

**§ 860E. Treatment of income in excess of daily accruals on residual interests**

**(a) Excess inclusions may not be offset by net operating losses**

**(1) In general**

The taxable income of any holder of a residual interest in a REMIC for any taxable year shall in no event be less than the excess inclusion for such taxable year.

**(2) Special rule for affiliated groups**

All members of an affiliated group filing a consolidated return shall be treated as 1 taxpayer for purposes of this subsection.

**(3) Coordination with section 172**

Any excess inclusion for any taxable year shall not be taken into account—

(A) in determining under section 172 the amount of any net operating loss for such taxable year, and

(B) in determining taxable income for such taxable year for purposes of subsection (a)(2)(B)(ii)(I) and the second sentence of subsection (b)(2) of section 172.

**(4) Coordination with minimum tax**

For purposes of part VI of subchapter A of this chapter—

(A) the reference in section 55(b)(2) to taxable income shall be treated as a reference to taxable income determined without regard to this subsection,

(B) the alternative minimum taxable income of any holder of a residual interest in a REMIC for any taxable year shall in no event be less than the excess inclusion for such taxable year, and

(C) any excess inclusion shall be disregarded for purposes of computing the alternative tax net operating loss deduction.

**(b) Organizations subject to unrelated business tax**

If the holder of any residual interest in a REMIC is an organization subject to the tax imposed by section 511, the excess inclusion of such holder for any taxable year shall be treated as unrelated business taxable income of such holder for purposes of section 511.

**(c) Excess inclusion**

For purposes of this section—

**(1) In general**

The term “excess inclusion” means, with respect to any residual interest in a REMIC for any calendar quarter, the excess (if any) of—

(A) the amount taken into account with respect to such interest by the holder under section 860C(a), over

(B) the sum of the daily accruals with respect to such interest for days during such calendar quarter while held by such holder.

To the extent provided in regulations, if residual interests in a REMIC do not have significant value, the excess inclusions with respect to such interests shall be the amount determined under subparagraph (A) without regard to subparagraph (B).

**(2) Determination of daily accruals**

**(A) In general**

For purposes of this subsection, the daily accrual with respect to any residual interest

for any day in any calendar quarter shall be determined by allocating to each day in such quarter its ratable portion of the product of—

(i) the adjusted issue price of such interest at the beginning of such quarter, and

(ii) 120 percent of the long-term Federal rate (determined on the basis of compounding at the close of each calendar quarter and properly adjusted for the length of such quarter).

**(B) Adjusted issue price**

For purposes of this paragraph, the adjusted issue price of any residual interest at the beginning of any calendar quarter is the issue price of the residual interest (adjusted for contributions)—

(i) increased by the amount of daily accruals for prior quarters, and

(ii) decreased (but not below zero) by any distribution made with respect to such interest before the beginning of such quarter.

**(C) Federal long-term rate**

For purposes of this paragraph, the term “Federal long-term rate” means the Federal long-term rate which would have applied to the residual interest under section 1274(d) (determined without regard to paragraph (2) thereof) if it were a debt instrument.

**(d) Treatment of residual interests held by real estate investment trusts**

If a residual interest in a REMIC is held by a real estate investment trust, under regulations prescribed by the Secretary—

(1) any excess of—

(A) the aggregate excess inclusions determined with respect to such interests, over

(B) the real estate investment trust taxable income (within the meaning of section 857(b)(2), excluding any net capital gain),

shall be allocated among the shareholders of such trust in proportion to the dividends received by such shareholders from such trust, and

(2) any amount allocated to a shareholder under paragraph (1) shall be treated as an excess inclusion with respect to a residual interest held by such shareholder.

Rules similar to the rules of the preceding sentence shall apply also in the case of regulated investment companies, common trust funds, and organizations to which part I of subchapter T applies.

