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## NOL Carryback Rules Extended

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President Obama signed the “Worker, Homeownership and Business Assistance Act of 2009” on November 6, 2009. Among other things, the new law expands the net operating loss carryback rules so that virtually all taxpayers can elect to carryback 2008 and 2009 NOLs for up to five years.

A net operating loss (“NOL”) generally means the amount by which a taxpayer’s business deductions exceed its gross income. In general, an NOL may be carried back two years and carried over 20 years to offset taxable income in those years.

Under present law (which was passed in 2009 as part of the federal stimulus measures), “electing small businesses” – generally businesses (including individuals who run a trade or business) with less than \$15 million in annual sales – can elect to carry back a 2008 net operating loss for three, four or five years instead of the usual two years.

The new law expands this rule by permitting virtually all businesses (other than those that have received federal bailout money or been acquired by the federal government) to elect to carry back 2008 and 2009 NOLs for three, four or five years. Under the new law, however, there is a 50 percent income limit on any NOL offsets applied to the fifth year.

The law also affects the NOL deduction for AMT purposes. Under present law a taxpayer’s NOL deduction cannot reduce the taxpayer’s AMT

income by more than 90%. This restriction is suspended under the new law for 2008 and 2009 NOLs and related carrybacks.

The decision as to whether to make the carryback election can be complicated and generally involves analyzing (1) the size of the NOL, (2) the taxpayer's income, character of the income (ordinary or capital gain), and effective tax rate in each of the past five years, (3) the taxpayer's expected future income and (4) the effect of any carryback for AMT purposes. A taxpayer can also elect under Code §172(b)(3) to waive the carryback to prior years and therefore carry the entire NOL forward to future years.

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