

§ 1.852-11

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the deduction under section 852(b)(3)(A)(ii) for dividends paid determined with reference to capital gains dividends only. This paragraph and section 852(d) shall apply only with respect to the capital gain net income (net capital gain for taxable years beginning before January 1, 1977) realized by the trust which is attributable to a redemption by a holder of an interest in such trust. Such dividend may be designated as a capital gain dividend by a written notice to the certificate holder. Such designation should clearly indicate to the holder that the holder's gain or loss on the redemption of the certificate may differ from such designated amount, depending upon the holder's basis for the redeemed certificate, and that the holder's own records are to be used in computing the holder's gain or loss on the redemption of the certificate.

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

Example. B entered into a periodic payment plan contract with X as custodian and Z as plan sponsor under which he purchased a plan certificate of X. Under this contract, upon B's demand, X must redeem B's certificate at a price substantially equal to the value of the number of shares in Y, a management company, which are credited to B's account by X in connection with the unit investment trust. Except for a small amount of cash which X is holding to satisfy liabilities and to invest for other plan certificate holders, all of the assets held by X in connection with the trust consist of shares in Y. Pursuant to the terms of the periodic payment plan contract, 100 shares of Y are credited to B's account. Both X and Y have elected to be treated as regulated investment companies. On March 1, 1965, B notified X that he wished to have his entire interest in the unit investment trust redeemed. In order to redeem B's interest, X caused Y to redeem 100 shares of Y which X held. At the time of redemption, each share of Y had a value of \$15. X then distributed the \$1,500 to B. X's basis for each of the Y shares which was redeemed was \$10. Therefore, X realized a long-term capital gain of \$500 (\$5×100 shares) which is attributable to the redemption by B of his interest in the trust. Under section 852(d), the \$500 capital gain distributed to B will not be considered a preferential dividend. Therefore, X is allowed a deduction of \$500 under section 852(b)(3)(A)(ii) for dividends paid determined with reference to capital gains dividends only, with the result that X will not pay a

capital gains tax with respect to such amount.

(c) *Definition of unit investment trust.* A unit investment trust to which paragraph (a) of this section refers is a business arrangement which—

(1) Is registered under the Investment Company Act of 1940 as a unit investment trust;

(2) Issues periodic payment plan certificates (as defined in such Act);

(3) Possesses, as substantially all of its assets, securities issued by a management company (as defined in such Act);

(4) Qualifies as a regulated investment company under section 851; and

(5) Complies with the requirements provided for by section 852(a).

Paragraph (a) of this section does not apply to a unit investment trust described in section 851(f)(1) and paragraph (d) of § 1.851-7.

[T.D. 6921, 32 FR 8755, June 20, 1967, as amended by T.D. 7187, 37 FR 13527, July 6, 1972; T.D. 7728, 45 FR 72650, Nov. 3, 1980]

§ 1.852-11 Treatment of certain losses attributable to periods after October 31 of a taxable year.

(a) *Outline of provisions.* This paragraph lists the provisions of this section.

(a) Outline of provisions.

(b) Scope.

(1) In general.

(2) Limitation on application of section.

(c) Post-October capital loss defined.

(1) In general.

(2) Methodology.

(3) October 31 treated as last day of taxable year for purpose of determining taxable income under certain circumstances.

(i) In general.

(ii) Effect on gross income.

(d) Post-October currency loss defined.

(1) Post-October currency loss.

(2) Net foreign currency loss.

(3) Foreign currency gain or loss.

(e) Limitation on capital gain dividends.

(1) In general.

(2) Amount taken into account in current year.

(i) Net capital loss.

(ii) Net long-term capital loss.

(3) Amount taken into account in succeeding year.

(f) Regulated investment company may elect to defer certain losses for purposes of determining taxable income.

(1) In general.

(2) Effect of election in current year.

(3) Amount of loss taken into account in current year.

(i) If entire amount of net capital loss deferred.

(ii) If part of net capital loss deferred.

(A) In general.

(B) Character of capital loss not deferred.

(iii) If entire amount of net long-term capital loss deferred.

(iv) If part of net long-term capital loss deferred.

(v) If entire amount of post-October currency loss deferred.

(vi) If part of post-October currency loss deferred.

(4) Amount of loss taken into account in succeeding year and subsequent years.

(5) Effect on gross income.

(g) Earnings and profits.

(1) General rule.

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(i) Procedure for making election.

(1) In general.

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(1) In general.

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(i) In general.

(ii) Deadline for making election.

(3) Amended return required for succeeding year in certain circumstances.

(i) In general.

(ii) Time for filing amended return.

(4) Retroactive dividend.

(i) In general.

(ii) Method of making election.

(iii) Deduction for dividends paid.

(A) In general.

(B) Limitation on ordinary dividends.

(C) Limitation on capital gain dividends.

(D) Effect on other years.

(iv) Earnings and profits.

(v) Receipt by shareholders.

(vi) Foreign tax election.

(vii) Example.

(5) Certain distributions may be designated retroactively as capital gain dividends.

(k) Effective date.

(b) *Scope*—(1) *In general*. This section prescribes the manner in which a regulated investment company must treat a post-October capital loss (as defined in paragraph (c) of this section) or a post-October currency loss (as defined in paragraph (d)(1) of this section) for purposes of determining its taxable income, its earnings and profits, and the amount that it may designate as capital gain dividends for the taxable year in which the loss is incurred and the

succeeding taxable year (the “succeeding year”).

(2) *Limitation on application of section*.

This section shall not apply to any post-October capital loss or post-October currency loss of a regulated investment company attributable to a taxable year for which an election is in effect under section 4982(e)(4) of the Code with respect to the company.

(c) *Post-October capital loss defined*—

(1) *In general*. For purposes of this section, the term *post-October capital loss* means—

(i) Any net capital loss attributable to the portion of a regulated investment company’s taxable year after October 31; or

(ii) If there is no such net capital loss, any net long-term capital loss attributable to the portion of a regulated investment company’s taxable year after October 31.