**(e) Tax on transfers of residual interests to certain organizations, etc.**

**(1) In general**

A tax is hereby imposed on any transfer of a residual interest in a REMIC to a disqualified organization.

**(2) Amount of tax**

The amount of the tax imposed by paragraph (1) on any transfer of a residual interest shall be equal to the product of—

(A) the amount (determined under regulations) equal to the present value of the total

anticipated excess inclusions with respect to such interest for periods after such transfer, multiplied by

(B) the highest rate of tax specified in section 11(b).

### (3) Liability

The tax imposed by paragraph (1) on any transfer shall be paid by the transferor; except that, where such transfer is through an agent for a disqualified organization, such tax shall be paid by such agent.

### (4) Transferee furnishes affidavit

The person (otherwise liable for any tax imposed by paragraph (1)) shall be relieved of liability for the tax imposed by paragraph (1) with respect to any transfer if—

(A) the transferee furnishes to such person an affidavit that the transferee is not a disqualified organization, and

(B) as of the time of the transfer, such person does not have actual knowledge that such affidavit is false.

### (5) Disqualified organization

For purposes of this section, the term “disqualified organization” means—

(A) the United States, any State or political subdivision thereof, any foreign government, any international organization, or any agency or instrumentality of any of the foregoing,

(B) any organization (other than a cooperative described in section 521) which is exempt from tax imposed by this chapter unless such organization is subject to the tax imposed by section 511, and

(C) any organization described in section 1381(a)(2)(C).

For purposes of subparagraph (A), the rules of section 168(h)(2)(D) (relating to treatment of certain taxable instrumentalities) shall apply; except that, in the case of the Federal Home Loan Mortgage Corporation, clause (ii) of such section shall not apply.

### (6) Treatment of pass-thru entities

#### (A) Imposition of tax

If, at any time during any taxable year of a pass-thru entity, a disqualified organization is the record holder of an interest in such entity, there is hereby imposed on such entity for such taxable year a tax equal to the product of—

(i) the amount of excess inclusions for such taxable year allocable to the interest held by such disqualified organization, multiplied by

(ii) the highest rate of tax specified in section 11(b).

#### (B) Pass-thru entity

For purposes of this paragraph, the term “pass-thru entity” means—

(i) any regulated investment company, real estate investment trust, or common trust fund,

(ii) any partnership, trust, or estate, and

(iii) any organization to which part I of subchapter T applies.

Except as provided in regulations, a person holding an interest in a pass-thru entity as

a nominee for another person shall, with respect to such interest, be treated as a pass-thru entity.

### (C) Tax to be deductible

Any tax imposed by this paragraph with respect to any excess inclusion of any pass-thru entity for any taxable year shall, for purposes of this title (other than this subsection), be applied against (and operate to reduce) the amount included in gross income with respect to the residual interest involved.

### (D) Exception where holder furnishes affidavit

No tax shall be imposed by subparagraph (A) with respect to any interest in a pass-thru entity for any period if—

(i) the record holder of such interest furnishes to such pass-thru entity an affidavit that such record holder is not a disqualified organization, and

(ii) during such period, the pass-thru entity does not have actual knowledge that such affidavit is false.

### (7) Waiver

The Secretary may waive the tax imposed by paragraph (1) on any transfer if—

(A) within a reasonable time after discovery that the transfer was subject to tax under paragraph (1), steps are taken so that the interest is no longer held by the disqualified organization, and

(B) there is paid to the Secretary such amounts as the Secretary may require.

### (8) Administrative provisions

For purposes of subtitle F, the taxes imposed by this subsection shall be treated as excise taxes with respect to which the deficiency procedures of such subtitle apply.

### (f) Treatment of variable insurance contracts

Except as provided in regulations, with respect to any variable contract (as defined in section 817), there shall be no adjustment in the reserve to the extent of any excess inclusion.

