of the CFC group's remaining section 163(j) limitation”;

(3) Replacing the terms “consolidated group” and “group” with “CFC group”;

(4) Replacing the term “consolidated group's remaining section 163(j) limita-

tion” with “CFC group's remaining section 163(j) limitation”;

(5) Replacing the term “consolidated return year” with “specified period”;

(6) Replacing the term “current year” or “current-year” with “current specified period” or “specified taxable year with respect to the current specified period,” as the context requires;

(7) Replacing the term “member” with “CFC group member”; and

(8) Replacing the term “taxable year” with “specified taxable year with respect to a specified period.”

(ii) *Carryforwards treated as attributable to the same taxable year.* For purposes of applying the principles of §1.163(j)-5(b)(3)(ii), as required under paragraph (c)(3)(i) of this section, CFC group members' disallowed business interest expense carryforwards that arose in specified taxable years with respect to the same specified period are treated as disallowed business interest expense carryforwards from taxable years ending on the same date and are deducted on a pro rata basis, under the principles of §1.163(j)-5(b)(3)(ii)(C)(3), pursuant to paragraph (c)(3)(i) of this section.

(iii) *Multiple specified taxable years of a CFC group member with respect to a specified period.* If a CFC group member has more than one specified taxable year (each year, an *applicable specified taxable year*) with respect to a single specified period of a CFC group, then all such applicable specified taxable years are taken into account for purposes of applying the principles of §1.163(j)-5(b)(3)(ii), as required under paragraph (c)(3)(i) of this section, with respect to the specified period. The portion of the section 163(j) limitation allocable to disallowed business interest expense carryforwards of the CFC group member for its applicable specified taxable years is prorated among the applicable specified taxable years in proportion to the number of days in each applicable specified taxable year.

(iv) *Limitation on pre-group disallowed business interest expense carryforward—(A) General rule—(1) CFC group member pre-group disallowed business interest expense carryforward.* This paragraph (c)(3)(iv) applies to pre-group disallowed business interest expense carryforwards of a CFC group member. The amount of the

pre-group disallowed business interest expense carryforwards described in the preceding sentence that are included in any CFC group member's business interest expense deduction for any specified taxable year under this paragraph (c)(3) may not exceed the aggregate section 163(j) limitation for all specified periods of the CFC group, determined by reference only to the CFC group member's items of income, gain, deduction, and loss, and reduced (including below zero) by the CFC group member's business interest expense (including disallowed business interest expense carryforwards) taken into account as a deduction by the CFC group member in all specified taxable years in which the CFC group member has continuously been a CFC group member of the CFC group (*cumulative section 163(j) pre-group carryforward limitation*).

(2) *Subgrouping.* In the case of a CFC group member with a pre-group disallowed business interest expense carryforward (the *loss member*) that joined the CFC group (the *current group*) for a specified taxable year with respect to a specified period (the *relevant period*), if the loss member was a CFC group member of a different CFC group (the *former group*) immediately prior to joining the current group, a pre-group subgroup is composed of the loss member and each other CFC group member that became a CFC group member of the current group for a specified taxable year with respect to the relevant period and was a member of the former group immediately prior to joining the current group. For purposes of this paragraph (c), the rules and principles of §1.163(j)-5(d)(1)(B) apply to a pre-group subgroup as if the pre-group subgroup were a SRLY subgroup.

(B) *Deduction of pre-group disallowed business interest expense carryforwards.* Notwithstanding paragraph (c)(3)(iv)(A)(1) of this section, pre-group disallowed business interest expense carryforwards are available for deduction by a CFC group member in its specified taxable year only to the extent the CFC group has remaining section 163(j) limitation for the specified period after the deduction of current-year business interest expense and disallowed business interest expense carryforwards from earlier taxable years that are permitted to be deducted in specified taxable

years of CFC group members with respect to the specified period. See paragraph (c)(3)(i) of this section and §1.163(j)-5(b)(3)(ii)(A). Pre-group disallowed business interest expense carryforwards are deducted on a pro rata basis (under the principles of paragraph (c)(3)(i) of this section and §1.163(j)-5(b)(3)(ii)(C)(3)) with other disallowed business interest expense carryforwards from taxable years ending on the same date.

(4) *Currency translation.* For purposes of applying this paragraph (c), items of a CFC group member are translated into a single currency for the CFC group and back to the functional currency of the CFC group member using the average rate for the CFC group member's specified taxable year, using any reasonable method, consistently applied. The single currency for the CFC group may be the U.S. dollar or the functional currency of a plurality of the CFC group members.

(5) *Special rule for specified periods beginning in 2019 or 2020—(i) 50 percent ATI limitation applies to a specified period of a CFC group.* In the case of a CFC group, §1.163(j)-2(b)(2) (including the election under §1.163(j)-2(b)(2)(ii)) applies to a specified period of the CFC group beginning in 2019 or 2020, rather than to a specified taxable year of a CFC group member. An election under §1.163(j)-2(b)(2)(ii) for a specified period of a CFC group is not effective unless made by each designated U.S. person. Except as otherwise provided in this paragraph (c)(5)(i), the election is made in accordance with Revenue Procedure 2020-22, 2020-18 I.R.B. 745. For purposes of applying §1.964-1(c), the election is treated as if made for each CFC group member.

(ii) *Election to use 2019 ATI applies to a specified period of a CFC group—(A) In general.* In the case of a CFC group, for purposes of applying paragraph (c)(2) of this section, an election under §1.163(j)-2(b)(3)(i) is made for a specified period of a CFC group beginning in 2020 and applies to the specified taxable years of each CFC group member with respect to such specified period, taking into account the application of paragraph (c)(5)(ii)(B) of this section. The election under §1.163(j)-2(b)(3)(i) does not apply to any specified taxable year of a CFC group member oth-

er than those described in the preceding sentence. An election under §1.163(j)-2(b)(3)(i) for a specified period of a CFC group is not effective unless made by each designated U.S. person. Except as otherwise provided in this paragraph (c)(5)(ii)(A), the election is made in accordance with Revenue Procedure 2020-22, 2020-18 I.R.B. 745. For purposes of applying §1.964-1(c), the election is treated as if made for each CFC group member.

(B) *Specified taxable years that do not begin in 2020.* If a specified taxable year of a CFC group member with respect to the specified period described in paragraph (c)(5)(ii)(A) of this section begins in 2019, then, for purposes of applying paragraph (c)(2) of this section, §1.163(j)-2(b)(3) is applied to such specified taxable year by substituting "2018" for "2019" and "2019" for "2020." If a specified taxable year of a CFC group member with respect to the specified period described in paragraph (c)(5)(ii)(A) of this section begins in 2021, then, for purposes of applying paragraph (c)(2) of this section, §1.163(j)-2(b)(3) is applied to such specified taxable year by substituting "2020" for "2019" and "2021" for "2020."

(d) *Determination of a specified group and specified group members—(1) Scope.* This paragraph (d) provides rules for determining a specified group and specified group members. Paragraph (d)(2) of this section provides rules for determining a specified group. Paragraph (d)(3) of this section provides rules for determining specified group members.

(2) *Rules for determining a specified group—(i) Definition of a specified group.* Subject to paragraph (d)(2)(ii) of this section, the term *specified group* means one or more chains of applicable CFCs connected through stock ownership with a specified group parent (which is included in the specified group only if it is an applicable CFC), but only if—

(A) The specified group parent owns directly or indirectly stock meeting the requirements of section 1504(a)(2)(B) in at least one applicable CFC; and

(B) Stock meeting the requirements of section 1504(a)(2)(B) in each of the applicable CFCs (except the specified group parent) is owned directly or indirectly by one or more of the other applicable CFCs or the specified group parent.

(ii) *Indirect ownership.* For purposes of applying paragraph (d)(2)(i) of this section, stock is owned indirectly only if it is owned under section 318(a)(2)(A) through a partnership or under section 318(a)(2)(A) or (B) through an estate or trust not described in section 7701(a)(30).

(iii) *Specified group parent.* The term *specified group parent* means a qualified U.S. person or an applicable CFC.

(iv) *Qualified U.S. person.* The term *qualified U.S. person* means a United States person described in section 7701(a)(30)(A) or (C). For purposes of this paragraph (d), members of a consolidated group that file (or that are required to file) a consolidated U.S. federal income tax return are treated as a single qualified U.S. person and individuals described in section 7701(a)(30)(A) whose filing status is married filing jointly are treated as a single qualified U.S. person.

(v) *Stock.* For purposes of paragraph (d)(3)(i) of this section, the term *stock* has the same meaning as “stock” in section 1504 (without regard to §1.1504-4, except as provided in paragraph (d)(2)(vi) of this section) and all shares of stock within a single class are considered to have the same value. Thus, control premiums and minority and blockage discounts within a single class are not taken into account.

(vi) *Options treated as exercised.* For purposes of this paragraph (d)(2), options that are reasonably certain to be exercised, as determined under §1.1504-4(g), are treated as exercised. For purposes of this paragraph (d)(2)(vi), options include call options, warrants, convertible obligations, put options, and any other instrument treated as an option under §1.1504-4(d), determined by replacing the term “a principal purpose of avoiding the application of section 1504 and this section” with “a principal purpose of avoiding the application of section 163(j).”

(vii) *When a specified group ceases to exist.* The principles of §1.1502-75(d)(1), (d)(2)(i) through (d)(2)(ii), and (d)(3)(i) through (d)(3)(iv), apply for purposes of determining when a specified group ceases to exist. Solely for purposes of applying these principles, each applicable CFC that is treated as a specified group member for a taxable year with respect to a specified period is treated as affiliated with the specified group parent from the beginning

to the end of the specified period, without regard to the beginning or end of its taxable year.

(3) *Rules for determining a specified group member.* If an applicable CFC is included in a specified group on the last day of a taxable year of the applicable CFC that ends with or within a specified period, the applicable CFC is a *specified group member* with respect to the specified period for its entire taxable year ending with or within the specified period. If an applicable CFC has multiple taxable years that end with or within a specified period, this paragraph (d)(3) is applied separately to each taxable year to determine if the applicable CFC is a specified group member for such taxable year.

(e) *Rules and procedures for treating a specified group as a CFC group—(1) Scope.* This paragraph (e) provides rules and procedures for treating a specified group member as a CFC group member and for determining a CFC group for purposes of applying section 163(j) and the section 163(j) regulations.

(2) *CFC group and CFC group member—(i) CFC group.* The term *CFC group* means, with respect to a specified period, all CFC group members for their specified taxable years.

(ii) *CFC group member.* The term *CFC group member* means, with respect to a specified taxable year and a specified period, a specified group member of a specified group for which a CFC group election is in effect.

(3) *Duration of a CFC group.* A CFC group continues until the CFC group election is revoked, or there is no longer a specified period with respect to the specified group.

(4) *Joining or leaving a CFC group.* If an applicable CFC becomes a specified group member for a specified taxable year with respect to a specified period of a specified group for which a CFC group election is in effect, the CFC group election applies to the applicable CFC and the applicable CFC becomes a CFC group member. If an applicable CFC ceases to be a specified group member for a specified taxable year with respect to a specified period of a specified group for which a CFC group election is in effect, the CFC group election terminates solely with respect to the applicable CFC.

(5) *Manner of making or revoking a CFC group election—(i) In general.* An election is made or revoked under this paragraph (e)(5) (a *CFC group election*) with respect to a specified period of a specified group. A CFC group election remains in effect for each specified period of the specified group until revoked. A CFC group election that is in effect with respect to a specified period of a specified group applies to each specified group member for its specified taxable year that ends with or within the specified period. The making or revoking of a CFC group election is not effective unless made or revoked by each designated U.S. person.

(ii) *Revocation by election.* A CFC group election cannot be revoked with respect to any specified period beginning prior to 60 months following the last day of the specified period for which the election was made. Once a CFC group election has been revoked, a new CFC group election cannot be made with respect to any specified period beginning prior to 60 months following the last day of the specified period for which the election was revoked.

(iii) *Timing.* A CFC group election must be made or revoked with respect to a specified period of a specified group no later than the due date (taking into account extensions, if any) of the original Federal income tax return for the taxable year of each designated U.S. person in which or with which the specified period ends.

(iv) *Election statement.* Except as otherwise provided in publications, forms, instructions, or other guidance, to make or revoke a CFC group election for a specified period of a specified group, each designated U.S. person must attach a statement to its relevant Federal tax or information return. The statement must include the name and taxpayer identification number of all designated U.S. persons, a statement that the CFC group election is being made or revoked, as applicable, the specified period for which the CFC group election is being made or revoked, and the name of each CFC group member and its specified taxable year with respect to the specified period. The statement must be filed in the manner prescribed in publications, forms, instructions, or other guidance.

