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Regulations: Consolidated net operating losses (text of regulations)

The U.S. Treasury Department and IRS this afternoon released for publication in the Federal Register temporary regulations (T.D. 9900) and proposed regulations (REG-125716-18) as guidance under sections 1502 and 172 regarding consolidated net operating losses (NOLs). The temporary and proposed regulations are scheduled to be published in the Federal Register on July 8, 2020.

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The **temporary regulations** [PDF 307 KB] promulgated under section 1502 permit 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 an extended carryback period under section 172 for certain losses attributable to the acquired members when there is a retroactive statutory extension of the NOL carryback period under section 172. These temporary regulations reflect provisions enacted as part of the “Coronavirus Aid, Relief, and Economic Security Act” (Pub. L. No. 116-136) (CARES Act) that retroactively extends the carryback period under section 172 for tax years beginning after 2017 and before 2021.

The **proposed regulations** [PDF 411 KB] include proposed amendments to the consolidated return regulations under section 1502, and provide guidance implementing recent statutory amendments to section 172 as made by the 2017 tax law (Pub. L. No. 115-97, that is often referred to as the “Tax Cuts and Jobs Act”) and the CARES Act. With today’s release, certain provisions of previously proposed regulations relating to the absorption of consolidated NOL carryovers and carrybacks are withdrawn and re-proposed. In addition, today’s proposed regulations update the regulations applicable to consolidated groups that include both life insurance companies and other companies to reflect the statutory changes.

The purpose of this edition of *TaxNewsFlash* is to provide text of these regulations.

As explained in a related IRS release—**IR-2020-138**—the TCJA and CARES Act amended the rules for NOLs. After amendment, the NOL deduction is the sum of:

- The total of the NOLs arising before January 1, 2018 (pre-2018 NOLs) that are carried to that year; plus
- The lesser of:
  - o The total of the NOLs arising after December 31, 2017; or
  - o 80% of taxable income less pre-2018 NOLs (the 80% limitation).

The TCJA generally eliminated NOL carrybacks and permitted NOLs to be carried forward indefinitely. The TCJA also provides special rules for nonlife insurance companies and farming losses.

- Nonlife insurance companies are permitted to carry back NOLs two years and forward 20 years, and the 80% limitation does not apply.
- Farming losses are permitted to be carried back two years and carried forward indefinitely, subject to the 80% limitation.

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.

The IRS release continues to note that the proposed regulations:

- Provide guidance to consolidated groups on the application of the 80% limitation
- Remove obsolete provisions from the rules for consolidated groups that contain both life insurance companies and nonlife insurance companies

Because the CARES Act allows certain NOLs to be carried back five years, the temporary regulations allow 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.