

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9490]

RIN 1545-BJ12

Extended Carryback of Losses to or from a Consolidated Group

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations under section 1502 that affect corporations filing consolidated returns. These regulations contain rules regarding the implementation of section 172(b)(1)(H) within a consolidated group. These regulations also permit certain acquiring consolidated groups to elect to waive all or a portion of the pre-acquisition carryback period pursuant to section 172(b)(1)(H) for specific losses attributable to certain acquired members. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Applicability Date: For date of applicability, see §1.1502-21T(h)(9)(i).

The applicability of these regulations will expire on June 21, 2013.

FOR FURTHER INFORMATION CONTACT: Grid Glycer, (202) 622-7930 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545-2171. Responses to this collection of information are required to obtain a benefit.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**.

Books or records relating to the collection of information must be retained as long as their contents may become material in the administration

of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Section 172(b)(1) provides, in part, that a net operating loss for any taxable year must generally be carried back to each of the two taxable years preceding the taxable year of the loss. Section 172(b)(3) provides that any taxpayer entitled to a carryback period pursuant to section 172(b)(1) may elect to relinquish the carryback period with respect to a loss for any taxable year. An election to relinquish the carryback period pursuant to section 172(b)(3) must be made by the due date (including extensions) of the taxpayer's return for the taxable year of the loss and in the manner prescribed by the Secretary. Normally, this election is irrevocable. A consolidated group is permitted to make this election for its entire consolidated net operating loss (CNOL) pursuant to the procedures provided in §1.1502-21(b)(3)(i). In addition, §1.1502-21(b)(3)(ii)(B) permits an acquiring consolidated group to make a separate election to waive, for all taxable years of the acquiring group, and solely with respect to all consolidated net operating losses attributable to certain acquired members, the portion of the carryback period for which the acquired corporations were members of another group. This election is irrevocable and must be made by the due date (including extensions) of the acquiring group for the taxable year of the acquisition.

Section 172(b)(1)(H) was amended by the Worker, Homeownership, and Business Assistance Act of 2009, which was signed by the President on

November 6, 2009 (Public Law 111-92, 123 Stat. 2984) (the Act). As amended, section 172(b)(1)(H) allows taxpayers to elect to extend the standard two-year carryback period for an additional period of up to three years (Extended Carryback Period) for a net operating loss arising in a single taxable year ending after December 31, 2007, and beginning before January 1, 2010 (Applicable NOL). However, section 172(b)(1)(H) does not apply to any taxpayer if that taxpayer, or any member of the taxpayer's affiliated group (within the meaning of the Act), is described in section 13(f) of the Act.

As described in Revenue Procedure 2009-52, 2009-49 IRB 744, section 13(e)(4) of the Act permits any taxpayer that previously elected pursuant to section 172(b)(3) to forgo the carryback period for a loss arising in a taxable year ending before the date of enactment of the Act (November 6, 2009) to revoke such election in order to take advantage of the Extended Carryback Period, provided that the taxpayer revokes the election before the due date (including extensions) for filing the return for the taxpayer's last taxable year beginning in 2009. Revenue Procedure 2009-52 also permits a taxpayer that filed an application for a tentative carryback adjustment or an amended return using the two-year carryback period for an Applicable NOL to file certain forms to claim the Extended Carryback Period provided pursuant to section 172(b)(1)(H). Revenue Procedure 2009-52 further clarifies that a taxpayer includes an affiliated group filing a consolidated return, an Applicable NOL includes a CNOL, and the section 172(b)(1)(H) election is made by the common parent of the group.

Explanation of Provisions

1. Extended Carryback Period election and computation of limitation for fifth preceding consolidated return year

a. Extended Carryback Period election and revocation of prior elections

These temporary regulations provide that a consolidated group may elect to carry back a consolidated net operating loss arising in a consolidated return year ending after December 31, 2007, or beginning before January 1, 2010 (Applicable CNOL) to the Extended Carryback Period. In addition, these regulations provide that a group may revoke a prior election pursuant to §1.1502-21(b)(3)(i) in order to make an election pursuant to section 172(b)(1)(H). See section 4.01(3) and (4) of Rev. Proc. 2009-52 for the manner in which a group makes the election pursuant to section 172(b)(1)(H) and revokes a prior election pursuant to §1.1502-21(b)(3)(i).

If a member (Electing Member) of a consolidated group elects an Extended Carryback Period pursuant to section 172(b)(1)(H) with regard to an Applicable NOL arising in a separate return year ending before the Electing Member's acquisition by a consolidated group, the election will not disqualify the acquiring group from making an otherwise available election pursuant to section 172(b)(1)(H) with regard to an Applicable CNOL for a consolidated return year.

b. Implementation of the Extended Carryback Period with respect to a consolidated return year

As contemplated by section 172(b)(1)(H), the designated taxable year within the Extended Carryback Period may be the fifth taxable year preceding the year of the loss (Five-Year Carryback). A taxpayer may also choose the third or fourth preceding taxable year for the Extended Carryback Period. However, section 172(b)(1)(H)(iv) provides that the amount of an Applicable NOL that may be the subject of a Five-Year Carryback shall not exceed 50 percent of taxpayer's taxable income (computed without regard to the NOL deduction attributable to the loss year or any taxable year thereafter) for such fifth preceding taxable year.

These temporary regulations provide that, if a group elects pursuant to section 172(b)(1)(H) to make a Five-Year Carryback into a consolidated return year of the same group, for purposes of computing the group's 50 percent limitation, taxpayer's taxable income means the consolidated taxable income (CTI) (computed without regard to any CNOL deduction attributable to the loss year or any equivalent taxable year as defined in §1.1502-21(b)(2)(iii), or any taxable year thereafter) of the group in its fifth consolidated return year preceding the year of the loss for which the group has elected the Five-Year Carryback.