(v) *Effect of prior CFC group election.* A CFC group election is made solely pur-

suant to the provisions of this paragraph (e)(5), without regard to whether the election described in proposed §1.163(j)-7(f)(7) that was included in a notice of proposed rulemaking (REG-106089-18) that was published on December 28, 2018, in the Federal Register (83 FR 67490) was in effect.

(f) *Treatment of a CFC group member that has ECI*—(1) *In general*. If a CFC group member has ECI in its specified taxable year, then for purposes of section 163(j) and the section 163(j) regulations—

(i) The items, disallowed business interest expense carryforwards, and other attributes of the CFC group member that are ECI are treated as items, disallowed business interest expense carryforwards, and attributes of a separate applicable CFC (such deemed corporation, an *ECI deemed corporation*), subject to §1.163(j)-8(d), that has same taxable year and shareholders as the applicable CFC; and

(ii) The ECI deemed corporation is not treated as a specified group member for the specified taxable year.

(2) *Ordering rule*. Paragraph (f)(1) of this section applies before application of §1.163(j)-8(d).

(g) * * *

(3) *Treatment of certain taxes*. For purposes of computing the ATI of a relevant foreign corporation for a taxable year, tentative taxable income takes into account any deduction for foreign taxes. See section 164(a).

(4) *Anti-abuse rule*—(i) *In general*. If a specified group member of a specified group or an applicable partnership (*specified lender*) includes an amount (the *payment amount*) in income and such amount is attributable to business interest expense incurred by another specified group member or an applicable partnership of the specified group (a *specified borrower*) during its taxable year, then the ATI of the specified borrower for the taxable year is increased by the ATI adjustment amount if—

(A) The business interest expense is incurred with a principal purpose of reducing the Federal income tax liability of any United States shareholder of a specified group member (including over multiple taxable years);

(B) Absent the application of this paragraph (g)(4), the effect of the speci-

fied borrower treating all or part of the payment amount as disallowed business interest expense would be to reduce the Federal income tax liability of any United States shareholder of a specified group member; and

(C) Either no CFC group election is in effect with respect to the specified group or the specified borrower is an applicable partnership.

(ii) *ATI adjustment amount*—(A) *In general*. For purposes of this paragraph (g)(4), the term *ATI adjustment amount* means, with respect to a specified borrower and a taxable year, the product of 3 1/3 and the lesser of the payment amount or the disallowed business interest expense, computed without regard to this paragraph (g)(4).

(B) *Special rule for taxable years or specified periods beginning in 2019 or 2020*. For any taxable year of an applicable CFC or specified taxable year of a CFC group member with respect to a specified period for which the section 163(j) limitation is determined based, in part, on 50 percent of ATI, in accordance with §1.163(j)-2(b)(2), paragraph (g)(4)(ii)(A) of this section is applied by substituting “2” for “3 1/3.”

(iii) *Applicable partnership*. For purposes of this paragraph (g)(4), the term *applicable partnership* means, with respect to a specified group, a partnership in which at least 80 percent of the interests in capital or profits is owned, directly or indirectly through one or more other partnerships, by specified group members of the specified group.

(h) *Election to apply safe-harbor*—(1) *In general*. If an election to apply this paragraph (h)(1) (*safe-harbor election*) is in effect with respect to a taxable year of a stand-alone applicable CFC or a specified taxable year of a CFC group member, as applicable, then, for such year, no portion of the applicable CFC’s business interest expense is disallowed under the section 163(j) limitation. This paragraph (h) does not apply to excess business interest expense, as described in §1.163(j)-6(f)(2), until the taxable year in which it is treated as paid or accrued by an applicable CFC under §1.163(j)-6(g)(2)(i). Furthermore, excess business interest expense is not taken into account for purposes of determining whether the safe-harbor election

is available for a stand-alone applicable CFC or a CFC group until the taxable year in which it is treated as paid or accrued by an applicable CFC under §1.163(j)-6(g)(2)(i).

(2) *Eligibility for safe-harbor election*—(i) *Stand-alone applicable CFC*. The safe-harbor election may be made for the taxable year of a stand-alone applicable CFC only if business interest expense of the applicable CFC is less than or equal to 30 percent of the lesser of qualified tentative taxable income or the eligible amount of the applicable CFC for its taxable year.

(ii) *CFC group*—(A) *In general*. The safe-harbor election may be made for the specified period of a CFC group only if the business interest expense of the CFC group for the specified period is less than or equal to 30 percent of the lesser of the sum of qualified tentative taxable income or the sum of the eligible amounts of each CFC group member for its specified taxable year with respect to the specified period, and no CFC group member has pre-group disallowed business interest expense carryforward.

(B) *Currency translation*. For purposes of applying paragraph (h)(2)(ii) of this section, qualified tentative taxable income and eligible amounts of each CFC group member are translated into the currency in which the business interest expense of the CFC group is denominated using the method used under paragraph (c)(4) of this section. See paragraph (c)(2)(i) of this section for rules for determining the business interest expense of a CFC group.

(3) *Eligible amount*—(i) *In general*. Subject to paragraph (h)(3)(ii) of this section, the term *eligible amount* means, with respect to the taxable year of an applicable CFC, the sum of the following amounts, computed without regard to the application of section 163(j) and the section 163(j) regulations (including without regard to any disallowed business interest expense carryforwards)—

(A) Subpart F income (within the meaning of section 952);

(B) The product of—

(1) The excess of 100 percent over the percentage described in section 250(a)(1) (B), taking into account section 250(a)(3) (B), and

(2) The excess, if any, of tested income (within the meaning of section 951A(c)(2)(A) and §1.951A-2(b)(1)), over the CFC-level net deemed tangible income return.

(ii) *Amounts properly allocable to a non-excepted trade or business.* For purposes of computing an eligible amount, subpart F income and tested income are determined by only taking into account items properly allocable to a non-excepted trade or business.

(4) *Qualified tentative taxable income.* The term *qualified tentative taxable income* means, with respect to a taxable year of an applicable CFC, the applicable CFC's tentative taxable income, determined by only taking into account items properly allocable to a non-excepted trade or business.

(5) *Manner of making a safe-harbor election—(i) In general.* A safe-harbor election is an annual election made under this paragraph (h)(5) with respect to a taxable year of a stand-alone applicable CFC or with respect to a specified period of a CFC group. A safe-harbor election that is made with respect to a specified period of a CFC group is effective with respect to each CFC group member for its specified taxable year. A safe-harbor election is only effective if made by each designated U.S. person with respect to a stand-alone applicable CFC or a CFC group. A safe-harbor election is made with respect to a taxable year of a stand-alone applicable CFC, or a specified period of a CFC group, no later than the due date (taking into account extensions, if any) of the original Federal income tax return for the taxable year of each designated U.S. person, respectively, in which or with which the taxable year of the stand-alone applicable CFC ends or the specified period of the CFC group ends.

(ii) *Election statement.* Unless otherwise provided in publications, forms, instructions, or other guidance, to make a safe-harbor election, each designated U.S. person must attach to its relevant Federal income tax return or information return a statement that includes the name and taxpayer identification number of all designated U.S. persons, a statement that a safe-harbor election is being made pursuant to §1.163(j)-7(h) and that the requirements for making the election are satisfied, and the taxable year of the stand-alone ap-

plicable CFC or the specified period of the CFC group, as applicable, for which the safe-harbor election is being made. In the case of a CFC group, the statement must also include the name of each CFC group member and its specified taxable year that ends with or within the specified period for which the safe-harbor election is being made. The statement must be filed in the manner prescribed in publications, forms, instructions, or other guidance.

(6) *Special rule for taxable years or specified periods beginning in 2019 or 2020.* In the case of a stand-alone applicable CFC, for any taxable year beginning in 2019 or 2020, paragraph (h)(2)(i) of this section is applied by substituting “50 percent” for “30 percent.” In the case of a CFC group, for any specified period beginning in 2019 or 2020, paragraph (h)(2)(ii)(A) of this section is applied by substituting “50 percent” for “30 percent.”

* * * *

(j) *Rules regarding the computation of ATI of certain United States shareholders of applicable CFCs—(1) In general.* For purposes of computing ATI of a United States shareholder of an applicable CFC, for the taxable year of the United States shareholder in which or with which the taxable year of the applicable CFC ends, there is added to the United States shareholder's tentative taxable income the product of—

(i) The portion of the adjustment, if any, made to the United States shareholder's tentative taxable income under §1.163(j)-1(b)(1)(ii)(G) (regarding specified deemed inclusions) that is attributable to the applicable CFC, but for this purpose excluding the portion of the adjustment that is attributable to an inclusion under section 78 with respect to the applicable CFC; and

(ii) A fraction, expressed as a percentage, but not greater than 100 percent, the numerator of which is CFC excess taxable income and the denominator of which is the ATI of the applicable CFC for the taxable year.

(2) *Rules for determining CFC excess taxable income—(i) In general.* The term *CFC excess taxable income* means, with respect to a taxable year of an applicable CFC, the amount described in paragraph (j)(2)(ii) or (j)(2)(iii) of this section, as applicable.

(ii) *Applicable CFC is a stand-alone applicable CFC.* If an applicable CFC is a stand-alone applicable CFC for a taxable year, its CFC excess taxable income for the taxable year is the amount that bears the same ratio to the applicable CFC's ATI as—

(A) The excess (if any) of—

(I) 30 percent of the applicable CFC's ATI; over

(2) The amount (if any) by which the applicable CFC's business interest expense exceeds its business interest income and floor plan financing interest expense; bears to

(B) 30 percent of the applicable CFC's ATI.

(iii) *Applicable CFC is a CFC group member.* If an applicable CFC is a CFC group member for a specified taxable year, its CFC excess taxable income is equal to the product of the CFC group member's ATI percentage and the amount that bears the same ratio to the CFC group's ATI for the specified period as—

(A) The excess (if any) of—

(I) 30 percent of the CFC group's ATI; over

(2) The amount (if any) by which the CFC group's business interest expense exceeds the CFC group's business interest income and floor plan financing interest expense; bears to

(B) 30 percent of the CFC group's ATI.

(iv) *ATI percentage.* For purposes of this paragraph (j), the term *ATI percentage* means, with respect to a specified taxable year of a CFC group member and a specified period of the CFC group, a fraction (expressed as a percentage), the numerator of which is the ATI of the CFC group member for the specified taxable year, and the denominator of which is the ATI of the CFC group for the specified period. If either the numerator or denominator of the fraction is less than or equal to zero, the ATI percentage is zero.

(3) *Cases in which an addition to tentative taxable income is not allowed.* Paragraph (j)(1) of this section is not applicable for a taxable year of a United States shareholder if, with respect to the taxable year of the applicable CFC described in paragraph (j)(1) of this section—

(i) A safe-harbor election (as described in paragraph (h) of this section) is in effect; or

(ii) The applicable CFC is neither a stand-alone applicable CFC nor a CFC group member.

(4) *Special rule for taxable years or specified periods beginning in 2019 or 2020.* In the case of a stand-alone applicable CFC, for any taxable year beginning in 2019 or 2020 to which the election described in §1.163(j)-2(b)(2)(ii) does not apply, paragraph (j)(2)(ii) of this section is applied by substituting “50 percent” for “30 percent” each place it appears. In the case of a CFC group member, for any specified taxable year with respect to a specified period beginning in 2019 or 2020 to which the election described in §1.163(j)-2(b)(2)(ii) does not apply, paragraph (j)(2)(iii) of this section is applied by substituting “50 percent” for “30 percent” each place it appears.

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

(1) *Applicable partnership.* The term *applicable partnership* has the meaning provided in paragraph (g)(4)(iii) of this section.

(2) *Applicable specified taxable year.*

The term *applicable specified taxable year* has the meaning provided in paragraph (c)(3)(iii) of this section.

(3) *ATI adjustment amount.* The term *ATI adjustment amount* has the meaning provided in paragraph (g)(4)(ii) of this section.

(4) *ATI percentage.* The term *ATI percentage* has the meaning provided in paragraph (j)(2)(iv) of this section.

(5) *CFC excess taxable income.* The term *CFC excess taxable income* has the meaning provided in paragraph (j)(2)(i) of this section.

(6) *CFC group.* The term *CFC group* has the meaning provided in paragraph (e)(2)(i) of this section.

(7) *CFC group election.* The term *CFC group election* means the election described in paragraph (e)(5) of this section.

(8) *CFC group member.* The term *CFC group member* has the meaning provided in paragraph (e)(2)(ii) of this section.

(9) *CFC-level net deemed tangible income return—(i) In general.* The term *CFC-level net deemed tangible income return* means, with respect to a taxable year of an applicable CFC, the excess (if any) of—

(A) 10 percent of the qualified business asset investment, as defined in section 951A(d)(1) and §1.951A-3(b), of the applicable CFC, over

(B) The excess, if any, of—

(I) Tested interest expense, as defined in §1.951A-4(b)(1), of the applicable CFC, over

(2) Tested interest income, as defined in §1.951A-4(b)(2), of the applicable CFC.

