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Title 26—INTERNAL REVENUE

Chapter I—Internal Revenue Service, Department of the Treasury

SUBCHAPTER A—INCOME TAX

[T.D. 7198]

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Activities Not Engaged in for Profit

On August 19, 1971, notice of proposed rule making with respect to amendment of the Income Tax Regulations (26 CFR Part 1) under sections 61, 162, 183, 212, and 270 of the Internal Revenue Code of 1954 to conform such regulations to the changes made by section 213 of the Tax Reform Act of 1969 (83 Stat. 571) was published in the FEDERAL REGISTER (36 F.R. 16112). After consideration of all such relevant matter as was presented by interested persons regarding the rules proposed, the amendment of the regulations as proposed is hereby adopted, subject to the changes set forth below. Furthermore, the Income Tax Regulations (26 CFR Part 1) under section 183 are amended to conform such regulations to the changes made by section 311 of the Revenue Act of 1971 (85 Stat. 525).

PARAGRAPH 1. Paragraphs (a) and (b) (3) of § 1.162-12, as set forth in paragraph 2 of the notice of proposed rule making, are revised as set forth below.

PAR. 2. Section 1.183, as set forth in paragraph 3 of the notice of proposed rule making, is revised by adding subsection (e) and amending the historical note. Section 1.183-1, as set forth in paragraph 3 of the notice of proposed rule making, is revised by amending paragraphs (a), (b) (1) (i), (3), and (4), (c) (1) (i), (2), and (4), (d), and (e), by adding a new subparagraph (5) at the end of paragraph (c), and by deleting paragraph (g). Section 1.183-2, as set forth in paragraph 3 of the notice of proposed rule making, is revised by amending paragraphs (a), (b), and example (5) of paragraph (c). Section 1.183-3, as set forth in paragraph 3 of the notice of proposed rule making, revised and redesignated as § 1.183-4. A new § 1.183-3 is added immediately following revised § 1.183-2. These amended, added, and redesignated provisions read as set forth below.

PAR. 3. Section 1.212-1, as set forth in paragraph 4 of the notice of proposed rule making, is revised by deleting the amendment to paragraph (b) and amending paragraph (c) to read as set forth below.

PAR. 4. The historical note following § 1.270, as set forth in paragraph 5 of the notice of proposed rule making, is revised as set forth below.

PAR. 5. Paragraph (f) of § 1.270-1, as set forth in paragraph 6 of the notice of proposed rule making, is revised as set forth below.

(Sec. 7805, Internal Revenue Code of 1954, 68A Stat. 917, 26 U.S.C. 7805)

[SEAL] JOHNNIE M. WALTERS,
Commissioner of Internal Revenue.

Approved: July 7, 1972.

FREDERIC W. HICKMAN,
Acting Assistant Secretary of
the Treasury.

In order to conform the Income Tax Regulations (26 CFR Part 1) under sections 61, 162, 183, 212, and 270 of the Internal Revenue Code of 1954 to section 213 of the Tax Reform Act of 1969 (83 Stat. 571) and section 311 of the Revenue Act of 1971 (85 Stat. 525), such regulations are amended as follows:

PARAGRAPH 1. Paragraph (c) of § 1.61-4 is amended to read as follows:

§ 1.61-4 Gross income of farmers.

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

regulations are filed in final form by the FEDERAL REGISTER), where a farmer is engaged in producing crops which take more than a year from the time of planting to the time of gathering and disposing, the income therefrom may, with the consent of the Commissioner (see section 446 and the regulations thereunder), be computed upon the crop method. In any case in which the crop method is used, the entire cost of producing the crop must be taken as a deduction for the year in which the gross income from the crop is realized, and not earlier.

PAR. 2. § 1.162-12 is amended to read as follows:

§ 1.162-12 Expenses of farmers.

(a) *Farms engaged in for profit.* A farmer who operates a farm for profit is entitled to deduct from gross income as necessary expenses all amounts actually expended in the carrying on of the business of farming. The cost of ordinary tools of short life or small cost, such as hand tools, including shovels, rakes, etc., may be deducted. The purchase of feed and other costs connected with raising livestock may be treated as expense deductions insofar as such costs represent actual outlay, but not including the value of farm produce grown upon the farm or the labor of the taxpayer. For taxable years beginning after (insert date that these regulations are filed in final form by the FEDERAL REGISTER), where a farmer is engaged in producing crops and the process of gathering and disposal of such crops is not completed within the taxable year in which such crops were planted, expenses deducted may, with the consent of the Commissioner (see section 446 and the regulations thereunder), be determined upon the crop method, and such deductions must be taken in the taxable year in which the gross income from the crop has been realized. For taxable years beginning on or before (insert date that these regulations are filed in final form by the FEDERAL REGISTER), where a farmer is engaged in producing crops which take more than a year from the time of planting to the process of gathering and disposal, expenses deducted may, with the consent of the Commissioner (see section 446 and the regulations thereunder), be determined upon the crop method, and such deductions must be taken in the taxable year in which the gross income from the crop has been realized. If a farmer does not compute income upon the crop method, the cost of seeds and young plants which are purchased for further development and cultivation prior to sale in later years may be deducted as an expense for the year of purchase, provided the farmer follows a consistent practice of deducting such costs as an expense from year to year. The preceding sentence does not

apply to the cost of seeds and young plants connected with the planting of timber (see section 611 and the regulations thereunder). For provisions relating to citrus and almond groves, see section 278 and the regulations thereunder. The cost of farm machinery, equipment, and farm buildings represents a capital investment and is not an allowable deduction as an item of expense. Amounts expended in the development of farms, orchards, and ranches prior to the time when the productive state is reached may, at the election of the taxpayer, be regarded as investments of capital. For the treatment of soil and water conservation expenditures as expenses which are not chargeable to capital account, see section 175 and the regulations thereunder. For taxable years beginning after December 31, 1959, in the case of expenditures paid or incurred by farmers for fertilizer, lime, etc., see section 180 and the regulations thereunder. Amounts expended in purchasing work, breeding, dairy, or sporting animals are regarded as investments of capital, and shall be depreciated unless such animals are included in an inventory in accordance with § 1.61-4. The purchase price of an automobile, even when wholly used in carrying on farming operations, is not deductible, but is regarded as an investment of capital. The cost of gasoline, repairs, and upkeep of an automobile if used wholly in the business of farming is deductible as an expense; if used partly for business purposes and partly for the pleasure or convenience of the taxpayer or his family, such cost may be apportioned according to the extent of the use for purposes of business and pleasure or convenience, and only the proportion of such cost justly attributable to business purposes is deductible as a necessary expense.

(b) *Farms not engaged in for profit; taxable years beginning before January 1, 1970.*—(1) *In general.* If a farm is operated for recreation or pleasure and not on a commercial basis, and if the expenses incurred in connection with the farm are in excess of the receipts therefrom, the entire receipts from the sale of farm products may be ignored in rendering a return of income, and the expenses incurred, being regarded as personal expenses, will not constitute allowable deductions.

(2) *Effective date.* The provisions of this paragraph shall apply with respect to taxable years beginning before January 1, 1970.

(3) *Cross reference.* For provisions relating to activities not engaged in for profit, applicable to taxable years beginning after December 31, 1969, see section 183 and the regulations thereunder.

PAR. 3. There are inserted immediately following § 1.182-6, the following new sections:

§ 1.183 Statutory provisions; activities not engaged in for profit.

SEC. 183. *Activities not engaged in for profit.*—(a) *General rule.* In the case of an activity engaged in by an individual or an electing small business corporation (as defined in section 1371(b)), if such activity is

not engaged in for profit, no deduction attributable to such activity shall be allowed under this chapter except as provided in this section.

(b) *Deductions allowable.* In the case of an activity not engaged in for profit to which subsection (a) applies, there shall be allowed—

(1) The deductions which would be allowable under this chapter for the taxable year without regard to whether or not such activity is engaged in for profit, and

(2) A deduction equal to the amount of the deductions which would be allowable under this chapter for the taxable year only if such activity were engaged in for profit, but only to the extent that the gross income derived from such activity for the taxable year exceeds the deductions allowable by reason of paragraph (1).

(c) *Activity not engaged in for profit defined.* For purposes of this section, the term "activity not engaged in for profit" means any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or under paragraph (1) or (2) of section 212.

(d) *Presumption.* If the gross income derived from an activity for two or more of the taxable years in the period of 5 consecutive taxable years which ends with the taxable year exceeds the deductions attributable to such activity (determined without regard to whether or not such activity is engaged in for profit), then, unless the Secretary or his delegate establishes to the contrary, such activity shall be presumed for purposes of this chapter for such taxable year to be an activity engaged in for profit. In the case of an activity which consists in major part of the breeding, training, showing, or racing of horses, the preceding sentence shall be applied by substituting the period of 7 consecutive taxable years for the period of 5 consecutive taxable years.

(e) *Special rule.*—(1) *In general.* A determination as to whether the presumption provided by subsection (d) applies with respect to any activity shall, if the taxpayer so elects, not be made before the close of the fourth taxable year (sixth taxable year, in the case of an activity described in the last sentence of such subsection) following the taxable year in which the taxpayer first engages in the activity. For purposes of the preceding sentence, a taxpayer shall be treated as not having engaged in an activity during any taxable year beginning before January 1, 1970.

(2) *Initial period.* If the taxpayer makes an election under paragraph (1), the presumption provided by subsection (d) shall apply to each taxable year in the 5-taxable-year (or 7-taxable-year) period beginning with the taxable year in which the taxpayer first engages in the activity, if the gross income derived from the activity for two or more of the taxable years in such period exceeds the deductions attributable to the activity (determined without regard to whether or not the activity is engaged in for profit).

(3) *Election.* An election under paragraph (1) shall be made at such time and manner, and subject to such terms and conditions, as the Secretary or his delegate may prescribe. [Sec. 183 as added by sec. 213, Tax Reform Act 1969 (83 Stat. 571); as amended by sec. 311, Rev. Act 1971 (85 Stat. 525)]

§ 1.183-1 Activities not engaged in for profit.

(a) *In general.* Section 183 provides rules relating to the allowance of deductions in the case of activities (whether active or passive in character) not engaged in for profit by individuals and electing small business corporations, creates a presumption that an activity is

engaged in for profit if certain requirements are met, and permits the taxpayer to elect to postpone determination of whether such presumption applies until he has engaged in the activity for at least 5 taxable years, or, in certain cases, 7 taxable years. Whether an activity is engaged in for profit is determined under section 162 and section 212 (1) and (2) except insofar as section 183(d) creates a presumption that the activity is engaged in for profit. If deductions are not allowable under sections 162 and 212 (1) and (2), the deduction allowance rules of section 183(b) and this section apply. Pursuant to section 641(b), the taxable income of an estate or trust is computed in the same manner as in the case of an individual, with certain exceptions not here relevant. Accordingly, where an estate or trust engages in an activity or activities which are not for profit, the rules of section 183 and this section apply in computing the allowable deductions of such trust or estate. No inference is to be drawn from the provisions of section 183 and the regulations thereunder that any activity of a corporation (other than an electing small business corporation) is or is not a business or engaged in for profit. For rules relating to the deductions that may be taken into account by taxable membership organizations which are operated primarily to furnish services, facilities, or goods to members, see section 277 and the regulations thereunder. For the definition of an activity not engaged in for profit, see § 1.183-2. For rules relating to the election contained in section 183(e), see § 1.183-3.

(b) *Deductions allowable.*—(1) *Manner and extent.* If an activity is not engaged in for profit, deductions are allowable under section 183(b) in the following order and only to the following extent:

(i) Amounts allowable as deductions during the taxable year under chapter 1 of the Code without regard to whether the activity giving rise to such amounts was engaged in for profit are allowable to the full extent allowed by the relevant sections of the Code, determined after taking into account any limitations or exceptions with respect to the allowability of such amounts. For example, the allowability-of-interest expenses incurred with respect to activities not engaged in for profit is limited by the rules contained in section 163(d).

(ii) Amounts otherwise allowable as deductions during the taxable year under chapter 1 of the Code, but only if such allowance does not result in an adjustment to the basis of property, determined as if the activity giving rise to such amounts was engaged in for profit, are allowed only to the extent the gross income attributable to such activity exceeds the deductions allowed or allowable under subdivision (i) of this subparagraph.

(iii) Amounts otherwise allowable as deductions for the taxable year under chapter 1 of the Code which result in (or if otherwise allowed would have resulted in) an adjustment to the basis of property, determined as if the activity

giving rise to such deductions was engaged in for profit, are allowed only to the extent the gross income attributable to such activity exceeds the deductions allowed or allowable under subdivisions (i) and (ii) of this subparagraph. Deductions falling within this subdivision include such items as depreciation, partial losses with respect to property, partially worthless debts, amortization, and amortizable bond premium.

(2) *Rule for deductions involving basis adjustments*—(i) *In general.* If deductions are allowed under subparagraph (1)(iii) of this paragraph, and such deductions are allowed with respect to more than one asset, the deduction allowed with respect to each asset shall be determined separately in accordance with the computation set forth in subdivision (ii) of this subparagraph.

(ii) *Basis adjustment fraction.* The deduction allowed under subparagraph (1)(iii) of this paragraph is computed by multiplying the amount which would have been allowed, had the activity been engaged in for profit, as a deduction with respect to each particular asset which involves a basis adjustment, by the basis adjustment fraction—

(a) The numerator of which is the total of deductions allowable under subparagraph (1)(iii) of this paragraph, and

(b) The denominator of which is the total of deductions which involve basis adjustments which would have been allowed with respect to the activity had the activity been engaged in for profit.

The amount resulting from this computation is the deduction allowed under subparagraph (1)(iii) of this paragraph with respect to the particular asset. The basis of such asset is adjusted only to the extent of such deduction.