(2) *Methodology*. The amount of any net capital loss or any net long-term capital loss attributable to the portion of the regulated investment company’s taxable year after October 31 shall be determined in accordance with general tax law principles (other than section 1212) by treating the period beginning on November 1 of the taxable year of the regulated investment company and ending on the last day of such taxable year as though it were the taxable year of the regulated investment company. For purposes of this paragraph (c)(2), any item (other than a capital loss carryover) that is required to be taken into account or any rule that must be applied, for purposes of section 4982, on October 31 as if it were the last day of the regulated investment company’s taxable year must also be taken into account or applied in the same manner as required under section 4982, both on October 31 and again on the last day of the regulated investment company’s taxable year.

(3) *October 31 treated as last day of taxable year for purpose of determining taxable income under certain circumstances*—

(i) *In general*. If a regulated investment company has a post-October capital loss for a taxable year, any item that must be marked to market for purposes of section 4982 on October 31 as if it were the last day of the regulated investment company’s taxable year must

also be marked to market on October 31 and again on the last day of the regulated investment company's taxable year for purposes of determining its taxable income. If the regulated investment company does not have a post-October capital loss for a taxable year, the regulated investment company must treat items that must be marked to market for purposes of section 4982 on October 31 as if it were the last day of the regulated investment company's taxable year as marked to market only on the last day of its taxable year for purposes of determining its taxable income.

(ii) *Effect on gross income.* The marking to market of any item on October 31 of a regulated investment company's taxable year for purposes of determining its taxable income under paragraph (c)(3)(i) of this section shall not affect the amount of the gross income of such company for such taxable year for purposes of section 851(b) (2) or (3).

(d) *Post-October currency loss defined.* For purposes of this section—

(1) *Post-October currency loss.* The term *post-October currency loss* means any net foreign currency loss attributable to the portion of a regulated investment company's taxable year after October 31. For purposes of the preceding sentence, principles similar to those of paragraphs (c)(2) and (c)(3) of this section shall apply.

(2) *Net foreign currency loss.* The term "net foreign currency loss" means the excess of foreign currency losses over foreign currency gains.

(3) *Foreign currency gain or loss.* The terms "foreign currency gain" and "foreign currency loss" have the same meaning as provided in section 988(b).

(e) *Limitation on capital gain dividends—(1) In general.* For purposes of determining the amount a regulated investment company may designate as capital gain dividends for a taxable year, the amount of net capital gain for the taxable year shall be determined without regard to any post-October capital loss for such year.

(2) *Amount taken into account in current year—(i) Net capital loss.* If the post-October capital loss referred to in paragraph (e)(1) of this section is a post-October capital loss as defined in paragraph (c)(1)(i) of this section, the

net capital gain of the company for the taxable year in which the loss arose shall be determined without regard to any capital gains or losses (both long-term and short-term) taken into account in computing the post-October capital loss for the taxable year.

(ii) *Net long-term capital loss.* If the post-October capital loss referred to in paragraph (e)(1) of this section is a post-October capital loss as defined in paragraph (c)(1)(ii) of this section, the net capital gain of the company for the taxable year in which the loss arose shall be determined without regard to any long-term capital gain or loss taken into account in computing the post-October capital loss for the taxable year.

(3) *Amount taken into account in succeeding year.* If a regulated investment company has a post-October capital loss (as defined in paragraph (c)(1)(i) or (c)(1)(ii) of this section) for any taxable year, then, for purposes of determining the amount the company may designate as capital gain dividends for the succeeding year, the net capital gain for the succeeding year shall be determined by treating all gains and losses taken into account in computing the post-October capital loss as arising on the first day of the succeeding year.

(f) *Regulated investment company may elect to defer certain losses for purposes of determining taxable income—(1) In general.* A regulated investment company may elect, in accordance with the procedures of paragraph (i) of this section, to compute its taxable income for a taxable year without regard to part or all of any post-October capital loss or post-October currency loss for that year.

(2) *Effect of election in current year.* The taxable income of a regulated investment company for a taxable year to which an election under paragraph (f)(1) of this section applies shall be computed without regard to that part of any post-October capital loss or post-October currency loss to which the election applies.

(3) *Amount of loss taken into account in current year—(i) If entire amount of net capital loss deferred.* If a regulated investment company elects, under paragraph (f)(1) of this section, to defer the entire amount of a post-October capital

loss as defined in paragraph (c)(1)(i) of this section, the taxable income of the company for the taxable year in which the loss arose shall be determined without regard to any capital gains or losses (both long-term and short-term) taken into account in computing the post-October capital loss for the taxable year.

(ii) *If part of net capital loss deferred—*
(A) *In general.* If a regulated investment company elects, under paragraph (f)(1) of this section, to defer less than the entire amount of a post-October capital loss as defined in paragraph (c)(1)(i) of this section, the taxable income of the company for the taxable year in which the loss arose shall be determined by including an amount of capital loss taken into account in computing the post-October capital loss for the taxable year equal to the amount of the post-October capital loss that is not deferred. No amount of capital gain taken into account in computing the post-October capital loss for the taxable year shall be taken into account in the determination.

(B) *Character of capital loss not deferred.* The capital loss includible in the taxable income of the company under this paragraph (f)(3)(ii) for the taxable year in which the loss arose shall consist first of any short-term capital losses to the extent thereof, and then of any long-term capital losses, taken into account in computing the post-October capital loss for the taxable year.

(iii) *If entire amount of net long-term capital loss deferred.* If a regulated investment company elects, under paragraph (f)(1) of this section, to defer the entire amount of a post-October capital loss as defined in paragraph (c)(1)(ii) of this section, the taxable income of the company for the taxable year in which the loss arose shall be determined without regard to any long-term capital gains or losses taken into account in computing the post-October capital loss for the taxable year.