(ii) *Amounts properly allocable to a non-exceptioned trade or business.* For purposes of computing CFC-level net deemed tangible income return, qualified business asset investment is determined by only taking into account assets properly allocable to a non-exceptioned trade or business, as determined in §1.163(j)-10(c)(3), and tested interest expense and tested interest income are determined by only taking into account items properly allocable to a non-exceptioned trade or business, as determined in §1.163(j)-10(c).

(10) *Cumulative section 163(j) pre-group carryforward limitation.* The term *cumulative section 163(j) pre-group carryforward limitation* has the meaning provided in paragraph (c)(3)(iv)(A)(1) of this section.

(11) *Current group.* The term *current group* has the meaning provided in paragraph (c)(3)(iv)(A)(2) of this section.

(12) *Designated U.S. person.* The term *designated U.S. person* means—

(i) With respect to a stand-alone applicable CFC, each controlling domestic shareholder, as defined in §1.964-1(c)(5) of the applicable CFC; or

(ii) With respect to a specified group, the specified group parent, if the specified group parent is a qualified U.S. person, or each controlling domestic shareholder, as defined in §1.964-1(c)(5), of the specified group parent, if the specified group parent is an applicable CFC.

(13) *ECI deemed corporation.* The term *ECI deemed corporation* has the meaning provided in paragraph (f)(1)(i) of this section.

(14) *Effectively connected income.* The term *effectively connected income* (or *ECI*) means income or gain that is ECI, as defined in §1.884-1(d)(1)(iii), and deduction or loss that is allocable to, ECI, as defined in §1.884-1(d)(1)(iii).

(15) *Eligible amount.* The term *eligible amount* has the meaning provided in paragraph (h)(3)(i) of this section.

(16) *Former group.* The term *former group* has the meaning provided in paragraph (c)(3)(iv)(A)(2) of this section.

(17) *Loss member.* The term *loss member* has the meaning provided in paragraph (c)(3)(iv)(A)(2) of this section.

(18) *Payment amount.* The term *payment amount* has the meaning provided in paragraph (g)(4)(i) of this section.

(19) *Pre-group disallowed business interest expense carryforward.* The term *pre-group disallowed business interest expense carryforward* means, with respect to a CFC group member and a specified taxable year, any disallowed business interest expense carryforward of the CFC group member that arose in a taxable year during which the CFC group member (or its predecessor) was not a CFC group member of the CFC group.

(20) *Qualified tentative taxable income.* The term *qualified tentative taxable income* has the meaning provided in paragraph (h)(4) of this section.

(21) *Qualified U.S. person.* The term *qualified U.S. person* has the meaning provided in paragraph (d)(2)(iv) of this section.

(22) *Relevant period.* The term *relevant period* has the meaning provided in paragraph (c)(3)(iv)(A)(2) of this section.

(23) *Safe-harbor election.* The term *safe-harbor election* has the meaning provided in paragraph (h)(1) of this section.

(24) *Specified borrower.* The term *specified borrower* has the meaning provided in paragraph (g)(4)(i) of this section.

(25) *Specified group.* The term *specified group* has the meaning provided in paragraph (d)(2)(i) of this section.

(26) *Specified group member.* The term *specified group member* has the meaning provided in paragraph (d)(3) of this section.

(27) *Specified group parent.* The term *specified group parent* has the meaning provided in paragraph (d)(2)(iii) of this section.

(28) *Specified lender.* The term *specified lender* has the meaning provided in paragraph (g)(4)(i) of this section.

(29) *Specified period—(i) In general.* Except as otherwise provided in paragraph (k)(29)(ii) of this section, the term *specified period* means, with respect to a specified group—

(A) If the specified group parent is a qualified U.S. person, the period ending on the last day of the taxable year of the specified group parent and beginning on the first day after the last day of the specified group's immediately preceding specified period; or

(B) If the specified group parent is an applicable CFC, the period ending on the last day of the specified group parent's required year described in section 898(c)(1), without regard to section 898(c)(2), and beginning on the first day after the last day of the specified group's immediately preceding specified period.

(ii) *Short specified period.* A specified period begins no earlier than the first date on which a specified group exists. A specified period ends on the date a specified group ceases to exist under paragraph (d)(2)(vii) of this section. If the last day of a specified period, as determined under paragraph (k)(29)(i) of this section, changes, and, but for this paragraph (k)(29)(ii), the change in the last day of the specified period would result in the specified period being longer than 12 months, the specified period ends on the date on which the specified period would have ended had the change not occurred.

(30) *Specified taxable year.* The term *specified taxable year* means, with respect to an applicable CFC that is a specified group member of a specified group and a specified period, a taxable year of the applicable CFC that ends with or within the specified period.

(31) *Stand-alone applicable CFC.* The term *stand-alone applicable CFC* means any applicable CFC that is not a specified group member.

(32) *Stock.* The term *stock* has the meaning provided in paragraph (d)(2)(v) of this section.

(l) *Examples.* The following examples illustrate the application of this section. For each example, unless otherwise stated, no exemptions from the application of section 163(j) are available, no foreign corporation has ECI, and all relevant taxable years and specified periods begin after December 31, 2020.

(1) *Example 1. Specified taxable years included in specified period of a specified group—(i) Facts.* As of June 30, Year 1, USP, a domestic corporation, owns 60 percent of the common stock of FP, which owns all of the stock of FC1, FC2, and FC3. The remaining 40 percent of the common stock of FP is

owned by an unrelated foreign corporation. FP has a single class of stock. FP acquired the stock of FC3 from an unrelated person on March 22, Year 1. The acquisition did not result in a change in FC3's taxable year or a close of its taxable year. USP's interest in FP and FP's interest in FC1 and FC2 has been the same for a number of years. USP has a taxable year ending June 30, Year 1, which is not a short taxable year. Each of FP, FC1, FC2, and FC3 are applicable CFCs. Pursuant to section 898(c)(2), FP and FC1 have taxable years ending May 31, Year 1. Pursuant to section 898(c)(1), FC2 and FC3 have taxable years ending June 30, Year 1.

(ii) *Analysis—(A) Determining a specified group and specified period of the specified group.* Pursuant to paragraph (d) of this section, FP, FC1, FC2, and FC3 are members of a specified group, and FP is the specified group parent. Because the specified group parent, FP, is an applicable CFC, the specified period of the specified group is the period ending on June 30, Year 1, which is the last day of FP's required year described in section 898(c)(1), without regard to section 898(c)(2), and on beginning July 1, Year 0, which is the first day following the last day of the specified group's immediately preceding specified period (June 30, Year 0). See paragraph (k)(29)(i)(B) of this section.

(B) *Determining the specified taxable years with respect to the specified period.* Pursuant to paragraph (d)(3) of this section, because each of FP and FC1 are included in the specified group on the last day of their taxable years ending May 31, Year 1 and such taxable years end with or within the specified period ending June 30, Year 1, FP and FC1 are specified group members with respect to the specified period ending June 30, Year 1, for their entire taxable years ending May 31, Year 1, and those taxable years are specified taxable years. Similarly, because each of FC2 and FC3 are included in the specified group on the last day of their taxable years ending June 30, Year 1, and such taxable years end with or within the specified period ending June 30, Year 1, FC2 and FC3 are specified group members with respect to the specified period ending June 30, Year 1, for their entire taxable years ending June 30, Year 1, and those taxable years are specified taxable years. The fact that FC3 was acquired on March 22, Year 1, does not prevent FC3 from being a specified group member with respect to the specified period for the portion of its specified taxable year prior to March 22, Year 1.

(2) *Example 2. CFC groups—(i) Facts.* The facts are the same as in *Example 1* in paragraph (l)(1)(i) of this section. In addition, a CFC group election is in place with respect to the specified period ending June 30, Year 1.

(ii) *Analysis.* Because a CFC group election is in place for the specified period ending June 30, Year 1, pursuant to paragraph (e)(2)(ii) of this section, each specified group member is a CFC group member with respect to its specified taxable year ending with or within the specified period. Accordingly, FP, FC1, FC2, and FC3 are CFC group members with respect to the specified period ending June 30, Year 1, for their specified taxable years ending May 31, Year 1, and June 30, Year 1, respectively. Pursuant to paragraph (e)(2)(i) of this section, the CFC group for the specified period ending June 30, Year 1, consists of FP, FC1, FC2, and FC3 for their specified taxable

years ending May 31, Year 1, and June 30, Year 1, respectively. Pursuant to paragraph (c)(2) of this section, a single section 163(j) limitation is computed for the specified period ending June 30, Year 1. That section 163(j) calculation will include FP and FC1's specified taxable years ending May 31, Year 1, and FC2 and FC3's specified taxable years ending June 30, Year 1.

(3) *Example 3. Application of anti-abuse rule—(i) Facts.* USP, a domestic corporation, is the specified group parent of a specified group. The specified group members include CFC1 and CFC2. USP owns (within the meaning of section 958(a)) all of the stock of all specified group members. USP has a calendar year taxable year. All specified group members also have a calendar year taxable year and a functional currency of the U.S. dollar. CFC1 is organized in, and a tax resident of, a jurisdiction that imposes no tax on certain types of income, including interest income. With respect to Year 1, USP expects to pay no residual U.S. tax on its income inclusion under section 951A(a) (GILTI inclusion) and expects to have unused foreign tax credits in the category described in section 904(d)(1)(A). A CFC group election is not in effect for Year 1. With a principal purpose of reducing USP's Federal income tax liability, on January 1, Year 1, CFC1 loans \$100x to CFC2. On December 31, Year 1, CFC2 pays interest of \$10x to CFC1 and repays the principal of \$100x. Absent application of paragraph (g)(4)(i) of this section, CFC2 would treat all \$10x of interest expense as disallowed business interest expense and therefore would have \$10x of disallowed business interest expense carryforward to Year 2. In Year 2, CFC2 disposes of one of its businesses at a substantial gain that gives rise to tested income (within the meaning of section 951A(c)(2)(A) and §1.951A-2(b)(1)). Assume that as a result of the gain being included in the ATI of CFC2, absent application of paragraph (g)(3)(i) of this section, CFC2 would be allowed to deduct the entire \$10x of disallowed business interest expense carryforward and therefore reduce the amount of CFC2's tested income. Also, assume that USP would have residual U.S. tax on its GILTI inclusion in Year 2, without regard to the application of paragraph (g)(4)(i) of this section.

(ii) *Analysis.* The \$10x of interest expense paid in Year 1 is a payment amount described in paragraph (g)(4)(i) of this section because it is between specified group members, CFC1 and CFC2. Furthermore the requirements of paragraph (g)(4)(i)(A), (B), and (C) of this section are satisfied because the business interest expense is incurred with a principal purpose of reducing USP's Federal income tax liability; absent the application of paragraph (g)(4)(i) of this section, the effect of CFC2 treating the \$10x of business interest expense as disallowed business interest expense in Year 1 would be to reduce USP's Federal income tax liability in Year 2; and no CFC group election is in effect with respect to the specified group in Year 1. Because the requirements of paragraph (g)(4)(i)(A), (B), and (C) of this section are satisfied, CFC2's ATI for Year 1 is increased by \$33.33x, which is the amount equal to 3 1/3 multiplied by \$10x (the lesser of the payment amount of \$10x and the disallowed business interest expense of \$10x). As a result, the \$10x of business interest expense is not treated by CFC2 as disallowed business

interest expense in Year 1, and therefore does not give rise to a disallowed business interest expense carryforward to Year 2.

(m) *Applicability dates*—(1) *General applicability date*. Except as provided in paragraph (m)(2) of this section, this section applies to taxable years of a foreign corporation beginning on or after November 13, 2020. However, except as provided in paragraph (m)(2) of this section, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of this section to each subsequent taxable year and the section 163(j) regulations, and if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4 to that taxable year and each subsequent taxable year.

(2) *Exception*. Paragraphs (a), (c) through (f), (g)(3) and (4), and (h) through (k) of this section apply to taxable years beginning on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply paragraphs (a), (c) through (f), (g)(3) and (4), and (h) through (k) of this section in their entirety for a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties also apply §1.163(j)-8 for the taxable year. For taxable years beginning before November 13, 2020, taxpayers and their related parties may not choose to apply paragraphs (a), (c) through (f), (g)(3) and (4), and (h) through (k) of this section unless they also apply paragraphs (b) and (g)(1) and (2) of this section in accordance with the second sentence of paragraph (m)(1) of this section. Notwithstanding paragraph (e)(5)(iii) or (h)(5)(i) of this section, in the case of a specified period of a specified group or a taxable year of a stand-alone applicable CFC that ends with

or within a taxable year of a designated U.S. person ending before November 13, 2020, a CFC group election or a safe-harbor election may be made on an amended Federal income tax return filed on or before the due date (taking into account extensions, if any) of the original Federal income tax return for the first taxable year of each designated U.S. person ending after November 13, 2020.

