Plans, Tax Exempt and Government Entities Division, and Michael P. Brewer and Linda S. F. Marshall of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, please contact the Employee Plans taxpayer assistance answering service at 1–877–829–5500 (a toll-free number), Mr. Brewer or Ms. Marshall at (202) 622–6090 (not a toll-free number), or e-mail Ms. Zimmerman, at *RetirementPlanQuestions@irs.gov*.

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26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.
(Also Part I, §§ 172, 6411.)

Rev. Proc. 2009–19

SECTION 1. PURPOSE

.01 This revenue procedure provides guidance under § 1211 of the American Recovery and Reinvestment Tax Act of 2009, Div. B of Pub. L. No. 111–5, 123 Stat. 115 (February 17, 2009) (the Act). Section 1211 of the Act amends § 172(b)(1)(H) of the Internal Revenue Code to allow any taxpayer that is an eligible small business (ESB) to elect a 3, 4, or 5-year net operating loss (NOL) carryback for a taxable year ending after 2007.

.02 Specifically, this revenue procedure provides guidance to taxpayers as to the time and manner for making an election under § 172(b)(1)(H), including the election of a 3, 4, or 5-year carryback period and an election to apply § 172(b)(1)(H) to an NOL for a taxable year beginning in 2008, instead of an NOL for a taxable year ending in 2008. This revenue procedure provides guidance on when and how to elect § 172(b)(1)(H) if the taxpayer previously filed an election under § 172(b)(3) to forgo the NOL carryback period.

.03 This revenue procedure also provides guidance on how a taxpayer makes the election if the taxpayer is a partner of an ESB that is a partnership, a shareholder of an ESB that is an S corporation, or a sole proprietor.

SECTION 2. BACKGROUND

.01 Section 172(a) allows a deduction equal to the aggregate of the NOL carryovers and carrybacks to the taxable year. Section 172(b)(1)(A)(i) provides that an NOL for any taxable year generally must be carried back to each of the 2 years preceding the taxable year of the NOL. Section 172(b)(3) provides that any taxpayer entitled to a carryback period under § 172(b)(1) may make an irrevocable election to relinquish the carryback period with respect to an NOL for any taxable year.

.02 Section 6411(a) provides that a taxpayer may file an application for a tentative carryback adjustment of the tax for the prior taxable year affected by an NOL carryback from any taxable year. Section 6411(a) also provides that the application must be filed on or after the date of filing for the return for the taxable year of the NOL from which the carryback results and within a period of 12 months after that taxable year or, with respect to any portion of a business credit carryback attributable to an NOL from a subsequent taxable year, within a period of 12 months from the end of the subsequent taxable year. Section 6411(b) provides a 90-day period during which the Internal Revenue Service will make a limited examination of the application to discover omissions and errors of computation and determine the amount of the decrease in tax attributable to the carryback. The Service may disallow, without further action, any application that contains errors of computation that cannot be corrected within the 90-day period or that contains material omissions. The decrease in tax attributable to the carryback will be applied against unpaid amounts of tax. Any remainder of the decrease will, within the 90-day period, be credited or refunded.

.03 Section 172(b)(1)(H) permits an ESB to carry back its applicable 2008 NOL to 3, 4, or 5 years preceding the taxable year of the NOL, as the ESB elects.

.04 Section 172(b)(1)(H)(iv) provides that the term "eligible small business" has the meaning given by § 172(b)(1)(F)(iii), except that § 448(c) is applied by substituting "$15 million" for "$5 million" each place it appears. Section 172(b)(1)(F)(iii) provides that a small business is a corporation or partnership that meets the gross receipts test of § 448(c) for the taxable year in which the loss arose (or in the case of a sole proprietorship, that would meet such test if the proprietorship were a corporation).

.05 Section 448 generally prohibits certain taxpayers from using the cash receipts and disbursements method of accounting. Section 448(b)(3) provides an exception to this requirement in the case of any corporation or partnership if, for all prior taxable years beginning after December 31, 1985, the entity (or any predecessor) met the $5 million gross receipts test of § 448(c). Section 448(c)(1) provides that a corporation or partnership meets the $5 million gross receipts test for any prior taxable year if the average annual gross receipts of the entity for the 3-taxable-year period ending with that prior taxable year does not exceed $5 million. Section 448(c)(2) (aggregation rules) generally provides that all persons treated as a single employer under subsection (a) or (b) of § 52 or subsection (m) or (o) of § 414 are treated as one person for purposes of § 448(c)(1).