(3) *Examples.* The provisions of subparagraphs (1) and (2) of this paragraph may be illustrated by the following examples:

Example (1). A, an individual, maintains a herd of dairy cattle, which is an "activity not engaged in for profit" within the meaning of section 183(c). A sold milk for \$1,000 during the year. During the year A paid \$300 State taxes on gasoline used to transport the cows, milk, etc., and paid \$1,200 for feed for the cows. For the year A also had a casualty loss attributable to this activity of \$500. A determines the amount of his allowable deductions under section 183 as follows:

(i) First, A computes his deductions allowable under subparagraph (1)(i) of this paragraph as follows:

State gasoline taxes specifically allowed under section 164(a)(5) without regard to whether the activity is engaged in for profit	\$300
Casualty loss specifically allowed under section 165(c)(3) without regard to whether the activity is engaged in for profit (\$500 less \$100 limitation)	400
Deductions allowable under subparagraph (1)(i) of this paragraph	700

(ii) Second, A computes his deductions allowable under subparagraph (1)(ii) of this paragraph (deductions which would be allowed under chapter 1 of the Code if the activity were engaged in for profit and which do not involve basis adjustments) as follows:

under subparagraph (1)(ii) of this paragraph:

Income from milk sales	\$1,000
Gross income from activity	1,000
Less: deductions allowable under subparagraph (1)(i) of this paragraph	700

Maximum amount of deductions allowable under subparagraph (1)(ii) of this paragraph

Feed for cows	1,200
Deduction allowed under subparagraph (1)(ii) of this paragraph	300

\$900 of the feed expense is not allowed as a deduction under section 183 because the total feed expense (\$1,200) exceeds the maximum amount of deductions allowable under subparagraph (1)(ii) of this paragraph (\$300). In view of these circumstances, it is not necessary to determine deductions allowable under subparagraph (1)(iii) of this paragraph which would be allowable under chapter 1 of the Code if the activity were engaged in for profit and which involve basis adjustment (the \$100 of casualty loss not allowable under subparagraph (1)(i) of this paragraph because of the limitation in section 165(c)(3)) because none of such amount will be allowed as a deduction under section 183.

Example (2). Assume the same facts as in example (1), except that A also had income from sales of hay grown on the farm of \$1,200 and that depreciation of \$750 with respect to a barn, and \$650 with respect to a tractor would have been allowed with respect to the activity had it been engaged in for profit. A determines the amount of his allowable deductions under section 183 as follows:

(i) First, A computes his deductions allowable under subparagraph (1)(i) of this paragraph as follows:

State gasoline taxes specifically allowed under section 164(a)(5) without regard to whether the activity is engaged in for profit	\$300
Casualty loss specifically allowed under section 165(c)(3) without regard to whether the activity is engaged in for profit (\$500 less \$100 limitation)	400
Deductions allowable under subparagraph (1)(i) of this paragraph	700

(ii) Second, A computes his deductions allowable under subparagraph (1)(ii) of this paragraph (deductions which would be allowable under chapter 1 of the Code if the activity were engaged in for profit and which do not involve basis adjustments) as follows:

Maximum amount of deductions allowable under subparagraph (1)(ii) of this paragraph:

Income from milk sales	\$1,000
Income from hay sales	1,200
Gross income from activity	2,200
Less: deductions allowable under subparagraph (1)(i) of this paragraph	700
Maximum amount of deductions allowable under subparagraph (1)(ii) of this paragraph	1,500
Feed for cows	1,200

The entire \$1,200 of expenses relating to feed for cows is allowable as a deduction under subparagraph (1)(ii) of this paragraph, since it does not exceed the maximum

amount of deductions allowable under such subparagraph.

(iii) Last, A computes the deductions allowable under subparagraph (1)(iii) of this paragraph (deductions which would be allowable under chapter 1 of the Code if the activity were engaged in for profit and which involve basis adjustments) as follows:

Maximum amount of deductions allowable under subparagraph (1)(iii) of this paragraph:

Gross income from farming	\$2,200
Less: Deductions allowed under subparagraph (1)(i) of this paragraph	700
Deductions allowed under subparagraph (1)(ii) of this paragraph	1,200
Maximum amount of deductions allowable under subparagraph (1)(iii) of this paragraph	300

(iv) Since the total of A's deductions under chapter 1 of the Code (determined as if the activity was engaged in for profit) which involve basis adjustments (\$750 with respect to barn, \$650 with respect to tractor, and \$100 with respect to limitation on casualty loss) exceeds the maximum amount of the deductions allowable under subparagraph (1)(iii) of this paragraph (\$300), A computes his allowable deductions with respect to such assets as follows:

A first computes his basis adjustment fraction under subparagraph (2)(ii) of this paragraph as follows:

The numerator of the fraction is the maximum of deductions allowable under subparagraph (1)(iii) of this paragraph which involve basis adjustments \$300

The denominator of the fraction is the total of deductions that involve basis adjustments which would have been allowed with respect to the activity had the activity been engaged in for profit \$1,500

The basis adjustment fraction is then applied to the amount of each deduction which would have been allowable if the activity were engaged in for profit and which involves a basis adjustment as follows:

Depreciation allowed with respect to barn $(300/1,500 \times \$750)$	\$150
Depreciation allowed with respect to tractor $(300/1,500 \times \$650)$	\$130
Deduction allowed with respect to limitation on casualty loss $(300/1,500 \times \$100)$	\$20

The basis of the barn and of the tractor are adjusted only by the amount of depreciation actually allowed under section 183 with respect to each (as determined by the above computation). The basis of the asset with regard to which the casualty loss was suffered is adjusted only to the extent of the amount of the casualty loss actually allowed as a deduction under subparagraph (1)(i) and (iii) of this paragraph.

(4) *Rule for capital gains and losses.*

(i) *In general.* For purposes of section 183 and the regulations thereunder, the gross income from any activity not engaged in for profit includes the total of all capital gains attributable to such activity determined without regard to the section 1202 deduction. Amounts attributable to an activity not engaged in for profit which would be allowable as a deduction under section 1202, without regard to section 183, shall be allowable as a deduction under section 183(b)(1)

in accordance with the rules stated in this subparagraph.

(ii) *Cases where deduction not allowed under section 183.* No deduction is allowable under section 183(b)(1) with respect to capital gains attributable to an activity not engaged in for profit if—

(a) Without regard to section 183 and the regulations thereunder, there is no excess of net long-term capital gain over net short-term capital loss for the year, or

(b) There is no excess of net long-term capital gain attributable to the activity over net short-term capital loss attributable to the activity.

(iii) *Allocation of deduction.* If there is—

(a) An excess of net long-term capital gain over net short-term capital loss attributable to an activity not engaged in for profit, and

(b) Such an excess attributable to all activities, determined without regard to section 183 and the regulations thereunder, the deduction allowable under section 183(b)(1) attributable to capital gains with respect to each activity not engaged in for profit (with respect to which there is an excess of net long-term capital gain over net short-term capital loss for the year) shall be an amount equal to the deduction allowable under section 1202 for the taxable year (determined without regard to section 183) multiplied by a fraction the numerator of which is the excess of the net long-term capital gain attributable to the activity over the net short-term capital loss attributable to the activity and the denominator of which is an amount equal to the total excess of net long-term capital gain over net short-term capital loss for all activities with respect to which there is such excess. The amount of the total section 1202 deduction allowable for the year shall be reduced by the amount determined to be allocable to activities not engaged in for profit and accordingly allowed as a deduction under section 183 (b) (1).

(iv) *Example.* The provisions of this subparagraph may be illustrated by the following example:

Example. A, an individual who uses the cash receipts and disbursement method of accounting and the calendar year as the taxable year, has three activities not engaged in for profit. For his taxable year ending on December 31, 1973, A has a \$200 net long-term capital gain from activity No. 1, a \$100 net short-term capital loss from activity No. 2, and a \$300 net long-term capital gain from activity No. 3. In addition, A has a \$500 net long-term capital gain from another activity which he engages in for profit. A computes his deductions for capital gains for calendar year 1973 as follows:

Section 1202 deduction without regard to section 183 is determined as follows:	
Net long-term capital gain from activity No. 1.....	\$200
Net long-term capital gain from activity No. 3.....	300
Net long-term capital gain from activity engaged in for profit.....	500
Total net long-term capital gain from all activities.....	1,000

Less: Net short-term capital loss attributable to activity No. 2.....	100
Aggregate net long-term capital gain over net short-term capital loss from all activities.....	900
Section 1202 deduction determined without regard to section 183 (one-half of \$900).....	\$450

Allocation of the total section 1202 deduction among A's various activities:

Portion allocable to activity No. 1 which is deductible under section 183(b)(1) (Excess net long-term capital gain attributable to activity No. 1 (\$200) over total excess net long-term capital gain attributable to all of A's activities with respect to which there is such an excess (\$1,000) times amount of section 1202 deduction (\$450)).....	90
Portion allocable to activity No. 3 which is deductible under section 183(b)(1) (Excess net long-term capital gain attributable to activity No. 3 (\$300) over total excess net long-term capital gain attributable to all of A's activities with respect to which there is such an excess (\$1,000) times amount of section 1202 deduction (\$450)).....	135
Portion allocable to all activities engaged in for profit (total section 1202 deduction (\$450) less section 1202 deduction allowable to activities Nos. 1 and 3 (\$225)).....	225
Total section 1202 deduction deductible under sections 1202 and 183(b)(1).....	450

(c) *Presumption that activity is engaged in for profit—(1) In general.* If for—

(i) Any 2 of 7 consecutive taxable years, in the case of an activity which consists in major part of the breeding, training, showing, or racing of horses, or

(ii) Any 2 of 5 consecutive taxable years, in the case of any other activity,

the gross income derived from an activity exceeds the deductions attributable to such activity which would be allowed or allowable if the activity were engaged in for profit, such activity is presumed, unless the Commissioner establishes to the contrary, to be engaged in for profit. For purposes of this determination the deduction permitted by section 1202 shall not be taken into account. Such presumption applies with respect to the second profit year and all years subsequent to the second profit year within the 5- or 7-year period beginning with the first profit year. This presumption arises only if the activity is substantially the same activity for each of the relevant taxable years, including the taxable year in question. If the taxpayer does not meet the requirements of section 183(d) and this paragraph, no inference that the activity is not engaged in for profit shall arise by reason of the provisions of section 183. For purposes of this paragraph, a net operating loss deduction is not taken into account as a deduction. For purposes of this subparagraph a short taxable year constitutes a taxable year.

(2) *Examples.* The provisions of subparagraph (1) of this paragraph may be illustrated by the following examples, in each of which it is assumed that the taxpayer has not elected, in accordance with section 183(e), to postpone determination of whether the presumption described in section 183(d) and this paragraph is applicable.

Example (1). For taxable years 1970-74, A, an individual who uses the cash receipts and disbursement method of accounting and the calendar year as the taxable year, is engaged in the activity of farming. In taxable years 1971, 1973, and 1974, A's deductible expenditures with respect to such activity exceed his gross income from the activity. In taxable years 1970 and 1972 A has income from the sale of farm produce of \$30,000 for each year. In each of such years A had expenses for feed for his livestock of \$10,000, depreciation of equipment of \$10,000, and fertilizer cost of \$5,000 which he elects to take as a deduction. A also has a net operating loss carryover to taxable year 1970 of \$6,000. A is presumed, for taxable years 1972, 1973, and 1974, to have engaged in the activity of farming for profit, since for 2 years of a 5-consecutive-year period the gross income from the activity (\$30,000 for each year) exceeded the deductions (computed without regard to the net operating loss) which are allowable in the case of the activity (\$25,000 for each year).

Example (2). For the taxable years 1970 and 1971, B, an individual who uses the cash receipts and disbursement method of accounting and the calendar year as the taxable year, engaged in raising pure-bred Charolais cattle for breeding purposes. The operation showed a loss during 1970. At the end of 1971, B sold a substantial portion of his herd and the cattle operation showed a profit for that year. For all subsequent relevant taxable years B continued to keep a few Charolais bulls at stud. In 1972, B started to raise Tennessee Walking Horses for breeding and show purposes, utilizing substantially the same pasture land, barns, and (with structural modifications) the same stalls. The Walking Horse operations showed a small profit in 1973 and losses in 1972 and 1974 through 1976.

(i) Assuming that under paragraph (d)(1) of this section the raising of cattle and raising of horses are determined to be separate activities, no presumption that the Walking Horse operation was carried on for profit arises under section 183(d) and this paragraph since this activity was not the same activity that generated the profit in 1971 and there are not, therefore, 2 profit years attributable to the horse activity.

(ii) Assuming the same facts as in (i) above, if there were no stud fees received in 1972 with respect to Charolais bulls, but for 1973 stud fees with respect to such bulls exceed deductions attributable to maintenance of the bulls in that year, the presumption will arise under section 183(d) and this paragraph with respect to the activity of raising and maintaining Charolais cattle for 1973 and for all subsequent years within the 5-year period beginning with taxable year 1971, since the activity of raising and maintaining Charolais cattle is the same activity in 1971 and in 1973, although carried on by B on a much reduced basis and in a different manner. Since it has been assumed that the horse and cattle operations are separate activities, no presumption will arise with respect to the Walking Horse operation because there are not 2 profit years attributable to such horse operation during the period in question.

(iii) Assuming, alternatively, that the raising of cattle and raising of horses would

be considered a single activity under paragraph (d) (1) of this section. B would receive the benefit of the presumption beginning in 1973 with respect to both the cattle and horses since there were profits in 1971 and 1973. The presumption would be effective through 1977 (and longer if there is an excess of income over deductions in this activity in 1974, 1975, 1976, or 1977 which would extend the presumption) if, under section 183(d) and subparagraph (3) of this paragraph, it was determined that the activity consists in major part of the breeding, training, showing, or racing of horses. Otherwise, the presumption would be effective only through 1975 (assuming no excess of income over deductions in this activity in 1974 or 1975 which would extend the presumption).

(3) *Activity which consists in major part of the breeding, training, showing, or racing of horses.* For purposes of this paragraph an activity consists in major part of the breeding, training, showing, or racing of horses for the taxable year if the average of the portion of expenditures attributable to breeding, training, showing, and racing of horses for the 3 taxable years preceding the taxable year (or, in the case of an activity which has not been conducted by the taxpayer for 3 years, for so long as it has been carried on by him) was at least 50 percent of the total expenditures attributable to the activity for such prior taxable years.

