



TaxNewsFlash

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IRS provides FAQs on NOL carrybacks for taxpayers with section 965 inclusions

The IRS today released a set of “frequently asked questions” (FAQs) that address how taxpayers with section 965 inclusions may carryback a net operating loss (NOL).

The *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act) amended section 172(b)(1) to provide for a carryback of any net operating loss (NOL) arising in a taxable year beginning after December 31, 2017, and before January 1, 2021, to each of the five taxable years preceding the taxable year in which the loss arises (the carryback period).

Taxpayers may elect under section 172(b)(3) to waive the carryback period for NOLs arising in those years. Alternatively, taxpayers may make an election under section 172(b)(1)(D)(v)(I) for NOLs arising in those years to exclude tax years in which they have section 965(a) inclusions (section 965 years) from the carryback period.

- Rev. Proc. 2020-24 includes procedures for taxpayers to make these two elections. Read [TaxNewsFlash](#)
- The IRS also provided “temporary procedures” in a list of FAQs for taxpayers to following in faxing certain Forms 1139 and 1045 to the IRS. Read [TaxNewsFlash](#)

FAQs

Today’s FAQs provide the additional information that the IRS announced it would issue in the answer to question 5 of the prior FAQs on faxing Forms 1139 and 1045 to the IRS.

Read the [FAQs](#) (text of the FAQs is provided below).

Q1. I have an NOL arising in a taxable year beginning in 2018, 2019, or 2020, and one or more of the tax years in the carryback period for that NOL is a section 965 year. May I make an election either under section 172(b)(3) to waive the entire carryback period (with respect to both section 965 years and non-section 965 years) or under section 172(b)(1)(D)(v)(I) to waive the carryback only with respect to section 965 years?

A1. Yes. Generally, you are required to carry back any NOL arising in a taxable year beginning in 2018, 2019, or 2020, to each of the five taxable years preceding the taxable year in which the loss arises. However, you may file an election to either waive the entire five-year carryback period or to exclude all of your section 965 years from the carryback period. Guidance regarding when and how to file these elections is provided in section 4.01 of Revenue Procedure 2020-24 and in Q&A 2 below.

Q2. If I have an NOL arising in a taxable year beginning in 2018, 2019, or 2020, and also have one or more section 965 years in the carryback period, how do I elect to exclude only the section 965 years from the carryback period?

A2. After April 9, 2020, you may make the election to exclude all section 965 years from the carryback period by attaching an election statement to the earliest filed of the following:

- The Federal income tax return for the taxable year in which the NOL arises,
- Either a Form 1139, Corporation Application for Tentative Refund, or Form 1045, Application for Tentative Refund, applying the NOL to a taxable year in the carryback period, or
- An amended Federal income tax return applying the NOL to the earliest taxable year in the carryback period that is not a section 965 year.

The election statement must state the following:

- You are electing to apply section 172(b)(1)(D)(v)(I) under Revenue Procedure 2020-24,
- The taxable year in which the NOL arose, and
- Your section 965 years.

If you claim a refund or credit as a result of the carryback of the NOL by filing amended Federal income tax returns for taxable years in the carryback period, you must also attach the election statement to each amended return. See section 4.01(2) of Revenue Procedure 2020-24.

Q3. I am carrying back an NOL to a section 965 year and am now entitled to a refund for the section 965 year because my income tax liability for the section 965 year (including all amounts payment of which was deferred under section 965(h)) is fully paid. May I use Form 1139 or Form 1045, as applicable, to apply for a refund for the section 965 year?

A3. Yes. Please disregard the portion of instructions for Form 1139, Corporation Application for Tentative Refund, and Form 1045, Application for Tentative Refund, that prohibit taxpayers from using these forms to apply for refunds for section 965 years. However, please be aware that under the CARES Act, section 172(b)(1)(D)(iv) has been added to provide that a taxpayer who has a carryback to a section 965 year is deemed to have made a section 965(n) election that limits the amount of the loss that can be carried back to each such 965 year. Because of this, an NOL can be carried back only to reduce income in excess of the amount of the section 965(a) inclusion net of the section 965(c) deduction. See Q&A4 below for additional information regarding refunds for taxpayers who carry back NOLs to section 965 years.

Q4. If I file a Form 1139 or Form 1045 to request a refund resulting from carrying an NOL arising in a taxable year beginning in 2018, 2019, or 2020, back five years and the carryback periods include section 965 years, will I receive the full carryback refund amount?

A4. A taxpayer may not receive a refund or credit of any portion of properly applied section 965 year tax payments unless and until the amount of payments exceeds the entire income tax liability for the section 965 year, which includes all amounts to be paid in installments under section 965(h) in subsequent years, if a section 965(h) election was made. See [Q&A 14, Questions and Answers about Reporting Related to Section 965 on 2017 Tax Returns](#), and [Q&A 4, Questions and Answers about Tax Year 2018 Reporting and Payments Arising under Section 965](#). For a taxpayer who has made a section 965(h) election, a refund will be generated only if the excess credit generated by the NOL deduction in the section 965 year exceeds the entire unpaid income tax liability, including the unpaid section 965(h) net tax liability, for the section 965 year.

Q5. Generally, a taxpayer must file Form 1139 or Form 1045 within 12 months of the close of the taxable year in which an NOL arises to apply for a tentative refund based on the NOL carryback. For taxpayers with NOLs arising in taxable years beginning on or after January 1, 2018, and ending before March 27, 2019, the deadline to file an application for a tentative refund as a result of the carryback of such NOLs had expired by the time the CARES Act was enacted on March 27, 2020. Has the IRS extended the due date for filing Forms 1139 and 1045 to apply for a tentative refund based on the carryback of NOLs arising in taxable years beginning on or after January 1, 2018, and ending before March 27, 2019?