.06 The $5 million gross receipts test of § 448(c) is applied to a taxpayer's prior taxable year by determining the average annual gross receipts for the 3-year period that ends with that prior taxable year. Under §172(b)(1)(F)(iii), in order to be a small business, a taxpayer must meet the gross receipts test of § 448(c) for the taxable year in which the NOL arose. Consequently, to determine if a taxpayer is a small business for purposes of § 172(b)(1)(F)(iii), the taxable year in which the NOL arose is the last taxable year of the 3-year period to which the test is applied.

.07 Section 172(b)(1)(H)(ii)(I) provides that the term "applicable 2008 net operating loss" means the taxpayer's NOL for any taxable year ending in 2008. However, under § 172(b)(1)(H)(ii)(II), the taxpayer may elect instead to have the term mean the taxpayer's NOL for any taxable year beginning in 2008.

.08 Section 172(b)(1)(H)(iii) provides that any election under § 172(b)(1)(H) is required to be made in such a manner as may be prescribed by the Secretary, and must be made by the due date (including extension of time) for filing the taxpayer's return for the taxable year of the NOL. The election is irrevocable and may be made only for one taxable year.

.09 Section 1211(d)(2) of the Act provides that in the case of an applicable 2008 NOL for a taxable year ending before the date of enactment of the Act (February 17, 2009), (A) a previous election made un-

der § 172(b)(3) for the NOL may be revoked on or before April 17, 2009; (B) the § 172(b)(1)(H) election for the NOL is treated as timely if made on or before April 17, 2009; and (C) an application under § 6411(a) with respect to the NOL is treated as timely if filed on or before April 17, 2009.

SECTION 3. SCOPE

This revenue procedure applies to any taxpayer that is an ESB, a partner of a partnership that is an ESB, a shareholder in an S corporation that is an ESB, or a sole proprietor of a business that is an ESB, and that incurred an NOL for any taxable year ending in 2008 or beginning in 2008.

SECTION 4. APPLICATION

.01 *Eligible small businesses that have not filed a return for the applicable 2008 NOL taxable year*.

(1) A taxpayer within the scope of this revenue procedure that has not filed a return for the taxable year in which the applicable 2008 NOL arises makes the election under § 172(b)(1)(H) by attaching a statement to the taxpayer's federal income tax return for the taxable year in which the applicable 2008 NOL arises. The statement must—

(a) Clearly state that the taxpayer is electing to apply §172(b)(1)(H);

(b) Describe the length of the NOL carryback period elected by the taxpayer (3, 4, or 5 years); and

(c) If applicable, state that the taxpayer is electing to apply § 172(b)(1)(H) to the taxpayer's taxable year that begins in 2008.

(2) The taxpayer's return must be filed by the due date (including extensions of time) for filing the taxpayer's return for the taxable year of the applicable 2008 NOL. In the case of a late election, relief may be available under § 301.9100–2(b) of the Procedure and Administration Regulations. Notwithstanding this due date, an election to apply § 172(b)(1)(H) to an applicable 2008 NOL for a taxable year ending before February 17, 2009, will be treated as timely if the election is filed on or before April 17, 2009.

.02 *Eligible small businesses that have filed a return for the applicable 2008 NOL taxable year and did not elect to forgo the NOL carryback period.*

(1) A taxpayer within the scope of this revenue procedure that previously filed a return for the applicable 2008 NOL taxable year and did not elect to forgo the NOL carryback period under § 172(b)(3) makes the election under § 172(b)(1)(H) as follows:

(a) *What to file.*

(i) The taxpayer must file the appropriate form including a statement of the carryback period the taxpayer elects (3, 4, or 5 years). The appropriate form is—

(A) For corporations, Form 1139, *Corporation Application for Tentative Refund*, or Form 1120X, *Amended U.S. Corporation Income Tax Return*;

(B) For individuals, Form 1045, *Application for Tentative Refund*, or Form 1040X, *Amended U.S. Individual Income Tax Return*; and

(C) For estates or trusts, Form 1045, or amended Form 1041, *U.S. Income Tax Return for Estates and Trusts*.