(4) *Transitional rule.* In applying the presumption described in section 183(d) and this paragraph, only taxable years beginning after December 31, 1969, shall be taken into account. Accordingly, in the case of an activity referred to in subparagraph (1) (i) or (ii) of this paragraph, section 183(d) does not apply prior to the second profitable taxable year beginning after December 31, 1969, since taxable years prior to such date are not taken into account.

(5) *Cross reference.* For rules relating to section 183(e) which permits a taxpayer to elect to postpone determination of whether any activity shall be presumed to be "an activity engaged in for profit" by operation of the presumption described in section 183(d) and this paragraph until after the close of the fourth taxable year (sixth taxable year, in the case of activity which consists in major part of breeding, training, showing, or racing of horses) following the taxable year in which the taxpayer first engages in the activity, see § 1.183-3.

(d) *Activity defined.*—(1) *Ascertainment of activity.* In order to determine whether, and to what extent, section 183 and the regulations thereunder apply, the activity or activities of the taxpayer must be ascertained. For instance, where the taxpayer is engaged in several undertakings, each of these may be a separate activity, or several undertakings may constitute one activity. In ascertaining the activity or activities of the taxpayer, all the facts and circumstances of the case must be taken into account. Generally, the most significant facts and circumstances in making this determination are the degree of organizational and economic interrelationship of various undertakings, the business purpose which is (or might be) served by carrying on the

various undertakings separately or together in a trade or business or in an investment setting, and the similarity of various undertakings. Generally, the Commissioner will accept the characterization by the taxpayer of several undertakings either as a single activity or as separate activities. The taxpayer's characterization will not be accepted, however, when it appears that his characterization is artificial and cannot be reasonably supported under the facts and circumstances of the case. If the taxpayer engages in two or more separate activities, deductions and income from each separate activity are not aggregated either in determining whether a particular activity is engaged in for profit or in applying section 183. Where land is purchased or held primarily with the intent to profit from increase in its value, and the taxpayer also engages in farming on such land, the farming and the holding of the land will ordinarily be considered a single activity only if the farming activity reduces the net cost of carrying the land for its appreciation in value. Thus, the farming and holding of the land will be considered a single activity only if the income derived from farming exceeds the deductions attributable to the farming activity which are not directly attributable to the holding of the land (that is, deductions other than those directly attributable to the holding of the land such as interest on a mortgage secured by the land, annual property taxes attributable to the land and improvements, and depreciation of improvements to the land).

(2) *Rules for allocation of expenses.* If the taxpayer is engaged in more than one activity, an item of deduction or income may be allocated between two or more of these activities. Where property is used in several activities, and one or more of such activities is determined not to be engaged in for profit, deductions relating to such property must be allocated between the various activities on a reasonable and consistently applied basis.

(3) *Example.* The provisions of this paragraph may be illustrated by the following example:

Example. (1) A, an individual, owns a small house located near the beach in a resort community. Visitors come to the area for recreational purposes during only 3 months of the year. During the remaining 9 months of the year houses such as A's are not rented. Customarily, A arranges that the house will be leased for 2 months of 3-month recreational season to vacationers and reserves the house for his own vacation during the remaining month of the recreational season. In 1971, A leases the house for 2 months for \$1,000 per month and actually uses the house for his own vacation during the other month of the recreational season. For 1971, the expenses attributable to the house are \$1,200 interest, \$600 real estate taxes, \$600 maintenance, \$300 utilities, and \$1,200 which would have been allowed as depreciation had the activity been engaged in for profit. Under these facts and circumstances, A is engaged in a single activity, holding the beach house primarily for personal purposes, which is an "activity not engaged in for profit" within the meaning of

section 183(c). See paragraph (b) (9) of § 1.183-2.

(ii) Since the \$1,200 of interest and the \$600 of real estate taxes are specifically allowable as deductions under sections 163 and 164(a) without regard to whether the beach house activity is engaged in for profit, no allocation of these expenses between the uses of the beach house is necessary. However, since section 262 specifically disallows personal, living, and family expenses as deductions, the maintenance and utilities expenses and the depreciation from the activity must be allocated between the rental use and the personal use of the beach house. Under the particular facts and circumstances, $\frac{2}{3}$ (2 months of rental use over 3 months of total use) of each of these expenses are allocated to the rental use, and $\frac{1}{3}$ (1 month of personal use over 3 months of total use) of each of these expenses are allocated to the personal use as follows:

	Rental use $\frac{2}{3}$ —expenses allocable to section 183(b) (2)	Personal use $\frac{1}{3}$ —expenses allocable to section 262
Maintenance expense \$600.....	\$400	\$200
Utilities expense \$300.....	200	100
Depreciation \$1,200.....	800	400
Total.....	1,400	700

The \$700 of expenses and depreciation allocated to the personal use of the beach house are disallowed as a deduction under section 262. In addition, the allowability of each of the expenses and the depreciation allocated to section 183(b) (2) is determined under paragraph (b) (1) (ii) and (iii) of this section. Thus, the maximum amount allowable as a deduction under section 183(b) (2) is \$200 (\$2,000 gross income from activity, less \$1,800 deductions under section 183(b) (1)). Since the amounts described in section 183(b) (2) (\$1,400) exceed the maximum amount allowable (\$200), and since the amounts described in paragraph (b) (1) (ii) of this section (\$600) exceed such maximum amount allowable (\$200), none of the depreciation (an amount described in paragraph (b) (1) (iii) of this section) is allowable as a deduction.

(e) *Gross income from activity not engaged in for profit defined.* For purposes of section 183 and the regulations thereunder, gross income derived from an activity not engaged in for profit includes the total of all gains from the sale, exchange, or other disposition of property, and all other gross receipts derived from such activity. Such gross income shall include, for instance, capital gains, and rents received for the use of property which is held in connection with the activity. The taxpayer may determine gross income from any activity by subtracting the cost of goods sold from the gross receipts so long as he consistently does so and follows generally accepted methods of accounting in determining such gross income.

(f) *Rule for electing small business corporations.* Section 183 and this section shall be applied at the corporate level in determining the allowable deductions of an electing small business corporation.

§ 1.183-2 Activity not engaged in for profit defined.

(a) *In general.* For purposes of section 183 and the regulations thereunder, the

term "activity not engaged in for profit" means any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or under paragraph (1) or (2) of section 212. Deductions are allowable under section 162 for expenses of carrying on activities which constitute a trade or business of the taxpayer and under section 212 for expenses incurred in connection with activities engaged in for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income. Except as provided in section 183 and § 1.183-1, no deductions are allowable for expenses incurred in connection with activities which are not engaged in for profit. Thus, for example, deductions are not allowable under section 162 or 212 for activities which are carried on primarily as a sport, hobby, or for recreation. The determination whether an activity is engaged in for profit is to be made by reference to objective standards, taking into account all of the facts and circumstances of each case. Although a reasonable expectation of profit is not required, the facts and circumstances must indicate that the taxpayer entered into the activity, or continued the activity, with the objective of making a profit. In determining whether such an objective exists, it may be sufficient that there is a small chance of making a large profit. Thus it may be found that an investor in a wildcat oil well who incurs very substantial expenditures in the venture for profit even though the expectation of a profit might be considered unreasonable. In determining whether an activity is engaged in for profit, greater weight is given to objective facts than to the taxpayer's mere statement of his intent.

(b) *Relevant factors.* In determining whether an activity is engaged in for profit, all facts and circumstances with respect to the activity are to be taken into account. No one factor is determinative in making this determination. In addition, it is not intended that only the factors described in this paragraph are to be taken into account in making the determination, or that a determination is to be made on the basis that the number of factors (whether or not listed in this paragraph) indicating a lack of profit objective exceeds the number of factors indicating a profit objective, or vice versa. Among the factors which should normally be taken into account are the following:

(1) *Manner in which the taxpayer carries on the activity.* The fact that the taxpayer carries on the activity in a businesslike manner and maintains complete and accurate books and records may indicate that the activity is engaged in for profit. Similarly, where an activity is carried on in a manner substantially similar to other activities of the same nature which are profitable, a profit motive may be indicated. A change of operating methods, adoption of new techniques or abandonment of unprofitable methods in a manner consistent with an intent

to improve profitability may also indicate a profit motive.

(2) *The expertise of the taxpayer or his advisors.* Preparation for the activity by extensive study of its accepted business, economic, and scientific practices, or consultation with those who are expert therein, may indicate that the taxpayer has a profit motive where the taxpayer carries on the activity in accordance with such practices. Where a taxpayer has such preparation or procures such expert advice, but does not carry on the activity in accordance with such practices, a lack of intent to derive profit may be indicated unless it appears that the taxpayer is attempting to develop new or superior techniques which may result in profits from the activity.

(3) *The time and effort expended by the taxpayer in carrying on the activity.* The fact that the taxpayer devotes much of his personal time and effort to carrying on an activity, particularly if the activity does not have substantial personal or recreational aspects, may indicate an intention to derive a profit. A taxpayer's withdrawal from another occupation to devote most of his energies to the activity may also be evidence that the activity is engaged in for profit. The fact that the taxpayer devotes a limited amount of time to an activity does not necessarily indicate a lack of profit motive where the taxpayer employs competent and qualified persons to carry on such activity.

(4) *Expectation that assets used in activity may appreciate in value.* The term "profit" encompasses appreciation in the value of assets, such as land, used in the activity. Thus, the taxpayer may intend to derive a profit from the operation of the activity, and may also intend that, even if no profit from current operations is derived, an overall profit will result when appreciation in the value of land used in the activity is realized since income from the activity together with the appreciation of land will exceed expenses of operation. See, however, paragraph (d) of § 1.183-1 for definition of an activity in this connection.

(5) *The success of the taxpayer in carrying on other similar or dissimilar activities.* The fact that the taxpayer has engaged in similar activities in the past and converted them from unprofitable to profitable enterprises may indicate that he is engaged in the present activity for profit, even though the activity is presently unprofitable.

(6) *The taxpayer's history of income or losses with respect to the activity.* A series of losses during the initial or start-up stage of an activity may not necessarily be an indication that the activity is not engaged in for profit. However, where losses continue to be sustained beyond the period which customarily is necessary to bring the operation to profitable status such continued losses, if not explainable, as due to customary business risks or reverses, may be indicative that the activity is not being en-

gaged in for profit. If losses are sustained because of unforeseen or fortuitous circumstances which are beyond the control of the taxpayer, such as drought, disease, fire, theft, weather damages, other involuntary conversions, or depressed market conditions, such losses would not be an indication that the activity is not engaged in for profit. A series of years in which net income was realized would of course be strong evidence that the activity is engaged in for profit.

(7) *The amount of occasional profits, if any, which are earned.* The amount of profits in relation to the amount of losses incurred, and in relation to the amount of the taxpayer's investment and the value of the assets used in the activity, may provide useful criteria in determining the taxpayer's intent. An occasional small profit from an activity generating large losses, or from an activity in which the taxpayer has made a large investment, would not generally be determinative that the activity is engaged in for profit. However, substantial profit, though only occasional, would generally be indicative that an activity is engaged in for profit, where the investment or losses are comparatively small. Moreover, an opportunity to earn a substantial ultimate profit in a highly speculative venture is ordinarily sufficient to indicate that the activity is engaged in for profit even though losses or only occasional small profits are actually generated.

(8) *The financial status of the taxpayer.* The fact that the taxpayer does not have substantial income or capital from sources other than the activity may indicate that an activity is engaged in for profit. Substantial income from sources other than the activity (particularly if the losses from the activity generate substantial tax benefits) may indicate that the activity is not engaged in for profit especially if there are personal or recreational elements involved.

(9) *Elements of personal pleasure or recreation.* The presence of personal motives in carrying on of an activity may indicate that the activity is not engaged in for profit, especially where there are recreational or personal elements involved. On the other hand, a profit motivation may be indicated where an activity lacks any appeal other than profit. It is not, however, necessary that an activity be engaged in with the exclusive intention of deriving a profit or with the intention of maximizing profits. For example, the availability of other investments which would yield a higher return, or which would be more likely to be profitable, is not evidence that an activity is not engaged in for profit. An activity will not be treated as not engaged in for profit merely because the taxpayer has purposes or motivations other than solely to make a profit. Also, the fact that the taxpayer derives personal pleasure from engaging in the activity is not sufficient to cause the activity to be classified as not engaged in for profit if the activity is in fact engaged in for profit as evidenced by other factors whether or not listed in this paragraph.

(c) *Examples.* The provisions of this section may be illustrated by the following examples:

Example (1). The taxpayer inherited a farm from her husband in an area which was becoming largely residential, and is now nearly all so. The farm had never made a profit before the taxpayer inherited it, and the farm has since had substantial losses in each year. The decedent from whom the taxpayer inherited the farm was a stockbroker, and he also left the taxpayer substantial stock holdings which yield large income from dividends. The taxpayer lives on an area of the farm which is set aside exclusively for living purposes. A farm manager is employed to operate the farm, but modern methods are not used in operating the farm. The taxpayer was born and raised on a farm, and expresses a strong preference for living on a farm. The taxpayer's activity of farming, based on all the facts and circumstances, could be found not to be engaged in for profit.

Example (2). The taxpayer is a wealthy individual who is greatly interested in philosophy. During the past 30 years he has written and published at his own expense several pamphlets, and he has engaged in extensive lecturing activity, advocating and disseminating his ideas. He has made a profit from these activities in only occasional years, and the profits in those years were small in relation to the amounts of the losses in all other years. The taxpayer has very sizable income from securities (dividends and capital gains) which constitutes the principal source of his livelihood. The activity of lecturing, publishing pamphlets, and disseminating his ideas is not an activity engaged in by the taxpayer for profit.

