Section 988.—Treatment of Certain Foreign Currency Transactions

26 CFR 1.988–2: Recognition and computation of exchange gain or loss.

T.D. 8860

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Treatment of Income and Expense From Certain Hyperinflationary, Nonfunctional Currency Transactions and Certain Notional Principal Contracts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations regarding the treatment of income and deductions arising from certain foreign currency transactions denominated in hyperinflationary currencies and coordinates section 988 with the section 446 regulations pertaining to significant nonperiodic payments. These regulations are intended to prevent distortions in computing income and deductions of taxpayers who enter into certain transactions in hyperinflationary currencies, and nonfunctional currency, notional principal contracts with significant nonperiodic payments.

DATES: These regulations are effective February 14, 2000**.**

FOR FURTHER INFORMATION CONTACT: Roger M. Brown at (202) 622-3830 (not a toll-free number) of the Office of the Associate Chief Counsel (International) within the Office of the Chief Counsel, Room 4554, 1111 Constitution Avenue, NW., Washington, DC. 20224.

SUPPLEMENTARY INFORMATION:

Background

On March 17, 1992, proposed regulations were published in the **Federal Register** at (57 F.R. 9217 [INTL–15–91, 1992–1 C.B. 1202]). The IRS received two written comments on the proposed regulations, which are discussed below. No public hearing was held and no requests to speak were received. Having considered the comments, the IRS and Treasury Department adopt the proposed regulations, as modified by this Treasury decision.

Explanation of Provisions

I. *Hyperinflationary Instruments*

A. Proposed Regulations

The proposed regulations under §1.988–2(b)(15) generally provided that currency gain or loss on debt instruments and demand deposits entered into or acquired when the currency in which the item was denominated was hyperinflationary must be realized annually under a mark-to-market methodology. For purposes of determining the character and source (or allocation) of such currency gain or loss, the gain or loss was generally treated as an increase in, or a reduction of, interest income or expense.

The proposed §1.988–2(b)(15) regulations excluded instruments described in section 988(a)(3)(C) (relating to non-dollar, related-party loans where the rate of interest is at least 10 percentage points higher than the Federal mid-term rate) from these rules. Proposed regulations §1.988–2(d)(5) and (e)(7) generally provided that currency gain or loss realized with respect to section 988 forward contracts, futures contracts, option contracts and similar items (such as currency swap contracts) entered into or acquired when the currency in which such an item is denominated was hyperinflationary was recognized annually under a mark-to-market methodology.

B. Discussion of Comments and Final Regulations

1. Comments and the Treasury and IRS's responses

One of the comments responding to the proposed regulations criticized the exclusion of loans described in section 988(a)(3)(C) from the rules of proposed regulation §1.988–2(b)(15). The comment noted that it was inappropriate to treat related-party loans differently from loans between unrelated parties in this context.

Proposed regulation §1.988–2(b)(15) excluded loans subject to section 988(a)(3)(C) from the mark-to-market rule of the proposed regulations because the loans were already subject to mark-to-market treatment under section 988(a)(3)(C), which was enacted to prevent manipulation of the section 904(a) foreign tax credit limitation through related party loans with artificially high interest rates. See H. Conf. Rep. No. 841, 99th Cong., 2d Sess. 668 (1986). However, due to interest income's U.S. source treatment under section 988(a)(3)(C)(ii), mark-to-market treatment under section 988(a)(3)(C), rather than §1.988–2(b)(15), would be, in most cases, more unfavorable to taxpayers.

Since the rules of proposed regulation §1.988–2(b)(15) were consistent with the approach of section 988(a)(3)(C) and prevented manipulation of the type Congress addressed in that section, the IRS and Treasury agree that transactions described in section 988(a)(3)(C) should not be excluded from the mark-to-market rule of the final regulations. The IRS and Treasury also have concluded that to the extent a debt instrument is subject to the rules of §1.988–2(b)(15), the application of section 988(a)(3)(C)'s resourcing rule is not necessary. The final regulations reflect these changes.

The other comment identified the need for coordinating the mark-to-market regime for hyperinflationary instruments under proposed regulation §1.988–2(b)(15), and the mark-to-market election under proposed regulation §1.988–5(f) for all section 988 transactions. The final regulations do not include a rule coordinating these two mark-to-market regimes because the mark-to-market election for all section 988 transactions is still in proposed form. Accordingly, the IRS and Treasury have decided that consideration of the proper coordination is most appropriate when the regulations relating to the general mark-to-market election for all section 988 transactions are finalized.