(ii) A taxpayer that makes the election by filing an amended return must file the return for the earliest taxable year to which the taxpayer is carrying back the applicable 2008 NOL. The taxpayer should not file an amended return for the applicable 2008 NOL taxable year.

(b) *Labels*. The taxpayer should type or print across the top of the appropriate form "2008 NOL Carryback Election Pursuant to Rev. Proc. 2009–19." If the taxpayer previously filed an application for a tentative carryback adjustment or an amended return applying an NOL carryback period that did not qualify for the election under § 172(b)(1)(H), the taxpayer also should type or print across the top of the appropriate form "Amended NOL Carryback Election Pursuant to Rev. Proc. 2009–19." In addition to the labels listed above, a taxpayer that elects pursuant to § 172(b)(1)(H)(ii)(II) to treat its NOL arising in a taxable year beginning in 2008 as the applicable 2008 NOL, must include a statement that the taxpayer is electing to apply § 172(b)(1)(H) to a taxable year that begins in 2008.

(c) *When to file*. The taxpayer must file the appropriate form by the later of the date that is 6 months after the due date (excluding extensions) for filing the taxpayer's return for the taxable year of the applicable 2008 NOL, or on or before April 17, 2009.

(2) If a taxpayer makes the election under § 172(b)(1)(H) by filing an applicable form that amends a prior refund claim, the amendment also will apply to a carryback of any alternative tax NOL for the same taxable year. In the case of an amended application for a tentative carryback adjustment, the 90-day period described in § 6411(b) will begin on the date the amended application is filed.

.03 *Eligible small businesses that elected to forgo the NOL carryback period under § 172(b)(3)*. A taxpayer within the scope of this revenue procedure that previously elected under § 172(b)(3) to forgo the carryback period for an applicable 2008 NOL for a taxable year ending before February 17, 2009, may revoke that election and make the election under § 172(b)(1)(H). Any revocation of the election to forgo the NOL carryback period also will apply to a carryback of any alternative tax NOL for the same taxable year. The taxpayer makes the revocation and election by following the procedures of section 4.02 of this revenue procedure. However, instead of the label required in section 4.02(1)(b) of this revenue procedure, the taxpayer should type or print across the top of the appropriate form "2008 NOL Carryback Election and Revocation of NOL Carryback Waiver Pursuant to Rev. Proc. 2009–19." The taxpayer must file the revocation and new election under § 172(b)(1)(H) on or before April 17, 2009.

.04 *Partnerships, S corporations, and sole proprietorships*.

(1) If the taxpayer is a partner in a partnership that qualifies as an ESB, the taxpayer may make the § 172(b)(1)(H) election for its distributive share of the qualifying ESB partnership income, gain, loss, and deduction that is both allocable to the taxpayer under § 704 and allowed in calculating the taxpayer's applicable 2008 NOL.

(2) If the taxpayer is a shareholder in an S corporation that qualifies as an ESB, the taxpayer may make the § 172(b)(1)(H) election for its *pro rata* share of the qualifying ESB S corporation income, gain, loss, and deduction under § 1366 that is allowed in calculating the shareholder's applicable 2008 NOL.

(3) If the taxpayer is an owner of a sole proprietorship that qualifies as an ESB, the taxpayer may make the § 172(b)(1)(H)

election for the qualifying ESB sole proprietorship income, gain, loss, and deduction that is allowed in calculating the taxpayer's applicable 2008 NOL.

(4) In determining whether a partnership, S corporation, or sole proprietorship qualifies as an ESB, the gross receipts test applies at the partnership, corporate, or sole proprietorship level. The aggregation rules of § 448(c)(2) apply to determine whether the partnership, S corporation, or sole proprietorship meets the gross receipts test of § 448(c).

(5) The amount of the taxpayer's applicable 2008 NOL that the taxpayer may carry back under §172(b)(1)(H) is limited to the lesser of:

(a) The taxpayer's items of income, gain, loss or deduction that are allowed in calculating the taxpayer's applicable 2008 NOL and are from one or more partnerships, S corporations or sole proprietorships that qualify as ESBs, or

(b) The taxpayer's applicable 2008 NOL.

(6) *Examples*.