Par. 9. As reserved in a final rule elsewhere in this issue of the Federal Register, effective November 13, 2020, §1.163(j)-8 is added to read as follows:

§1.163(j)-8 Application of the section 163(j) limitation to foreign persons with effectively connected income.

(a) *Overview*. This section provides rules concerning the application of section 163(j) to foreign persons with ECI. Paragraph (b) of this section modifies the application of section 163(j) for a specified foreign person with ECI. Paragraph (c) of this section sets forth rules for a specified foreign partner in a partnership with ECI. Paragraph (d) of this section allocates disallowed business interest expense for relevant foreign corporations with ECI. Paragraph (e) of this section provides rules concerning disallowed business interest expense. Paragraph (f) of this section coordinates the application of section 163(j) with §1.882-5 and the branch profits tax under section 884. Paragraph (g) of this section provides definitions that apply for purposes of this section. Paragraph (h) of this section illustrates the application of this section through examples.

(b) *Application to a specified foreign person with ECI*—(1) *In general*. If a taxpayer is a specified foreign person, then the taxpayer applies the modifications described in this paragraph (b), taking into account the application of paragraph (c) of this section.

(2) *Modification of adjusted taxable income*. Adjusted taxable income for a specified foreign person for a taxable year means the specified foreign person's adjusted taxable income, as determined under §1.163(j)-1(b)(1), taking into account only items that are ECI.

(3) *Modification of business interest expense*. Business interest expense for a specified foreign person means business

interest expense described in §1.163(j)-1(b)(3) that is ECI, taking into account the application of paragraph (f)(1)(iii) of this section.

(4) *Modification of business interest income*. The business interest income of a specified foreign person means business interest income described in §1.163(j)-1(b)(4) that is ECI.

(5) *Modification of floor plan financing interest expense*. The floor plan financing interest expense of a specified foreign person means floor plan financing interest expense described §1.163(j)-1(b)(19) that is ECI.

(6) *Modification of allocation of interest expense and interest income that is allocable to a trade or business*. For purposes of applying §1.163(j)-10(c) to a specified foreign person, only interest income and interest expense that are ECI and only assets that are U.S. assets, as defined in §1.884-1(d), are taken into account. If the specified foreign person is also a specified foreign partner, this paragraph (b)(6) does not apply to any trade or business of the partnership.

(c) *Rules for a specified foreign partner*—(1) *Characterization of excess taxable income*—(i) *In general*. The portion of excess taxable income allocated to a specified foreign partner from a partnership pursuant to §1.163(j)-6(f)(2) that is ECI is equal to the specified foreign partner's allocation of excess taxable income from the partnership multiplied by its specified ATI ratio with respect to the partnership, and the remainder is not ECI.

(ii) *Specified ATI ratio*. The term *specified ATI ratio* means the fraction described in this paragraph (c)(1)(ii). If the specified foreign partner's distributive share of ECI and distributive share of non-ECI are both positive, the numerator of this fraction is the specified foreign partner's distributive share of ECI and the denominator is the specified foreign partner's distributive share of partnership items of income, gain, deduction, and loss. If the specified foreign partner's distributive share of ECI is negative or zero and its distributive share of non-ECI is positive, this fraction is treated as zero. If the specified foreign partner's distributive share of non-ECI is negative or zero and its distributive share of ECI is positive, this fraction is treated as one. If the specified foreign partner's

distributive share of ECI and distributive share of non-ECI are both negative, the numerator of this fraction is its distributive share of non-ECI and the denominator is its distributive share of partnership items of income, gain, deduction, and loss.

(iii) *Distributive share of ECI*. The term *distributive share of ECI* means the net amount of the specified foreign partner's distributive share of partnership items of income, gain, deduction, and loss that are ECI.

(iv) *Distributive share of non-ECI*. The term *distributive share of non-ECI* means the net amount of the specified foreign partner's distributive share of partnership items of income, gain, deduction, and loss that are not ECI.

(2) *Characterization of excess business interest expense*—(i) *Allocable ECI excess BIE*. The portion of excess business interest expense allocated to a specified foreign partner from a partnership pursuant to §1.163(j)-6(f)(2) or paragraph (e)(2) of this section that is ECI (*allocable ECI excess BIE*) is equal to the excess, if any, of allocable ECI BIE over allocable ECI deductible BIE.

(ii) *Allocable non-ECI excess BIE*. The portion of excess business interest expense allocated to a specified foreign partner from a partnership pursuant to §1.163(j)-6(f)(2) or paragraph (e)(2) of this section that is not ECI (*allocable non-ECI excess BIE*) is equal to the excess, if any, of allocable non-ECI BIE over allocable non-ECI deductible BIE.

(3) *Characterization of deductible business interest expense*—(i) *In general*. The portion of deductible business interest expense, if any, that is allocated to a specified foreign partner from a partnership pursuant to §1.163(j)-6(f)(2) that is ECI (*allocable ECI deductible BIE*) is equal to the sum of the amounts described in paragraphs (c)(3)(ii)(A)(1)(i) and (c)(3)(ii)(B)(1) of this section. The portion of deductible business interest expense, if any, that is allocated to a specified foreign partner from a partnership pursuant to §1.163(j)-6(f)(2) that is not ECI (*allocable non-ECI deductible BIE*) is equal to the sum of the amounts described in paragraphs (c)(3)(ii)(A)(1)(ii) and (c)(3)(ii)(B)(2) of this section.

(ii) *Allocation between allocable ECI deductible BIE and allocable non-ECI de-*

ductible BIE. For purposes of paragraph (c)(3)(i) of this section—

(A) *Allocation to hypothetical deductible amounts*—(i) *In general*. Subject to paragraph (c)(3)(ii)(A)(2) of this section, deductible business interest expense that is allocated to the specified foreign partner from the partnership pursuant to §1.163(j)-6(f)(2) is allocated pro rata to—

(i) Hypothetical partnership ECI deductible BIE; and

(ii) Hypothetical partnership non-ECI deductible BIE.

(2) *Limitation*. The amount allocated to hypothetical partnership ECI deductible BIE in paragraph (c)(3)(ii)(A)(1)(i) of this section cannot exceed the lesser of hypothetical partnership ECI deductible BIE or allocable ECI BIE, and the amount allocated to hypothetical partnership non-ECI deductible BIE in paragraph (c)(3)(ii)(A)(1)(ii) of this section cannot exceed the lesser of hypothetical partnership non-ECI deductible BIE or allocable non-ECI BIE.

(B) *Allocation of remaining deductible amounts*. Deductible business interest expense that is allocated to the specified foreign partner from the partnership pursuant to §1.163(j)-6(f)(2) in excess of the amount allocated in paragraph (c)(3)(ii)(A) of this section, if any, is allocated pro rata to—

(1) Allocable ECI BIE, reduced by the amount described in paragraph (c)(3)(ii)(A)(1)(i) of this section; and

(2) Allocable non-ECI BIE, reduced by the amount described in paragraph (c)(3)(ii)(A)(1)(ii) of this section.

(iii) *Hypothetical partnership deductible business interest expense*—(A) *Hypothetical partnership ECI deductible BIE*. The term *hypothetical partnership ECI deductible BIE* means the deductible business interest expense of the partnership, as defined in §1.163(j)-6(b)(5), determined by only taking into account the specified foreign partner's allocable share of items that are ECI (including by reason of paragraph (f)(1)(iii) of this section).

(B) *Hypothetical partnership non-ECI deductible BIE*. The term *hypothetical partnership non-ECI deductible BIE* means the deductible business interest expense of the partnership, as defined in §1.163(j)-6(b)(5), determined by only taking into account the specified foreign part-

ner's allocable share of items that are not ECI (including by reason of paragraph (f)(1)(iii) of this section).

(4) *Characterization of excess business interest income*—(i) *In general*. The portion of excess business interest income allocated to a specified foreign partner from a partnership pursuant to §1.163(j)-6(f)(2) that is ECI is equal to the specified foreign partner's allocation of excess business interest income from the partnership multiplied by its specified BII ratio with respect to the partnership, and the remainder is not ECI.

(ii) *Specified BII ratio*. The term *specified BII ratio* means the ratio of the specified foreign partner's allocable ECI BII to allocable business interest income (determined under §1.163(j)-6(f)(2)(ii)).

(iii) *Allocable ECI BII*. The term *allocable ECI BII* means the specified foreign partner's allocable BII, as determined under §1.163(j)-6(f)(2)(ii), computed by only taking into account income that is ECI.

(5) *Rules for determining ECI*. Except as described in paragraph (f)(1) of this section, if the determination as to whether partnership items are ECI is made by a direct or indirect partner, rather than the partnership itself, then for purposes of this paragraph (c), the partnership must use a reasonable method to characterize such items as ECI or as not ECI.

(d) *Characterization of disallowed business interest expense by a relevant foreign corporation with ECI*—(1) *Scope*. A relevant foreign corporation that has ECI and disallowed business interest expense for a taxable year determines the portion of its disallowed business interest expense and deductible business interest expense that is characterized as ECI or as not ECI under this paragraph (d). A relevant foreign corporation that is a specified foreign partner also applies the rules in paragraph (c) of this section. See also §1.163(j)-7(f) for rules regarding CFC group members with ECI.

(2) *Characterization of disallowed business interest expense*—(i) *FC ECI disallowed BIE*. For purposes of this section, the portion of disallowed business interest expense of a relevant foreign corporation that is ECI (*FC ECI disallowed BIE*) is equal to the excess, if any, of FC ECI BIE over FC ECI deductible BIE.

(ii) *FC non-ECI disallowed BIE.* For purposes of this section, the portion of disallowed business interest expense of a relevant foreign corporation that is not ECI (*FC non-ECI disallowed BIE*) is equal to the excess, if any, of FC non-ECI BIE over FC non-ECI deductible BIE.

(3) *Characterization of deductible business interest expense—(i) In general.* The portion of deductible business interest expense, if any, that is ECI (*FC ECI deductible BIE*) is equal to the sum of the amounts described in paragraphs (d)(3)(ii)(A)(I)(i) and (d)(3)(ii)(B)(1) of this section. The portion of deductible business interest expense, if any, that is allocable to income that is not ECI (*FC non-ECI deductible BIE*) is equal to the sum of the amounts described in paragraphs (d)(3)(ii)(A)(I)(ii) and (d)(3)(ii)(B)(2) of this section.

(ii) *Allocation between FC ECI deductible BIE and FC non-ECI deductible BIE.* For purposes of paragraph (d)(3)(i) of this section—

(A) *Allocation to hypothetical deductible amounts—(I) In general.* Subject to paragraph (d)(3)(ii)(A)(2) of this section, deductible business interest expense is allocated pro rata to—

(i) Hypothetical FC ECI deductible BIE; and

(ii) Hypothetical FC non-ECI deductible BIE.

(2) *Limitation.* The amount allocated to hypothetical FC ECI deductible BIE in paragraph (d)(3)(ii)(A)(I)(i) of this section cannot exceed the lesser of hypothetical FC ECI deductible BIE or FC ECI BIE, and the amount allocated to hypothetical FC non-ECI deductible BIE in paragraph (d)(3)(ii)(A)(I)(ii) of this section cannot exceed the lesser of hypothetical FC non-ECI deductible BIE or FC non-ECI BIE.

(B) *Allocation of remaining deductible amounts.* Deductible business interest expense in excess of the amount allocated in paragraph (d)(3)(ii)(A) of this section, if any, is allocated pro rata to—

(I) FC ECI BIE, reduced by the amount described in paragraph (d)(3)(ii)(A)(I)(i) of this section; and

(2) FC non-ECI BIE, reduced by the amount described in paragraph (d)(3)(ii)(A)(I)(ii) of this section.

(iii) *Hypothetical FC deductible business interest expense—(A) Hypothetical*

FC ECI deductible BIE. The term *hypothetical FC ECI deductible BIE* means the deductible business interest expense of the relevant foreign corporation determined by only taking into account its items that are ECI.

(B) *Hypothetical FC non-ECI deductible BIE.* The term *hypothetical FC non-ECI deductible BIE* means the deductible business interest expense of the relevant foreign corporation determined by only taking into account its items that are not ECI.

(e) *Rules regarding disallowed business interest expense—(1) Retention of character in a succeeding taxable year.* Disallowed business interest expense of a specified foreign person or a relevant foreign corporation for a taxable year (including excess business interest expense allocated to a specified foreign partner under §1.163(j)-6(f)(2) or paragraph (e)(2) of this section) that is ECI or is not ECI retains its character as ECI or as not ECI in a succeeding taxable year.