2. Other changes to the final regulations

(a) Source and Character of Gain or Loss

The proposed regulations provided that any exchange gain or loss realized upon marking to market a debt instrument or a demand deposit under proposed regulation §1.988–2(b)(15)(i) was to be directly allocable to the interest income or interest expense from the debt instrument or deposit. Accordingly, the gain or loss reduced or increased the amount of interest income or interest expense paid or accrued during that year with respect to that instrument or deposit. Additionally, if realized exchange gain exceeded interest expense of an issuer, or realized exchange loss exceeded interest income of a holder or depositor, the character and source of such excess amount were to be determined under the general rules of §§1.988–3 and 1.988–4.

The assumption underlying this proposed treatment was that in hyperinflationary conditions, high nominal interest rates perform two functions: compensate lenders for currency loss attributable to the repayment of the principal with a devalued currency, and account for borrowers' currency gain on the repayment of the principal with a devalued currency. In instances, however, where hyperinflationary conditions are subsiding and a lender would actually have currency gain on principal repayment (and the borrower would have currency loss on principal repayment), these assumptions are no longer appropriate. For example, if a lender has currency gain on the marking to market (for currency fluctuations only) of the principal of a debt instrument, high nominal interest rates would not be compensating the lender for the decline in the value of the principal as there would be a gain on the principal.

Accordingly, the final regulations retain the source and character rule of the proposed regulations (direct allocation of the exchange gain or loss against interest expense or income, respectively) when hyperinflationary conditions result in exchange loss to lenders or exchange gain to borrowers on the principal amount of a debt instrument or deposit. However, where a lender has exchange gain or a borrower has exchange loss on the debt instrument — which may occur as hyperinflationary conditions subside — the final regulations clarify that the exchange gain or loss is not allocated against interest expense or income. Rather, the exchange gain or loss is treated under the normal currency character and source rules of §§1.988–3 and 1.988–4. Thus, for example, if an issuer has both interest expense and currency loss, the currency loss is sourced and characterized under section 988 and does not affect the determination of interest expense.

(b) Synthetic, Non-hyperinflationary Currency Debt Instruments

The final regulations also make clear that when a debt instrument has interest and principal payments that are to be made by reference to a non-hyperinflationary currency or item (commonly known as interest and principal protection features), the instrument is not marked to market under the final section 988 regulations. This is because the instrument is, in substance, a synthetic non-hyperinflationary instrument and does not experience the distortions associated with a hyperinflationary instrument.

(c) Treatment of Hyperinflationary Contracts

Proposed regulation §1.988–2(d)(5) generally provided that currency gain or loss on derivative contracts described in §1.988–1(a)(2)(iii) and denominated in a currency that was hyperinflationary at the time the contract was entered into was to be realized annually under a mark-to-market methodology. This proposed regulation was issued prior to promulgation of the §1.446–4 regulations (published in the **Federal Register** on July 18, 1994) which requires that, to clearly reflect income, the timing of income, deduction, gain or loss on a hedge must match the timing of income, deduction, gain or loss on the item being hedged. The final regulations modify proposed regulation §1.988–2(d)(5) by providing that §1.446–4, to the extent applicable, will take precedence over proposed regulation §1.988–2(d)(5). This is because the IRS and Treasury believe that a clearer reflection of income is present where the income and deductions arising from an item hedged under §1.446–4 is matched with the income and deductions arising from the hedge. See §1.446–4(b).

(d) Demand and Time Deposits

The proposed regulations applied the mark-to-market rules to demand deposits denominated in a currency that was hyperinflationary at the time the deposit was entered into. Under the final regulations, the mark-to-market rules apply to demand and time deposits that provide for payments denominated in or by reference to a currency which is hyperinflationary at the time the taxpayer enters into or otherwise acquires the deposit, or whose interest rate reflects hyperinflationary conditions in a country. Similar clarifications have been made with respect to the definitions of hyperinflationary debt instruments and currency swap contracts.

3. Abusive transactions

The Treasury and the IRS are concerned about the use of hyperinflationary currencies in transactions motivated by tax considerations. Because the direction of exchange rates is relatively predictable in hyperinflation economies, some taxpayers have attempted to use such currencies in transactions lacking economic substance. See, e.g., _*Agro Science Co. v. Commissioner*, T.C. Memo. 1989–687, *aff'd*, 927 F.2d 213 (5th Cir.), *cert. denied*, 502 U.S. 907 (1991). However, section 988 may be applied by the IRS in a manner that reflects the proper timing, source, and character of income, gain, loss, or expense arising from a transaction whose form is not in accordance with its economic substance. §§1.988–1(a)(11) and 1.988–2(f); *Agro Science Co. v. Commissioner, supra*. Accordingly, the rules contained in this Treasury decision will be applied within the framework of these general economic substance principles.

