



TaxNewsFlash

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Final regulations: Carryback of consolidated net operating losses

The U.S. Treasury Department and IRS today released for publication in the Federal Register final regulations (T.D. 9977) permitting consolidated groups that acquire new members that were members of another consolidated group to elect in a year subsequent to the year of acquisition to waive all or part of the pre-acquisition portion of the carryback period under section 172 for certain losses attributable to the acquired members when there is a retroactive statutory extension of the net operating loss (NOL) carryback period.

The [final regulations](#) [PDF 292 KB] finalize certain provisions in proposed and temporary regulations that were published on July 8, 2020 (read [TaxNewsFlash](#)), and remove temporary regulations published on the same date. The temporary regulations reflected provisions enacted as part of Pub. L. No. 116-136 (the “Coronavirus Aid, Relief, and Economic Security Act” or the CARES Act) that retroactively extended the carryback period under section 172 for tax years beginning after 2017 and before 2021.

Pub. L. No. 115-97 (the “Tax Cuts and Jobs Act” or TCJA) generally eliminated NOL carrybacks and permitted NOLs to be carried forward indefinitely, and also provided special rules for nonlife insurance companies and farming losses. The CARES Act effectively delayed application of the TCJA amendments until January 1, 2021. Additionally, the CARES Act permits a five-year carryback for NOLs, including farming losses and NOLs of nonlife insurance companies, for tax years beginning after December 31, 2017, and before January 1, 2021. Because the CARES Act allows certain NOLs to be carried back five years, the temporary regulations allowed certain acquiring consolidated groups to make an election to waive all or a portion of the pre-acquisition portion of the extended carryback period for certain losses attributable to certain acquired members.

The IRS received one comment in response to the 2020 temporary regulations. The IRS considered the commenter’s recommendations and concluded that their adoption would necessitate conforming changes to the split-waiver election provisions set forth in Treas. Reg. § 1.1502-21(b)(3)(ii)(B), which are beyond the scope of the guidance. Therefore, aside from non-substantive revisions, the IRS now adopts the 2020 temporary regulations as final regulations without change. The IRS continues to study the commenter’s recommendations for purposes of potential future guidance.

The final regulations apply to consolidated NOLs arising in tax years ending after July 2, 2020. However, taxpayers may apply the final regulations to any consolidated NOLs arising in a tax year beginning after December 31, 2017.

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