(iv) *If part of net long-term capital loss deferred.* If a regulated investment company elects, under paragraph (f)(1) of this section, to defer less than the entire amount of a post-October capital loss as defined in paragraph (c)(1)(ii) of this section, the taxable income of the

company for the taxable year in which the loss arose shall be determined by including an amount of long-term capital loss taken into account in computing the post-October capital loss for the taxable year equal to the amount of the post-October capital loss that is not deferred. No amount of long term capital gain taken into account in computing the post-October capital loss for the taxable year shall be taken into account in the determination.

(v) *If entire amount of post-October currency loss deferred.* If a regulated investment company elects, under paragraph (f)(1) of this section, to defer the entire amount of a post-October currency loss, the taxable income of the company for the taxable year in which the loss arose shall be determined without regard to any foreign currency gains or losses taken into account in computing the post-October currency loss for the taxable year.

(vi) *If part of post-October currency loss deferred.* If a regulated investment company elects, under paragraph (f)(1) of this section, to defer less than the entire amount of a post-October currency loss, the taxable income of the company for the taxable year in which the loss arose shall be determined by including an amount of foreign currency loss taken into account in computing the post-October currency loss for the taxable year equal to the amount of the post-October currency loss that is not deferred. No amount of foreign currency gain taken into account in computing the post-October currency loss for the taxable year shall be taken into account in the determination.

(4) *Amount of loss taken into account in succeeding year and subsequent years.* If a regulated investment company has a post-October capital loss or a post-October currency loss for any taxable year and an election under paragraph (f)(1) is made for that year, then, for purposes of determining the taxable income of the company for the succeeding year and all subsequent years, all capital gains and losses taken into account in determining the post-October capital loss, and all foreign currency gains and losses taken into account in determining the post-October currency loss, that are not taken into

account under the rules of paragraph (f)(3) of this section in determining the taxable income of the regulated investment company for the taxable year in which the loss arose shall be treated as arising on the first day of the succeeding year.

(5) *Effect on gross income.* An election by a regulated investment company to defer any post-October capital loss or any post-October currency loss for a taxable year under paragraph (f)(1) of this section shall not affect the amount of the gross income of such company for such taxable year (or the succeeding year) for purposes of section 851(b) (2) or (3).

(g) *Earnings and profits*—(1) *General rule.* The earnings and profits of a regulated investment company for a taxable year are determined without regard to any post-October capital loss or post-October currency loss for that year. If a regulated investment company distributes with respect to a calendar year amounts in excess of the limitation described in the preceding sentence, then, with respect to those excess amounts, for the taxable year with respect to which the amounts are distributed, the earnings and profits of the company are computed without regard to the preceding sentence. The limitation described in this sentence is the amount that would be the required distribution for that calendar year under section 4982 if “100 percent” were substituted for each percentage set forth in section 4982(b)(1).

(2) *Special Rule—Treatment of losses that are deferred for purposes of determining taxable income.* If a regulated investment company elects to defer, under paragraph (f)(1) of this section, any part of a post-October capital loss or post-October currency loss arising in a taxable year, then, for both the taxable year in which the loss arose and the succeeding year, both the earnings and profits and the accumulated earnings and profits of the company are determined as if the part of the loss so deferred had arisen on the first day of the succeeding year.

(h) *Examples.* The provisions of paragraphs (e), (f), and (g) of this section may be illustrated by the following examples. For each example, assume that X is a regulated investment company

that computes its income on a calendar year basis, and that no election is in effect under section 4982(e)(4).

Example 1. X has a \$25 net foreign currency gain, a \$50 net short-term capital loss, and a \$75 net long-term capital gain for the post-October period of 1988. X has no post-October currency loss and no post-October capital loss for 1988, and this section does not apply.

Example 2. X has the following capital gains and losses for the periods indicated:

| | Long-term | Short-term |
|-------------------------|-------------|-------------|
| 01/01 to 10/31/88 | 115 (15) | 80 (20) |
| | 100 | 60 |
| 11/01 to 12/31/88 | 75 (150) | 150 (50) |
| | (75) | 100 |
| 01/01 to 10/31/89 | 30 (5) | 40 (20) |
| | 25 | 20 |
| 11/01 to 12/31/89 | 35 (0) | 100 (50) |
| | 35 | 50 |

X has a post-October capital loss of \$75 for its 1988 taxable year due to a net long-term capital loss for the post-October period of 1988. X does not make an election under paragraph (f)(1) of this section.

(i) *Capital gain dividends.* X may designate up to \$100 as a capital gain dividend for 1988 because X must disregard the \$75 long-term capital gain and the \$150 long-term capital loss for the post-October period of 1988 in computing its net capital gain for this purpose. In computing its net capital gain for 1989 for the purposes of determining the amount it may designate as a capital gain dividend for 1989, X must take into account the \$75 long-term capital gain and the \$150 long-term capital loss for the post-October period of 1988 in addition to the long-term and short-term capital gains and losses for 1989. Accordingly, X may not designate any amount as a capital gain dividend for 1989.

(ii) *Taxable income.* X must include the \$75 long-term capital gain and the \$150 long-term capital loss for its post-October period of 1988 in its taxable income for 1988 because it did not make an election under paragraph (f)(1) of this section for 1988. Accordingly, X’s taxable income for 1988 will include a net capital gain of \$25 and a net short-term capital gain of \$160. X’s taxable income for 1989 will include a net capital gain of \$60 and a net short-term capital gain of \$70.

(iii) *Earnings and profits.* X must determine its earnings and profits for 1988 without regard to the \$75 long-term capital gain and the \$150 long-term capital loss for the post-October period of 1988. X must, however, include the \$75 long-term capital gain and \$150 long-term capital loss for the post-October period of 1988 in determining its accumulated earnings and profits for 1988. Thus, X includes \$260 of capital gain in its earnings and profits for 1988, includes \$185 in its accumulated earnings and profits for 1988, and includes \$130 of capital gain in its earnings and profits for 1989.

Example 3. Same facts as example 2, except that X elects to defer the entire \$75 post-October capital loss for 1988 under paragraph (f)(1) of this section for purposes of determining its taxable income for 1988.

