

April 10, 2020

## **Guidance on Certain Net Operating Loss Elections Under the CARES Act**

On April 9, 2020, the Internal Revenue Service issued two pieces of guidance regarding the five-year extended net operating loss (NOL) carryback period enacted by the Coronavirus Aid, Relief and Economic Security Act (CARES Act). This guidance provides rules that detail the process and timing of making several potential elections with respect to the five-year extended NOL carryback period and grants certain taxpayers a six-month extension of time to file a tentative carryback adjustment for recently generated NOLs.

Under the CARES Act, NOLs generated in taxable years beginning after December 31, 2017 and before January 1, 2021 may be carried back to the five taxable years preceding the tax year in which the NOLs arose. In lieu of this general carryback, a taxpayer may elect to (i) waive the entire five-year carryback period or (ii) exclude all Section 965 years (i.e., years in which the taxpayer had an income inclusion from mandatory repatriation under the Tax Cuts and Jobs Act of 2017) from the carryback period. Additionally, Section 6411(a) provides that a taxpayer may file an application for a tentative carryback adjustment for the taxable years affected by an NOL carryback (generally made on Form 1139 for corporations and Form 1045 for taxpayers other than corporations), but such application generally must be filed within 12 months of the close of the taxable year in which such NOL arose. The new guidance clarifies the time and manner of filing the elections mentioned above and also provides relief to certain taxpayers for which the due date to file their tentative carryback adjustment application has passed or will soon pass.

Revenue Procedure 2020-24 provides guidance to taxpayers who want to (i) make an election to waive the carryback period for an NOL arising in taxable years beginning in 2018 and 2019; (ii) elect to exclude Section 965 years from the carryback period for an NOL arising in taxable years that begin in 2018, 2019 and 2020, or (iii) make an application under Section 6411(a) for an NOL arising in a taxable year that began before January 1, 2018 and ended after December 31, 2017. Specifically:

- Taxpayers may make an irrevocable election under Section 172(b)(3) to waive the carryback period for an NOL arising in a taxable year beginning in 2018 and 2019 by attaching to its Federal income tax return for the first taxable year ending after March 27, 2020, a separate statement stating that the taxpayer is electing to apply Section 172(b)(3) under Revenue Procedure 2020-24 and the taxable year for which the statement applies.

- Taxpayers may elect to exclude Section 965 years from the carryback period for an NOL arising in taxable years beginning in 2018, 2019 or 2020 by attaching an election statement to the earliest filed (i) Federal income tax return for the taxable year in which the NOL arises, (ii) Form 1045 or Form 1139, as applicable, or (iii) the amended Federal income tax return applying the NOL to the earliest taxable year in the carryback period that is not a Section 965 year.
- Taxpayers that file their tentative adjustment applications (on Form 1139 or Form 1045, as applicable) on or before July 27, 2020 will be treated as having timely filed an application under Section 6411 with respect to an NOL arising in a taxable year that began before January 1, 2018 and ended after December 31, 2017. The same deadline applies to elections for such taxable years to waive any carryback period, to reduce any carryback period, or to revoke an election made under Section 172(b).

Notice 2020-26 grants a six-month extension of time to file a tentative carryback adjustment under Section 6411 of the Code (on Form 1139 or Form 1045, as applicable) to taxpayers that have an NOL that arose in a taxable year that began during calendar year 2018 and ended on or before June 30, 2019. Under Notice 2020-26, for example, for an NOL that arose in a taxable year that began in 2018 and ended on March 31, 2019, a taxpayer that was originally required to file its tentative carryback adjustment before March 31, 2020 now has until September 30, 2020 to file the applicable form.

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If you have questions concerning the contents of this alert, or would like more information about Weil's Tax practice, please speak to your regular contact at Weil, or to the authors:

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