II. Significant Non-periodic Payments and Currency Swaps

The proposed regulations coordinated section 988 with the section 446 regulations pertaining to significant nonperiodic payments. The final regulations maintain this coordination and clarify that exchange gain or loss may be realized on the principal and interest components of a significant nonperiodic payment.

III. *Proposed Change to Base Period in Notice of Proposed Rulemaking*

In REG–116567–99 on page 463, the IRS and Treasury are publishing a notice of proposed rulemaking that proposes to change the period during which inflation rates are measured in the determination of whether a currency is hyperinflationary for purposes of section 988 (base period). The effect of this change to §1.988–1(f) (defining hyperinflationary currency for purposes of section 988) is to take into account current year, hyperinflationary conditions, rather than determining whether a currency is hyperinflationary based on the three years prior to the current year. The proposed change relates only to section 988 and not to the dollar approximate separate transactions method of §1.985–3 (DASTM). However, other sections, such as §1.267(f)–1(e) (relating to application of the loss disallowance rule of section 267(a)(1) as applied to related party, nonfunctional currency loans), which make reference to the section 988 definition of hyperinflation will be affected.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small businesses.

Drafting Information

The principal author of these regulations is Roger M. Brown of the Office of the Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department also participated in their development.

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Adoption of the Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 ***

Par. 2. Section 1.988–0 in the Table of Contents is amended by:

1. The entry for §1.988–2(b)(14)–(15) is removed.
2. An entry for §1.988–2(b)(14) is added.
3. An entry for §1.988–2(b)(15) is added.
4. The entry for §1.988–2(d)(5) is revised.
5. The entry for §1.988–2(e)(7) is revised.

The revisions and additions read as follows:

§1.988–0 Taxation of gain or loss from a section 988 transaction; Table of Contents.

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§1.988–2 Recognition and computation of exchange gain or loss.

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(b) ***

(14) [Reserved]

(15) Debt instruments and deposits denominated in hyperinflationary currencies.

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(d) ***

(5) Hyperinflationary contracts.

(e) ***

(7) Special rules for currency swap contracts in hyperinflationary currencies.

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Par. 3. Section 1.988–2 is amended by:

1. Adding paragraphs (b)(14) and (b)(15).

2. Adding paragraph (d)(5).

3. Adding paragraph (e)(3)(iv).

4. Adding paragraph (e)(7).

The additions read as follows:

§1.988–2 Recognition and computation of exchange gain or loss.

* * * * *

(b) ***

(14) [Reserved]

(15) *Debt instruments and deposits denominated in hyperinflationary currencies*— (i) *In general.* If a taxpayer issues, acquires, or otherwise enters into or holds a hyperinflationary debt instrument (as defined in paragraph (b)(15)(vi)(A) of this section) or a hyperinflationary deposit (as defined in paragraph (b)(15)(vi)(B) of this section) on which interest is paid or accrued that is denominated in (or determined by reference to) a nonfunctional currency of the taxpayer, then the taxpayer shall realize exchange gain or loss with respect to such instrument or deposit for its taxable year determined by reference to the change in exchange rates between—

(A) The later of the first day of the taxable year, or the date the instrument was entered into (or an amount deposited); and

(B) The earlier of the last day of the taxable year, or the date the instrument (or deposit) is disposed of or otherwise terminated.

(ii) *Only exchange gain or loss is realized*. No gain or loss is realized under paragraph (b)(15)(i) by reason of factors other than movement in exchange rates, such as the creditworthiness of the debtor.

(iii) *Special rule for synthetic, non-hyperinflationary currency debt instruments*—(A) *General rule*. Paragraph (b)(15)(i) does not apply to a debt instrument that has interest and principal payments that are to be made by reference to a currency or item that does not reflect hyperinflationary conditions in a country (within the meaning of §1.988–1(f)).