(i) *Capital gain dividends.* Same result as in example 2.

(ii) *Taxable income.* X must compute its taxable income for 1988 without regard to the \$75 long-term capital gain and the \$150 long-term capital loss for the post-October period of 1988 because it made an election to defer the entire \$75 post-October capital loss for 1988 under paragraph (f)(1) of this section. Accordingly, X's taxable income for 1988 will include a net capital gain of \$100 and a net short-term capital gain of \$160. X must include the \$75 long-term capital gain and the \$150 long-term capital loss for the post-October period of 1988 in its taxable income for 1989 in addition to the long-term and short-term capital gains and losses for 1989. Accordingly, X's taxable income for 1989 will include a net long-term capital loss of \$15 and a net short-term capital gain of \$70.

(iii) *Earnings and profits.* For 1988, X must determine both its earnings and profits and its accumulated earnings and profits without regard to the \$75 long-term capital gain and \$150 long-term capital loss for the post-October period of 1988. In determining both its earnings and profits and its accumulated earnings and profits for 1989, X must include (in addition to the long-term and short-term capital gains and losses for 1989) the \$75 long-term capital gain and \$150 long-term capital loss for the post-October period of 1988 as if those deferred gains and losses arose on January 1, 1989. Thus, X will include \$260 of capital gain in its earnings and profits for 1988 and \$55 of capital gain in its earnings and profits for 1989.

Example 4. Same facts as example 2, except that X elects to defer only \$50 of the post-October capital loss for 1988 under paragraph (f)(1) of this section for purposes of determining its taxable income for 1988.

(i) *Capital gain dividends.* Same results as in example 2.

(ii) *Taxable income.* X must compute its taxable income for 1988 without regard to the \$75 long-term capital gain and \$125 of the \$150 long-term capital loss for the post-October

ber period of 1988 because it made an election to defer \$50 of the \$75 post-October capital loss for 1988 under paragraph (f)(1) of this section. Accordingly, X's taxable income for 1988 will include a net capital gain of \$75 and a net short-term capital gain of \$160. X must include the \$75 long-term capital gain and \$125 of the \$150 long-term capital loss for the post-October period of 1988 in its taxable income for 1989 in addition to the long-term and short-term capital gains and losses for 1989. Accordingly, X's taxable income for 1989 will include a net capital gain of \$10 and a net short-term capital gain of \$70.

(iii) *Earnings and profits.* X must determine its earnings and profits for 1988 without regard to the \$75 long-term capital gain and the \$150 long-term capital loss for the post-October period of 1988. X must include \$25 of the \$150 long-term capital loss for the post-October period of 1988 in determining its accumulated earnings and profits for 1988. In determining both its earnings and profits and its accumulated earnings and profits for 1989, X must include (in addition to the long-term and short-term capital gains and losses for 1989) the \$75 long-term capital gain and \$125 of the \$150 long-term capital loss for the post-October period of 1988 as if those deferred gains and losses arose on January 1, 1989. Thus, X includes \$260 of capital gain in its earnings and profits for 1988, includes \$235 in its accumulated earnings and profits for 1988, and includes \$80 of capital gain in its earnings and profits for 1989.

Example 5. X has the following capital gains and losses for the periods indicated:

| | Long-term | Short-term |
|-------------------------|-----------|------------|
| 01/01 to 10/31/88 | 115 | 80 |
| | (15) | (20) |
| | 100 | 60 |
| 11/01 to 12/31/88 | 150 | 50 |
| | (75) | (150) |
| | 75 | (100) |
| 01/01 to 10/31/89 | 30 | 40 |
| | (5) | (20) |
| | 25 | 20 |
| 11/01 to 12/31/89 | 35 | 100 |
| | (0) | (50) |
| | 35 | 50 |

X has a post-October capital loss of \$25 for its 1988 taxable year due to a net capital loss for the post-October period of 1988. X does not make an election under paragraph (f)(1) of this section.

(i) *Capital gain dividends.* X may designate up to \$100 as a capital gain dividend for 1988 because X must disregard the \$150 long-term capital gain, the \$75 long-term capital loss,

the \$50 short-term capital gain, and the \$150 short-term capital loss for the post-October period of 1988 in computing its net capital gain for this purpose. In computing its net capital gain for 1989 for purposes of determining the amount it may designate as a capital gain dividend for 1989, X must take into account the \$150 long-term capital gain, the \$75 long-term capital loss, the \$50 short-term capital gain, and the \$150 short-term capital loss for the post-October period of 1988 in addition to the long-term and short-term capital gains and losses for 1989. Accordingly, X may designate up to \$105 as a capital gain dividend for 1989.

(ii) *Taxable income.* X must include the \$150 long-term capital gain, the \$75 long-term capital loss, the \$50 short-term capital gain, and the \$150 short-term capital loss for the post-October period of 1988 in its taxable income for 1988 because it did not make an election under paragraph (f)(1) of this section for 1988. Accordingly, X's taxable income for 1988 will include a net capital gain of \$135 (consisting of a net long-term capital gain of \$175 and a net short-term capital loss of \$40). X's taxable income for 1989 will include a net capital gain of \$60 and a net short-term capital gain of \$70.

(iii) *Earnings and profits.* X must determine its earnings and profits for 1988 without regard to the \$150 long-term capital gain, the \$75 long-term capital loss, the \$50 short-term capital gain, and the \$150 short-term capital loss for the post-October period of 1988. X must, however, include the \$150 long-term capital gain, the \$75 long-term capital loss, the \$50 short-term capital gain, and the \$150 short-term capital loss for the post-October period of 1988 in determining its accumulated earnings and profits for 1988. Thus, X includes \$160 of capital gain in its earnings and profits for 1988, includes \$135 in its accumulated earnings and profits for 1988, and includes \$130 of capital gain in its earnings and profits for 1989.

Example 6. Same facts as example 5, except that X elects to defer the entire \$25 post-October capital loss for 1988 under paragraph (f)(1) of this section for purposes of determining its taxable income for 1988.

