

Practice Update

IRS Issues Guidance on the NOL Carryback Provisions of the CARES Act

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By [Robert Loewy](#) and [Bill Sullivan](#)

The Coronavirus Aid, Relief and Economic Security Act (CARES Act), enacted March 27, 2020, amends the Internal Revenue Code (Code) and provides for the carryback of net operating losses arising in taxable years beginning on or after January 1, 2018, and before January 1, 2021, to each of the five taxable years preceding the year in which the loss arises (carryback period). Taxpayers take into account such net operating losses in the earliest taxable year to which it may be carried back. Code Section 172(b)(3) allows taxpayers to elect waive the carryback of net operating losses arising in a taxable year. In addition, the CARES Act allows taxpayers to elect to waive the carryback to the specific years in which the taxpayer had a Code Section 965(a) inclusion.

The CARES Act provides that an election to waive the carryback for net operating losses arising in a taxable year that began in 2018 or 2019 may be made by the due date (including extensions) of the taxpayer's federal income tax for the first year ending after March 27, 2020.

Code Section 6411 provides for the application of a tentative adjustment (refund) of the tax of prior years due to the carryback of net operating losses. Such request is generally made on IRS Form 1139 or IRS Form 1045. The taxpayer must file for such adjustment within 12 months of the taxable year in

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which the loss arose. The IRS has 90 days to make a limited examination of the application, and unless the IRS discovers any errors, to refund the amount requested within the 90 day period.

The CARES Act provides a special rule that with respect to net operating losses that arose in a taxable year that began before January 1, 2018 and ended after December 31, 2017, the Code Section 6411 application will be considered timely if filed within 120 days after March 27, 2020.

Rev. Proc. 2020-24

Rev. Proc. 2020-24 (April 9, 2020) provides:

- The procedure for making the election to waive the carryback period for a net operating loss arising in a taxable year beginning after December 31, 2017 and before January 1, 2020;
- Guidance regarding the election to exclude from the carryback period (for net operating losses arising in taxable years beginning after December 31, 2017 and before January 1, 2021) any taxable year in which the taxpayer has Section 965(a) inclusions;
- Guidance regarding elections to reduce a carryback period, waive a carryback period or revoke any prior election made to waive the carryback for a taxable year that began before January 1, 2018, and ended after December 31, 2017; and
- Guidance regarding making a Code Section 6411 application with respect to net operating losses arising in taxable years that began before January 1, 2018, and ended after December 31, 2017.

The election to waive the carryback of net operating losses arising in taxable years beginning in 2018 or 2019 pursuant to Code Section 172(b)(3) is made in the taxpayer's federal income tax return for the first taxable year ending after March 27, 2020. A statement must be attached to such return for each

taxable year for which the taxpayer intends to make the election stating that it elects to apply Code Section 172(b)(3) (i.e., to waive the carryback of net operating losses) under Rev. Proc. 2020-24 and the taxable year for which the election is being made. Once made, the election is irrevocable.

The due date to make an election to waive the carryback of net operating losses arising in taxable years beginning in 2018 or 2019 for years in which the taxpayer had a Section 965(a) inclusion, is also made no later than the due date (including extensions) of the taxpayer's federal income tax for the first year ending after March 27, 2020. For net operating losses arising in a taxable year beginning in 2020, the election must be made no later than the due date, including extensions, for the taxpayer's federal income tax return for the taxable year in which the net operating loss arises. The election is made by attaching a statement to the first of the following three tax forms that the taxpayer's files after April 9, 2020:

- Federal income tax return for the taxable year in which the net operating loss arises;
- The taxpayer's Form 1045 or Form 1139, as applicable; or
- The taxpayer's amended tax return applying the net operating losses to the earliest year in the carryback period for which the taxpayer did not have a Section 965(a) inclusion.

The statement must provide that the taxpayer is electing to apply Section 172(b)(1)(D)(v)(I) under Rev. Proc. 2020-24, the taxable year in which the net operating loss arose and the taxable years in which the taxpayer had Section 965(a) inclusions. If the election is made on the amended tax returns filed for the years to which the net operating loss is carried back, the election statement must be attached to each such amended tax return. Once made the election is irrevocable.

IRS Notice 2020-26

The IRS also issued Notice 2020-26 (April 9, 2020) that provides a six month extension to file the Code Section 6411 application (on Form 1139 or Form 1045) requesting a tentative refund to carry back an NOL with respect to a taxable year that began during calendar year 2018, and ended on or before June 30, 2019. For instance, a calendar year taxpayer that had a net operating loss arising in its 2018 year would normally have until December 31, 2019 to file for the tentative refund but now has until June 30, 2020 to file the Form 1139 or Form 1045, as applicable. The extension of time is limited to requesting a tentative refund to carry back a net operating loss and does not extend the time to carry back any other item.

The IRS has also announced that beginning April 17, 2020, it will accept Form 1139 and Form 1045 that are submitted to the IRS fax. Form 1139 may be faxed to 844-249-6236; and Form 1045 may be faxed to 844-249-6237.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.