

*Lexis Explanation IRC Sec. 172(b)*

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**IRC § 172(b)  
Net Operating Loss Deduction  
*Net Operating Loss Carrybacks and Carryovers***

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**II. Net Operating Loss Carryback for Eligible Small Businesses**

For net operating losses arising in taxable years ending after December 31, 2007, *The American Recovery and Reinvestment Act of 2009* allows an eligible small business to elect a 3-, 4-, or 5-year carryback period for an applicable 2008 net operating loss. In other words, an eligible small business with a net operating loss in 2008 may elect to offset this loss against income earned in up to five prior years. To qualify for this special provision, an eligible small business must have no greater than an average of \$15 million in gross receipts over a three-year period ending with the tax year of the net operating loss. An "applicable 2008 net operating loss" is the taxpayer's net operating loss for any taxable year ending in 2008, or if elected by the taxpayer, the net operating loss for any taxable year beginning in 2008. Any such election is irrevocable, and may be made only with respect to one taxable year. Anti-abuse rules are to be prescribed. Moreover, for a net operating loss or loss from operations for a taxable year ending before February 17, 2009, the following transition rules apply:

- (1) any election to waive the carryback period with respect to the loss may be revoked before April 18, 2009;
- (2) any election to increase the carryback period under [IRC Section 172\(b\)\(1\)\(H\)](#) is treated as timely made if made before April 18, 2009; and

(3) any application for a tentative carryback adjustment under [IRC Section 6411\(a\)](#) with respect to the loss is treated as timely filed if filed before April 18, 2009.

There are several methods that a small business uses to elect the special provision. Revenue Procedure **2009-19** provides guidance to taxpayers as to the time and manner for making an election under [IRC Section 172\(b\)\(1\)\(H\)](#), including the election of a 3, 4, or 5-year carryback period and an election to apply [IRC Section 172\(b\)\(1\)\(H\)](#) to a net operating loss for a taxable year beginning in 2008, instead of a net operating loss for a taxable year ending in 2008; on when and how to elect [IRC Section 172\(b\)\(1\)\(H\)](#) if the taxpayer previously filed an election under [IRC Section 172\(b\)\(3\)](#) to forgo the net operating loss carryback period; and on how a taxpayer makes the election if the taxpayer is a partner of an eligible small business that is a partnership, a shareholder of an eligible small business that is an S corporation, or a sole proprietor.

Generally, eligible small businesses that are not corporations (including sole proprietorships filing Schedule C with their Form 1040) may file Form 1045, Application for Tentative Refund and eligible small businesses that are corporations with net operating losses may file Form 1139, Corporation Application for Tentative Refund to make use of the special carryback provision for tax year 2008. These forms are used to accelerate the payment of refunds. Form 1045 or Form 1139 generally must be filed within one year after the end of the tax year of the net operating loss. Furthermore, the current year's tax return must be filed by the date the Form 1045 or Form 1139 is filed.

If the small business does not elect the special carryback provision, the normal two-year carryback remains available. If the loss exceeds the income for the carryback period, the taxpayer can continue to carry forward the remaining balance of the net operating loss for up to twenty years.