(i) *Capital gain dividends.* Same result as in example 5.

(ii) *Taxable income.* X must compute its taxable income for 1988 without regard to the \$150 long-term capital gain, the \$75 long-term capital loss, the \$50 short-term capital gain, and the \$150 short-term capital loss for the post-October period of 1988 because it made an election to defer the entire \$25 post-October capital loss for 1988 under paragraph (f)(1) of this section. Accordingly, X's taxable income for 1988 will include a net capital gain of \$100 and a net short-term capital gain of \$60. X must include the \$150 long-term capital gain, the \$75 long-term capital loss, the \$50 short-term capital gain, and the

\$150 short-term capital loss for the post-October period of 1988 in its taxable income for 1989 in addition to the long-term and short-term capital gains and losses for 1989. Accordingly, X's taxable income for 1989 will include a net capital gain of \$105 (consisting of a net long-term capital gain of \$135 and a net short-term capital loss of \$30).

(iii) *Earnings and profits.* For 1988, X must determine both its earnings and profits and its accumulated earnings and profits without regard to the \$150 long-term capital gain, the \$75 long-term capital loss, the \$50 short-term capital gain, and the \$150 short-term capital loss for the post-October period of 1988. In determining both its earnings and profits and its accumulated earnings and profits for 1989, X must include (in addition to the long-term and short-term capital gains and losses for 1989) the \$150 long-term capital gain, the \$75 long-term capital loss, the \$50 short-term capital gain, and the \$150 short-term capital loss for the post-October period of 1988 as if those deferred gains and losses arose on January 1, 1989. Thus, X will include \$160 of capital gain in its earnings and profits for 1988 and \$105 of capital gain in its earnings and profits for 1989.

Example 7. Same facts as example 5, except that X elects to defer only \$20 of the post-October capital loss for 1988 under paragraph (f)(1) of this section for purposes of determining its taxable income for 1988.

(i) *Capital gain dividends.* Same result as in example 5.

(ii) *Taxable income.* X must compute its taxable income for 1988 by including \$5 of the \$150 short-term capital loss for the post-October period of 1988, but without regard to the \$150 long-term capital gain, the \$75 long-term capital loss, the \$50 short-term capital gain, and \$145 of the \$150 short-term capital loss for the post-October period of 1988 because it made an election to defer \$20 of the \$25 post-October capital loss for 1988 under paragraph (f)(1) of this section. Accordingly, X's taxable income for 1988 will include a net capital gain of \$100 and a net short-term capital gain of \$55. X must include the \$150 long-term capital gain, the \$75 long-term capital loss, the \$50 short-term capital gain, and \$145 of the \$150 short-term capital loss for the post-October period of 1988 in its taxable income for 1989 in addition to the long-term and short-term capital gains and losses for 1989. Accordingly, X's taxable income for 1989 will include a net capital gain of \$110 (consisting of a long-term capital gain of \$135 and a net short-term capital loss of \$25).

(iii) *Earnings and profits.* X must determine its earnings and profits for 1988 without regard to the \$150 long-term capital gain, the \$75 long-term capital loss, the \$50 short-term capital gain, and the \$150 short-term capital loss for the post-October period of 1988. In determining its accumulated earnings and profits for 1988, X must include \$5 of the \$150

short-term capital loss for the post-October period of 1988. In determining its accumulated earnings and profits for 1989, X must include (in addition to the long-term and short-term capital gains and losses for 1989) the \$150 long-term capital gain, the \$75 long-term capital loss, the \$50 short-term capital gain, and \$145 of the \$150 short-term capital loss for the post-October period of 1988 as if those deferred gains and losses arose on January 1, 1989. Thus, X includes \$160 of capital gain in its earnings and profits for 1988, includes \$155 in its accumulated earnings and profits for 1988, and includes \$110 of capital gain in its earnings and profits for 1989.

Example 8. X has the following capital gains and losses for the periods indicated:

| | Long-term | Short-term |
|-------------------------|-------------|-------------|
| 01/01 to 10/31/88 | 115 (15) | 80 (20) |
| | 100 | 60 |
| 11/01 to 12/31/88 | 15 (75) | 25 (10) |
| | (60) | 15 |
| 01/01 to 10/31/89 | 80 (5) | 50 (100) |
| | 75 | (50) |
| 11/01 to 12/31/89 | 85 (0) | 40 (20) |
| | 85 | 20 |

X has a post-October capital loss of \$45 for its 1988 taxable year due to a net capital loss for the post-October period of 1988. X does not make an election under paragraph (f)(1) of this section.

(i) *Capital gain dividends.* X may designate up to \$100 as a capital gain dividend for 1988 because X must disregard the \$15 long-term capital gain, the \$75 long-term capital loss, the \$25 short-term capital gain, and the \$10 short-term capital loss for the post-October period of 1988 in computing its net capital gain for this purpose. In computing its net capital gain for 1989 for purposes of determining the amount it may designate as a capital gain dividend for 1989, X must take into account the \$15 long-term capital gain, the \$75 long-term capital loss, the \$25 short-term capital gain, and the \$10 short-term capital loss for the post-October period of 1988 in addition to the long-term and short-term capital gains and losses for 1989. Accordingly, X may designate up to \$85 as a capital gain dividend for 1989.

(ii) *Taxable income.* X must include the \$15 long-term capital gain, the \$75 long-term capital loss, the \$25 short-term capital gain, and the \$10 short-term capital loss for the post-October period of 1988 in its taxable in-

come for 1988 because it did not make an election under paragraph (f)(1) of this section for 1988. Accordingly, X's taxable income for 1988 will include a net capital gain of \$40 and a net short-term capital gain of \$75. X's taxable income for 1989 will include a net capital gain of \$130 for 1989 (consisting of a net long-term capital gain of \$160 and a net short-term capital loss of \$30).

