

## **Extended Carryback Period Expanded to 2008 or 2009 NOLs and Now Applies to More Than Just Eligible Small Businesses**

For taxable years ending or beginning in 2008 or 2009, two separate provisions provide elections that extend the net operating loss (NOL) carryback period and apply to more than just "eligible small businesses." Under the normal NOL rules, an NOL may be carried back to each of the two taxable years preceding the loss and carried forward to each of the 20 taxable years following the loss. However, Congress first enacted the American Recovery and Reinvestment Act of 2009 (ARRA) which allows an "eligible small business" to elect to extend the NOL carryback period for an "applicable 2008 NOL." Secondly, Congress amended IRC § 172(b)(1)(H) as part of the Worker, Homeownership, and Business Assistance Act of 2009 (WHBAA) which expands the extended carryback period to include 2009 in addition to 2008 NOLs and applies to more than just eligible small businesses.

Under ARRA, the election to increase the carryback period for an applicable 2008 NOL to three, four, or five years was limited to an eligible small business.<sup>1</sup> An eligible small business is defined for purposes of ARRA as either a corporation or partnership meeting a \$15 million gross receipts test, or a sole proprietorship that would meet the test if it were a corporation.<sup>2</sup> Moreover, under ARRA, the NOL must have been incurred during a taxable year beginning or ending in 2008.

Pursuant to the passage of the WHBAA, businesses may still elect to carryback applicable NOLs up to five years with some limitations in the fifth year.<sup>3</sup> However, the term for an "applicable NOL" has been expanded under WHBAA to include a taxpayer's NOL for any one taxable year ending after December 31, 2007, and beginning before January 1, 2010.<sup>4</sup> The election is irrevocable<sup>5</sup> and must be made by the extended due date for filing the tax return for the taxpayer's last taxable year beginning in 2009. Although, generally, the election may only be made for one taxable year, an eligible small business may elect both the extended carryback for an "eligible 2008 NOL" under the pre-2009 WHBAA rules and the extended carryback for an "applicable NOL" under current IRC § 172(b)(1)(H).

According to Rev. Proc. 2009-52, a taxpayer may elect the extended carryback period for an applicable NOL by either attaching an election statement to his/her federal income tax return (or amended return) for the taxable year that the NOL occurred or by attaching an election statement to Form 1045 (individuals, estates and trusts) or Form 1139 (corporations). Under either method, the statement must: i) specify the length of the NOL carryback period the taxpayer is electing, ii) indicate that the taxpayer is electing to apply IRC § 172(b)(1)(H) under Rev. Proc. 2009-52, and iii) state that the taxpayer is neither a TARP recipient nor an affiliate as defined by Section 13 of the 2009

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<sup>1</sup> 2009 ARRA § 1211(a)

<sup>2</sup> Pre-2009 WHBAA IRC § 172(b)(1)(H)(i), as amended by the 2009 ARRA

<sup>3</sup> IRC § 172(b)(1)(H), as amended by Section 13 of the 2009 WHBAA.

<sup>4</sup> IRC § 172(b)(1)(H)(ii), as amended by Section 13 of the 2009 WHBAA.

<sup>5</sup> IRC § 172(b)(1)(H)(ii)(II), as amended by Section 13 of the 2009 WHBAA.

WHBAA. If applicable, the statement must also provide that the election amends any previous carryback application or claim.

For an eligible small business, no limitation applies to the amount of "applicable 2008 NOL" that can be carried back under pre-2009 WHBAA IRC § 172(b)(1)(H). However, under current IRC § 172(b)(1)(H), the amount of an NOL that may be carried back to the fifth taxable year preceding the loss year is limited to 50% of taxable income.

For a detailed article on this topic, go to <http://www.taxgovernanceinstitute.com/> and click on "New Law Provides Five-Year Carryback for 2008 or 2009 Net Operating Losses" under "Insights."