(2) *Deemed allocation of excess business interest expense of a partnership to a specified foreign partner.* For purposes of this paragraph (e) and paragraphs (c)(2), (g)(3), and (g)(7) of this section, a specified foreign partner's allocable share of business interest expense is deemed to include its allocable share of excess business interest expense of a partnership in which it is a direct or indirect partner. For purposes of this paragraph (e)(2), a specified foreign partner's allocable share of excess business interest expense of a partnership in which it is a direct or indirect partner is determined as if the excess business interest expense of the partnership were deductible in the taxable year in which the interest expense is first paid or accrued.

(3) *Ordering rule for conversion of excess business interest expense to business interest expense paid or accrued by a partner.* A specified foreign partner's allocable share of excess business interest expense (determined under §1.163(j)-6(f)(2) or paragraph (e)(2) of this section) is treated as business interest expense paid or accrued under §1.163(j)-6(g)(2)(i) in the order of the taxable years in which the excess business interest expense arose, and pro rata between allocable ECI excess BIE and allocable non-ECI excess BIE that arose in the same taxable year. This

paragraph (e)(3) applies before application of paragraph (b)(3) of this section.

(4) *Allocable ECI excess BIE and allocable non-ECI excess BIE retains its character when treated as business interest expense paid or accrued in a succeeding taxable year.* If excess business interest expense of a partnership in which a specified foreign partner is a direct or indirect partner is treated as business interest expense paid or accrued by the specified foreign partner or a partnership in which it is a direct or indirect partner under §1.163(j)-6(g)(2)(i), then allocable ECI excess BIE is treated as business interest expense allocable to ECI and allocable non-ECI excess BIE is treated as business interest expense allocable to income that is not ECI.

(f) *Coordination of the application of section 163(j) with §1.882-5 and similar provisions and with the branch profits tax—(1) Coordination of section 163(j) with §1.882-5 and similar provisions—(i) Ordering rule.* A foreign corporation first determines its business interest expense allocable to ECI under §1.882-5 or any other relevant provision (*§1.882-5 and similar provisions*) before applying section 163(j) to the foreign corporation. If a foreign corporation has a disallowed business interest expense carryforward from a taxable year, then none of that business interest expense is taken into account for purposes of determining business interest expense under §1.882-5 and similar provisions in a succeeding taxable year.

(ii) *Treatment of excess business interest expense.* For purposes of applying §1.882-5 and similar provisions, the business interest expense of a specified foreign partner that is a direct or indirect partner in a partnership is determined without regard to the application of section 163(j) to the partnership. As a result, for purposes of applying §1.882-5 and similar provisions, the specified foreign partner's share of business interest expense on liabilities of a partnership in which it is a direct or indirect partner is determined as if any excess business interest expense of the partnership (determined under §1.163(j)-6(f)(2) or paragraph (e)(2) of this section) were deductible in the taxable year in which the business interest expense is first paid or accrued and not in a succeeding taxable year.

(iii) *Attribution of certain §1.882-5 interest expense among the foreign corporation and its partnership interests*—(A) *In general.* If a foreign corporation is a specified foreign partner in one or more partnerships, then, for purposes of section 163(j) and the section 163(j) regulations, interest expense determined under §1.882-5(b) through (d) or §1.882-5(e) (*§1.882-5 three-step interest expense*) is treated as attributable to liabilities of the foreign corporation or the foreign corporation's share of liabilities of each partnership in accordance with paragraphs (f)(1)(iii)(B) and (f)(1)(iii)(C) of this section. Accordingly, the portion of the §1.882-5 three-step interest expense attributable to liabilities of the foreign corporation described in this paragraph (f)(1)(iii) is subject to section 163(j) and the section 163(j) regulations at the level of the foreign corporation. The portion of the §1.882-5 three-step interest expense attributable to liabilities of a partnership described in this paragraph (f)(1)(iii) is subject to section 163(j) and the section 163(j) regulations at the partnership-level. See §1.163(j)-6. This paragraph (f)(1)(iii) merely characterizes interest expense of the foreign corporation and its partnership interests as ECI or not ECI. It does not change the amount of interest expense of the foreign corporation or its partnership interests.

(B) *Attribution of interest expense on U.S. booked liabilities.* The §1.882-5 three-step interest expense is treated as attributable, pro rata, to interest expense on U.S. booked liabilities of a foreign corporation, determined under §1.882-5(d)(2)(ii)-(iii) or its interest expense on its share of U.S. booked liabilities of a partnership, determined under §1.882-5(d)(2)(vii), as applicable, to the extent thereof (without regard to whether the foreign corporation uses the method described in §1.882-5(b) through (d) or the method described in §1.882-5(e) for purposes of determining §1.882-5 interest expense).

(C) *Attribution of excess §1.882-5 three-step interest expense*—(1) *In general.* The §1.882-5 three-step interest expense in excess of interest expense attributable to U.S. booked liabilities described in §1.882-5(d)(2), if any (*excess §1.882-5 three-step interest expense*), is treated as attributable to liabilities of the foreign corporation or the foreign corpo-

ration's allocable share of liabilities of one or more partnerships, in accordance with paragraphs (f)(1)(iii)(C)(2) and (f)(1)(iii)(C)(3) of this section, subject to the limitation in paragraph (f)(1)(iii)(C)(4) of this section. For purposes of this paragraph (f)(1)(iii)(C), the term "U.S. assets" means U.S. assets described in §1.882-5(b).

(2) *Attribution of excess §1.882-5 three-step interest expense to the foreign corporation.* Excess §1.882-5 three-step interest expense is treated as attributable to interest expense on liabilities of the foreign corporation (and not its partnership interests) in proportion to its U.S. assets other than its partnership interests over all of its U.S. assets.

(3) *Attribution of excess §1.882-5 three-step interest expense to partnerships*—(i) *In general.* Excess §1.882-5 three-step interest expense is treated as attributable to interest expense on the foreign corporation's direct or indirect allocable share of liabilities of a partnership in proportion to the portion of the partnership interest that is treated as a U.S. asset under paragraph (f)(1)(iii)(C)(3)(ii) of this section over all of the foreign corporation's U.S. assets.

(ii) *Direct and indirect partnership interests.* If a foreign corporation owns an interest in a partnership that does not own an interest in any other partnerships, the portion of the partnership interest that is a U.S. asset is determined under §1.882-5(b). If a foreign corporation owns an interest in a partnership (the top-tier partnership) that owns an interest in one or more other partnerships, directly or indirectly (the lower-tier partnerships), the portion of the foreign corporation's direct or indirect interest in the top-tier partnership and lower-tier partnerships that is a U.S. asset is determined by re-attributing the portion of the top-tier partnership interest that is a U.S. asset, as determined under §1.882-5(b), among the foreign corporation's direct interest in the top-tier partnership and indirect interests in each lower-tier partnership in proportion to their contribution to the portion of the foreign corporation's interest in the upper-tier partnership that is a U.S. asset. Each partnership interest's contribution is determined based on a reasonable method consistent with the method used to determine the portion of the top-tier partnership interest that is a U.S. asset under §1.882-5(b).

(4) *Limitation on attribution of excess §1.882-5 three-step interest expense.* The portion of excess §1.882-5 three-step interest expense attributable to a foreign corporation under paragraph (f)(1)(iii)(C)(2) of this section or to a partnership under paragraph (f)(1)(iii)(C)(2) or (f)(1)(iii)(C)(3) of this section, as applicable, is limited to interest on liabilities of the foreign corporation or the foreign corporation's allocable share of liabilities of the partnership, reduced by the sum of the amounts of interest expense on its U.S. booked liabilities described in §1.882-5(d)(2) and interest expense on liabilities described in §1.882-5(a)(1)(ii)(A) or (B) (regarding direct allocations of interest expense). The portion of any excess §1.882-5 three-step interest expense that would be treated as attributable to the foreign corporation or a partnership interest, as applicable, but for this paragraph (f)(1)(iii)(C)(4) is re-attributable in accordance with the rules and principles of this paragraph (f)(1)(iii)(C). The portion of any excess §1.882-5 three-step interest expense that cannot be re-attributed under the rules of (f)(1)(iii)(C)(1) through (3) of this section because of the application of the first sentence of this paragraph (f)(1)(iii)(C)(4) is attributable, first to interest on liabilities of the foreign corporation, and then, pro rata, to the foreign corporation's allocable share of interest on liabilities of its direct or indirect partnership interests, to the extent such attribution is not in excess of the limitation described in this paragraph (f)(1)(iii)(C)(4), and without regard to whether the foreign corporation or its partnership interests have U.S. assets.

(2) *Coordination with the branch profits tax.* The disallowance and carryforward of business interest expense under §1.163(j)-2(b) and (c) will not affect the computation of the U.S. net equity of a foreign corporation, as defined in §1.884-1(c).

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

(1) *§1.882-5 and similar provisions.* The term *§1.882-5 and similar provisions* has the meaning provided in paragraph (f)(1)(i) of this section.

(2) *§1.882-5 three-step interest expense.* The term *§1.882-5 three-step interest expense* has the meaning provided in paragraph (f)(1)(iii)(A) of this section.

(3) *Allocable ECI BIE*. The term *allocable ECI BIE* means, with respect to a partnership, the specified foreign partner's allocable share of the partnership's business interest expense that is ECI, taking into account the application of paragraph (e)(2) of this section.

(4) *Allocable ECI BII*. The term *allocable ECI BII* has the meaning provided in paragraph (c)(4)(ii) of this section.

(5) *Allocable ECI deductible BIE*. The term *allocable ECI deductible BIE* has the meaning provided in paragraph (c)(3)(i) of this section.

(6) *Allocable ECI excess BIE*. The term *allocable ECI excess BIE* has the meaning provided in paragraph (c)(2)(i) of this section.

(7) *Allocable non-ECI BIE*. The term *allocable non-ECI BIE* means, with respect to a partnership, the specified foreign partner's allocable share of the partnership's business interest expense that is not ECI, taking into account the application of paragraph (e)(2) of this section.

(8) *Allocable non-ECI deductible BIE*. The term *allocable non-ECI deductible BIE* has the meaning provided in paragraph (c)(3)(i) of this section.

(9) *Allocable non-ECI excess BIE*. The term *allocable non-ECI excess BIE* has the meaning provided in paragraph (c)(2)(ii) of this section.

(10) *Distributive share of ECI*. The term *distributive share of ECI* has the meaning provided in paragraph (c)(1)(iii) of this section.

(11) *Distributive share of non-ECI*. The term *distributive share of non-ECI* has the meaning provided in paragraph (c)(1)(iv) of this section.

(12) *Effectively connected income*. The term *effectively connected income* (or *ECI*) means income or gain that is ECI, as defined in §1.884-1(d)(1)(iii), and deduction or loss that is allocable to, ECI, as defined in §1.884-1(d)(1)(iii).

(13) *Excess §1.882-5 three-step interest expense*. The term *excess §1.882-5 three-step interest expense* has the meaning provided in paragraph (f)(1)(iii)(C)(1) of this section.

(14) *FC ECI BIE*. The term *FC ECI BIE* means, with respect to a relevant foreign corporation and a taxable year, business interest expense that is ECI, determined without regard to the application

of section 163(j) and the section 163(j) regulations except for the application of paragraph (f)(1)(iii) of this section.

(15) *FC ECI deductible BIE*. The term *FC ECI deductible BIE* has the meaning provided in paragraph (d)(3)(i) of this section.

(16) *FC ECI disallowed BIE*. The term *FC ECI disallowed BIE* has the meaning provided in paragraph (d)(2)(i) of this section.

(17) *FC non-ECI BIE*. The term *FC non-ECI BIE* means, with respect to a relevant foreign corporation and a taxable year, business interest expense that is not ECI, determined without regard to the application of section 163(j) and the section 163(j) regulations except for the application of paragraph (f)(1)(iii) of this section.

(18) *FC non-ECI deductible BIE*. The term *FC non-ECI deductible BIE* has the meaning provided in paragraph (d)(3)(i) of this section.

(19) *FC non-ECI disallowed BIE*. The term *FC non-ECI disallowed BIE* has the meaning provided in paragraph (d)(2)(ii) of this section.

(20) *Hypothetical partnership ECI deductible BIE*. The term *hypothetical partnership ECI deductible BIE* has the meaning provided in paragraph (c)(3)(iii)(A) of this section.

(21) *Hypothetical partnership non-ECI deductible BIE*. The term *hypothetical partnership non-ECI deductible BIE* has the meaning provided in paragraph (c)(3)(iii)(B) of this section.

(22) *Hypothetical FC ECI deductible BIE*. The term *hypothetical FC ECI deductible BIE* has the meaning provided in paragraph (d)(3)(iii)(A) of this section.

