



TaxNewsFlash

United States



No. 2020-212
April 10, 2020

KPMG report: Initial impressions of IRS guidance implementing NOL provisions in CARES Act (COVID-19)

The IRS has issued guidance—Rev. Proc. 2020-24 and Notice 2020-26—providing needed and helpful guidance on implementation and reporting of the expanded net operating loss (NOL) provisions contained in the “Coronavirus Aid, Relief, and Economic Security Act” (CARES Act) (Pub. L. No. 116-136, March 27, 2020).

[Rev. Proc. 2020-24](#) [PDF 87 KB] focuses on the carryback of losses from:

- The 2018 through 2020 tax years and related elections
- 2017 “straddle” tax years—i.e., tax years beginning prior to January 1, 2018, and ending after December 31, 2017.

[Notice 2020-26](#) [PDF 107 KB] both:

- Extends the period of time for submitting Form 1139 *Corporation Application for Tentative Refund*, and Form 1045, *Application for Tentative Refund*, for certain tax years for which the “12 months from the close of the taxable year in which the NOL arose” filing deadline has expired (e.g., calendar year 2018 filers)
- Provides the procedures for filing Form 1045 and Form 1139 for such years, as well as for filing a single Form 1139 to allow a corporation to apply for both a tentative refund arising in an applicable tax year and elect under new section 53(e)(5) to recover 100% of any of its remaining minimum tax credits in such year

The following discussion provides initial impressions of the guidance provided by Rev. Proc. 2020-24 and Notice 2020-26.

Rev. Proc. 2020-24

Elections with respect to NOLs for tax years beginning in 2018, 2019, and 2020

The CARES Act allows a taxpayer to elect to waive the five-year carryback for tax years beginning in 2018, 2019, and 2020.

The CARES Act also allows taxpayers to elect to exclude tax years with a section 965 inclusion (“section 965 years”) from the carryback application of losses.

A taxpayer may waive the NOL carryback for tax years beginning in 2018 and 2019 no later than the due date, including extensions, for filing the taxpayer’s federal income tax return for the first tax year ending after March 27, 2020 (the 2020 taxable year return for most taxpayers). For tax years beginning in 2018 and 2019, this election is made by attaching to the relevant return a separate statement for each of tax years 2018 or 2019 (a specific statement for each year) for which the taxpayer intends to make the election. The revenue procedure is silent regarding the timing for making the election for tax years beginning in calendar year 2020, but it is presumed that this election is to be made no later than the due date, including elections, for filing the taxpayer’s federal income tax return for such year. The election statement must state that the taxpayer is electing to apply section 172(b)(3) under Rev. Proc. 2020-24 and the tax year for which the statement applies. Once made, the election is irrevocable.

A taxpayer may also elect to exclude section 965 years from the carryback period. This election allows a taxpayer to disregard all section 965 years from the carryback period and to apply the NOL to the remaining tax years in the carryback period. However, the section 965 years are counted towards the five years to which the NOL could apply—e.g., when a taxpayer wants to carry its 2019 NOL back five years, and its 2017 tax year was a section 965 year, the taxpayer may still only carry back the loss to its 2014 tax year but it can apply that NOL in full to its 2014, 2015, 2016, and 2018 tax years.

A taxpayer may elect to exclude section 965 years from the carryback period for tax years beginning in 2018 and 2019 no later than the due date, including extensions, for filing the taxpayer’s federal income tax return for the first tax year ending after March 27, 2020 (again, the 2020 taxable year for most taxpayers), while a taxpayer with a tax year beginning in calendar year 2020 must make the election no later than the due date, including extensions, for filing the taxpayer’s federal income tax return for that year. This election is made by attaching a statement to the earliest post-Rev. Proc. 2020-24:

- Filed federal income tax return for the year the NOL arises
- The taxpayer’s application for tentative carryback adjustment (Form 1045 or Form 1139) applying the NOL to a tax year in the carryback period, or
- An amended federal income tax return applying the NOL to the earliest tax year in the carryback period that is not a section 965 year

A taxpayer that makes the election and claims a refund or credit via multiple amended returns must also attach the statement to each amended return. The election statement must state that the taxpayer is electing to apply section 172(b)(1)(D)(v)(II) under Rev. Proc. 2020-24, the tax year in which the NOL arose, and the taxpayer’s section 965 years. Once made, the election is irrevocable.

