



# TaxNewsFlash

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## Proposed regulations: Certain basket contract transactions identified as listed transactions

The U.S. Treasury Department and IRS today released [proposed regulations](#) (REG-102161-23) identifying certain “basket contract” transactions and substantially similar transactions as listed transactions, a type of reportable transaction.

### Background

Taxpayers use Form 8886, *Reportable Transaction Disclosure Statement*, to disclose information for each reportable transaction in which they participate. Material advisors must file Form 8918, *Material Advisor Disclosure Statement*, to disclose information about reportable transactions. Penalties apply to taxpayers and material advisors who fail to properly disclose their participation in reportable transactions.

### Proposed regulations

The preamble to the proposed regulations describes a “basket contract” transaction as a type of structured financial transaction in which a taxpayer attempts to defer income recognition and convert short-term capital gain and ordinary income to long-term capital gain using a contract denominated as an option, notional principal contract, forward contract, or other derivative contract. The preamble describes that Notice 2015-47 identified certain basket contracts described in that notice as listed transactions, and Notice 2015-48 identified certain basket contracts described in that notice as transactions of interest. Although Notice 2015-47 and Notice 2015-48 did not request comments, some industry comments were submitted expressing concern that difficulty in identifying transactions described in Notice 2015-47 and Notice 2015-48 may cause taxpayers to file disclosures for transactions that were not intended to be treated as listed transactions or transactions of interest. Responding to those concerns, Notice 2015-73 revoked Notice 2015-47 and provided additional details on the types of basket contracts that were identified as listed transactions, and Notice 2015-74 revoked Notice 2015-48 and provided additional details on the types of basket contracts that were identified as transactions of interest. Notice 2015-73 and Notice 2015-74 also more specifically describe the tax benefits that identify the transaction as a listed transaction or transaction of interest, respectively.

The preamble to the proposed regulations explains that examinations of taxpayers and promoters and information received through disclosures filed in response to Notice 2015-74 have clarified the Treasury Department’s and IRS’s understanding of basket contract transactions identified in Notice 2015-74 and have indicated that the transactions identified in both Notice 2015-74 and Notice 2015-73 have been used to inappropriately defer income recognition or inappropriately convert ordinary income or short-term capital gain

into long-term capital gain. Therefore, the Treasury Department and the IRS are proposing in the proposed regulations to identify the transactions in both notices as listed transactions.

The proposed regulations specifically describe a basket contract transaction as a listed transaction if:

- A taxpayer enters into a contract with a counterparty, including a contract denominated as an option contract, notional principal contract (as defined in Treas. Reg. § 1.446-3(c)(1)(i)), forward contract, or other derivative contract, to receive a return based on the performance of a reference basket.
- The contract has a stated term of more than one year, or overlaps two or more of the taxpayer's tax years.
- The taxpayer has exercised discretion to change (either directly or through a request to the counterparty) the assets in the reference basket or the trading algorithm.
- The taxpayer's tax return for a tax year ending on or after January 1, 2011, reflects a tax benefit with respect to the transaction.

The proposed regulations also describe the following exceptions to treatment as a listed transaction:

- The contract is traded on a national securities exchange that is regulated by the Securities and Exchange Commission or a domestic board of trade regulated by the Commodity Futures Trading Commission, or a foreign exchange or board of trade that is subject to regulation by a comparable regulator.
- The contract is treated as a contingent payment debt instrument under Treas. Reg. § 1.1275-4 (including a short-term contingent payment debt instrument) or a variable rate debt instrument under Treas. Reg. § 1.1275-5.
- With respect to a counterparty, if:
  - The taxpayer represents to the counterparty in writing under penalties of perjury that none of the taxpayer's tax returns for tax years ending on or after January 1, 2011, has reflected or will reflect a tax benefit with respect to the transaction, or
  - The counterparty has established that the taxpayer is a nonresident alien that is not engaged in a U.S. trade or business or a foreign corporation that is not engaged in a U.S. trade or business by obtaining a valid withholding certificate (W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals), or W-8BEN-E, Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities) (or successor forms)) upon which it may rely under the requirements of Treas. Reg. § 1.1441-1 from the taxpayer as the beneficial owner of the payments made or to be made under the basket contract, or in the case of payments made outside of the U.S. on offshore obligations, by obtaining documentary evidence described in Treas. Reg. § 1.1441-1(c)(17) upon which it is permitted to rely.

### **Applicability date**

The proposed regulations are proposed to apply as of the date the proposed regulations are finalized. The proposed regulations would obsolete Notice 2015-74 as of the date the proposed regulations are published in the Federal Register, but would not obsolete, revoke, or modify Notice 2015-73.

### **Request for comments**

Comments on the proposed regulations, as well as requests to speak and outlines for topics to be discussed at the public hearing (scheduled for September 26, 2024, at 10:00 AM ET), are due by the date that is 60 days after the proposed regulations are published in the Federal Register (which is scheduled to be July 12, 2024). If no outlines are received by that date, the public hearing will be cancelled.

The Treasury Department and the IRS specifically request comments on the following:

- Are there types of transactions to which the proposed regulations may apply that did not exist when Notice 2015-73 and Notice 2015-74 were issued?

- Specific examples of indices that should qualify as a “widely used and publicly quoted index that is based on objective financial information” (see proposed Treas. Reg. § 1.6011- 16(b)(3)(ii)(B)).
- Specific examples of indices that should be treated as one that “tracks a broad market or a market segment” (see proposed Treas. Reg. § 1.6011-16(b)(3)(ii)(B)).
- Specific examples of “objective instructions, operations or calculations” (see proposed Treas. Reg. § 1.6011-16(b)(4)(ii)(A)).
- Specific examples of the exercise of “routine judgment in the administration of the rules” (see proposed Treas. Reg. § 1.6011-16(b)(4)(iii)(A)).
- Are there changes that could be made to clarify how to apply the terms described above to specific types of transactions?
- Are there alternative rules that should apply to determine which persons treated as partners in an arrangement or entity that is treated as a partnership for Federal income tax purposes but that does not have one or more general partners or managing members should be treated as participants in a transaction carried out by the partnership?

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