(23) *Hypothetical FC non-ECI deductible BIE*. The term *hypothetical FC non-ECI deductible BIE* has the meaning provided in paragraph (d)(3)(iii)(B) of this section.

(24) *Specified ATI ratio*. The term *specified ATI ratio* has the meaning provided in paragraph (c)(1)(ii) of this section.

(25) *Specified BII ratio*. The term *specified BII ratio* has the meaning provided in paragraph (c)(4)(ii) of this section.

(26) *Specified foreign partner*. The term *specified foreign partner* means, with respect to a partnership that has ECI, a direct or indirect partner that is a specified

foreign person or a relevant foreign corporation.

(27) *Specified foreign person*. The term *specified foreign person* means a nonresident alien individual, as defined in section 7701(b) and the regulations under section 7701(b), or a foreign corporation other than a relevant foreign corporation.

(28) *Successor*. The term *successor* includes, with respect to a foreign corporation, the acquiring corporation in a transaction described in section 381(a) in which the foreign corporation is the distributor or transferor corporation.

(h) *Examples*. The following examples illustrate the application of this section. For all examples, assume that all referenced interest expense is deductible but for the application of section 163(j), the small business exemption under §1.163(j)-2(d) is not available, no entity is engaged in an excepted trade or business, no business interest expense is floor plan financing interest expense, all entities have the same taxable year, all entities use the U.S. dollar as their functional currency, no foreign corporation is a relevant foreign corporation, all relevant taxable years begin after December 31, 2020, and, for purposes of computing ATI, none of the adjustments described in §1.163(j)-1(b) are relevant other than the adjustment for business interest expense.

(i) *Example 1. Limitation on business interest deduction of a foreign corporation*—(i) *Facts*. FC, a foreign corporation, has \$100x of gross income that is ECI. FC has \$60x of other income which is not ECI. FC has total expenses of \$100x, of which \$50x is business interest expense. Assume that FC has \$30x of §1.882-5 three-step interest expense. Under section 882(c) and the regulations, FC has \$40x of other expenses that are ECI, none of which are business interest expense. FC does not have any business interest income. All amounts described in this paragraph (h)(1)(i) are with respect to a single taxable year of FC.

(ii) *Analysis*. FC is a specified foreign person under paragraph (g)(27) of this section. The amount of FC's business interest expense that is disallowed for the taxable year is determined under §1.163(j)-2(b) with respect to business interest expense described in paragraph (b)(3) of this section. Under paragraph (b)(3) of this section, FC has business interest expense of \$30x. Under paragraph (b)(2) of this section, FC has ATI of \$60x (\$100x - \$40x). Accordingly, FC's section 163(j) limitation is \$18x (\$60x x 30 percent). Because FC's business interest expense (\$30x) that is ECI exceeds the section 163(j) limitation (\$18x), FC may only deduct \$18x of business interest expense. Under §1.163(j)-2(c), the remaining \$12x is disallowed business interest expense carryforward, and under paragraph (f)(1)(i) of this section, the

\$12x is not taken into account for purposes of applying §1.882-5 in the succeeding taxable year.

(2) *Example 2. Use of a disallowed business interest expense carryforward—(i) Facts.* The facts are the same as in *Example 1* in paragraph (h)(1)(i) of this section except that for the taxable year FC has \$300x of gross income that is all ECI. Furthermore, assume that for the taxable year FC has a disallowed business interest expense carryforward of \$25x with respect to business interest expense described in paragraph (b)(3) of this section.

(ii) *Analysis.* Under paragraph (f)(1)(i) of this section, FC's \$25x of disallowed business interest expense carryforward is not taken into account for purposes of determining FC's interest expense under §1.882-5 for the taxable year. Therefore, FC has \$30x of §1.882-5 three-step interest expense. Under paragraph (b)(2) of this section, FC has ATI of \$260x (\$300x of gross income reduced by \$40 of expenses other than business interest expense). Accordingly, FC's section 163(j) limitation is \$78x (\$260x x 30 percent). Because FC's business interest expense (\$55x) does not exceed the section 163(j) limitation (\$78x), FC may deduct all \$55x of business interest expense.

(3) *Example 3. Foreign corporation is engaged in a U.S. trade or business and is also a specified foreign partner—(i) Facts.* FC, a foreign corporation, owns a 50-percent interest in ABC, a partnership that has ECI. In addition to owning a 50-percent interest in ABC, FC conducts a separate business that is engaged in a trade or business in the United States, Business Y. Business Y produces \$65x of taxable income before taking into account business interest expense and has U.S. assets with an adjusted basis of \$300x, business interest expense of \$15x on \$160x of liabilities, and no business interest income. All of the liabilities of Business Y are U.S. booked liabilities for purposes of §1.882-5(d). FC also has various foreign operations, some of which have U.S. dollar denominated debt. ABC has two lines of business, Business S and Business T. FC is allocated 50 percent of all items of income and expense of Business S and Business T. Business S produces \$140x of taxable income before taking into account business interest expense, and Business T produces \$80x of taxable income before taking into account business interest expense. Business S has business interest expense of \$20x on \$400x of liabilities and no business interest income. Business T has business interest expense of \$10x on \$150x of liabilities and no business interest income. With respect to FC, only Business S produces ECI. FC has an outside basis of \$600x in the portion of its ABC partnership interest that is a U.S. asset for purposes of §1.882-5(b), step 1. All of the liabilities of Business S are U.S. booked liabilities for purposes of §1.882-5(d). FC computes its interest expense under the three-step method described in §1.882-5(b) through (d) and for purposes of §1.882-5(c), step 2, FC uses the fixed ratio of 50 percent described in §1.882-5(c)(4) for taxpayers that are neither a bank nor an insurance company. Under §1.882-5(d)(5)(ii), FC's interest rate on excess U.S. connected liabilities is 5 percent. For the taxable year, assume FC has total interest expense of \$100x for purposes of §1.882-5(a)(3). All amounts described in this paragraph (h)(3)(i) are with respect to a single taxable year of FC or ABC, as applicable.

(ii) *Analysis—(A) Application of §1.882-5 to FC.* FC is a specified foreign person under paragraph (g)(27) of this section and a specified foreign partner under paragraph (g)(26) of this section. Under paragraph (f)(1) of this section, FC first determines its §1.882-5 three-step interest expense and then applies section 163(j). Under §1.882-5(b), step 1, FC has U.S. assets of \$900x (\$600x of basis in the portion of its ABC partnership interest that is a U.S. asset determined using the asset method described in §1.884-1(d)(3)(ii) + \$300x basis in U.S. assets of Business Y). Under §1.882-5(c), step 2, applying the 50-percent fixed ratio described in §1.882-5(c)(4), FC has U.S. connected liabilities of \$450x (\$900x x 50 percent). Under §1.882-5(d), step 3, FC has U.S. booked liabilities of \$360x (\$200x attributable to its 50-percent share of Business S liabilities of ABC + \$160x of Business Y liabilities) and interest on U.S. booked liabilities of \$25x (\$10x attributable to its 50-percent share of \$20x interest expense of Business S + \$15x of Business Y interest expense). FC has excess U.S. connected liabilities of \$90x (\$450x - \$360x) and under §1.882-5(d)(5) has interest expense on excess U.S. connected liabilities of \$4.50x (\$90x x 5 percent), which is excess §1.882-5 three-step interest expense. FC's §1.882-5 three-step interest expense is \$29.50x (\$25x + \$4.50x).

(B) *Attribution of §1.882-5 business interest expense between FC and ABC.* Under paragraph (f)(1)(iii) of this section, FC's §1.882-5 three-step interest expense is attributable to interest on its liabilities or on its share of ABC liabilities. Under paragraph (f)(1)(iii)(B), FC's §1.882-5 three-step interest expense of \$29.50x is first attributable to \$15 of interest expense on FC's (Business Y) U.S. booked liabilities and \$10x of interest expense on FC's share of U.S. booked liabilities of ABC. Under paragraph (f)(1)(iii)(C)(2) of this section, of the excess §1.882-5 three-step interest expense of \$4.50x (\$29.50x - \$15x - \$10x), 66.67 percent (\$600x of basis in the portion of the ABC partnership interest that is a U.S. asset / \$900x of total U.S. assets), or \$3.00x, is attributable to interest expense on FC's share of liabilities of ABC and 33.33 percent (\$300x U.S. assets other than partnership interests / \$900x of total U.S. assets), or \$1.50x, is attributable to interest expense on liabilities of FC. As a result, \$16.50x of business interest expense (\$15x + \$1.50x) is attributed to FC and \$13x of business interest expense (\$10x + \$3x) is attributed to ABC. The limitation under paragraph (f)(1)(iii)(C)(4) of this section does not change the result described in the preceding sentence. Specifically, under paragraph (f)(1)(iii)(C)(4) of this section, the amount attributed to ABC (tentatively, \$3.00x) is limited to \$5x (FC's 50-percent share of the \$30x of business interest expense of ABC or \$15x, reduced by FC's 50-percent share of the \$20x of business interest expense on U.S. booked liabilities of Business S), and the amount attributed to FC (tentatively, \$1.50x) is limited to \$70x (FC's business interest expense of \$100x, reduced by \$15x of business interest expense on U.S. booked liabilities of Business Y and its \$15x allocable share of ABC's business interest expense).

(C) *Application of the section 163(j) limitation to ABC.* Under §1.163(j)-6(a), ABC computes a section 163(j) limitation at the partnership level. ABC has business interest expense of \$30x (\$20x from Business S and \$10x from Business T). Under §1.163(j)-

6(d), ABC has ATI of \$220x (\$140 + \$80). Under §1.163(j)-2(b), ABC's section 163(j) limitation is \$66x (\$220x x 30 percent). Because ABC's business interest expense (\$30x) does not exceed the section 163(j) limitation (\$66x), all of ABC's business interest expense is deductible for the taxable year.

(D) *Excess taxable income of ABC.* Under §1.163(j)-1(b)(15), ABC has excess taxable income of \$120x (\$220x x (\$36x/\$66x)). Under §1.163(j)-6(f)(2), FC is allocated 50 percent of the \$120x of ABC's excess taxable income or \$60x of allocable excess taxable income. Under paragraph (c)(1) of this section, the amount of the allocable excess taxable income of \$60x that is ECI is equal to FC's allocable excess taxable income multiplied by the specified ATI ratio. Under paragraph (c)(1)(iii) of this section, FC's distributive share of ECI of ABC is \$57x (FC's 50-percent share of \$140x (Business S income computed without regard to business interest expense) or \$70x - \$13x of business interest expense that is ECI). Under paragraph (c)(1)(iv) of this section, FC's distributive share of non-ECI of ABC is \$38x (FC's 50-percent share of \$80x (Business T income computed without regard to business interest expense) or \$40x - \$2x of business interest expense that is not ECI). FC's distributive share of partnership items of income, gain, deduction, and loss of ABC is \$95x (\$57x distributive share of ECI and \$38x distributive share of non-ECI). Because both FC's distributive share of ECI and distributive share of non-ECI are positive, under paragraph (c)(1)(ii) of this section, the specified ATI ratio is 60 percent (\$57x distributive share of ECI / \$95x distributive share of partnership items of income, gain, deduction, and loss of ABC). As a result, the amount of FC's allocable excess taxable income from ABC that is ECI is \$36x (\$60 of allocable excess taxable income x 60 percent specified ATI ratio).

(E) *Application of section 163(j) to FC.* Under paragraph (b)(3) of this section, FC's business interest expense is \$16.50x. Under §1.163(j)-6(e)(1), FC's ATI is determined under §1.163(j)-1(b)(1) without regard to FC's distributive share of any items of income, gain, deduction, or loss of ABC. Under paragraph (b)(2) of this section, FC's ATI is \$101x (\$65x of ECI from Business Y + \$36x of allocable excess taxable income from ABC that is ECI). FC's section 163(j) limitation is \$30.30x (\$101x x 30 percent). Because FC's business interest expense (\$16.50x) is less than FC's section 163(j) limitation (\$30.30x) and all of its share of ABC's business interest expense that is allocable to ECI (\$13x) is deductible, FC may deduct all \$29.50x of §1.882-5 three-step interest expense determined under paragraph (h)(3)(ii)(A) of this section.

(4) *Example 4. Specified foreign partner with excess business interest expense from a partnership—(i) Facts—(A) In general.* FC, a foreign corporation, owns a 50-percent interest in ABC, a partnership that has ECI. In addition to owning a 50-percent interest in ABC, FC conducts a separate business that is engaged in a trade or business in the United States, Business Y. Business Y produces \$56x of taxable income before taking into account business interest expense and has U.S. assets with an adjusted basis of \$800x, business interest expense of \$16x on \$200x of liabilities, and no business interest income. All of the liabilities of Business Y are U.S. booked liabili-

ties for purposes of §1.882-5(d). FC also has various foreign operations, some of which have U.S. dollar denominated debt.