Example (3). The taxpayer, very successful in the business of retailing soft drinks, raises dogs and horses. He began raising a particular breed of dogs many years ago in the belief that the breed was in danger of declining, and he has raised and sold the dogs in each year since. The taxpayer recently began raising and racing thoroughbred horses. The losses from the taxpayer's dog and horse activities have increased in magnitude over the years, and he has not made a profit on these operations during any of the last 15 years. The taxpayer generally sells the dogs only to friends, does not advertise the dogs for sale, and shows the dogs only infrequently. The taxpayer races his horses only at the "prestige" tracks at which he combines his racing activities with social and recreational activities. The horse and dog operations are conducted at a large residential property on which the taxpayer also lives, which includes substantial living quarters and attractive recreational facilities for the taxpayer and his family. Since (i) the activity of raising dogs and horses and racing the horses is of a sporting and recreational nature, (ii) the taxpayer has substantial income from his business activities of retailing soft drinks, (iii) the horse and dog operations are not conducted in a businesslike manner, and (iv) such operations have a continuous record of losses, it could be determined that the horse and dog activities of the taxpayer are not engaged in for profit.

Example (4). The taxpayer inherited a farm of 65 acres from his parents when they died 6 years ago. The taxpayer moved to the farm from his house in a small nearby town, and he operates it in the same manner as his parents operated the farm before they died. The taxpayer is employed as a skilled machine operator in a nearby factory, for which he is paid approximately \$8,500 per year. The farm has not been profitable for

the past 15 years because of rising costs of operating farms in general, and because of the decline in the price of the produce of this farm in particular. The taxpayer consults the local agent of the State agricultural service from time-to-time, and the suggestions of the agent have generally been followed. The manner in which the farm is operated by the taxpayer is substantially similar to the manner in which farms of similar size, and which grow similar crops in the area are operated. Many of these other farms do not make profits. The taxpayer does much of the required labor around the farm himself, such as fixing fences, planting, crops, etc. The activity of farming could be found, based on all the facts and circumstances, to be engaged in by the taxpayer for profit.

Example (5). A, an independent oil and gas operator, frequently engages in the activity of searching for oil on undeveloped and unexplored land which is not near proven fields. He does so in a manner substantially similar to that of others who engage in the same activity. The chances, based on the experience of A and others who engaged in this activity, are strong that A will not find a commercially profitable oil deposit when he drills on land not established geologically to be proven oil bearing land. However, on the rare occasions that these activities do result in discovering a well, the operator generally realizes a very large return from such activity. Thus, there is a small chance that A will make a large profit from his oil exploration activity. Under these circumstances, A is engaged in the activity of oil drilling for profit.

Example (6). C, a chemist, is employed by a large chemical company and is engaged in a wide variety of basic research projects for his employer. Although he does no work for his employer with respect to the development of new plastics, he has always been interested in such development and has outfitted a workshop in his home at his own expense which he uses to experiment in the field. He has patented several developments at his own expense but as yet has realized no income from his inventions or from such patents. C conducts his research on a regular, systematic basis, incurs fees to secure consultation on his projects from time to time, and makes extensive efforts to "market" his developments. C has devoted substantial time and expense in an effort to develop a plastic sufficiently hard, durable, and malleable that it could be used in lieu of sheet steel in many major applications, such as automobile bodies. Although there may be only a small chance that C will invent new plastics, the return from any such development would be so large that it induces C to incur the costs of his experimental work. C is sufficiently qualified by his background that there is some reasonable basis for his experimental activities. C's experimental work does not involve substantial personal or recreational aspects and is conducted in an effort to find practical applications for his work. Under these circumstances, C may be found to be engaged in the experimental activities for profit.

§ 1.183-3 Election to postpone determination with respect to the presumption described in section 183 (d). [Reserved]

§ 1.183-4 Taxable years affected.

The provisions of section 183 and the regulations thereunder shall apply only with respect to taxable years beginning after December 31, 1969. For provisions applicable to prior taxable years, see section 270 and § 1.270-1.

PAR. 3. § 1.212-1 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1.212-1 Nontrade or nonbusiness expenses.

(c) In the case of taxable years beginning before January 1, 1970, expenses of carrying on transactions which do not constitute a trade or business of the taxpayer and are not carried on for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income, but which are carried on primarily as a sport, hobby, or recreation are not allowable as nontrade or nonbusiness expenses. The question whether or not a transaction is carried on primarily for the production of income or for the management, conservation, or maintenance of property held for the production or collection of income, rather than primarily as a sport, hobby, or recreation, is not to be determined solely from the intention of the taxpayer but rather from all the circumstances of the case. For example, consideration will be given to the record of prior gain or loss of the taxpayer in the activity, the relation between the type of activity and the principal occupation of the taxpayer, and the uses to which the property or what it produces is put by the taxpayer. For provisions relating to activities not engaged in for profit applicable to taxable years beginning after December 31, 1969, see section 183 and the regulations thereunder.

PAR. 4. Section 1.270 is amended by adding an historical note. Such new provision reads as follows:

§ 1.270 Statutory provisions; limitation on deductions allowable to individuals in certain cases.

[Sec. 270 as repealed by sec. 213, Tax Reform Act 1969 (83 Stat. 572)]

PAR. 5. § 1.270-1 is amended by adding at the end thereof a new paragraph (f). Such new paragraph reads as follows:

§ 1.270-1 Limitation on deductions allowable to individuals in certain cases.

(f) *Effective date; cross reference.* The provisions of section 270 and this section apply to taxable years beginning before January 1, 1970. Thus, for instance, if the taxpayer had a profit of \$2,000 attributable to a trade or business in 1965, section 270 and this section would not apply to the taxable years 1966 through 1970, even though he had losses of more than \$50,000 in each of the 5 years ending with 1970. For provisions relating to activities not engaged in for profit applicable to taxable years beginning after December 31, 1969, see section 183 and the regulations thereunder.

[FR Doc. 72-10692 Filed 7-12-72; 8:45 am]

[T.D. 7196]

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

SUBCHAPTER F—PROCEDURE AND ADMINISTRATION

PART 301—PROCEDURE AND ADMINISTRATION

Income Averaging

On February 17, 1972, notice of proposed rule making, with respect to amendments of the Income Tax Regulations (26 CFR Part 1) and the Regulations on Procedure and Administration (26 CFR Part 301) under sections 1301, 1302, 1303, 1304, and 6511(d)(2)(B) of the Internal Revenue Code of 1954 to conform such regulations to changes made by section 232(d) of the Revenue Act of 1964 (78 Stat. 111) and sections 311, 515(c)(4), 802(c)(5), and 803(d)(8) of the Tax Reform Act of 1969 (83 Stat. 586, 646, 678, 684), and to otherwise clarify such regulations, was published in the FEDERAL REGISTER (37 F.R. 3530). After consideration of all such relevant matter as was presented by interested persons regarding the rules proposed, the amendments of the regulations as proposed are hereby adopted, subject to the changes set forth below.

PARAGRAPH 1. Section 1.1301-0, as set forth in paragraph 2 of the notice of proposed rule making, is revised as set forth below.

PAR. 2. Section 1304(c)(1)(A)(i) and the historical note following § 1.1304, as set forth in paragraph 12 of the notice of proposed rule making, are revised as set forth below.

PAR. 3. Paragraph (a)(5) of § 1.1304-2, as set forth in paragraph 14 of the notice of proposed rule making, is revised as set forth below.

PAR. 4. Section 1.1304-3, as set forth in paragraph 15 of the notice of proposed rule making, is further amended by revising paragraphs (a)(1), (d), and (f) thereof, as set forth below.

PAR. 5. Paragraph (a)(5) of § 1.1304-5, as set forth in paragraph 17 of the notice of proposed rule making, is revised as set forth below.

PAR. 6. Section 1.1304-6, as set forth in paragraph 19 of the notice of proposed rule making, is further amended by revising paragraph (b) thereof, as set forth below.

(Sec. 7805, Internal Revenue Code of 1954, 68A Stat. 917; 26 U.S.C. 7805)

[SEAL] JOHNNIE M. WALTERS,
Commissioner of Internal Revenue.

Approved: July 5, 1972.

FREDERIC W. HICKMAN,
Acting Assistant Secretary
of the Treasury.

PARAGRAPH 1. Section 1.1301 is amended by revising such section and the historical note to read as follows:

§ 1.1301 Statutory provisions; limitation on tax.

SEC. 1301. *Limitation on tax.* If an eligible individual has average income for the

computation year, and if the amount of such income exceeds \$3,000, then the tax imposed by section 1 for the computation year which is attributable to average income shall be 5 times the increase in tax under such section which would result from adding 20 percent of such income to 120 percent of average base period income.

(Sec. 1301 as amended by sec. 232(a), Rev. Act 1964 (78 Stat. 105); sec. 311(a), Tax Reform Act 1969 (83 Stat. 586))

PAR. 2. There is inserted immediately after § 1.1301 the following new section:

§ 1.1301-0 Taxable years affected.

The provisions of § 1.1301 through § 1.1305 apply to computation years beginning after December 31, 1969, and to base period years applicable thereto. See section 1302(c)(1) and § 1.1302-3(a) for the definition of "computation year". See section 1302(c)(3) and § 1.1302-3(c) for the definition of "base period year". See 26 CFR § 1.1301 through § 1.1305 (rev. as of Jan. 1, 1972) for the provisions applying to computation years beginning before January 1, 1970, and to base period years applicable thereto.

PAR. 3. Section 1.1301-1 is amended to read as follows:

§ 1.1301-1 Limitation on tax.

If, for a computation year beginning after December 31, 1969, an eligible individual has average income for such computation year, and if the amount of his average income for such year exceeds \$3,000, then such individual may choose (pursuant to the provisions of section 1304(a) and § 1.1304-1) to compute the tax attributable to his average income under section 1301. The tax imposed by section 1 which is attributable to an individual's average income for the computation year is the amount of the tax equal to five times the increase in tax under section 1 which would result from adding 20 percent of such income to 120 percent of average base period income. See section 1303 and § 1.1303-1 for the definition of "eligible individual". See section 1302(a) and § 1.1302-1 for the definition of "average income." See section 1302(b) and § 1.1302-3(a) for the definition of "average base period income."

PAR. 4. Section 1.1302 is amended by revising section 1302 and the historical note to read as follows:

§ 1.1302 Statutory provisions; definition of average income; related definitions.

SEC. 1302. *Definition of average income; related definitions—(a) Average income—*

(1) *In general.* For purposes of this part, the term "average income" means the amount by which taxable income for the computation year (reduced as provided in paragraph (2)) exceeds 120 percent of average base period income.

(2) *Reductions.* The taxable income for the computation year shall be reduced by—

(A) the amount (if any) to which section 72(m)(5) applies, and

(B) the amounts included in the income of a beneficiary of a trust under section 668(a).

(b) *Average base period income.* For purposes of this part—

(1) *In general.* The term "average base period income" means one-fourth of the sum

of the base period incomes for the base period.

(2) *Base period income.* The base period income for any taxable year is the taxable income for such year—

(A) increased by an amount equal to the excess of—

(i) the amount excluded from gross income under section 911 (relating to earned income from sources without the United States) and subpart D of part III of subchapter N (sec. 931 and following, relating to income from sources within possessions of the United States), over

(ii) the deductions which would have been properly allocable to or chargeable against such amount but for the exclusion of such amount from gross income; and

(B) decreased by the amounts included in the income of a beneficiary of a trust under section 668(a).

(c) *Other related definitions.* For purposes of this part—

(1) *Computation year.* The term "computation year" means the taxable year for which the taxpayer chooses the benefits of this part.

(2) *Base period.* The term "base period" means the 4 taxable years immediately preceding the computation year.

(3) *Base period year.* The term "base period year" means any of the 4 taxable years immediately preceding the computation year.

(4) *Joint return.* The term "joint return" means the return of a husband and wife made under section 6013.

(Sec. 1302 as amended by sec. 232(a), Rev. Act 1964 (78 Stat. 105); sec. 311(b), Tax Reform Act 1969 (83 Stat. 586))

PAR. 5. Section 1.1302-1 is amended to read as follows:

§ 1.1302-1 Definition of average income.

(a) *In general.* The term "average income" means the amount (if any) by which taxable income for the computation year as modified in accordance with section 1302(a)(2) and section 1304(c)(3)(B) exceeds 120 percent of average base period income (as defined in section 1302(b) and § 1.1302-3(a)).

(b) *Modifications.* For purposes of paragraph (a) of this section, taxable income for the computation year shall be reduced by—

(1) Any amount described in section 72(m)(5)(A), to which a penalty under section 72(m)(5) and § 1.72-17(e) is applicable,

(2) Any amount which is included in the income of a beneficiary of a trust under section 668(a), and

(3) The excess (if any) of amounts includible in a separate return made by a married taxpayer for the computation year which constitutes earned income (within the meaning of section 911(b)) and is community income under community property laws over the amount of such income which would have been includible if such earned income did not constitute community income.

(c) *Example.* Paragraph (b)(3) of this section may be illustrated by the following example:

Example. The total income of a husband and wife for the computation year consists of \$60,000 of community income attributable to personal services, \$40,000 of which is earned by H. W. makes a separate return for such year and reports gross income of \$30,000, her share of the community income.

W chooses the benefits of income averaging for such year. In determining her averageable taxable income for such year, W's taxable income must be reduced by \$10,000, the excess of the community income attributable to personal services includible in her return (\$30,000) over the amount of such income from personal services which would have been reportable by her if such income did not constitute community income (\$20,000). The additional \$10,000 of W's income for such year (which results from the application of local community property laws) is not subject to income averaging. For tax on such amounts, see paragraph (a) (3) and example 3 of § 1.1304-5(c).

§ 1.1302-2 [Deleted]

PAR. 6. Section 1.1302-2 is deleted.

PAR. 7. Section 1.1302-3 is redesignated as § 1.1302-2, and such redesignated section is amended by revising paragraph (b) (1) and (2) and paragraph (c) to read as follows:

§ 1.1302-2 Average base period income.

(b) *Base period income*—(1) *Definition*. Except as otherwise provided in subparagraph (3) of this paragraph, the term "base period income" means taxable income for any base period year first increased in accordance with section 1302(b) (2) (A) and paragraph (c) (1) of this section, and then decreased in accordance with section 1302(b) (2) (B) and paragraph (c) (2) of this section. Base period income for any taxable year may never be less than zero.