(B) *Example*. Paragraph (b)(15)(iii)(A) is illustrated by the following example:

Example. When the Turkish lira (TL) is a hyperinflationary currency, A, a U.S. corporation with the U.S. dollar as its functional currency, makes a 5 year, 100,000 TL-denominated loan to B, an unrelated corporation, at a 10% interest rate when 1,000 TL equals $1. Under the terms of the debt instrument, B must pay interest annually to A in amount of Turkish lira that is equal to $100. Also under the terms of the debt instrument, B must pay A upon maturity of the debt instrument an amount of Turkish lira that is equal to $1,000. Although the principal and interest are payable in a hyperinflationary currency, the debt instrument is a synthetic dollar debt instrument and is not subject to paragraph (b)(15)(i) of this section.

(iv) *Source and character of gain or loss*—(A) *General rule for hyperinflationary conditions*. The rules of this paragraph (b)(15)(iv)(A) shall apply to any taxpayer that is either an issuer of (or obligor under) a hyperinflationary debt instrument or deposit and has currency gain on such debt instrument or deposit, or a holder of a hyperinflationary debt instrument or deposit and has currency loss on such debt instrument or deposit. For purposes of subtitle A of the Internal Revenue Code, any exchange gain or loss realized under paragraph (b)(15)(i) of this section is directly allocable to the interest expense or interest income, respectively, from the debt instrument or deposit (computed under this paragraph (b)), and therefore reduces or increases the amount of interest income or interest expense paid or accrued during that year with respect to that instrument or deposit. With respect to a debt instrument or deposit during a taxable year, to the extent exchange gain realized under paragraph (b)(15)(i) of this section exceeds interest expense of an issuer, or exchange loss realized under paragraph (b)(15)(i) of this section exceeds interest income of a holder or depositor, the character and source of such excess amount shall be determined under §§1.988–3 and 1.988–4.

(B) *Special rule for subsiding hyperinflationary conditions*. If the taxpayer is an issuer of (or obligor under) a hyperinflationary debt instrument or deposit and has currency loss, or if the taxpayer is a holder of a hyperinflationary debt instrument or deposit and has currency gain, then for purposes of subtitle A of the Internal Revenue Code, the character and source of the currency gain or loss is determined under §§1.988–3 and 1.988–4. Thus, if an issuer has both interest expense and currency loss, the currency loss is sourced and characterized under section 988, and does not affect the determination of interest expense.

(v) *Adjustment to principal or basis*. Any exchange gain or loss realized under paragraph (b)(15)(i) of this section is an adjustment to the functional currency principal amount of the issuer, functional currency basis of the holder, or the functional currency amount of the deposit. This adjusted amount or basis is used in making subsequent computations of exchange gain or loss, computing the basis of assets for purposes of allocating interest under §§1.861–9T through 1.861–12T, and 1.882–5, or making other determinations that may be relevant for computing taxable income or loss.

(vi) *Definitions*—(A) *Hyperinflationary debt instrument*. A hyperinflationary debt instrument is a debt instrument that provides for—

(*1*) Payments denominated in or determined by reference to a currency that is hyperinflationary (as defined in §1.988–1(f)) at the time the taxpayer enters into or otherwise acquires the debt instrument; or

(*2*) Payments denominated in or determined by reference to a currency that is hyperinflationary (as defined in §1.988–1(f)) during the taxable year, and the terms of the instrument provide for the adjustment of principal or interest payments in a manner that reflects hyperinflation. For example, a debt instrument providing for a variable interest rate based on local conditions and generally responding to changes in the local consumer price index will reflect hyperinflation.

(B) *Hyperinflationary deposit*. A hyperinflationary deposit is a demand or time deposit or similar instrument issued by a bank or other financial institution that provides for—

(*1*) Payments denominated in or determined by reference to a currency that is hyperinflationary (as defined in §1.988–1(f)) at the time the taxpayer enters into or otherwise acquires the deposit; or

(*2*) Payments denominated in or determined by reference to a currency that is hyperinflationary (as defined in §1.988–1(f)) during the taxable year, and the terms of the deposit provide for the adjustment of the deposit amount or interest payments in a manner that reflects hyperinflation.

(vii) *Interaction with other provisions*—(A) *Interest allocation rules.* In determining the amount of interest expense, this paragraph (b)(15) applies before §§1.861–9T through 1.861–12T, and 1.882–5.

(B) *DASTM*. With respect to a qualified business unit that uses the United States dollar approximate separate transactions method of accounting described in §1.985–3, paragraph (b)(15)(i) of this section does not apply.

(C) *Interaction with section 988(a)(3)(C)*. Section 988(a)(3)(C) does not apply to a debt instrument subject to the rules of paragraph (b)(15)(i) of this section.