(Added Pub. L. 99-514, title VI, §671(a), Oct. 22, 1986, 100 Stat. 2311; amended Pub. L. 100-647, title I, §1006(t)(13), (15), (16)(B), (17), (23), (26), (27), Nov. 10, 1988, 102 Stat. 3423, 3426, 3427; Pub. L. 104-188, title I, §§1616(b)(10), 1704(h)(1), Aug. 20, 1996, 110 Stat. 1857, 1881; Pub. L. 115-97, title I, §13001(b)(1)(B), Dec. 22, 2017, 131 Stat. 2096; Pub. L. 116-136, div. A, title II, §2303(a)(2)(C), Mar. 27, 2020, 134 Stat. 353.)

## Editorial Notes

### AMENDMENTS

2020—Subsec. (a)(3)(B). Pub. L. 116-136 substituted “subsection (a)(2)(B)(ii)(I) and the second sentence of subsection (b)(2) of section 172.” for “the 2nd sentence of section 172(b)(2).”

2017—Subsec. (e)(2)(B), (6)(A)(ii). Pub. L. 115-97 substituted “section 11(b)” for “section 11(b)(1)”.

1996—Subsec. (a)(1). Pub. L. 104-188, §1616(b)(10)(A), substituted “The” for “Except as provided in paragraph (2), the”.

Subsec. (a)(2). Pub. L. 104-188, §1616(b)(10)(B), (C), redesignated par. (3) as (2), struck out “, except that

paragraph (2) shall be applied separately with respect to each corporation which is a member of such group and to which section 593 applies” after “of this subsection”, and struck out former par. (2) which read as follows: “EXCEPTION FOR CERTAIN FINANCIAL INSTITUTIONS.—Paragraph (1) shall not apply to any organization to which section 593 applies. The Secretary may by regulations provide that the preceding sentence shall not apply where necessary or appropriate to prevent avoidance of tax imposed by this chapter.”

Subsec. (a)(3). Pub. L. 104-188, § 1616(b)(10)(B), redesignated par. (5) as (3). Former par. (3) redesignated (2).

Subsec. (a)(4). Pub. L. 104-188, § 1616(b)(10)(B), (D), redesignated par. (6) as (4), struck out at end “The preceding sentence shall not apply to any organization to which section 593 applies, except to the extent provided in regulations prescribed by the Secretary under paragraph (2).”, and struck out former par. (4) which related to certain subsidiaries being treated as single corporations to which section 593 applied.

Subsec. (a)(5). Pub. L. 104-188, § 1616(b)(10)(B), redesignated par. (5) as (3).

Subsec. (a)(6). Pub. L. 104-188, § 1616(b)(10)(B), redesignated par. (6) as (4).

Pub. L. 104-188, § 1704(h)(1), added par. (6).

1988—Subsec. (a)(3), (4). Pub. L. 100-647, § 1006(t)(15), added pars. (3) and (4).

Subsec. (a)(5). Pub. L. 100-647, § 1006(t)(27), added par. (5).

Subsec. (c)(2)(B). Pub. L. 100-647, § 1006(t)(13), (17), substituted “issue price of the residual interest (adjusted for contributions)” for “issue price of residual interest” in introductory text, and in cl. (ii) inserted “(but not below zero)” after “decreased”.

Subsec. (d). Pub. L. 100-647, § 1006(t)(23), inserted at end “Rules similar to the rules of the preceding sentence shall apply also in the case of regulated investment companies, common trust funds, and organizations to which part I of subchapter T applies.”

Subsec. (e). Pub. L. 100-647, § 1006(t)(16)(B), added subsec. (e).

Subsec. (f). Pub. L. 100-647, § 1006(t)(26), added subsec. (f).

#### Statutory Notes and Related Subsidiaries

##### EFFECTIVE DATE OF 2020 AMENDMENT

Amendment by Pub. L. 116-136 applicable to taxable years beginning after Dec. 31, 2017, and to taxable years beginning on or before Dec. 31, 2017, to which net operating losses arising in taxable years beginning after Dec. 31, 2017, are carried, see section 2303(d)(1) of Pub. L. 116-136, set out in a note under section 172 of this title.