(2) *Base period income with respect to a computation year*. Base period income for each base period year must be determined in a manner consistent with the return for the computation year. The base period income with respect to a computation year for which an individual makes a separate return is the separate base period income of such individual. The base period income with respect to a computation year for which a husband and wife make a joint return is the sum of the base period incomes of both the husband and wife. Thus, if A and B, who are not married for the taxable years 1967-70 and made separate returns for such years, marry in 1971 and make a joint return for the computation year 1971, their base period income for each of the taxable years 1967-70 is the sum of the base period incomes for each such year of A (computed on the basis of his taxable income for each such year) and of B (similarly computed). If, however, they were married and made joint returns with each other for any of the base period years, their base period income for any such year may be computed on the basis of their aggregate taxable income. The base period income with respect to a computation year for which an individual makes a return as a surviving spouse (as defined in section 2(a) and § 1.2-2) is the sum of the base period incomes of the surviving spouse and the decedent with respect to whom such return is made.

(c) *Adjustments to taxable income*—(1) *Foreign and possessions income*. In determining base-period income for any

taxable year, taxable income for such year shall be increased by an amount equal to the excess of the amount of income which was excluded from gross income under section 911 (relating to earned income from sources without the United States) and subpart D of part III of subchapter N (sec. 931 and following, relating to income from sources within possessions of the United States) over the deductions which would have been properly allocable to or chargeable against such amount but for the exclusion of such amount from gross income.

(2) *Certain trust income*. In determining base-period income for any taxable year, taxable income for such year shall be decreased by any amount which is included in the income of a beneficiary of a trust under section 668(a).

§ 1.1302-4 [Deleted]

PAR. 8. Section 1.1302-4 is deleted.

PAR. 9. Section 1.1302-5 is redesignated as § 1.1302-3, and such redesignated section is amended by revising paragraph (b) to read as follows:

§ 1.1302-3 Other related definitions.

(b) *Base period*. See paragraph (a) of § 1.1302-2 for definition of the term "base period".

PAR. 10. Section 1.1303 is amended by revising section 1303(c) (2) (B) and the historical note to read as follows:

§ 1.1303 Statutory provisions; eligible individual.

(c) *Individuals receiving support from others*—

(2) *Exemptions*. (B) More than one-half of the individual's taxable income for the computation year is attributable to work performed by him in substantial part during two or more of the base period years, or

[Sec. 1303 as amended by sec. 232(a), Rev. Act 1964 (78 Stat. 105); sec. 311(d), Tax Reform Act 1969 (83 Stat. 587)]

PAR. 11. Section 1.1303-1 is amended by revising paragraph (b), and paragraph (c) (1), (3), and (4)(i) to read as follows:

§ 1.1303-1 Eligible individuals.

(b) *Nonresident alien individuals*. An individual is not an eligible individual for the computation year if, at any time during such year or his base period, he was a nonresident alien. The determination that an individual is a nonresident alien is made in accordance with § 1.871-2 through § 1.871-4. For example, if H, a U.S. citizen living abroad, married W, an alien, during 1967 and returned with her to live in the United States on December 31, 1969, they may not choose the benefits of income averaging if they file a joint return for the taxable year 1971 since W was a nonresident alien for 3-base-period years (1967-69). H, however, may make a separate return and may, if

he is otherwise qualified, choose the benefits of income averaging.

(c) *Individuals receiving support from others*—(1) *Self-support rule*. Except as provided in section 1303(c) (2) and subparagraphs (2), (3), and (4) of this paragraph, to be an eligible individual for the computation year under this paragraph, an individual must, together with his spouse, have furnished 50 percent or more of his support during each of his 4-base-period years. For example, H and W are married for the computation year and the 4-base-period years. If H and W have provided more than 50 percent of their support during each of the 4-base-period years, both H and W are eligible individuals for the computation year.

(3) *Major accomplishment rule*. Notwithstanding the general rule contained in section 1303(c) (1) and subparagraph (1) of this paragraph, an individual may be an eligible individual for a computation year if more than 50 percent of his taxable income for the computation year is attributable to work performed by him in substantial part during two or more of his 4-base-period years. It is not necessary that the individual perform any of the work in his computation year.

(4) *Spouse supported by others*. (i) Notwithstanding the general rule contained in section 1303(c) (1) and subparagraph (1) of this paragraph, an individual may be an eligible individual for a computation year if—

(a) Such individual makes a joint return under section 6013 for such year, and

(b) Not more than 25 percent of the aggregate adjusted gross income of such individual and his spouse for such year is attributable to such individual.

For example, H and W, who are United States citizens and calendar year taxpayers, were married in August 1970. H supported himself from 1967 to 1971. W's parents furnished more than 50 percent of her support for each year prior to her marriage. For the taxable year 1971, H and W filed a joint return showing an aggregate adjusted gross income of \$10,000, all of which is attributable to H. If H and W are otherwise qualified, they may choose the benefits of income averaging for 1971.

PAR. 12. Section 1.1304 is amended by revising such section and the historical note to read as follows:

§ 1.1304 Statutory provisions; special rules.

Sec. 1304. *Special rules*—(a) *Taxpayer must choose benefits*. This part shall apply to the taxable year only if the taxpayer chooses to have the benefits of this part for such taxable year. Such choice may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the tax imposed by this chapter for the taxable year.

(b) *Certain provisions inapplicable*. If the taxpayer chooses the benefits of this part for the taxable year, the following provisions shall not apply to him for such year:

(1) Section 3 (relating to optional tax),
 (2) Section 72(n)(2) (relating to limitation of tax in case of total distribution),
 (3) Section 911 (relating to earned income from sources without the United States),
 (4) Subpart D of part III of subchapter N (sec. 931 and following, relating to income from sources within possessions of the United States),
 (5) Section 1201(b) (relating to alternative capital gains tax), and
 (6) Section 1348 (relating to 50-percent maximum rate on earned income).

(c) *Failure of certain married individuals to make joint return, etc.*—(1) *Application of subsection.* Paragraphs (2) and (3) of this subsection shall apply in the case of any individual who was married for any base period year or the computation year; except that—

(A) such paragraphs shall not apply in respect of a base period year if—
 (i) Such individual and his spouse make a joint return, or such individual makes a return as a surviving spouse (as defined in section 2(b)(1)(A)), for the computation year, and
 (ii) Such individual was not married to any other spouse for such base period year, and
 (B) Paragraph (3) shall not apply in respect of the computation year if the individual and his spouse make a joint return for such year.

(2) *Minimum base period income.* For purposes of this part, the base period income of an individual for any base period year shall not be less than 50 percent of the base period income which would result from combining his income and deductions for such year—

(A) With the income and deductions for such year of the individual who is his spouse for the computation year, or
 (B) If greater, with the income and deductions for such year of the individual who was his spouse for such base period year.

(3) *Community income attributable to services.* In the case of amounts which constitute earned income (within the meaning of section 911(b)) and are community income under community property laws applicable to such income—

(A) The amount taken into account for any base period year for purposes of determining base period income shall not be less than the amount which would be taken into account if such amounts did not constitute community income, and
 (B) The amount taken into account for purposes of determining taxable income for the computation year shall not exceed the amount which would be taken into account if such amounts did not constitute community income.

(4) *Marital status.* For purposes of this subsection, section 143(a) shall apply in determining whether an individual is married for any taxable year.

(d) *Dollar limitations in case of joint returns.* In the case of a joint return, the \$3,000 figure contained in section 1301 shall be applied to the aggregate averageable income.

(e) *Treatment of certain other items.*—
 (1) *Section 72(m)(5).* Section 72(m)(5) (relating to penalties applicable to certain amounts received by owner-employees) shall be applied as if this part had not been enacted.

(2) *Other items.* Except as otherwise provided in this part, the order and manner in which items of income or limitations on tax shall be taken into account in computing the tax imposed by this chapter on the income of any eligible individual to whom section 1301 applies for any computation year shall be determined under regulations prescribed by the Secretary or his delegate.

(f) *Short taxable years.* In the case of any computation year or base period year which is a short taxable year, this part shall be applied in the manner provided in regulations prescribed by the Secretary or his delegate.

[Sec. 1304 as amended by sec. 232(a), Rev. Act 1964 (78 Stat. 105); secs. 311 (c) and (d), 515(c)(4), 802(c)(5), and 803(d)(8), Tax Reform Act 1969 (83 Stat. 537, 646, 678, 684)]

PAR. 13. Paragraphs (b) and (c) of § 1.1304-1 are amended to read as follows:

§ 1.1304-1 Choice of income averaging by taxpayer.

(b) *Subsequent qualification.* A taxpayer who was not qualified to choose the benefits of income averaging for a taxable year may subsequently become qualified for such taxable year. For example, if a taxpayer was not qualified to choose the benefits of income averaging for 1971 incurs a net operating loss in 1972, and the carryback of such loss reduces his income for 1969 and 1970 so that he is no longer ineligible under section 1301 to choose the benefits of income averaging for 1971, the taxpayer may recompute the tax imposed by chapter 1 of the Code on his income for 1971 as if he had originally chosen the benefits of income averaging.

(c) *Subsequent disqualification.* A taxpayer who has chosen the benefits of income averaging for a taxable year may subsequently become disqualified for such benefits for such taxable year. For example, if a taxpayer who chose the benefits of income averaging for 1971 incurs a net operating loss for 1972 and the carryback of such loss reduces his income for 1971 so that he is no longer qualified under section 1301 to choose the benefits of income averaging for that year, the taxpayer must recompute the tax imposed by chapter 1 of the Code on his income for 1971 as if he had not originally chosen the benefits of income averaging.

PAR. 14. Section 1.1304-2 is amended by adding at the end of paragraph (a) (4) the following new subparagraphs:

§ 1.1304-2 Provisions inapplicable if income averaging is chosen.

(a) *Provisions inapplicable.* . . .

(5) Section 1201(b) (relating to alternative capital gains tax). A taxpayer may not, therefore, make use of the alternative tax imposed by section 1201(b) for any taxable year beginning after December 31, 1969, for which he chooses the benefits of income averaging.

(6) Section 1348 (relating to 50 percent maximum rate on earned income). A taxpayer may not, therefore, make use of the 50 percent maximum rate of tax contained in section 1348 for any taxable year for which he chooses the benefits of income averaging.

PAR. 15. Section 1.1304-3 is amended by revising paragraphs (b), (c) (1), (d), and (e), by deleting paragraph (f) and by redesignating paragraph (g) as paragraph (f). Such revised and redesignated paragraphs shall read as follows:

§ 1.1304-3 Special rules for computing base period income.

(a) *Applicability.* . . .

(1) For the computation year, such individual and his spouse make a joint return, or he makes a return as a surviving spouse (as defined in section 2(a) and § 1.2-2), and

(b) *Minimum separate base period income.* In any case in which section 1304(c) and this section apply, the separate base period income of an individual for a base period year is the greatest of the following amounts:

(1) The individual's separate income and deductions (increased in accordance with section 1304(c)(3)(A), relating to community income) adjusted in accordance with § 1.1302-2(c);

(2) 50 percent of the base period income resulting from adjusting, in accordance with § 1.1302-2(c), the sum of the individual's separate income and deductions for the base period year (increased in accordance with section 1304(c)(3)(A), relating to community income) and the separate income and deductions for such year of the individual who is his spouse for the computation year; or

(3) 50 percent of the base period income resulting from adjusting, in accordance with § 1.1302-2(c), the sum of the individual's separate income and deductions for the base period year and the separate income and deductions of the individual who is his spouse for such base period year.

However, subparagraph (2) of this paragraph shall not apply in respect of a base period year if an individual and his spouse make a joint return for the computation year.

(c) *Separate income and deductions.*—

(1) *Definition.* The term "separate income and deductions" for a base period year means the excess of an individual's gross income over his allowable separate deductions. The separate income and deductions of an individual may never be less than zero.

(d) *Community income attributable to services.* Under section 1304(c)(3)(A), in any case in which paragraph (b) (2) or (3) of this section applies, an individual's separate income and deductions (as defined in paragraph (c) of this section), shall be increased to take into account, in the case of amounts which constitute earned income (within the meaning of section 911(b)) and are community income under community property laws applicable to such income, not less than the net amount of such earned income which would be taken into account if such amounts of earned income did not constitute community income.

(e) *Example.* The provisions of this section may be illustrated by the following example.

Example. H and W are calendar year taxpayers who were married, residents of a common law State, and otherwise eligible to choose the benefits of income averaging for the taxable year 1970. They made a joint

return for 1970. W, however, was married to and made a joint return with A for the taxable year 1966. H was unmarried for 1966. H, A, and W had taxable income for 1966 indicated in the table below. H and W compute their base period income for 1966 in the following manner:

	A	W	A and W joint return	H
Salary	\$11,500	\$3,000	\$14,500	\$3,000
Dividends	500	1,000	1,500	1,000
Adjusted gross income	12,000	4,000	16,000	4,000
Total deductions allowable in computing taxable income			4,000	1,500
Amount of total deductions allowable in computing separate income and deductions	3,000	1,000		1,500
Net of separate income and deductions	9,000	3,000	12,000	2,500
Foreign income excluded under section 911	10,000			
Separate base period income in accordance with paragraph (b)(1)	10,000	3,000		2,500
Separate base period income in accordance with paragraph (b):				
(1) Net of W's separate income and deductions under paragraph (b)(1)			\$3,000	
(2) Net of W's separate base period income under paragraph (b)(3):				
(a) W and A's taxable income for 1966		\$12,000		
(b) Adjustment under § 1.1302-2				
(c)		10,000		
		22,000		
(c) 50 percent of combined base period income			11,000	

W must take \$11,000 into account as her separate base period income for 1966. Since H made a joint return with W in the computation year and was not married to another spouse in 1966, section 1304(c) and § 1.1304-3 do not apply to him for 1966. Therefore, his separate base period income for 1966 is \$2,500. H and W's base period income, on a joint return basis, for 1966 is \$13,500.

(f) *Marital status.* For purposes of section 1304(c) and this section, the rules of section 143(a) (relating to determination of marital status) and the regulations thereunder apply in determining whether an individual is married for any taxable year.

PAR. 16. Section 1.1304-4 is amended by revising such section to read as follows:

§ 1.1304-4 Dollar limitations in case of joint returns.

