

# Tax Flash

New tax developments  
from Grant Thornton's National Tax Office

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## IRS issues guidance on extended carryback provision

### Overview

The IRS has issued Rev. Proc 2009-52, setting out instructions for electing an extended (three-, four- or five-year) net operating loss (NOL) carryback period for any one year that begins or ends in 2008 or 2009 (an applicable year). Generally, taxpayers may elect on either an original or amended return and may use Form 1139 (for corporations) or Form 1045 (for individuals, trust and estates) to access expedited refund procedures. A previous election to forego the NOL carryback period may be revoked as part of this election. Elections must be made no later than the due date (including extensions) for the taxpayer's last taxable year beginning in 2009 and are irrevocable once made. The revenue procedure applies to losses from operations of a life insurance company in the same manner as to NOLs of non-life insurance companies.

### Background

The opportunity to elect an extended carryback period was added by Section 13 of the Worker, Homeownership, and Business Assistance Act of 2009 (the Act). Section 13 of the Act amended IRC Section 172(b)(1)(H) to allow taxpayers to elect to carry back an applicable net operating loss for a period of three, four or five years. As a result of the amendment, Section 172(b)(1)(H) is no longer limited to eligible small businesses (ESB), who were given the opportunity to carry their 2008 losses for three, four or five years as part of the American Recovery and Reinvestment Act (ARRA) enacted in February 2009. Rev. Proc. 2009-52 describes when and how to elect under Section 172(b)(1)(H) to carry back an applicable NOL for a period of three, four or five years for:

- 1 taxpayers that have not claimed a deduction for an applicable NOL;
- 2 taxpayers that previously claimed a deduction for an applicable NOL; and
- 3 taxpayers that wish to revoke a previously filed election under Section 172(b)(3) to forgo the carryback period.

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The revenue procedure applies to taxpayers (including affiliated groups filing consolidated federal income tax returns) that incurred an applicable NOL for a taxable year ending after Dec. 31, 2007, and beginning before Jan. 1, 2010.

### Applicable procedures

Taxpayers that have not claimed a deduction for an applicable NOL Rev. Proc 2009-52 provides two methods for making an election under Section 172(b)(1)(H) (the election). The election may be made by attaching a statement to the taxpayer's federal income tax return for the taxable year in which the NOL arises. A taxpayer that already filed a federal income tax return for the taxable year of the applicable NOL may make the election by attaching a statement to an amended return for the taxable year of the applicable NOL.

The election statement must state: **“The taxpayer is electing to apply Section 172(b)(1)(H) under Rev. Proc. 2009-52.”** The election statement must also provide: **“The taxpayer is not a TARP recipient nor, in 2008 or 2009, an affiliate of a TARP recipient.”** The statement must also specify the length of the carryback period elected by the taxpayer (i.e., three, four or five years).

A taxpayer must file the election statement with the taxpayer's original return or amended federal income tax return for the taxable year of the applicable NOL on or before the due date (including extensions) for filing the return for the taxpayer's last taxable year beginning in 2009.

A taxpayer that makes the election as described above must attach a copy of the election statement to the taxpayer's claim for tentative carryback adjustment (i.e., Form 1045 for individuals or Form 1139 for corporations) or amended return applying the applicable NOL to the carryback year. **Note that the due date for filing the Form 1045 or Form 1139 is the due date (including extensions) for filing the return for the taxpayer's last taxable year beginning in 2009.<sup>1</sup>**

#### Alternative procedure using Forms 1139 and 1045

As an alternative, Rev. Proc. 2009-52 provides that a taxpayer may make the election by attaching the above highlighted election statement to the “appropriate form” and specifying the length of the NOL carryback period. When using an appropriate form to make the election, the taxpayer must file the form on or before the due date (including extensions) for filing the return for the taxpayer's last taxable year beginning in 2009. The appropriate form is as follows:

- for corporations, either Form 1139 or Form 1120X;
- for individuals, either Form 1045 or Form 1040X;
- for estates or trusts, either Form 1045 or amended Form 1041; and
- for tax-exempt organizations with UBI, either Form 1139 or amended Form 990-T.

Taxpayers that previously filed a carryback application or claim

A taxpayer that previously filed a Form 1045 or Form 1139 (whether or not the IRS has acted upon the application) or an amended return (except an ESB that submitted an application or claim for an applicable NOL under ARRA) may make the election by following either of the above procedures. However, the election statement must provide that the election amends a previous carryback election. A taxpayer's amendment of a carryback application or claim also applies to a carryback of any alternative tax NOL for the same taxable year.

Revocation of the election to waive the NOL carryback period

A taxpayer that previously elected under Section 172(b)(3) to forgo the carryback period for an applicable year ending before Nov. 6, 2009, may revoke that election and make an election under Section 172(b)(1)(H). Any revocation to forgo the carryback period will also apply to the carryback of any alternative tax NOL for the same taxable year. The revocation/election statement must state: **“The taxpayer is revoking an NOL carryback waiver and is electing to apply Section 172(b)(1)(H) under Rev. Proc. 2009-52.”** The revocation/election statement must also state: **“The taxpayer is not a TARP recipient nor, in 2008 or 2009, an affiliate of a TARP recipient.”** The statement must also specify the length of the carryback period the taxpayer elects (three, four or five years).

The revocation and election must be filed before the due date (including extensions) for filing the return for the taxpayer's last taxable year beginning in 2009. The revenue procedure does not limit the revocation of an earlier election to forego the carryback period to the loss year to which the election for an extended carryback period relates. For example, if the taxpayer waived the carryback period for calendar-year 2007, it may revoke that election as part of an election of an extended three-, four- or five-year carryback period for 2008 or 2009. However, no procedure is provided for revoking an election to waive the carryback period if an election of an extended carryback period is not being made.

### Alternative minimum tax

Rev. Proc. 2009-52 confirms that an election of an extended carryback period will apply for the purpose of both the regular and alternative minimum tax, and that the rule limiting the use of a loss in the fifth carryback year to 50 percent of the taxable income in that year applies to both regular and alternative minimum taxable income.

### Conclusion

Because the election generally can only be made for one year and is irrevocable, it is critical that an analysis be conducted before the election is made to determine which year's NOL would provide the greatest benefit.

For questions on Rev. Proc. 2009-52, contact [Mel Schwarz](#) at 202.521.1564, [Walter Goldberg](#) at 202.521.1510 or [Susan Pick](#) at 732.516.7657.

## Notes

1. Under Section 6411(a), a Form 1045 or Form 1139 must be filed within 12 months after the end of the year of the NOL. Although Rev. Proc. 2009-52 could be interpreted to shorten the period of time for submitting a Form 1045 or Form 1139 for a 2009 loss for a calendar-year taxpayer, such a result would not appear to be consistent with statutory authority. Separate guidance will be published when this issue is resolved.

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