A5. Yes. Notice 2020-26 grants a six-month extension of time for taxpayers to file Form 1139 or Form 1045, as applicable, to apply for a tentative refund from the carryback of an NOL that arose in a taxable year that began during calendar year 2018 and that ended on or before June 30, 2019. This extension of time is limited to requesting a tentative refund to carry back an NOL and does not extend the time to carry back any other item. For example, a taxpayer that wishes to file an application for a tentative refund as a result of the carryback of an NOL arising in a taxable year ending on December 31, 2018, must file Form 1139 or Form 1045, as applicable, with respect to such NOL no later than June 30, 2020, to be considered timely after application of Notice 2020-26. If a taxpayer files a late Form 1139 or Form 1045, as applicable, to apply for a tentative refund from the carryback of an NOL, the Form 1139 or Form 1045 will be rejected, and the taxpayer will be instructed to file amended returns for each applicable tax year in the five-year carryback period.

Q6. What is the due date for filing a Form 1139 or Form 1045 to request a tentative refund from the carryback of an NOL arising in a taxable year beginning before January 1, 2018, and ending after December 31, 2017 (2017 fiscal tax year), and to make or revoke an election with respect to an NOL arising in a 2017 fiscal tax year?

A6. Taxpayers with an NOL arising in a 2017 fiscal tax year who make an application for a tentative refund on Form 1139 or Form 1045 (as applicable) with respect to a carryback of such NOL will be treated as having timely filed if Form 1139 or 1045 with respect to such carryback is filed no later than July 27, 2020. Similarly, elections for a 2017 fiscal tax year with an NOL to waive any carryback period, to reduce any carryback period, or to revoke any election made under section 172(b) to waive any carryback period will be treated as timely filed if filed no later than July 27, 2020. You can file such elections by attaching the statement required to make the election, with "Filed pursuant to Rev. Proc. 2020-24" at the top, to Form 1045, or Form 1139 containing only the taxpayer's name, address, and taxpayer identification number. The statement required to make the election must indicate the section under which the election is being made and set forth information to identify the election, the period for which it applies, and the taxpayer's basis and entitlement to make the election. See section 4.04(1) of Rev. Proc. 2020-24.

Q7. Prior to the CARES Act, only certain farming businesses and insurance companies could carry back NOLs arising in taxable years beginning in 2018 and 2019. If I am in one of these categories and I previously filed elections to forgo the carryback period for NOLs arising in

tax years 2018 and 2019, am I eligible to revoke those elections and claim the five-year carryback period with respect to such NOLs?

A7. No. The CARES Act does not provide for an election to revoke prior elections to forgo the carryback period for NOLs arising in these years. You may, however, make an election to revoke a prior election to relinquish the carryback period with respect to an NOL arising in a 2017 fiscal tax year. See section 4.04(1) of Revenue Procedure 2020-24 and Q&A6 for additional information regarding when and how to file that election.

Q8. What is the due date for filing an election to forgo the entire carryback period or forgo only section 965 years?

A8. A taxpayer must make an election either to exclude section 965 years from the carryback period for an NOL arising in a taxable year beginning in 2018 or 2019, or to waive the carryback period for such an NOL by the due date (including extensions) for filing its return for the first taxable year ending after March 27, 2020. See section 4.01 of Revenue Procedure 2020-24. For an NOL arising in a taxable year beginning in 2020, these elections must be made by the due date (including extensions) for filing the Federal income tax return for that taxable year. See section 4.01(2) of Revenue Procedure 2020-24 and section 172(b)(3). Once made, both elections are irrevocable.

Q9. What supporting documentation is required to be attached to a request for refund resulting from the carryback of NOLs to section 965 years?

A9. The following documentation must be attached to a request for refund:

- All supporting documentation for the NOL carryback as described in the Form 1139 or Form 1045 instructions.
- An amended Form 965-A or Form 965-B (as applicable) to record the amount of the change in the section 965 net tax liability, if any, caused by the NOL carryback.
- A statement of explanation to explain the change in the section 965 net tax liability.

Additionally, Q&A13 of the temporary procedures provides procedures relating to missing information or IRS questions regarding your filing.

Q10. I carried back an NOL arising in 2018 solely to non-section 965 years (in this case, 2013, 2014, 2015, and 2016), and made an election to exclude 2017, my section 965 year, from the carryback period. I also previously made a timely section 965(h) election to pay my section 965 net tax liability for 2017 in installments. The NOL was fully absorbed in pre-section 965 years. As a result of the carryback of the NOL to pre-section 965 years, there is a change in tax attributes (such as a foreign tax credit carryover or charitable contribution carryover) for 2017. The change in tax attributes reduces, but does not eliminate, my section 965 net tax liability for 2017. Should I file an amended return for 2017 to reflect this?

A10. If you do not file an amended return, our records will not reflect the change in either the total tax liability or the section 965(h) net tax liability for the section 965 year due to the change in tax attributes. Consequently, your section 965(h) net tax liability and associated installment payments due in the future may not be accurately reflected in our systems. This, in turn, could lead to unintentional or erroneous accelerations of section 965(h) installment payments if you do not pay the pre-change installment amounts, as well as potential interest and penalty charges, delays in refunds, or other processing complications.

Do not use the temporary procedures reserved for submission of certain claims on Form 1139 or Form 1045 to fax your amended return. Amended returns and other submissions faxed to the temporary fax number will not be processed.

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