##### EFFECTIVE DATE OF 2017 AMENDMENT

Amendment by Pub. L. 115-97 applicable to taxable years beginning after Dec. 31, 2017, see section 13001(c)(1) of Pub. L. 115-97, set out as a note under section 11 of this title.

##### EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by section 1616(b)(10) of Pub. L. 104-188 applicable to taxable years beginning after Dec. 31, 1995, but not applicable to any residual interest held by a taxpayer if such interest has been held by such taxpayer at all times since Oct. 31, 1995, see section 1616(c)(1), (4) of Pub. L. 104-188, set out as a note under section 593 of this title.

Pub. L. 104-188, title I, § 1704(h)(2), Aug. 20, 1996, 110 Stat. 1881, provided that: “The amendment made by paragraph (1) [amending this section] shall take effect as if included in the amendments made by section 671 of the Tax Reform Act of 1986 [Pub. L. 99-514] unless the taxpayer elects to apply such amendment only to taxable years beginning after the date of the enactment of this Act [Aug. 20, 1996].”

##### EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100-647, title I, § 1006(t)(16)(D)(ii)-(iv), Nov. 10, 1988, 102 Stat. 3425, provided that:

“(ii) The amendments made by subparagraphs (B) and (C) [amending this section and section 26 of this title] (except to the extent they relate to paragraph (6) of section 860E(e) of the 1986 Code as added by such amendments) shall apply to transfers after March 31, 1988; except that such amendments shall not apply to any transfer pursuant to a binding written contract in effect on such date.

“(iii) Except as provided in clause (iv), the amendments made by subparagraphs (B) and (C) (to the extent they relate to paragraph (6) of section 860E(e) of the 1986 Code as so added) shall apply to excess inclusions for periods after March 31, 1988 but only to the extent such inclusions are—

“(I) allocable to an interest in a pass-thru entity acquired after March 31, 1988, or

“(II) allocable to an interest in a pass-thru entity acquired on or before March 31, 1988, but attributable to a residual interest acquired by the pass-thru entity after March 31, 1988.

For purposes of the preceding sentence, any interest in a pass-thru entity (or residual interest) acquired after March 31, 1988, pursuant to a binding written contract in effect on such date shall be treated as acquired before such date.

“(iv) In the case of any real estate investment trust, regulated investment company, common trust fund, or publicly traded partnership, no tax shall be imposed under section 860E(e)(6) of the 1986 Code (as added by the amendment made by subparagraph (B)) for any taxable year beginning before January 1, 1989.”

Amendment by section 1006(t)(13), (15), (17), (23), (26), (27) of Pub. L. 100-647 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99-514, to which such amendment relates, see section 1019(a) of Pub. L. 100-647, set out as a note under section 1 of this title.

#### § 860F. Other rules

##### (a) 100 percent tax on prohibited transactions

###### (1) Tax imposed

There is hereby imposed for each taxable year of a REMIC a tax equal to 100 percent of the net income derived from prohibited transactions.

###### (2) Prohibited transaction

For purposes of this part, the term “prohibited transaction” means—

###### (A) Disposition of qualified mortgage

The disposition of any qualified mortgage transferred to the REMIC other than a disposition pursuant to—

(i) the substitution of a qualified replacement mortgage for a qualified mortgage (or the repurchase in lieu of substitution of a defective obligation),

(ii) a disposition incident to the foreclosure, default, or imminent default of the mortgage,

(iii) the bankruptcy or insolvency of the REMIC, or

(iv) a qualified liquidation.

###### (B) Income from nonpermitted assets

The receipt of any income attributable to any asset which is neither a qualified mortgage nor a permitted investment.

###### (C) Compensation for services

The receipt by the REMIC of any amount representing a fee or other compensation for services.