(iii) *Earnings and profits.* X must determine its earnings and profits for 1988 without regard to the \$15 long-term capital gain, the \$75 long-term capital loss, the \$25 short-term capital gain, and the \$10 short-term capital loss for the post-October period of 1988. X must, however, include the \$15 long-term capital gain, the \$75 long-term capital loss, the \$25 short-term capital gain, and the \$10 short-term capital loss for the post-October period of 1988 in determining its accumulated earnings and profits for 1988. Thus, X includes \$160 of capital gain in its earnings and profits for 1988, includes \$115 in its accumulated earnings and profits for 1988, and includes \$130 of capital gain in its earnings and profits for 1989.

Example 9. Same facts as example 8, except that X elects to defer the entire \$45 post-October capital loss for 1988 under paragraph (f)(1) of this section for purposes of determining its taxable income for 1988.

(i) *Capital gain dividends.* Same result as in example 8.

(ii) *Taxable income.* X must compute its taxable income for 1988 without regard to the \$15 long-term capital gain, the \$75 long-term capital loss, the \$25 short-term capital gain, and the \$10 short-term capital loss for the post-October period of 1988 because it made an election to defer the entire \$45 post-October capital loss for 1988 under paragraph (f)(1) of this section. Accordingly, X's taxable income for 1988 will include a net capital gain of \$100 and a net short-term capital gain of \$60. X must include the \$15 long-term capital gain, the \$75 long-term capital loss, the \$25 short-term capital gain, and the \$10 short-term capital loss for the post-October period of 1988 in its taxable income for 1989 in addition to the long-term and short-term capital gains and losses for 1989. Accordingly, X's taxable income for 1989 will include a net capital gain of \$85 (consisting of a net long-term capital gain of \$100 and a net short-term capital loss of \$15).

(iii) *Earnings and profits.* For 1988, X must determine both its earnings and profits and its accumulated earnings and profits without regard to the \$15 long-term capital gain, the \$75 long-term capital loss, the \$25 short-term capital gain, and the \$10 short-term capital loss for the post-October period of 1988. In determining both its earnings and profits and its accumulated earnings and profits for 1989, X must include (in addition to the long-term and short-term capital gains and losses for 1989) the \$15 long-term capital gain, the \$75

long-term capital loss, the \$25 short-term capital gain, and the \$10 short-term capital loss for the post-October period of 1988 as if those deferred gains and losses arose on January 1, 1989. Thus, X will include \$160 of capital gain in its earnings and profits for 1988 and \$85 of capital gain in its earnings and profits for 1989.

Example 10. Same facts as example 8, except that X elects to defer only \$30 of the post-October capital loss for 1988 under paragraph (f)(1) of this section for purposes of determining its taxable income for 1988.

(i) *Capital gain dividends.* Same result as in example 8.

(ii) *Taxable income.* X must compute its taxable income for 1988 by including \$5 of the \$75 long-term capital loss and the \$10 short-term capital loss for the post-October period of 1988, but without regard to the \$15 long-term capital gain, \$70 of the \$75 long-term capital loss, and the \$25 short-term capital gain for the post-October period of 1988 because it made an election to defer \$30 of the \$45 post-October capital loss for 1988 under paragraph (f)(1) of this section. Accordingly, X's taxable income for 1988 will include a net capital gain of \$95 and a net short-term capital gain of \$50. X must include the \$15 long-term capital gain, \$70 of the \$75 long-term capital loss, and the \$25 short-term capital gain for the post-October period of 1988 in its taxable income for 1989 in addition to the long-term and short-term capital gains and losses for 1989. Accordingly, X's taxable income for 1989 will include a net capital gain of \$100 (consisting of a net long-term capital gain of \$105 and a net short-term capital loss of \$5).

(iii) *Earnings and profits.* X must determine its earnings and profits for 1988 without regard to the \$15 long-term capital gain, the \$75 long-term capital loss, the \$25 short-term capital gain, and the \$10 short-term capital loss for the post-October period of 1988. In determining its accumulated earnings and profits for 1988, X must include \$5 of the \$75 long-term capital loss and the \$10 short-term capital loss for the post-October period of 1988. In determining both its earnings and profits and its accumulated earnings and profits for 1989, X must include (in addition to the long-term and short-term capital gains and losses for 1989) the \$15 long-term capital gain, \$70 of the \$75 long-term capital loss, and the \$25 short-term capital gain for the post-October period of 1988 as if those deferred gains and losses arose on January 1, 1989. Thus, X includes \$160 of capital gain in its earnings and profits for 1988, includes \$145 in its accumulated earnings and profits for 1989, and includes \$100 of capital gain in its earnings and profits for 1989 (consisting of a net long-term capital gain of \$105 and a net short-term capital loss of \$5).

Example 11. X has the following foreign currency gains and losses attributable to the periods indicated:

| | |
|------------------------|-------|
| 01/01 to 10/31/88..... | 200 |
| 11/01 to 12/31/88..... | (100) |
| 01/01 to 10/31/89..... | 110 |
| 11/01 to 12/31/89..... | 40 |

X has a \$100 post-October currency loss for its 1988 taxable year due to a net foreign currency loss for the post-October period of 1988. X does not make an election under paragraph (f)(1) of this section.

(i) *Taxable income.* X must compute its taxable income for 1988 by including the \$100 foreign currency loss for the post-October period of 1988 because it did not make an election under paragraph (f)(1) of this section. Accordingly, X's taxable income for 1988 will include a net foreign currency gain of \$100. X's taxable income for 1989 will include a net foreign currency gain of \$150.

(ii) *Earnings and profits.* X must determine its earnings and profits for 1988 without regard to the foreign currency loss for the post-October period of 1988. X must, however, include the \$100 foreign currency loss for the post-October period 1988 in determining its accumulated earnings and profits for 1988. Thus, X includes \$200 of foreign currency gain in its earnings and profits for 1988, includes \$100 in its accumulated earnings and profits for 1988, and includes \$150 of foreign currency gain in its earnings and profits for 1989.

