# The New Election to Carry Back NOLs: Factoring in the Variables.

**The Worker, Homeownership and Business Assistance Act of 2009 has given hard pressed businesses a generous pre-holiday gift in its extension and expansion of ;the enhanced five-year net operating loss carryback provision under Internal Revenue Code of 1986, as amended, Section 172. Many economists predict an eventual windfall to businesses far in excess of the $10.5 Billion 10 year cost estimated by the Joint Committee on Taxation. Even so, the Joint Committee forecasts front loaded benefits of over $33 Billion in 2010. To maximize this windfall, however, each taxpayer must carefully evaluate how its own facts and circumstances relate to certain variables and recommended strategies.**

**GROUND RULES. The new NOL carryback provision benefits businesses experiencing financial difficulty by expanding their ability to use net operating losses attributable to 2008 or 2009. Taxpayers can elect to carry back a 20008 or 2009 NOL for three, four, or five years, instead of the normal two years.**

**The tax advantage of the extended carryback period is tempered by the limitation on the NOL amount that can offset income from the fifth tax year preceding the loss year. Under the new law, the amount of any NOL that can be carried back to that fifth out year cannot exceed 50 percent (50.0%) of the taxpayer's taxable income for such a fifth year.**

**Taxpayers can make the election under the new law for only one year, either for 2008 NOLs or 2009 NOLs, but not both. Qualifying small businesses (those with $15 Million or less in gross receipts) that have elected the five year carryback for 2008 NOLs under the 2009 Recovery Act, under which no 50 percent (50.0%) limitation is imposed for ;the fifth carryback year, are allowed to elect a five year carryback of their 2009 NOLs under the new law as well.**

**DEADLINES. Taxpayers that qualify for the extended carry back period for applicable NOLs must make an affirmative election to use the longer carryback period. An election to use a four or five year carryback period for an applicable loss from operations must be made by the due date, including extensions, for filing the return for the taxpayer's last tax year beginning in 2009. Once an election is made, it cannot be revoked.**

**The due date, including extensions, for filing the return covering the taxpayer's last year beginning in 2009, therefore, becomes a key deadline under the new law. For calendar-year taxpayers, the date is September 15, 2010, for corporations, and October 15, 2010, for individuals and others.**

**Unfortunately, this election may bedevil some practitioners longer than others, depending upon how many fiscal-year taxpayers are clients. For a fiscal-year corporation with a tax year starting in December 2009, for example, its return's extended due date (and, therefore, its election deadline) won't take place until August 15, 2011.**

**ACCELERATING AN ELECTION. Once an election is made, it cannot be revoked. Rushing into a hasty decision over using the new law's NOL carryback provision, therefore, is ill-advised.**

**Nevertheless, getting a cash refund as the result of an extended NOL carryback is a benefit in a cash-starved economic environment that cannot be overlooked. That benefit ought to be realized "as soon as reasonably possible." One casualty in an effort to obtain cash on an NOL claim as soon as possible may be the return preparer. Many businesses may not be satisfied with filing 2009 returns right up until deadline this next year. At the very least, there will be more pressure put upon tax departments to give rough estimates of possible 2009 NOLs and evaluate whether electing a five-year carryback of 2008 NOLs is a sound-enough decision to be acted upon before 2009 returns are filed.**

**Congress has directed the Internal Revenue Service to issue procedures for making the election. Even those taxpayers that absolutely know that they will carry back 2008 NOLs might want to wait for this IRS guidance. Since this guidance is expected quickly, those taxpayers filing early and not using the new procedure may find their refunds delayed much longer than if they had waited. Their requests may be set aside for special (a.k.a., slower) examination, since they would fall outside of automatic qualification procedures that may have been issued while the claims were "in the mail."**

**VARIABLES IN CARRYBACK YEARS. The decision over whether to elect a five-year carryback for 2008 or 2009 NOLs is not only contingent on the size of the NOLs for 2008 and 2009. It also depends upon what available income there may be to offset in the fifth and fourth years back, as well as what income is available within the reach of the normal two-year carryback period.**

**Take a calendar-year business, for example: 2008 NOLs, if elected, have the advantage of offsetting half of the business's 2003 income, and all of its 2004 income. 2009 NOLs can't reach back to 2003 and can only reduce half of 2004's income. Both NOLs can soak up all available taxable income from 2005.**

**Also within the algebraic equation is the ability of 2008 NOLs to reach back under the normal two-year carryback rule to 2006 and 2007 income. If there was a little income in 2007, 2009 NOLs may need a five-year carryback to be used anytime**

**soon. 2008 NOLs, on the other hand, might be completely soaked up by 2006 income, or at least sufficiently so to combine and make a 2009 election more lucrative.**

**Use of NOLs to offset income also may create credit carryovers from the carried-back year. For example, an NOL carryback to a particular year requires a re-determination of the foreign tax credit in that year and may create excess credits.**

**Finally, a fiscal-year taxpayer may be dealing with an option that includes looking at NOLs from more than two years. An "applicable NOL" for purposes of the new law is the taxpayer's NOL for any tax year "ending after Dec. 31, 2007, and beginning before January 1, 2010." Therefore, three years may be involved; for example, May 2007 through April 2008; May 2008 through April 2009, and May 2009 through April 2010.**

**YEAR-END PLANNING. 2009 net operating losses are not etched in stone until the year closes. In the meantime, and especially for those businesses that may have a 2009 NOL larger than their 2008 NOL, taking steps to increase 2009 NOLs may make sense. Techniques to accelerate expenses and defer income should be examined carefully. Request to change accounting methods to achieve these ends might work for many businesses (requests on automatic accounting changes may be made even after the tax year closes). A careful look at depreciation, both before year's end and while filing the 2009 return, might be especially rewarding.**

**ADDITIONAL STRATEGIES? Time, and additional guidance, will eventually tell what the boundaries are for planning to maximize use of the new NOL carryback provision. Already gun shy over trusting its own legislative language, Congress has given the Treasury the directive under the new law to "prescribe anti-abuse rules as necessary to prevent abuse of the extended NOL carryback period." These anti-abuse rules likely would include anti-stuffing, anti-churning, and wash-sales rules, at the very least.**

**CONCLUSION. The extended net operating loss carryback provision under the Worker, Homeownership and Business Assistance Act of 2009 was a most-welcome surprise for many businesses and their tax advisors. Some considered it "too expensive" and "out of the question" only several months ago for Congress to consider this relief. Now, the amount of work necessary for each taxpayer to weigh the competing variables to maximize the benefits under this new election may likewise surprise many of us.**