(D) *Hedging rules*. To the extent §1.446–4 or 1.988–5 apply, the rules of paragraph (b)(15)(i) of this section will not apply. This paragraph (b)(15)(vii)(D) does not apply if the application of §1.988–5 results in hyperinflationary debt instrument or deposit described in paragraph (b)(15)(vi)(A) or (B) of this section.

(viii) *Effective date*. This paragraph (b)(15) applies to transactions entered into after February 14, 2000**.**

* * * * *

(d) * * *

(5) *Hyperinflationary contracts*—(i) *In general*. If a taxpayer acquires or otherwise enters into a hyperinflationary contract (as defined in paragraph (d)(5)(ii) of this section) that has payments to be made or received that are denominated in (or determined by reference to) a nonfunctional currency of the taxpayer, then the taxpayer shall realize exchange gain or loss with respect to such contract for its taxable year determined by reference to the change in exchange rates between—

(A) The later of the first day of the taxable year, or the date the contract was acquired or entered into; and

(B) The earlier of the last day of the taxable year, or the date the contract is disposed of or otherwise terminated.

(ii) *Definition of hyperinflationary contract*. A hyperinflationary contract is a contract described in paragraph (d)(1) of this section that provides for payments denominated in or determined by reference to a currency that is hyperinflationary (as defined in §1.988–1(f)) at the time the taxpayer acquires or otherwise enters into the contract.

(iii) *Interaction with other provisions*—(A) *DASTM*. With respect to a qualified business unit that uses the United States dollar approximate separate transactions method of accounting described in §1.985–3, this paragraph (d)(5) does not apply.

(B) *Hedging rules*. To the extent §1.446–4 or 1.988–5 apply, this paragraph (d)(5) does not apply.

(C) *Adjustment for subsequent transactions*. Proper adjustments must be made in the amount of any gain or loss subsequently realized for gain or loss taken into account by reason of this paragraph (d)(5).

(iv) *Effective date*. This paragraph (d)(5) is applicable to transactions acquired or otherwise entered into after February 14, 2000**.**

(e) ***

(3) ***

(iv) *Coordination with §1.446–3(g)(4) regarding swaps with significant nonperiodic payments*. The rules of §1.446–3(g)(4) apply to any currency swap with a significant nonperiodic payment. Section 1.446–3(g)(4) applies before this paragraph (e)(3). Thus, if §1.446–3(g)(4) applies, currency gain or loss may be realized on the loan. This paragraph (e)(3)(iv) applies to transactions entered into after February 14, 2000**.**

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(7) *Special rules for currency swap contracts in hyperinflationary currencies*—(i) *In general*. If a taxpayer enters into a hyperinflationary currency swap (as defined in paragraph (e)(7)(iv) of this section), then the taxpayer realizes exchange gain or loss for its taxable year with respect to such instrument determined by reference to the change in exchange rates between —

(A) The later of the first day of the taxable year, or the date the instrument was entered into (by the taxpayer); and

(B) The earlier of the last day of the taxable year, or the date the instrument is disposed of or otherwise terminated.

(ii) *Adjustment to principal or basis*. Proper adjustments are made in the amount of any gain or loss subsequently realized for gain or loss taken into account by reason of this paragraph (e)(7).

(iii) *Interaction with DASTM*. With respect to a qualified business unit that uses the United States dollar approximate separate transactions method of accounting described in §1.985–3, this paragraph (e)(7) does not apply.

(iv) *Definition of hyperinflationary currency swap contract*. A hyperinflationary currency swap contract is a currency swap contract that provides for—

(A) Payments denominated in or determined by reference to a currency that is hyperinflationary (as defined in §1.988–1(f)) at the time the taxpayer enters into or otherwise acquires the currency swap; or

(B) Payments that are adjusted to take into account the fact that the currency is hyperinflationary (as defined in §1.988–1(f)) during the current taxable year. A currency swap contract that provides for periodic payments determined by reference to a variable interest rate based on local conditions and generally responding to changes in the local consumer price index is an example of this latter type of currency swap contract.

(v) *Special effective date for nonfunctional hyperinflationary currency swap contracts*. Paragraph (e)(7) applies to transactions entered into after February 14, 2000**.**

Robert E. Wenzel,
Deputy Commissioner
of Internal Revenue.

Approved December 13, 1999.

Jonathan Talisman,
Acting Assistant Secretary
of the Treasury.

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