Example 12. Same facts as example 11, except that X elects to defer the entire \$100 post-October currency loss for 1988 under paragraph (f)(1) of this section for purposes of determining its taxable income for 1988.

(i) *Taxable income.* X must compute its taxable income for 1988 without regard to the \$100 foreign currency loss for the post-October period of 1988 because it made an election to defer the entire \$100 post-October currency loss for 1988 under paragraph (f)(1) of this section. Accordingly, X's taxable income for 1988 will include a net foreign currency gain of \$200. X's taxable income for 1989 will include a net foreign currency gain of \$50 because X must compute its taxable income for 1989 by including the \$100 foreign currency loss for the post-October period of 1988 in addition to the foreign currency gains and losses for 1989.

(ii) *Earnings and profits.* For 1988, X must determine both its earnings and profits and its accumulated earnings and profits without regard to the \$100 foreign currency loss for the post-October period of 1988. In determining both its earnings and profits and its accumulated earnings and profits for 1989, X must include (in addition to the foreign currency gains and losses for 1989) the \$100 foreign currency loss for the post-October period 1988 as if that deferred loss arose on January 1, 1989. Thus, X will include \$200 of

foreign currency gain in its earnings and profits for 1988 and \$50 of foreign currency gain in its earnings and profits for 1989.

Example 13. Same facts as example 11, except that X elects to defer only \$75 of the post-October currency loss under paragraph (f)(1) of this section for purposes of determining its taxable income for 1988.

(i) *Taxable income.* X must compute its taxable income for 1988 by including \$25 of the \$100 foreign currency loss for the post-October period of 1988, but without regard to \$75 of the \$100 foreign currency loss for the post-October period of 1988 because it made an election to defer \$75 of the \$100 post-October currency loss for 1988 under paragraph (f)(1) of this section. Accordingly, X's taxable income for 1988 will include a net foreign currency gain of \$175. X's taxable income will include a net foreign currency gain of \$75 for 1989 because X must compute its taxable income for 1989 by including \$75 of the \$100 foreign currency loss for the post-October period of 1988 in addition to the foreign currency gains and losses for 1989.

(ii) *Earnings and profits.* X must determine its earnings and profits for 1988 without regard to the \$100 foreign currency loss for the post-October period of 1988. X must, however, include \$25 of the \$100 foreign currency loss for the post-October period of 1988 in determining its accumulated earnings and profits for 1988. In determining both its earnings and profits and its accumulated earnings and profits for 1989, X must include (in addition to the foreign currency gains and losses for 1989) the \$75 of the \$100 foreign currency loss for the post-October period of 1988 as if that loss arose on January 1, 1989. Thus, X includes \$200 of foreign currency gain in its earnings and profits for 1988, includes \$175 in its accumulated earnings and profits for 1988, and includes \$75 of foreign currency gain in its earnings and profits for 1989.

(i) *Procedure for making election—(1) In general.* Except as provided in paragraph (i)(2) of this section, a regulated investment company may make an election under paragraph (f)(1) of this section for a taxable year to which this section applies by completing its income tax return (including any necessary schedules) for that taxable year in accordance with the instructions for the form that are applicable to the election.

(2) *When applicable instructions not available.* If the instructions for the income tax returns of regulated investment companies for a taxable year to which this section applies do not reflect the provisions of this section, a regulated investment company may make an election under paragraph (f)(1)

of this section for that year by entering the appropriate amounts on its income tax return (including any necessary schedules) for that year, and by attaching a written statement to the return that states—

(i) The taxable year for which the election under this section is made;

(ii) The fact that the regulated investment company elects to defer all or a part of its post-October capital loss or post-October currency loss for that taxable year for purposes of computing its taxable income under the terms of this section;

(iii) The amount of the post-October capital loss or post-October currency loss that the regulated investment company elects to defer for that taxable year; and

(iv) The name, address, and employer identification number of the regulated investment company.

(j) *Transition rules—(1) In general.* For a taxable year ending before March 2, 1990 in which a regulated investment company incurred a post-October capital loss or post-October currency loss, the company may use any method that is consistently applied and in accordance with reasonable business practice to determine the amounts taken into account in that taxable year for purposes of paragraphs (e)(2), (f)(3), and (g) of this section and to determine the amount taken into account in the succeeding year for purposes of paragraphs (e)(3), (f)(4), and (g) of this section. For example, for purposes of paragraph (e), a taxpayer may use a method that treats as incurred in a taxable year all capital gains taken into account in computing the post-October capital loss for that year and an amount of capital loss for such period equal to the amount of such gains and that treats the remaining amount of capital loss for such period as arising on the first day of the succeeding year.

Similarly, for purposes of paragraph (e)(3), a taxpayer may use a method that treats as arising on the first day of the succeeding year only the excess of the capital losses from sales or exchanges after October 31 over the capital gains for such period (that is, the net capital loss or net long-term capital loss for such period).

(2) *Retroactive election*—(i) *In general.* A regulated investment company may make an election (a “retroactive election”) under paragraph (f)(1) for a taxable year with respect to which it has filed an income tax return on or before May 1, 1990 (a “retroactive election year”) by filing an amended return (including any necessary schedules) for the retroactive election year reflecting the appropriate amounts and by attaching a written statement to the return that complies with the requirements of paragraph (i)(2) of this section.

(ii) *Deadline for making election.* A retroactive election may be made no later than December 31, 1990.

(3) *Amended return required for succeeding year in certain circumstances*—(i) *In general.* If, at the time a regulated investment company makes a retroactive election under this section, it has already filed an income tax return for the succeeding year, the company must file an amended return for such succeeding year reflecting the appropriate amounts.

(ii) *Time for filing amended return.* An amended return required under paragraph (j)(3)(i) of this section must be filed together with the amended return described in paragraph (j)(2)(i).

(4) *Retroactive dividend*—(i) *In general.* A regulated investment company that makes a retroactive election under this section for a retroactive election year may elect to treat any dividend (or portion thereof) declared and paid (or treated as paid under section 852(b)(7)) by the regulated investment company after the retroactive election year and on or before December 31, 1990 as having been paid during the retroactive election year (a “retroactive dividend”). This election shall be irrevocable with respect to the retroactive dividend to which it applies.