(a) *Example 1*. Partnerships A, B, and C have average annual gross receipts of $10 million, $12 million, and $14 million, respectively. Partner T owns a 40% interest in each partnership. None of the partnerships is required to be aggregated with any other entity for purposes of the aggregation rules of § 448(c)(2). Subject to the limitations in section 4.04(5) of this revenue procedure, Partner T may apply its election under § 172(b)(1)(H) to the portion of its applicable 2008 NOL attributable to its distributive share of the income, gain, loss, and deduction of each of Partnerships A, B, and C.

(b) *Example 2*. The facts are the same as in *Example 1*, except that Partnerships A and B are under common control within the meaning of § 52(b)(1). Accordingly, Partnerships A and B are treated as one person under the aggregation rules of § 448(c)(2). Because the aggregated average annual gross receipts of Partnerships A and B exceed $15 million, Partnerships A and B do not qualify as ESBs. Partner T may not apply its election under § 172(b)(1)(H) to the portion of its applicable 2008 NOL attributable to its distributive share of the income, gain, loss, and deduction of Partnerships A and B. However, subject to the limitations in section 4.04(5) of this revenue procedure, Partner T may apply its election under § 172(b)(1)(H) to the portion of its applicable 2008 NOL attributable to its distributive share of income, gain, loss, and deduction of Partnership C.

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective for NOLs arising in taxable years ending after December 31, 2007.

SECTION 6. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under the following control numbers: 1545–0074 Form 1040 (*U.S. Individual Income Tax Return*) and Form 1040X (*Amended U.S. Individual Income Tax Return*); 1545–0123 Form 1120 (*U.S. Corporation Income Tax Return*); 1545–0132 Form 1120X (*Amended U.S. Corporation Income Tax Return*); 1545–0092 Form 1041 (*U.S. Income Tax Return for Estates and Trusts*); 1545–0098 Form 1045 (*Application for Tentative Refund*); 1545–0582 Form 1139 (*Corporation Application for Tentative Refund*). For further information, please refer to the Paperwork Reduction Act statements accompanying these forms.

DRAFTING INFORMATION

The principal author of this revenue procedure is Seoyeon Park of the Office of the Associate Chief Counsel (Income Tax and Accounting). For further information regarding this notice, contact Ms. Park at (202) 622–4960 (not a toll-free call).

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26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.
(Also Part I, §§ 165; 1.165–8(c).)

Rev. Proc. 2009–20

SECTION 1. PURPOSE

This revenue procedure provides an optional safe harbor treatment for taxpayers that experienced losses in certain investment arrangements discovered to be criminally fraudulent. This revenue procedure also describes how the Internal Revenue Service will treat a return that claims a deduction for such a loss and does not use the safe harbor treatment described in this revenue procedure.

SECTION 2. BACKGROUND

.01 The Service and Treasury Department are aware of investment arrangements that have been discovered to be fraudulent, resulting in significant losses to taxpayers. These arrangements often take the form of so-called "Ponzi" schemes, in which the party perpetrating the fraud receives cash or property from investors, purports to earn income for the investors, and reports to the investors income amounts that are wholly or partially fictitious. Payments, if any, of purported income or principal to investors are made from cash or property that other investors invested in the fraudulent arrangement. The party perpetrating the fraud criminally appropriates some or all of the investors' cash or property.

.02 Rev. Rul. 2009–9, 2009–14 I.R.B. 735 (April 6, 2009), describes the proper income tax treatment for losses resulting from these Ponzi schemes.

.03 The Service and Treasury Department recognize that whether and when investors meet the requirements for claiming a theft loss for an investment in a Ponzi scheme are highly factual determinations that often cannot be made by taxpayers with certainty in the year the loss is discovered.

.04 In view of the number of investment arrangements recently discovered to be fraudulent and the extent of the potential losses, this revenue procedure provides an optional safe harbor under which qualified investors (as defined in § 4.03 of this revenue procedure) may treat a loss as a theft loss deduction when certain conditions are met. This treatment provides qualified investors with a uniform manner for determining their theft losses. In addition, this treatment avoids potentially difficult problems of proof in determining how much income reported in prior years was fictitious or a return of capital, and alleviates compliance and administrative burdens on both taxpayers and the Service.

SECTION 3. SCOPE

The safe harbor procedures of this revenue procedure apply to taxpayers that are qualified investors within the meaning of section 4.03 of this revenue procedure.

SECTION 4. DEFINITIONS

The following definitions apply solely for purposes of this revenue procedure.