If a taxpayer does not elect to exclude section 965 years from the carryback period, the deemed section 965(n) election applies and cannot be waived. If the deemed election under section 965(n) applies to a section 965 year for which a taxpayer previously revoked or did not previously make an election under section 965(n), the deemed election shall only apply for purposes of the carryback of an NOL to such section 965 year.

Consolidated groups are included in the term “taxpayer,” and the agent for the consolidated group must make the elections. The term “NOL” includes, with regard to a consolidated tax year, the excess of deductions over gross income, as determined under Reg. section 1.1502-11(a) (without regard to any consolidated net operating loss (CNOL) deduction).

Manner of applying for tentative refund or credit for 2017 straddle tax years

The CARES Act allows a taxpayer with an NOL in a 2017 straddle tax year to carry that loss back two years.

A 2017 straddle tax year taxpayer may apply for tentative refund or credit on either Form 1045 or Form 1139 no later than July 27, 2020. Amended returns will be required for refund claims made after this date.

Similarly, elections for such tax years 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 are due no later than July 27, 2020, with such elections to be filed where the taxpayer files its federal income tax return by attaching the statement required to make the election, with "Filed pursuant to Rev. Proc. 2020-24" at the top, to an amended return, Form 1045 or Form 1139 containing only the taxpayer's name, address, and taxpayer identification number. This statement must indicate the section under which the election is being made and must set forth information to identify the election, the period for which it applies, and the taxpayer's basis and entitlement to make the election.

Notice 2020-26

Section 6411 and its regulations require that an application for tentative refund or credit (Form 1045 or Form 1139) must be filed within 12 months of the close of the tax year in which the NOL arose. The CARES Act did not, however, provide additional time to file tentative carryback adjustment applications with respect to NOLs arising in tax years beginning on or after January 1, 2018, and ending before March 27, 2019, even though the time to file a Form 1045 or Form 1139 for these years had expired as of the date of enactment of the Act. Although these taxpayers may file amended returns to claim refunds or credits resulting from NOLs in those years, they would not be able to take advantage of the expedited procedures provided by section 6411.

Notice 2020-26, pursuant to the authority provided under section 6081, grants a six-month extension of time to file a Form 1045 or Form 1139 to taxpayers that have an NOL that arose in a tax year that began during calendar year 2018 and that ended on or before June 30, 2019. This extension of time is strictly limited to requesting a tentative refund.

To take advantage of the extension of time for requesting a tentative refund based on an NOL carryback, a taxpayer must file the applicable form no later than 18 months after the close of the tax year in which the loss arose, with the notation "Notice 2020-26, Extension of Time to File Application for Tentative Carryback Adjustment" added at the top of that form. Thus, for example, 2018 calendar year taxpayers now have until June 30, 2020, to request a tentative refund using Form 1045 or Form 1139.

Notice 2020-26 also provides that if a corporation wishes to file one application for a tentative refund to claim both the NOL carryback and the minimum tax credit described in section 53(e)(5) at the same time, the taxpayer must do so by the earlier of the two deadlines, despite the December 30, 2020 deadline to claim the minimum tax credit. For example, if a calendar year 2018 taxpayer wishes to claim the NOL carryback for that year and the minimum tax credit on one Form 1139, it must do so by June 30, 2020. Nothing, however, appears to limit the ability of the taxpayer to file two separate Forms 1139—one for the NOL carryback and one for the minimum tax credit.

Although Notice 2020-26 directs taxpayers to [IRS.gov/Form1045](https://www.irs.gov/Form1045) and [IRS.gov/Form1139](https://www.irs.gov/Form1139) for instructions and more information, the forms and instructions found at these webpages are not yet updated to take into account the CARES Act amendments.

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