Under section 1301 an eligible individual may choose the benefits of income averaging only if his averagable income for the computation year exceeds \$3,000. In the case of a joint return, the \$3,000 limitation applies to the aggregate

averagable income of the husband and wife making the joint return.

PAR. 17. Section 1.1304-5 is amended by revising paragraphs (a), (b), and (d) to read as follows:

§ 1.1304-5 Determination of total tax for the computation year.

(a) *Total tax.* The total amount of tax imposed by section 1 for the computation year on the income of an individual who chooses the benefits of income averaging for that year is the sum of the following amounts of tax:

(1) The tax imposed on the amount of income equal to 120 percent of average base period income,

(2) Five times the increase in tax resulting from adding 20 percent of averageable income to 120 percent of average base period income,

(3) The increase in tax resulting from adding the amount (if any) described in § 1.1302-1(b)(3) (relating to community income with respect to services) to the sum of 120 percent of average base period income plus 20 percent of averageable income,

(4) The partial tax (if any) provided by section 668(a) (2) and (3) on certain accumulation distributions from a trust, and

(5) The tax on the amount (if any) of income to which section 72(m)(5), relating to certain distributions to owner-employees which are subject to penalties, applies, computed in accordance with the rules of paragraph (b) of this section.

(b) *Treatment of certain amounts received by owner-employees.* The amount of tax imposed by section 1 for the computation year attributable to amounts described in section 72(m)(5)(A), to which a penalty is applicable under section 1.72-17, is computed by determining the increase in tax which results under section 1 from the inclusion of such amounts in income without the use of the income averaging provisions.

(d) *Examples.* The application of the rules described in this section may be illustrated by the following examples:

Example (1). A, an eligible individual who was not married for the taxable years 1967 through 1971, has taxable income for those years as indicated in the table below. For the taxable years 1967 through 1970 all of his taxable income is from salary and capital gain. A's qualification to choose the benefits of income averaging and the amount of his averagable income for 1971 are determined in the following manner:

Year:	Taxable income
1967	\$2,000
1968	4,000
1969	3,500
1970	2,500
1971	41,000

(1) Average base period income for years 1967-70 (the base period years):

(a) 1967	\$2,000
1968	4,000
1969	3,500
1970	2,500
Total	12,000

(b) Average base period income (\$12,000 ÷ 4)

(2) Averagable income for 1971:

(a) Taxable income

(b) 120 percent of average base period income (120% × \$3,000)

(c) Averagable income

Since A's averagable income exceeds \$3,000, the entire amount (\$37,400) of his averagable income is subject to averaging.

Computation of tax due for computation year (1971) (rounded to nearest dollar):

(1) Tax on 120 percent of average base period income:

(a) 120 percent of the average base period income

(b) Tax on \$3,600

(2) Tax attributable to averagable income:

(a) 120 percent of the average base period income

(b) 20 percent of the averagable income (20% of \$37,400)

(c) Total

(d) Tax on \$3,600

(e) Tax on \$11,080 (\$3,600 + \$7,480)

(f) Increase in tax (\$2,382 - \$614)

(g) Tax attributable to averagable income (5 × \$1,768)

(3) Total tax for 1971:

(a) Tax on 120 percent of the average base period income (line (1))

(b) above

(b) Tax attributable to averagable income (line (2)(g) above)

Total tax

Example (2). A, an eligible individual who was not married for the taxable years 1967 through 1971, has taxable income for those years as indicated in the table below. For the taxable year 1971, A's income includes \$10,000 of income as a beneficiary of a trust which results in an additional tax of \$866 under section 668(a). A's qualification to choose benefits of income averaging and the amount of his averagable income for 1971 are determined in the following manner:

Year	Salary and 1/2 of net long-term capital gain	Section 668(a) income	Total
1967	\$4,500		\$4,500
1968	3,000	\$5,000	8,000
1969	3,500		3,500
1970	5,000		5,000
1971	20,000	10,000	30,000

(1) Average base period income for years 1967-70 (the base period years):

(a) 1967

1968

1969

1970

(b) Average base period income (\$16,000 ÷ 4)

(2) Averagable income for 1971:

(a) Taxable income reduced by amount included in income under section 668(a).....	20,000
Less:	
(b) 120 percent of average base period income (120% × \$4,000)....	4,800
(c) Averagable income.....	15,200

Since A's averagable income exceeds \$3,000, the entire amount (\$15,200) of his averagable income is subject to averaging.

Computation of tax due for computation year (1971) (rounded to the nearest dollar):

(1) Tax on 120 percent of average base period income:	
(a) 120 percent of average base period income.....	\$4,800
(b) Tax on \$4,800.....	858
(2) Tax attributable to averagable income:	
(a) 120 percent of average base period income.....	4,800
(b) 20 percent of averagable income (20% × \$15,200).....	3,040
(c) Total.....	7,840
(d) Tax on \$4,800.....	858
(e) Tax on \$7,840.....	1,552
(f) Increase in tax (\$1,552—\$858).....	694
(g) Tax attributable to averagable income (5 × \$694).....	3,470

(3) Partial tax on amount included in income under section 668(a) (2).....	866
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(4) Total tax for 1971:	
(a) Tax on 120 percent of average base period income (line (1) (b) above).....	858
(b) Tax attributable to averagable income (line (2) (g) above).....	3,470
(c) Partial tax on amount included in income under section 668(a) (2).....	866

Total tax..... 5,194

Example (3). H and W were married during 1971, are calendar year taxpayers, and reside in a community property state for the taxable year 1971. The total income of H and W for the computation year consists of \$60,000 of community income attributable to personal services, \$40,000 of which is earned by H. W was not married to any other spouse for taxable years 1967 through 1970, and elects to choose the benefits of income averaging for taxable year 1971. W elects to file a separate return. Even though under the applicable State community property laws \$30,000, one-half of the total community income, belongs to W, only \$20,000 of W's \$30,000 of taxable income for 1971 is subject to averaging under § 1.1302-1(b) and the remaining \$10,000 is not. See § 1.1302-1(c). W's qualification to choose the benefits of income averaging and the amount of her averagable income for 1971 are determined in the following manner:

Year:	Taxable income
1967.....	\$2,000
1968.....	1,500
1969.....	3,800
1970.....	2,700
1971.....	30,000

(1) Average base period income for years 1967 through 1970 (the base period years):	
(a) 1967.....	\$2,000
1968.....	1,500
1969.....	3,800
1970.....	2,700
	10,000

(b) Average base period income (\$10,000 ÷ 4).....	2,500
(2) Averagable income for 1971:	
(a) Taxable income subject to averaging.....	20,000
Less:	
(b) 120 percent of average base period income (120% × \$2,500)....	3,000
(c) Averagable income.....	17,000

Since W's averagable income exceeds \$3,000, the entire amount (\$17,000) of her averagable income is subject to averaging.

Computation of tax due for computation year (1971) (rounded to nearest dollar):

(1) Tax on 120 percent of average base period income:	
(a) 120 percent of the average base period income.....	\$3,000
(b) Tax on \$3,000.....	500
(2) Tax attributable to averagable income:	
(a) 120 percent of the average base period income.....	3,000
(b) 20 percent of the averagable income (20% × \$17,000).....	3,400
(c) Total.....	6,400
(d) Tax on \$3,000.....	500
(e) Tax on \$6,400 (\$3,000 + \$3,400).....	1,230
(f) Increase in tax (\$1,230—\$500).....	730
(g) Tax attributable to averagable income (5 × \$730).....	3,650

(3) Tax on community income not subject to averaging:	
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(a) Sum of 120 percent of average base period income and 20 percent of averagable income.....	6,400
(b) Community income not subject to averaging.....	10,000
(c) Total.....	16,400

(d) Tax on \$6,400.....	1,230
(e) Tax on \$16,400 (\$6,400 + \$10,000).....	4,498
(f) Increase in tax \$4,498—\$1,230.....	3,268

(4) Total tax for 1971:	
(a) Tax on 120 percent of base period income (line (1) (b) above).....	500
(b) Tax attributable to averagable income (line (2) (g) above).....	3,650
(c) Tax on community income not subject to averaging.....	3,268
Total tax.....	7,418

§ 1.1304-6 [Deleted]

Par. 18. Section 1.1304-6 is deleted.

Par. 19. Section 1.1304-7 is redesignated as § 1.1304-6 and such redesignated section is amended by revising subparagraph (4) of paragraph (a) and (b) to read as follows:

§ 1.1304-6 Short taxable years.

(a) *Change of annual accounting period.* * * *

(4) The application of the rules described in subparagraph (1) of this paragraph may be illustrated by the following example:

Example. A, an unmarried, eligible individual who had been a calendar year taxpayer, was allowed in 1971 to change his annual accounting period to a taxable year beginning on April 1, 1971. A made a return for the short period from January 1 to March 31, 1971. His taxable income for the taxable years 1967 to 1971 is as indicated in the table below. For the taxable years 1967 through 1970, all of A's income is ordinary income from salary. A's eligibility to choose

the benefits of income averaging and the amount of his averagable income for 1971 are determined in the following manner:

Year:	Taxable income
1967.....	\$12,000
1968.....	14,000
1969.....	17,500
1970.....	16,500
1971 (3 months).....	15,000

(1) Taxable income for 1971 on annual basis ((15,000 × 12) ÷ 3).....	60,000
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(2) Average base period income for years (1967-70) (the base period years):

(a) 1967.....	12,000
1968.....	14,000
1969.....	17,500
1970.....	16,500
	60,000

(b) Average base period income (\$60,000 ÷ 4).....	15,000
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(3) Averagable income for 1971:	
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(a) Taxable income.....	60,000
Less:	
(b) 120 percent of average base period income (120% × \$15,000).....	18,000

(c) Averagable income.....	42,000
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Since A's averagable income exceeds \$3,000, the entire amount (\$42,000) of his averagable income is subject to averaging.

Computation of total tax due for computation year (1971) (rounded to the nearest dollar):

(1) Tax on 120 percent of the average base period income on annual basis:	
(a) 120 percent of the average base period income.....	\$18,000
(b) Tax on \$18,000.....	4,510

(2) Tax attributable to averagable income on annual basis:	
--	--

(a) 120 percent of average base period income.....	18,000
(b) 20 percent of the averagable income (20% × \$42,000).....	8,400
(c) Total.....	26,400

(d) Tax on \$18,000.....	4,510
(e) Tax on \$26,400 (\$18,000 + \$8,400).....	7,770
(f) Increase in tax (\$7,770—\$4,510).....	3,260
(g) Tax attributable to averagable income (5 × \$3,260).....	16,300

(3) Total tax for 1971:	
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(a) Tax on 120 percent of the average base period income (line (1) (b) above).....	4,510
(b) Tax attributable to averagable income (line (2) (g) above).....	16,300

(c) Tax on annualized income.....	20,810
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Total tax due (7/12 × \$20,810)..... 5,203

(b) *Taxpayer not in existence for entire taxable year.* If an individual is required under section 443(a) (2) and the regulations thereunder to make a return for a short period, such short period may be treated as a computation year or a base period year. The amount of such individual's taxable income (if such short period is a computation year) or

his base period income (if such short period is a base period year) is computed as if such short period were a taxable year of 12 months ending on the last day of the short period.

§§ 1.1301A-1.1307A-3 [Deleted]

PAR. 20. Sections 1.1301A through 1.1307A-3 are deleted.

PAR. 21. Section 301.6511(d)-2 is amended by revising paragraph (b) to read as follows:

§ 301.6511(d)-2 Overpayment of income tax on account of net operating loss carryback.

(b) *Barred overpayments.* (1) If the allowance of a credit or refund of an overpayment of tax attributable to a net operating loss carryback is otherwise prevented by the operation of any law or rule of law (other than section 7122, relating to compromises), such credit or refund may be allowed or made under the provisions of section 6511(d) (2) (B) if a claim therefor is filed within the period provided by section 6511(d) (2) (A) and paragraph (a) of this section for filing a claim for credit or refund of an overpayment attributable to a carryback. Similarly, if the allowance of an application, credit, or refund of a decrease in tax determined under section 6411(b) is otherwise prevented by the operation of any law or rule of law (other than section 7122), such application, credit, or refund may be allowed or made if an application for a tentative carryback adjustment is filed within the period provided in section 6411(a). Thus, for example, even though the tax liability (not including the net operating loss deduction or the effect of such deduction) for a given taxable year has previously been litigated before the Tax Court, credit or refund of an overpayment may be allowed or made despite the provisions of section 6512(a), if claim for such credit or refund is filed within the period provided in section 6511(d) (2) (A) and paragraph (a) of this section. In the case of a claim for credit or refund of an overpayment attributable to a carryback, or in the case of an application for a tentative carryback adjustment, the determination of any court, including the Tax Court, in any proceeding in which the decision of the court has become final, shall be conclusive except with respect to the net operating loss deduction, and the effect of such deduction, to the extent that such deduction is affected by a carryback which was not in issue in such proceeding.

(2) For purposes of the special period of limitation for filing a claim for credit or refund of an overpayment of tax with respect to a computation year (as defined in section 1302(c) (1)) by an individual who has chosen to compute his tax under sections 1301 through 1305 (relating to income averaging), such claim is determined to relate to an overpayment attributable to a net operating loss carryback when such carryback relates to any base period year (as defined in section 1302(c) (3)). Thus, if (i) an individual has a net

operating loss for a taxable year subsequent to a taxable year for which he had chosen the benefits of income averaging, and (ii) such net operating loss carryback is wholly utilized in any one or more of his base period years (which would result in an increased amount of averageable income for such computation year), the special period of limitation with respect to such individual's computation year applies and a timely claim for credit or refund with respect to the computation year may be filed.

[FR Doc. 72-10691 Filed 7-12-72; 8:45 am]

PART 601—STATEMENT OF PROCEDURAL RULES

Disclosure of Information

CROSS REFERENCE: For a document affecting this title, chapter and part, see F.R. Doc. 72-10730 under Title 27 appearing in this issue.

