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NOL carryback rules modified by Congress

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The Worker, Homeownership, and Business Assistance Act of 2009, signed into law by President Obama on November 6th, extended the expanded five-year net operating loss carryback that was scheduled to expire at the end of 2009. The provision has been extended and modified for 2010.

The American Recovery and Reinvestment Act of 2009 allowed eligible small businesses to elect to carry back net operating losses (NOLs) from 2008 for three, four or five years. The new law provides a similar election to all U.S. businesses of every size to carry back NOLs up to five years. The new, expanded election is available for NOLs incurred in either 2008 or 2009, but not for both years. However, an eligible small business that elected under the 2009 Recovery Act to carryback 2008 NOLs may make the election for an additional year, enabling the qualified small business to carry back NOLs from both 2008 and 2009 for up to five years.

Under the new law, an NOL carried back to the fifth year before the loss year is limited to 50% of the available taxable income for that year. Any remaining NOL can fully offset taxable income in the remaining four carryback years.

The 50% limitation does not apply to an eligible small business that elected to carry back its 2008 NOL under the 2009 Recovery Act. However, it does apply to its 2009 NOLs. The election to take advantage of the new law's NOL provision must be made by the due date (including extensions) for the tax return filed for the taxpayer's last taxable year beginning in 2009.

The election is available for a tax year ending after December 31st, 2007, and beginning before January 1st, 2010. Thus, a fiscal year taxpayer can make the election for tax years beginning or ending in either 2008 or 2009. The IRS will likely follow the NOL election procedures it crafted under the American Recovery and Reinvestment Act of 2009.

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