(B) *ABC Partnership*. ABC has two lines of business, Business S and Business T, and owns a 50-percent interest in DEF, a partnership. FC is allocated 50 percent of all items of income and expenses of Business S and Business T and ABC's allocable share of items from partnership DEF. Business S produces \$80x of taxable income before taking into account business interest expense, and Business T produces \$90x of taxable income before taking into account business interest expense. Business S has business interest expense of \$30x on \$500x of liabilities and no business interest income. Business T has business interest expense of \$50x on \$500x of liabilities and no business interest income. With respect to FC, only Business S produces ECI. All of the liabilities of Business S are U.S. booked liabilities for purposes of §1.882-5(d).

(C) *DEF Partnership*. DEF has two lines of business, Business U and Business V. ABC is allocated 50 percent of all items of income and expenses of Business U and Business V. Business U produces \$100x of taxable income before taking into account business interest expense and Business V produces \$140x of taxable income before taking into account business interest expense. Business U has business interest expense of \$40x on \$600x of liabilities and no business interest income. Business V has business interest expense of \$60x on \$600x of liabilities and no business interest income. With respect to FC, only Business U produces ECI. All of the liabilities of Business U are U.S. booked liabilities for purposes of §1.882-5(d).

(D) *Section 1.882-5*. FC has an outside basis of \$600x in the portion of its ABC partnership interest that is a U.S. asset for purposes of §1.882-5(b), step 1, determined using the asset method described in §1.884-1(d)(3)(ii). For purposes of §1.884-1(d)(3)(ii), ABC has a total basis of \$500 in assets that would be treated as U.S. assets if ABC were a foreign corporation, including a basis of \$250x in the portion of its interest in DEF partnership interest that would be treated as a U.S. asset if ABC were a foreign corporation. FC computes its interest expense under the three-step method described in §1.882-5(b) through (d), and for purposes of §1.882-5(c), step 2, FC uses the fixed ratio of 50 percent described in §1.882-5(c)(4) for taxpayers that are neither a bank nor an insurance company. FC has total interest expense of \$100x for purposes of §1.882-5(a)(3). Under §1.882-5(d)(5)(ii), FC's interest rate on excess U.S. connected liabilities is 6 percent. All amounts described in this paragraph (h)(4)(i) are with respect to a single taxable year of FC, ABC, or DEF, as applicable.

(ii) *Analysis—(A) Application of §1.882-5 to FC*. FC is a specified foreign person under paragraph (g)(27) of this section and a specified foreign partner under paragraph (g)(26) of this section. Under paragraph (f)(1) of this section, FC first determines its §1.882-5 three-step interest expense and then applies section 163(j). Under §1.882-5(b), step 1, FC has U.S. assets of \$1400x (\$600x of basis in the portion of its ABC partnership interest that is a U.S. asset + \$800x basis in U.S. assets of Business Y). Under §1.882-5(c), step 2, applying the 50-percent fixed ra-

tio described in §1.882-5(c)(4), FC has U.S. connected liabilities of \$700x (\$1400x x 50 percent). Under §1.882-5(d), step 3, FC has U.S. booked liabilities of \$600x (\$250x attributable to its 50-percent share of Business S liabilities of ABC + \$150x attributable to its indirect 25-percent share of Business U liabilities of DEF + \$200x of Business Y liabilities), and interest on U.S. booked liabilities of \$41x (\$15x attributable to its 50-percent share of \$30x interest expense of Business S + \$10x attributable to its 25-percent share of \$40 interest expense of Business U + \$16x of Business Y interest expense). FC has excess U.S. connected liabilities of \$100x (\$700x - \$600x) and under §1.882-5(d)(5), interest expense on excess U.S. connected liabilities of \$6x (\$100x x 6 percent), which is excess §1.882-5 three-step interest expense. FC's §1.882-5 three-step interest expense is \$47x (\$41x + \$6x).

(B) *Attribution of certain §1.882-5 business interest expense among FC, ABC, and DEF*. Under paragraph (f)(1)(iii) of this section, FC's §1.882-5 three-step interest expense is attributable to interest on its liabilities or on its share of ABC and DEF's liabilities. Under paragraph (f)(1)(iii)(B) of this section, FC's §1.882-5 three-step interest expense of \$47x is first attributable to \$16x of interest expense on FC's U.S. booked liabilities, \$15x of interest expense on FC's share of U.S. booked liabilities of ABC, and \$10x of interest expense on FC's share of U.S. booked liabilities of DEF. Under paragraph (f)(1)(iii)(C)(2) of this section, of the excess §1.882-5 three-step interest expense of \$6x (\$47x - \$16x - \$15x - \$10x), 42.86 percent (\$600x of basis in the portion of the ABC partnership interest that is a U.S. asset / \$1400x of total U.S. assets) or \$2.57x is attributable to interest expense on FC's share of liabilities of ABC (and its partnership interests), and 57.14 percent (\$800x U.S. assets other than partnership interests / \$1400x of total U.S. assets) or \$3.43x is attributable to interest expense on liabilities of FC. Under paragraph (f)(1)(iii)(C)(3) of this section, of the \$2.57x of business interest expense that is ECI and that is attributable to interest expense on FC's share of liabilities of ABC (and its partnership interests), 50 percent (\$250x of basis in the portion of the DEF partnership interest that would be a U.S. asset if ABC were a foreign corporation / \$500x total basis in assets that would be U.S. assets if ABC were a foreign corporation), or \$1.29x, is attributable to interest expense on FC's share of liabilities of ABC and 50 percent (\$250x of basis in assets other than partnership interests that would be U.S. assets if ABC were a foreign corporation / \$500x of total basis in assets that would be U.S. assets if ABC were a foreign corporation), or \$1.29x is attributable to interest expense on FC's share of liabilities of DEF. As a result, \$19.43x (\$16x + \$3.43x) of business interest expense is attributed to FC, \$16.29x (\$15x + \$1.29x) of business interest expense is attributed to ABC, and \$11.29x (\$10x + \$1.29x) of business interest expense is attributed to DEF. The limitation under paragraph (f)(1)(iii)(C)(4) of this section does not change the result described in the preceding sentence. Specifically, under paragraph (f)(1)(iii)(C)(4) of this section, the amount attributed to FC (tentatively, \$3.43x) is limited to \$19x (FC's business interest expense of \$100x, reduced by \$16x of business interest expense on U.S. booked liabilities of Business Y, its \$40x allocable share

of ABC's business interest expense, and its \$25x allocable share of DEF's business interest expense); the amount attributed to ABC (tentatively, \$1.29x) is limited to \$25x (FC's 50-percent share of the \$80x of business interest expense of ABC, or \$40x, reduced by FC's 50-percent share of the \$30x of business interest expense on U.S. booked liabilities of Business S, or \$15x); and the amount attributed to DEF (tentatively, \$1.29x) is limited to \$15x (FC's 25-percent share of the \$100x of business interest expense of DEF, or \$25x, reduced by FC's 25-percent share of the \$40x of business interest expense on U.S. booked liabilities of Business U, or \$10x).

(C) *Application of section 163(j) to DEF—(1)*
In general. Under §1.163(j)-6(a), DEF computes a section 163(j) limitation at the partnership-level. DEF has business interest expense of \$100x (\$40x from Business U + \$60x from Business V). Under §1.163(j)-6(d), DEF has ATI of \$240x (\$100x + \$140x). Under §1.163(j)-2(b), DEF's section 163(j) limitation is \$72x (\$240x x 30 percent). Because DEF's business interest expense (\$100x) exceeds the section 163(j) limitation (\$72x), only \$72x of DEF's business interest expense is deductible and \$28x is disallowed under section 163(j). Pursuant to paragraph (e)(2) of this section, FC is allocated \$7x of excess business interest expense (25 percent x \$28x) and \$18x of deductible business interest expense (25 percent x \$72x).

(2) *Deductible business interest expense*. Under paragraph (c)(3) of this section, in order to determine the portion of FC's allocable deductible business interest expense (\$18x) that is allocable ECI deductible BIE and the portion that is allocable non-ECI deductible BIE, the hypothetical partnership ECI deductible BIE and hypothetical partnership non-ECI deductible BIE must be determined. Under paragraph (c)(3)(iii)(A) of this section, FC's hypothetical partnership ECI deductible BIE with respect to DEF is \$7.50x (\$25x of FC's allocable share of ECI before taking into account interest expense x 30 percent). Under paragraph (c)(3)(iii)(B) of this section, FC's hypothetical partnership non-ECI deductible BIE with respect to DEF is \$10.50x (\$35x of FC's allocable share of income that is not ECI before taking into account interest expense x 30 percent). Under paragraph (c)(3)(i) of this section, allocable ECI deductible BIE is equal to the amounts described in paragraphs (c)(3)(ii)(A)(1)(i) and (c)(3)(ii)(B)(1) of this section and allocable non-ECI deductible BIE is equal to the amounts described in paragraphs (c)(3)(ii)(A)(ii) and (c)(3)(ii)(B)(2) of this section. Under paragraph (c)(3)(ii)(A)(1) of this section, FC's allocable deductible business interest expense (\$18x) is allocated pro rata between hypothetical partnership ECI deductible BIE (\$7.50x) and hypothetical partnership non-ECI deductible BIE (\$10.50x). However, the amount allocated to hypothetical partnership ECI deductible BIE cannot exceed the lesser of hypothetical partnership ECI deductible BIE (\$7.50x) or allocable ECI BIE (\$11.29x), and the amount allocated to hypothetical partnership non-ECI deductible BIE cannot exceed the lesser of hypothetical partnership non-ECI deductible BIE (\$10.50x) or allocable non-ECI BIE (total allocable business interest expense of \$25x reduced by allocable ECI BIE of \$11.29x, or \$13.71x). The portion of FC's allocable deductible business interest expense (\$18x) from

DEF that is allocable ECI deductible BIE is 41.67 percent ($\$7.50x$ of hypothetical partnership ECI deductible BIE / $\$18x$ of total hypothetical partnership deductible BIE), or $\$7.5x$. The portion of FC's allocable deductible business interest expense from DEF ($\$18x$) that is allocable non-ECI deductible BIE is 58.33 percent ($\$10.50x$ of hypothetical partnership ECI deductible BIE / $\$18x$ of total hypothetical partnership deductible BIE), or $\$10.50x$. Because the full amount of FC's allocable deductible business interest expense ($\$18x$) is allocable under paragraph (c)(3)(ii)(A)(1) of this section, no portion is allocated under paragraph (c)(3)(ii)(B) of this section.

(3) *Excess business interest expense.* Under paragraph (c)(2)(i) of this section, the portion of excess business interest expense allocated to FC from DEF pursuant to paragraph (e)(2) of this section ($\$7x$) that is allocable ECI excess BIE is $\$3.79x$ ($\$11.29x$ of allocable ECI BIE - $\$7.50x$ allocable ECI deductible BIE). Under paragraph (c)(2)(ii) of this section, the portion of excess business interest expense allocated to FC from DEF pursuant to paragraph (e)(2) of this section ($\$7x$) that is allocable non-ECI excess BIE is $\$3.21x$ ($\$13.71x$ of allocable non-ECI BIE - $\$10.50x$ allocable non-ECI deductible BIE).

(D) *Application of section 163(j) to ABC—(1)*

In general. Under §1.163(j)-6(a), ABC computes a section 163(j) limitation at the partnership-level. ABC has business interest expense of $\$80x$ ($\$30x$ from Business S + $\$50x$ from Business T). Under §1.163(j)-6(d), ABC has ATI of $\$170x$ ($\$80x + \$90x$). Under §1.163(j)-2(b), ABC's section 163(j) limitation is $\$51x$ ($\$170x \times 30\%$ percent). Because ABC's business interest expense ($\$80x$) exceeds the section 163(j) limitation ($\$51x$), ABC may only deduct $\$51x$ of business interest expense, and $\$29x$ is disallowed under section 163(j). Pursuant to §1.163(j)-6(f)(2), FC is allocated $\$14.50x$ of excess business interest expense (50 percent x $\$29x$) and $\$25.50x$ of deductible business interest expense (50 percent x $\$51x$).