Title 27—ALCOHOL, TOBACCO PRODUCTS AND FIREARMS

Chapter I—Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury

SUBCHAPTER F—PROCEDURES AND PRACTICES

PART 71—STATEMENT OF PROCEDURAL RULES

Disclosure of Information

In order to establish procedures under which the Bureau of Alcohol, Tobacco and Firearms will administer the provisions of 5 U.S.C. 552 relating to the availability of information to the public, the following regulations are hereby prescribed as Part 71 of Title 27 of the Code of Federal Regulations:

Preamble. 1. The regulations in this part supersede Subpart G of 26 CFR Part 601 to the extent that it applied to alcohol, tobacco, firearms, and explosives records, formerly administered by the Internal Revenue Service and transferred to the Bureau of Alcohol, Tobacco and Firearms.

2. These regulations shall not affect any act done or any liability or right accruing, or accrued, or any suit or proceeding had or commenced before the effective date of these regulations.

3. The regulations in this part shall become effective on the date of publication in the FEDERAL REGISTER (7-13-72).

Subpart A—Scope

Sec.

71.1 General.

Subpart B—Definitions

71.11 Meaning of terms.

Subpart C—Records

71.21 Publicity of information.

71.22 Publication and public inspection.

AUTHORITY: The provisions of this Part 71 issued under 5 U.S.C. 301 and 552, unless otherwise noted.

Subpart A—Scope

§ 71.1 General.

This part sets forth the procedural rules of the Bureau of Alcohol, Tobacco and Firearms, The Department of the Treasury, respecting matters of official record in the Bureau of Alcohol, Tobacco and Firearms and the extent to which records and documents are subject to publication or open to public inspection.

Subpart B—Definitions

§ 71.11 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meaning ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words importing the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude things not enumerated which are in the same general class.

(a) *Bureau.* Bureau of Alcohol, Tobacco and Firearms, The Department of the Treasury.

(b) *Director.* The Director, Bureau of Alcohol, Tobacco and Firearms.

(c) *I.R.C.* The Internal Revenue Code of 1954, as amended.

(d) *Regional Director.* A Regional Director who is responsible to, and functions under, the direction and supervision of the Director, Bureau of Alcohol, Tobacco and Firearms.

(e) *Secretary.* The Secretary of the Treasury.

(f) *U.S.C.* The United States Code.

Subpart C—Records

§ 71.21 Publicity of information.

(a) *General.* The major categories for which the disclosure requirements of the Bureau are set forth in § 71.22 are as follows:

(1) Information required to be published in the FEDERAL REGISTER;

(2) Information required to be made available for public inspection and copying or, in the alternative, to be published and offered for sale; and

(3) Information required to be made available to any member of the public upon specific request.

The provisions of 5 U.S.C. 552 regarding the publicizing of information by Federal agencies are intended to protect, subject to specified safeguards, the right of the public to information. Section 552 is not authority to withhold information from Congress.

(b) *Exemptions.* (1) *In general.* Under 5 U.S.C. 552(b), the disclosure requirements of section 552 do not apply to certain matters described in specific exemptions, as follows:

(i) Matters specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(ii) Matters related solely to the internal personnel rules and practices of an agency, such as staff manuals or instructions, or parts thereof, which set

forth guidelines, operating rules, or other criteria for officers or employees in auditing or inspection procedures, or in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for the defense, prosecution, or settlement of cases;

(iii) Matters specifically exempted from disclosure by statute;

(iv) Trade secrets and commercial, financial, or other information which is privileged or confidential and thus would not customarily be made public by the person from whom it is obtained, such as business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, personal correspondence, or matter which the agency has obligated listed in good faith not to disclose;

(v) Interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with an agency, including communications (such as internal drafts, memorandums between officials or agencies, opinions and interpretations prepared by agency staff personnel or consultants for the use of the agency, and records of the deliberations of the agency or staff groups) which the agency has received from another agency, or which the agency generates, in the process of issuing an order, decision, ruling, or regulation, drafting proposed legislation, or otherwise carrying out its functions and responsibilities, if such communications would not routinely be available to such party through use of the discovery process;

(vi) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of the personal privacy of any officer or employee of an agency or of any other person;

(vii) Investigatory files compiled for any law enforcement purpose, including files prepared in connection with related Government litigation and adjudicative proceedings, except to the extent available by law to a party other than an agency;

(viii) Matters contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(ix) Geological and geophysical information and data, including maps, concerning wells, such as seismic reports and other exploratory findings of oil companies; or

(x) Matters specifically exempt under section 7213, I.R.C., relating to penalties for unauthorized disclosure of information by Federal officers or employees or other persons.

A reference in this subparagraph to a provision of the Internal Revenue Code will be considered to be a reference also to any corresponding provisions of prior law and the regulations promulgated thereunder. See also 18 U.S.C. 1905, which provides penalties for the unlawful disclosure by Federal officers or em-

ployees of certain information coming to them in the course of their employment. See paragraph (d) of § 71.22 for special rules pertaining to the disclosure of information in the case of certain specified matters.

(2) *Application of exemptions.* Even though an exemption described in subparagraph (1) of this paragraph may be fully applicable to a matter in a particular case, the Bureau may, if not precluded by law, elect under the circumstances of that case not to apply the exemption to such matter. The fact that the exemption is not applied by the Bureau in that particular case has no precedential significance as to the application of the exemption to such matter in other cases but is merely an indication that in the particular case involved the Bureau finds no compelling necessity for applying the exemption to such matter.

§ 71.22 Publication and public inspection.

(a) *Publication in the Federal Register.*—(1) *Requirement.* Subject to the application of the exemptions described in paragraph (b) of § 71.21 and subject to the limitations provided in subparagraph (2) of this paragraph, the Bureau is required under 5 U.S.C. 552(a) (1) to separately state and currently publish in the FEDERAL REGISTER for the guidance of the public the following information:

(i) Descriptions of its central and field organization and the established places at which, the persons from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions, from the Bureau;

(ii) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures which are available;

(iii) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(iv) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Bureau; and

(v) Each amendment, revision, or repeal of matters referred to in subdivisions (i) through (iv) of this subparagraph.

Pursuant to the foregoing requirements, the Director publishes in the FEDERAL REGISTER from time to time a statement, which is not codified in this chapter, on the organization and functions of the Bureau, and such amendments as are needed to keep the statement on a current basis. In addition, there are published in the FEDERAL REGISTER the rules set forth in this part or 26 CFR Part 601, as applicable, as well as the regulations issued pursuant to the laws administered by the Bureau, such as the regulations in 26 CFR Part 178 (Commerce in Firearms and Ammunition), 26 CFR Part 181

(Commerce in Explosives), 26 CFR Part 200 (Rules of Practice in Permit Proceedings), 26 CFR Part 201 (Distilled Spirits Plants Regulations), and Part 4 of this chapter (Wine Labeling and Advertising). Whenever the Director grants relief to any person pursuant to 26 CFR Part 178 (Commerce in Firearms and Ammunition), the notice of such action, together with the reasons therefor, is published in the FEDERAL REGISTER.

(2) *Limitations.*—(i) *Incorporation by reference in the Federal Register.* Matter which is reasonably available to the class of persons affected thereby, whether in a private or public publication, will be deemed published in the FEDERAL REGISTER for purposes of subparagraph (1) of this paragraph when it is incorporated by reference therein with the approval of the Director of the Federal Register. The matter which is incorporated by reference must be set forth in the private or public publication substantially in its entirety and not merely summarized or printed as a synopsis. Matter the location and scope of which are familiar to only a few persons having a special working knowledge of the activities of the Bureau may not be incorporated by reference in the FEDERAL REGISTER. Matter may be incorporated by reference in the FEDERAL REGISTER only pursuant to the provisions of 5 U.S.C. 552(a) (1) and 1 CFR Part 20.

(ii) *Effect of failure to publish.* Except to the extent that a person has actual and timely notice of the terms of any matter referred to in subparagraph (1) of this paragraph which is required to be published in the FEDERAL REGISTER, such person is not required in any manner to resort to, or be adversely affected by, such matter if it is not so published or is not incorporated by reference therein pursuant to subdivision (i) of this subparagraph. Thus, for example, any such matter which imposes an obligation and which is not so published or incorporated by reference will not adversely change or affect a person's rights.

(b) *Public inspection and copying.*—(1) *In general.* Subject to the application of the exemptions described in paragraph (b) of § 71.21, the Bureau is required under 5 U.S.C. 552(a) (2) to make available for public inspection and copying or, in the alternative, to promptly publish and offer for sale the following information:

(i) Final opinions, including concurring and dissenting opinions, and orders, if such opinions and orders are made in the adjudication of cases pursuant to 26 CFR 200.116 in administrative procedures on applications for, or to suspend, revoke, or annul, permits under the alcohol, alcoholic beverages, and tobacco permit systems, and 26 CFR 178.78 on administrative procedures relating to firearms licenses; and 26 CFR 181.79 on administrative procedures relating to explosives licenses and permits;

(ii) Those statements of policy and interpretations which have been adopted by the Bureau but are not published in the FEDERAL REGISTER; and

(iii) Its administrative staff manuals and instructions to staff that affect a member of the public.

The Bureau is also required by 5 U.S.C. 552(a)(2) to maintain and make available for public inspection and copying current indexes identifying any matter described in subdivisions (i) through (iii) of this subparagraph which is issued, adopted, or promulgated after July 4, 1967, and which is required to be made available for public inspection or published. No matter described in subdivisions (i) through (iii) of this subparagraph which is required by this subparagraph to be made available for public inspection or published may be relied upon, used, or cited as precedent by the Bureau against a party other than an agency unless such party has actual and timely notice of the terms of such matter or unless the matter has been indexed and either made available for inspection, or published, as provided by this subparagraph. This subparagraph applies only to matters which have precedential significance. It does not apply, for example, to administrative manuals on property or fiscal accounting, vehicle maintenance, personnel administration, and similar proprietary functions of the Bureau. Nor does it apply to any ruling or advisory interpretation which is issued on a particular transaction or set of facts and applied only to that transaction or set of facts. This subparagraph does not apply to matters which have been made available pursuant to paragraph (a) of this section.

(2) *Deletion of identifying details.* To prevent a clearly unwarranted invasion of personal privacy, the Bureau will, in accordance with 5 U.S.C. 552(a)(2), delete identifying details contained in any matter described in subparagraph (1) (i) through (iii) of this paragraph before making such matter available for inspection or publishing it. However, in every case where identifying details are so deleted, the justification for the deletion must be explained in writing. The written justification for deletion will be placed as a preamble to the document from which the identifying details have been deleted, except in the case of any matter which is published in the Internal Revenue Bulletin or other authorized publication, pursuant to publication of such authorization in the FEDERAL REGISTER. An introductory statement will be placed in each Internal Revenue Bulletin or other authorized publication providing that identifying details, including the names and addresses of persons involved, and information of a confidential nature are deleted to prevent unwarranted invasions of personal privacy and to comply with statutory provisions, such as section 7213, I.R.C., and 18 U.S.C. 1905, dealing with disclosure of information obtained from members of the public.

(3) *Availability of information—(1) In general.* The Bureau Headquarters and each regional office of the Bureau will make available the matters described in subparagraph (1) (i) through (iii) of this paragraph which are required by such subparagraph to be made available

for public inspection or published, and the current indexes to such matters, will be made available to the public for inspection and copying. Fees will not be charged for the use of the materials made available as provided in this paragraph, but fees will be charged for copying and certification services, as provided in subdivision (iii) of this subparagraph. The public will not be allowed to remove any records from the place of availability.

(ii) *Addresses where information may be obtained.* The addresses from which information may be obtained are as follows:

BUREAU HEADQUARTERS

Mail address: Director, Bureau of Alcohol, Tobacco, and Firearms, 1111 Constitution Avenue NW., Washington DC 20224.
Location: Same as mail address.

NORTH ATLANTIC REGION

Mail address: Regional Director, 90 Church Street, New York, NY 10007.
Location: Same as mail address.

MID-ATLANTIC REGION

Mail address: Regional Director, 2 Penn Center Plaza, Philadelphia, PA 19102.
Location: Same as mail address.

SOUTHEAST REGION

Mail address: Regional Director, 275 Peachtree Street NE., Atlanta, GA 30303.
Location: Same as mail address.

MIDWEST REGION

Mail address: Regional Director, 35 East Wacker Drive, Chicago, IL 60601.
Location: Same as mail address.

CENTRAL REGION

Mail address: Regional Director, Federal Office Building, 550 Main Street, Cincinnati, OH 45202.
Location: Same as mail address.

SOUTHWEST REGION

Mail address: Regional Director, 1114 Commerce Street, Dallas, TX 75202.
Location: Same as mail address.

WESTERN REGION

Mail address: Regional Director, 870 Market Street, San Francisco, CA 94102.
Location: Same as mail address.

(iii) *Copying facilities.* The Bureau Headquarters and each regional office will provide facilities whereby a person may obtain copies of material made available as provided in this paragraph. Certification services with respect to copies will also be provided. The fees in respect of such material are as follows:

Photocopies; each page	\$0.25
Certification of photocopies by appropriate official; each certification	1.00
Sale of unpriced printed material; each 25 pages or fraction thereof	.25
Minimum charge applicable when one or more of the above charges is assessed	1.00

While certain relevant publications which are available for sale through the Government Printing Office will be made available for inspection in the offices identified in subparagraph (3) of this paragraph, such publications will not be available for sale in those offices. Persons desiring to purchase such publications, for example, publications covering Bureau regulations, should con-

tact the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. However, copies of pages of such publications may be obtained in accordance with the schedule of fees set forth in this subdivision.

(iv) *Inability to visit offices.* If a person is unable or unwilling to visit an office where information described in this paragraph is available, in person, but wishes to inspect identifiable material, he may request permission to inspect such material at any office of the Bureau. To the extent that requested material is available for inspection at the office where the request is made, such material will promptly be made available for inspection at such office to the person making the request for inspection and, where facilities are available, for copying in accordance with the schedule of fees prescribed by subdivision (iii) of this subparagraph. Copies of the requested material may also be mailed to such person upon request.