(ii) *Method of making election.* The election under this paragraph (j)(4) must be made by the regulated investment company by treating the dividend (or portion thereof) to which the election applies as a dividend paid during the retroactive election year in computing its deduction for dividends paid in its tax returns for all applicable years (including the amended return(s)

required to be filed under paragraphs (j)(2) and (3) of this section).

(iii) *Deduction for dividends paid*—(A) *In general.* Subject to the rules of sections 561 and 562, a regulated investment company shall include the amount of any retroactive dividend in computing its deduction for dividends paid for the retroactive election year. No deduction for dividends paid shall be allowed under this paragraph (j)(4)(iii)(A) for any amount not paid (or treated as paid under section 852(b)(7)) on or before December 31, 1990.

(B) *Limitation on ordinary dividends.* The amount of retroactive dividends (other than retroactive dividends qualifying as capital gain dividends) paid for a retroactive election year under this section shall not exceed the increase, if any, in the investment company taxable income of the regulated investment company (determined without regard to the deduction for dividends paid (as defined in section 561)) that is attributable solely to the regulated investment company having made the retroactive election.

(C) *Limitation on capital gain dividends.* The amount of retroactive dividends qualifying as capital gain dividends paid for a retroactive election year under this section shall not exceed the increase, if any, in the amount of the excess described in section 852(b)(3)(A) (relating to the excess of the net capital gain over the deduction for capital gain dividends paid) that is attributable solely to the regulated investment company having made the retroactive election.

(D) *Effect on other years.* A retroactive dividend shall not be includible in computing the deduction for dividends paid for—

(1) The taxable year in which such distribution is actually paid (or treated as paid under section 852(b)(7)); or

(2) Under section 855(a), the taxable year preceding the retroactive election year.

(iv) *Earnings and profits.* A retroactive dividend shall be considered as paid out of the earnings and profits of the retroactive election year (computed with the application of sections 852(c) and 855, § 1.852-5, § 1.855-1, and

this section), and not out of the earnings and profits of the taxable year in which the distribution is actually paid (or treated as paid under section 852(b)(7)).

(v) *Receipt by shareholders.* Except as provided in section 852(b)(7), a retroactive dividend shall be included in the gross income of the shareholders of the regulated investment company for the taxable year in which the dividend is received by them.

(vi) *Foreign tax election.* If a regulated investment company to which section 853 (relating to foreign taxes) is applicable for a retroactive election year elects to treat a dividend paid (or treated as paid under section 852(b)(7)) during the taxable year as a retroactive dividend, the shareholders of the regulated investment company shall consider the amounts described in section 853(b)(2) allocable to such distribution as paid or received, as the case may be, in the shareholder's taxable year in which the distribution is made.

(vii) *Example.* The provisions of this paragraph (j)(4) may be illustrated by the following example:

Example. X is a regulated investment company that computes its income on a calendar year basis. No election is in effect under section 4982(e)(4). X has the following income for 1988:

FOREIGN CURRENCY GAINS AND LOSSES

Gains and Losses

Jan. 1–Oct. 31—100
Nov. 1–Dec. 31—(75)

CAPITAL GAINS AND LOSSES

Jan. 1–Oct. 31—short term, 100; long term, 100
Nov. 1–Dec. 31—short term, 50; long term, (100)

(A) X had investment company taxable income of \$175 and no net capital gain for 1988 for taxable income purposes. X distributed \$175 of investment company taxable income as an ordinary dividend for 1988.

(B) If X makes a retroactive election under this section to defer the entire \$75 post-October currency loss and the entire \$50 post-October capital loss for the post-October period of its 1988 taxable year for purposes of computing its taxable income, that deferral increases X's investment company taxable income for 1988 by \$25 (due to an increase in foreign currency gain of \$75 and a decrease in short-term capital gain of \$50) to \$200 and increases the excess described in section 852(b)(3)(A) for 1988 by \$100 from \$0 to \$100.

The amount that X may treat as a retroactive ordinary dividend is limited to \$25, and the amount that X may treat as a retroactive capital gain dividend is limited to \$100.

(5) *Certain distributions may be designated retroactively as capital gain dividends.* To the extent that a regulated investment company designated as capital gain dividends for a taxable year less than the maximum amount permitted under paragraph (e) of this section for that taxable year, the regulated investment company may designate an additional amount of dividends paid (or treated as paid under sections 852(b)(7) or 855, or paragraph (j)(4) of this section) for the taxable year as capital gain dividends, notwithstanding that a written notice was not mailed to its shareholders within 60 days after the close of the taxable year in which the distribution was paid (or treated as paid under section 852(b)(7)).

(k) *Effective date.* the provisions of this section shall apply to taxable years ending after October 31, 1987.

[T.D. 8287, 55 FR 3213, Jan. 31, 1990; 55 FR 7891, Mar. 6, 1990; 55 FR 11110, Mar. 26, 1990. Redesignated and amended by T.D. 8320, 55 FR 50176, Dec. 5, 1990; 56 FR 2808, Jan. 24, 1991; 56 FR 8130, Feb. 27, 1991]

§ 1.852-12 Non-RIC earnings and profits.

(a) *Applicability of section 852(a)(2)(A)—(1) In general.* An investment company does not satisfy section 852(a)(2)(A) unless—

(i) Part I of subchapter M applied to the company for all its taxable years ending on or after November 8, 1983; and

(ii) For each corporation to whose earnings and profits the investment company succeeded by the operation of section 381, part I of subchapter M applied for all the corporation's taxable years ending on or after November 8, 1983.

(2) *Special rule.* See section 1071(a)(5)(D) of the Tax Reform Act of 1984, Public Law 98-369 (98 Stat. 1051), for a special rule which treats part I of subchapter M as having applied to an investment company's first taxable year ending after November 8, 1983.