(2) *Deductible business interest expense.* Under paragraph (c)(3) of this section, in order to determine the portion of FC's allocable deductible business interest expense ($\$25.50x$) that is allocable ECI deductible BIE and the portion that is allocable non-ECI deductible BIE, the hypothetical partnership ECI deductible BIE and hypothetical partnership non-ECI deductible BIE must be determined. Under paragraph (c)(3)(iii)(A) of this section, FC's hypothetical partnership ECI deductible BIE with respect to ABC is $\$12x$ ($\$40x$ of FC's allocable share of ECI before taking into account interest expense x 30 percent). Under paragraph (c)(3)(iii)(B) of this section, FC's hypothetical partnership non-ECI deductible BIE with respect to ABC is $\$13.50x$ ($\$45x$ of FC's allocable share of income that is not ECI before taking into account interest expense x 30 percent). Under paragraph (c)(3)(i) of this section, allocable ECI deductible BIE is equal to the amounts described in paragraphs (c)(3)(ii)(A)(1)(i) and (c)(3)(ii)(B)(1) of this section and allocable non-ECI deductible BIE is equal to the amounts described in paragraphs (c)(3)(ii)(A)(1)(ii) and (c)(3)(ii)(B)(2) of this section. Under paragraph (c)(3)(ii)(A)(1) of this section, FC's allocable deductible business interest expense ($\$25.50x$) is allocated pro rata between hypothetical partnership ECI deductible BIE ($\$12x$)

and hypothetical partnership non-ECI deductible BIE ($\$13.50x$). However, the amount allocated to hypothetical partnership ECI deductible BIE cannot exceed the lesser of hypothetical partnership ECI deductible BIE ($\$12x$) or allocable ECI BIE ($\$16.29x$), and the amount allocated to hypothetical partnership non-ECI deductible BIE cannot exceed the lesser of hypothetical partnership non-ECI deductible BIE ($\$13.50x$) or allocable non-ECI BIE (total allocable business interest expense of $\$40x$ reduced by allocable ECI BIE of $\$16.29x$, or $\$23.71x$). The portion of FC's allocable deductible business interest expense from ABC ($\$25.50x$) that is allocable ECI deductible BIE is 47.06 percent ($\$12x$ of hypothetical partnership ECI deductible BIE / $\$25.50x$ of total hypothetical partnership deductible BIE), or $\$12x$. The portion of FC's allocable deductible business interest expense from ABC that is allocable non-ECI deductible BIE is 52.94 percent ($\$13.50x$ of hypothetical partnership ECI deductible BIE / $\$25.50x$ of total hypothetical partnership deductible BIE), or $\$13.50x$. Because the full amount of FC's allocable deductible business interest expense ($\$25.50x$) is allocable under paragraph (c)(3)(ii)(A)(1) of this section, no portion is allocated under paragraph (c)(3)(ii)(B) of this section.

(3) *Excess business interest expense.* Under paragraph (c)(2)(i) of this section, the portion of excess business interest expense allocated to FC from ABC pursuant to §1.163(j)-6(f)(2) ($\$14.50x$) that is allocable ECI excess BIE is $\$4.29x$ ($\$16.29x$ of allocable ECI BIE - $\$12x$ allocable ECI deductible BIE). Under paragraph (c)(2)(ii) of this section, the portion of excess business interest expense allocated to FC from ABC pursuant to §1.163(j)-6(f)(2) ($\$14.50x$) that is allocable non-ECI excess BIE is $\$10.21x$ ($\$23.71x$ of allocable non-ECI BIE - $\$13.50x$ allocable non-ECI deductible BIE).

(E) *Application of section 163(j) to FC.* Under paragraph (b)(3) of this section, FC's business interest expense is $\$19.43x$. Under §1.163(j)-6(e)(1), FC's ATI is determined under §1.163(j)-1(b)(1) without regard to FC's distributive share of any items of income, gain, deduction, or loss of ABC or DEF. Under paragraph (b)(2) of this section, FC's ATI is $\$56x$ ($\$56x$ of ECI of Business Y before taking into account interest expense). FC's section 163(j) limitation is $\$16.80x$ ($\$56x \times 30\%$ percent). Because the portion of FC's business interest expense determined under §1.882-5 that is attributed to FC ($\$19.43x$) exceeds the section 163(j) limitation ($\$16.80x$), FC may only deduct $\$16.80x$ of business interest expense, and $\$2.63x$ is disallowed business interest expense carryforward. After taking into account FC's allocable share of deductible business interest expense, FC may deduct $\$36.30x$ ($\$16.80x$ from FC + $\$12x$ allocable ECI deductible BIE from ABC + $\$7.50x$ allocable ECI deductible BIE from DEF). FC also has $\$2.63x$ disallowed business interest expense carryforward characterized as ECI, $\$4.29x$ allocable ECI excess BIE from ABC, $\$10.21x$ allocable non-ECI excess BIE from ABC, and, under paragraph (e)(2) of this section, is deemed to have $\$3.79x$ allocable ECI excess BIE from DEF and $\$3.21x$ allocable non-ECI excess BIE from DEF.

(i) [Reserved]

(j) *Applicability date.* This section applies to taxable years beginning on or

after **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER].** However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply this section in its entirety for a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties also apply §1.163(j)-7(a), (c) through (f), (g)(3) and (4), and (h) through (k) for the taxable year. For a taxable year beginning before November 13, 2020, taxpayers and their related parties may not choose to apply this section unless they also apply §1.163(j)-7(b) and (g)(1) and (2) in accordance with the second sentence of §1.163(j)-7(m)(1).

Par. 10. As added in a final rule elsewhere in this issue of the Federal Register, effective November 13, 2020, §1.163(j)-10 is amended by:

1. Designating paragraph (c)(5)(ii)(D) as paragraph (c)(5)(ii)(D)(1).
2. Adding a subject heading for paragraph (c)(5)(ii)(D).
3. Adding paragraph (c)(5)(ii)(D)(2).
4. Designating paragraph (f) as paragraph (f)(1).
5. Adding a subject heading for paragraph (f).
6. Revising the subject heading of newly redesignated paragraph (f)(1).
7. Adding paragraph (f)(2).

The additions and revision read as follows:

1.163(j)-10 Allocation of interest expense, interest income, and other items of expense and gross income to an excepted trade or business.

* * * * *

(c) * * *

(5) * * *

(ii) * * *

(D) *Limitations on application of look-through rules.* * * *

(2) *Limitation on application of look-through rule to C corporations.* Except as provided in §1.163(j)-9(h)(4)(iii) and (iv) (for a REIT or a partnership making the election under §1.163(j)-9(h)(1) or (7), respectively), for purposes of applying the look-through rules in paragraph (c)(5)(ii)(B) and (C) of this section to a non-consolidated C corporation (upper-ti-

er entity), that upper-tier entity may not apply these look-through rules to a lower-tier non-consolidated C corporation. For example, assume that P wholly and directly owns S1 (the upper-tier entity), which wholly and directly owns S2. Further assume that each of these entities is a non-consolidated C corporation to which the small business exemption does not apply. S1 may not look through the stock of S2 (and may not apply the asset basis look-through rule described in paragraph (c)(5)(ii)(B)(2)(iv) of this section) for purposes of P's allocation of its basis in its S1 stock between excepted and non-excepted trades or businesses; instead, S1 must treat its stock in S2 as an asset used in a non-excepted trade or business for that purpose. However, S1 may look through the stock of S2 for purposes of S1's allocation of its basis in its S2 stock between excepted and non-excepted trades or businesses.

* * * * *

(f) *Applicability dates.*

(1) *In general.* * * *

(2) *Paragraph (c)(5)(ii)(D)(2).* The rules contained in paragraph (c)(5)(ii)(D)(2) of this section apply for taxable years beginning on or after **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**. However, taxpayers may choose to apply the rules of paragraph (c)(5)(ii)(D)(2) of this section to a taxable year beginning after December 31, 2017, and before **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**, so long as they consistently apply the rules in the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.383-0, 1.383-1, 1.469-9, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4 to that taxable year and each subsequent taxable year.

Par. 11. Section 1.469-4 is amended by adding paragraph (d)(6) to read as follows:

§1.469-4 Definition of activity.

* * * * *

(d) * * *

(6) *Activities described in section 163(d)(5)(A)(ii).* An activity described in section 163(d)(5)(A)(ii) that involves the conduct of a trade or business which is not a passive activity of the taxpayer and with respect to which the taxpayer does not materially participate may not be grouped with any other activity or activities of the taxpayer, including any other activity described in section 163(d)(5)(A)(ii).

* * * * *

Par. 12. As amended in a final rule elsewhere in this issue of the Federal Register, effective November 13, 2020, §1.469-9 is further amended by revising paragraphs (b)(2)(ii)(A) and (B) to read as follows:

§1.469-9 Rules for certain rental real estate activities.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(A) *Real property development.* The term *real property development* means the maintenance and improvement of raw land to make the land suitable for subdivision, further development, or construction of residential or commercial buildings, or to establish, cultivate, maintain or improve timberlands (that is, land covered by timber-producing forest). Improvement of land may include any clearing (such as through the mechanical separation and removal of boulders, rocks, brush, brushwood, and underbrush from the land); excavation and gradation work; diversion or redirection of creeks, streams, rivers, or other sources or bodies of water; and the installation of roads (including highways, streets, roads, public sidewalks, and bridges), utility lines, sewer and drainage systems, and any other infrastructure that may be necessary for subdivision, further development, or construction of residential or commercial buildings, or for the establishment, cultivation, maintenance or improvement of timberlands.

(B) *Real property redevelopment.* The term *real property redevelopment* means the demolition, deconstruction, separation, and removal of existing buildings, landscaping, and infrastructure on a parcel of land to return the land to a raw condition or otherwise prepare the land for new development or construction, or for

the establishment and cultivation of new timberlands.

* * * * *

Par. 13. Section 1.469-11 is amended by revising paragraphs (a)(1) and (4) to read as follows:

§1.469-11 Applicability date and transition rules.

(a) * * *

(1) The rules contained in §§1.469-1, 1.469-1T, 1.469-2, 1.469-2T, 1.469-3, 1.469-3T, 1.469-4, but not §1.469-4(d)(6), 1.469-5 and 1.469-5T apply for taxable years ending after May 10, 1992. The rules contained in §1.469-4(d)(6) apply for taxable years beginning on or after **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b), may choose to apply the rules of §1.469-4(d)(6) to a taxable year beginning after December 31, 2017, and before **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**, so long as they consistently apply the rules in the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.383-0, 1.383-1, 1.469-9, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4 to that taxable year and each subsequent taxable year.

* * * * *

(4) The rules contained in §1.469-9(b)(2), other than paragraphs (b)(2)(ii)(A) and (B), apply to taxable years beginning on or after November 13, 2020. Section 1.469-9(b)(2)(ii)(A) and (B) applies to taxable years beginning on or after **[DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]**. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of §1.469-9(b)(2), other than paragraphs (b)(2)(ii)(A) and (B), to a taxable year beginning after December 31, 2017, and before November 13, 2020 and may choose to apply

the rules contained in §1.469-9(b)(2)(ii) (A) and (B) to taxable years beginning after December 31, 2017, and before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], so long as they consistently apply the rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.383-0, 1.383-1, 1.469-9, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4 to that taxable year and each subsequent taxable year.

* * * *

Par. 14. Section 1.1256(e)-2 is added to read as follows:

§1.1256(e)-2 Special rules for syndicates.

(a) *Allocation of losses.* For purposes of section 1256(e)(3), *syndicate* means

any partnership or other entity (other than a corporation that is not an S corporation) if more than 35 percent of the losses of such entity during the taxable year are allocated to limited partners or limited entrepreneurs (within the meaning of section 461(k)(4)).

(b) *Determination of loss amount.* For purposes of section 1256(e)(3), the amount of losses to be allocated under paragraph (a) of this section is calculated without regard to section 163(j).

(c) *Example.* The following example illustrates the rules in this section:

(1) *Facts.* Entity is an S corporation that is equally owned by individuals A and B. A provides all of the goods and services provided by Entity. B provided all of the capital for Entity but does not participate in Entity's business. For the current taxable year, Entity has gross receipts of \$5,000,000, non-interest expenses of \$4,500,000, and interest expense of \$600,000.

(2) *Analysis.* Under paragraph (b) of this section, Entity has a net loss of \$100,000 (\$5,000,000 minus \$5,100,000) for the current taxable year. One half (50 percent) of this loss is allocated to B, a limited owner. Therefore, for the current taxable year, Entity is a syndicate within the meaning of section 1256(e)(3)(B).

(d) *Applicability date.* This section applies to taxable years beginning on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]. However, taxpayers and their related parties, under sections 267(b) and 707(b)(1), may choose to apply the rules of this section for a taxable year beginning after December 31, 2017, and before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], provided that they consistently apply the rules of this section to that taxable year and each subsequent taxable year.

Sunita Lough,
Deputy Commissioner for Services
and Enforcement.

(Filed by the Office of the Federal Register on September 3, 2020, 4:15 p.m., and published in the issue of the Federal Register for September 14, 2020, 85 F.R. 56846)

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as “rulings”) that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the

new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the

new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.

ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel’s Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.

PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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¹A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2019–27 through 2019–52 is in Internal Revenue Bulletin 2019–52, dated December 27, 2019.

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