(c) *Specific requests for other identifiable records—(1) In general.* Subject to the application of the exemptions described in paragraph (b) of § 71.21, the Bureau is required under 5 U.S.C. 552(a)(3) to make identifiable records, other than those made available pursuant to paragraphs (a) and (b) of this section, promptly available to any person upon request. The request for records under section 552(a)(3) must be made in accordance with the rules set forth in this paragraph. This paragraph applies only to records in being which are in the possession or control of the Bureau. Where a record in the possession or control of the Bureau is the paramount or exclusive concern of another agency, the request for such record will be transferred to that agency, and the requester notified to that effect, to insure that the determination to disclose or withhold the record will be made by that agency. In applying this paragraph, the Bureau will not compile a record pursuant to a request, or procure a record from sources outside the Bureau.

(2) *Form of request.* The request for records must be in writing and signed by the person making the request. The request is required to identify the requested records in accordance with subparagraph (4) of this paragraph. The request must set forth the address where the person making the request desires to be notified of the determination by the Bureau as to whether the request will be granted. If the requester desires to make the inspection in an office other than the office to which the request is delivered or mailed, the request should designate the office of the Bureau where inspection is desired. Where the person making the request desires to have a copy of the requested records sent to him without first inspecting such records, his request should so state.

(3) *Time and place for making request.* The request for records may be made at any office of the Bureau. A request delivered to an office in person must be delivered during the regular office hours of that office. The person

making the request should allow a reasonable period of time for processing the request.

(4) *Identification of records.* The request for records must describe the records in reasonably sufficient detail to enable personnel of the Bureau to locate the records. While no specific formula for adequate identification of a record may be established, it will generally suffice if the requester gives the name, subject matter, and, if known, the date and location of the requested record. However, the person making the request is advised to furnish the Bureau with any additional information which will more clearly identify the requested records, since he has the burden of properly identifying them. The identification requirement will not be used by officers or employees of the Bureau as a device for improperly withholding records from the public.

(5) *Fees.* A schedule of fees for the services and costs required of the Bureau in locating, making available, copying, and certifying records pursuant to this paragraph is as follows:

Records search; each hour or fraction thereof	\$3.50
Photocopies; each page	.25
Certification of photocopies by appropriate official; each certification	1.00
Minimum charge with respect to photocopies	1.00

Such fees are intended to make any services performed with respect to the request self-sustaining to the extent possible. See title V, Act of August 31, 1951 (65 Stat. 290, 31 U.S.C. (Supp. II) 483a). If the Bureau estimates that the total fees for costs incurred in complying with the request will amount to \$50 or more, the person making the request may be required to enter into a contract for the payment of actual fees with respect to the request before the Bureau will undertake actions necessary to comply with the request.

(6) *Processing a request—(i) In general.* The person making a request will be promptly advised in writing that the request has been received, that action is being taken thereon, and that he will be notified in writing of the determination as to whether the request is granted. If the request does not sufficiently identify a record, the person making the request will be promptly advised of such fact and notified that a more detailed description of the record is required by the Bureau in order to proceed with the request.

(ii) *Determination by Bureau headquarters.* Except in a case described in subdivision (iii) of this subparagraph, a request sufficiently identifying records will be immediately transmitted to the Assistant to the Director for Public Affairs for prompt consideration who will notify the requester in writing of his determination with respect to the request.

(iii) *Determination by a field office.* Where disclosure authorization with respect to the requested records has been delegated to an officer or employee of the Bureau other than the Assistant to the Director for Public Affairs, such other officer or employee will make the deter-

mination as to whether the request for records should be granted or denied and will notify the requester in writing of his determination with respect to the request.

(7) *Granting of request.* If it is determined that the request is to be granted, the person making the request will be notified in writing of the determination, of the fees involved in complying with the request, and of the locations where such fees are payable. Upon receipt by the Bureau of the fees stated in its reply, the person making the request will be promptly advised, in writing, of the time and place where inspection may be made; or, if he has requested that a copy of the records be sent to him without first inspecting the records or if it has been necessary to reproduce the records in order to provide for inspection, a copy of the records will be mailed to him for his retention. In the usual case, the records will be made available for inspection at the office of the Bureau where the request was made. However, if the person making the request has expressed a desire to inspect the records at an office of the Bureau other than the office where the request was made, every reasonable effort will be made to comply with the request. Records will be made available for inspection at such reasonable and proper times as not to interfere with their use by the Bureau or to exclude other persons from making inspections. In addition, reasonable limitations may be placed on the number of records which may be inspected by a person on any given date. The person making the request will not be allowed to remove the records from the office where inspection is made. If, after making inspection, the person making the request desires copies of all or a portion of the requested records, copies will be furnished to him upon payment of the established fees prescribed by subparagraph (5) of this paragraph. Prepayment of fees is not required where the total fees with respect to the request are \$5 or less and the request is filled by mail.

(8) *Denial of request.* If it is determined that the request for records should be denied, the person making the request will be notified of such determination by mail. The letter of notification will specify the city or other location where the requested records are situated, contain a brief statement of the grounds for denial, and advise the requester of his right to appeal to the Director in accordance with subparagraph (9) of this paragraph.

(9) *Administrative appeal.* At any time within 30 days after the date of the letter of notification described in subparagraph (8) of this paragraph, the person making the request may file an appeal to the Director. The appeal must be in the form of a statement signed by the appellant and mailed to the Director, Bureau of Alcohol, Tobacco and Firearms, 1111 Constitution Avenue NW., Washington, DC 20224. The statement must contain the following information:

- (i) The appellant's name and address,
- (ii) The identification of the records requested,
- (iii) The date of the request and the date of the letter denying the request, and
- (iv) A request that the Director consider the denial.

The appeal will be promptly considered by the Director and the request either granted or denied by the Director or referred by him to the Secretary for determination. The appellant will be notified of the determination by mail, and such determination shall be final.

(10) *Judicial review.* If the request is denied upon appeal pursuant to subparagraph (9) of this paragraph, or if no determination is made on the appeal within 30 days after filing, the appellant may commence an action in a U.S. district court pursuant to 5 U.S.C. 552(a)(3). The statute authorizes an action only against the agency. With respect to records of the Bureau, the agency is the Bureau, not an officer or employee thereof. Service of process in such an action shall be in accordance with the Federal Rules of Civil Procedure (28 U.S.C. App.) applicable to actions against an agency of the United States. Where provided in such rules, delivery of process upon the Bureau must be directed to the Director, Bureau of Alcohol, Tobacco and Firearms: Attention: Chief Counsel, 1111 Constitution Avenue NW., Washington, DC 20224. The district court will determine the matter de novo, and the burden will be upon the Bureau to sustain its action in not making the requested records available.

(d) *Rules for disclosure of certain specified matters—(1) Accepted offers in compromise.* For each offer in compromise submitted and accepted pursuant to section 7122, I.R.C., in any case arising under subtitle E of the Internal Revenue Code (relating to alcohol, tobacco, and certain other excise taxes); pursuant to section 7 of the Federal Alcohol Administration Act (27 U.S.C. 207) in any case arising under that Act; or in connection with property seized under title I of the Gun Control Act of 1968 (18 U.S.C. chapter 44), and title XI of the Organized Crime Control Act of 1970 (18 U.S.C. chapter 40), or a copy of the abstract and statement relating to the offer will be available for public inspection, for a period of 1 year from the date of acceptance, in—

(i) The office of the Regional Director who received the offer and in the office of the district director of internal revenue for the internal revenue district in which the offer was submitted, in the case of offers accepted pursuant to the Code, title I of the Gun Control Act of 1968, or title XI of the Organized Crime Control Act of 1970 (18 U.S.C. chapter 40), or

(ii) The office of the Regional Director who received the offer, in the case of offers accepted pursuant to the Federal Alcohol Administration Act.

Information will not be disclosed, however, concerning any trade secrets, processes, operations, style of work, or apparatus, or confidential data or any other matter within the prohibition of 18 U.S.C. 1905.

(2) *Information regarding liquor permits*—(i) *Applications for permits*. Information with respect to the handling of applications for basic permits under the Federal Alcohol Administration Act (27 U.S.C. 204), operating permits under section 5171, I.R.C., and industrial use permits under section 5271, I.R.C., is maintained for public inspection in the offices of Regional Directors until the expiration of 1 year following final action on such applications. See section 1.59 of this chapter.

(ii) *Card index record of permits*. A current card index record for—

(a) All persons to whom industrial use permits have been issued pursuant to section 5271, I.R.C.

(b) All proprietors of distilled spirits plants to whom operating permits have been issued pursuant to section 5171, I.R.C., to cover distilling for industrial use, bonded warehousing of spirits for industrial use, or denaturing of spirits, and

(c) All applicants for such industrial use and operating permits.

Is available for public inspection in the offices of Regional Directors.

(3) *List of plants and permittees*. Upon request, the Regional Director will furnish a list of any type of qualified proprietor or permittee located in his region.

(4) *Information relating to certificates of label approval for distilled spirits, wine, and malt beverages*. Upon written request, the Director will furnish information as to the issuance, pursuant to section 5(e) of the Federal Alcohol Administration Act (27 U.S.C. 205(e)) and Part 4, 5, or 7 of this chapter, of certificates of label approval, or of exemption from label approval, for distilled spirits, wine, or malt beverages. The request must identify the class and type and brand name of the product and the name and address of the bottler or importer thereof or of the person to whom certificate was issued. The person making the request may obtain reproductions or certified copies of such certificates upon payment of the established fees prescribed by paragraph (c) (5) of this section. Information will not be disclosed, however, concerning any trade secrets, processes, operations, style of work, or apparatus, or confidential data or any other matter within the prohibition of 18 U.S.C. 1905.

(5) *Information relating to the tax classification of a roll of tobacco wrapped in reconstituted tobacco*. Upon request the Director, Bureau of Alcohol, Tobacco and Firearms, 1111 Constitution Avenue NW., Washington, DC 20224, will furnish information as to Bureau determination of the tax classification of a roll of tobacco wrapped in any substance containing tobacco, that is, reconstituted tobacco. The request should

identify the brand name of the product and the name and address of the manufacturer or importer. Information will not be disclosed, however, concerning any trade secrets, processes, operations, apparatus, confidential data, or any other matter within the prohibition of 26 U.S.C. 7213 or 18 U.S.C. 1905.

(6) *State cases*. Regional Directors may, in the interest of Federal and State law enforcement, upon receipt of demands or requests of State authorities, and at the expense of the State, authorize special agents and other employees under their supervision to attend trials and administrative hearings in liquor, tobacco, firearms, and explosives cases in which the State is a party, produce records, and testify as to facts coming to their knowledge in their official capacities: *Provided*, That such production or testimony will not divulge information contrary to section 7312, I.R.C., nor divulge information subject to the restrictions in section 5848, I.R.C. See also 26 CFR 301.9000-1(f) and 18 U.S.C. 1905.

(e) *Other disclosure procedures*. For procedure to be followed by officers and employees of the Bureau upon receipt of a request or demand for certain bureau records or information the disclosure procedure for which is not covered by this section, see 26 CFR 301.9000-1.

[SEAL]

REX D. DAVIS,
Acting Director.

[FR Doc. 72-10730 Filed 7-12-72; 8:48 am]

Title 28—JUDICIAL ADMINISTRATION

Chapter I—Department of Justice

[Order 487-72]

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

Subpart K—Criminal Division

DELEGATION OF AUTHORITY TO DESIGNATE ATTORNEYS TO PRESENT EVIDENCE TO GRAND JURIES

This order delegates to the Assistant Attorney General in charge of the Criminal Division the Attorney General's authority under 28 U.S.C. 515(a) to designate attorneys to present evidence to grand juries in criminal cases.

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, Subpart K of Part 0 of Chapter I of Title 28, Code of Federal Regulations, is amended by adding the following new § 0.60:

§ 0.60 Designation of attorneys to present evidence to grand juries.

The Assistant Attorney General in charge of the Criminal Division is authorized to designate attorneys to present evidence to grand juries in all cases assigned to, conducted, handled, or supervised by the Assistant Attorney

General in charge of the Criminal Division.

Dated: June 29, 1972.

RICHARD G. KLEINDIENST,
Attorney General.

[FR Doc. 72-10723 Filed 7-12-72; 8:48 am]

Title 40—PROTECTION OF ENVIRONMENT

Chapter I—Environmental Protection Agency

SUBCHAPTER E—PESTICIDES PROGRAMS

PART 180—TOLERANCES AND EX- EMPTIONS FROM TOLERANCES FOR PESTICIDE CHEMICALS IN OR ON RAW AGRICULTURAL COMMODI- TIES

Maneb

A petition (PP 2F1256) was filed by E. I. du Pont de Nemours & Co., Inc., Wilmington, Del. 19898, in accordance with provisions of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a), proposing that established tolerances (40 CFR Part 180) for residues of the fungicide maneb (manganous ethylenebis(dithiocarbamate) be reduced in or on the raw agricultural commodities celery to 5 parts per million and cucumbers, melons, squash (summer and winter), and tomatoes to 4 parts per million.

Based on consideration given data submitted in the petition and other relevant material, it is concluded that:

1. The pesticide is useful for the purpose for which the reduced tolerances are being established.

2. The reduced tolerances established by this order will better protect the public health than the tolerances they are replacing.

Therefore, pursuant to provisions of the Federal Food, Drug, and Cosmetic Act (sec. 408(d)(2), 68 Stat. 512; 21 U.S.C. 346a(d)(2)), the authority transferred to the Administrator of the Environmental Protection Agency (35 F.R. 15623), and the authority delegated by the Administrator to the Deputy Assistant Administrator for Pesticides Programs (36 F.R. 9038), § 180.110 is amended by deleting the word "celery" from the paragraph "10 parts per million * * *" and the words "cucumbers," "melons," "summer squash," "tomatoes," and "winter squash" from the paragraph "7 parts per million * * *" and by inserting two new paragraphs, as follows:

§ 180.110 Maneb; tolerances for residues.

* * *

5 parts per million in or on celery.

4 parts per million in or on cucumbers, melons, summer squash, tomatoes, and winter squash.

Any person who will be adversely affected by the foregoing order may at any