These temporary regulations also provide that a limitation applies to each year of a consolidated group that absorbs a Five-Year Carryback, even if the group itself has not made a section 172(b)(1)(H) election. For example, the annual limitation provided in these temporary regulations may limit the amount of loss absorbed by the group where such loss represents a Five-

Year Carryback from separate return years of one or more former members. See also §1.1502-21(c) (SRLY limitation).

2. Elections to waive the entire carryback period or the Extended Carryback Period for pre-acquisition consolidated return years of acquired members

Given the enactment of section 172(b)(1)(H), and taxpayers' ability to revoke prior elections pursuant to section 172(b)(3) in order to take advantage of the Extended Carryback Period, the IRS and the Treasury Department believe that it is appropriate to afford consolidated groups an opportunity to waive the entire carryback period or the Extended Carryback Period with regard to the portion of the Applicable CNOL that is allocable to certain acquired members. The carryback period may be waived only to the extent of years preceding the acquisition during which the acquired members were included in another consolidated group. Further, this election is available only to groups that did not make an election described in §1.1502-21(b)(3)(ii)(B) to waive all carrybacks with respect to the acquired members. In this regard, the regulations in this Treasury decision add §1.1502-21T(b)(3)(ii)(C), which sets forth two elections. These temporary regulations accordingly permit a consolidated group to make a carryback waiver that, as to an Applicable CNOL, is similar to the waiver described in §1.1502-21(b)(3)(ii)(B), even though the latter waiver election would otherwise be time-barred.

Each of the two carryback waiver elections added by this temporary regulation applies only if (i) the acquiring consolidated group makes a section

172(b)(1)(H) election; and (ii) a portion of the Applicable CNOL is attributable to a member acquired from another group. Pursuant to the first election, an acquiring group may waive the part of the five-year carryback period during which the member was a member of another group. With regard to the apportioned loss, this election may result in a waiver of the entire five-year carryback period to the taxable years prior to the acquisition. However, the waiver is only available where none of such loss has previously been carried back to a taxable year of a group of which the acquired member was previously a member.

Pursuant to the second election, an acquiring group may waive the part of the Extended Carryback Period during which the member was a member of another group. Thus, with regard to the apportioned loss, this second election permits a waiver of the third, fourth, and fifth carryback years only, to the extent that such years are prior to the acquisition. Moreover, this election is available even where such loss has been carried back to the first or second carryback years of the acquired member that are pre-acquisition years. However, this second election is available only where none of the loss has been carried back to a taxable year of a group of which the acquired member was previously a member which is prior to the second taxable year preceding the taxable year of the loss. Depending upon the facts of a particular group, it is possible that either of the two carryback waiver elections added by this Treasury decision could produce the same result.

Unlike the election pursuant to §1.1502-21(b)(3)(ii)(B), the elections

provided in these regulations apply only to a group's Applicable CNOL with regard to which the taxpayer makes an election pursuant to section 172(b)(1)(H) (that is, a single taxable year). An election that relates to an Applicable CNOL must be made by the due date (including extension of time) for filing the return for the taxpayer's last taxable year beginning in 2009.

If the acquiring consolidated group files a valid election described in §1.1502-21(b)(3)(ii)(B) with respect to the acquisition of a member, no election pursuant to §1.1502-21T(b)(3)(ii)(C) needs to be (nor should be) filed to ensure that an Applicable CNOL is not carried back to the relevant pre-acquisition years of the acquired member.

Special Analyses

These regulations are necessary to provide taxpayers with immediate elective relief pursuant to section 172(b)(1)(H), which was amended as part of the Act. These regulations provide rules necessary to implement section 172(b)(1)(H) within a consolidated group. These regulations further permit certain acquiring consolidated groups to elect to waive the standard carryback period or Extended Carryback Period with respect to certain acquired members. The regulations apply to NOLs arising in taxable years ending after December 31, 2007, and beginning before January 1, 2010. Based on these considerations, it has been determined that these regulations will provide taxpayers with the necessary guidance and authority to ensure equitable administration of the tax laws. Because of the need for immediate guidance, notice and public procedure are impracticable and contrary to the

public interest pursuant to 5 U.S.C. 553(b)(3)(B) and a delayed effective date is not required pursuant to 5 U.S.C. 553(d)(1) and (3).

Further, it has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6) refer to the Special Analyses section of the preamble to the cross-reference notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Grid Glycer, Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.1502-21 is amended by adding paragraphs (b)(3)(v) and (h)(9) to read as follows:

§1.1502-21 Net operating losses.

* * * * *

(b) * * *

(3) * * *

(v) [Reserved]. For further guidance, see §1.1502-21T(b)(3)(v).

* * * * *

(h) * * *

(9) [Reserved]. For further guidance, see §1.1502-21T(h)(9).

Par. 3. Section 1.1502-21T is revised to read as follows:

§1.1502-21T Net operating losses (temporary).

(a) through (b)(3)(ii)(B) [Reserved]. For further guidance, see §1.1502-21(a) through (b)(3)(ii)(B).

(C) Partial waiver of carryback period for an applicable consolidated net operating loss--(1) Application. The acquiring group may make an election described in paragraph (b)(3)(ii)(C)(2) or (b)(3)(ii)(C)(3) of this section with respect to an acquired member or members only if it did not file a valid

election described in §1.1502-21(b)(3)(ii)(B) with respect to such acquired member or members on or before **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

(2) Partial waiver of entire pre-acquisition carryback period. If one or more members of a consolidated group become members of another consolidated group, then, with respect to the consolidated net operating loss arising in a taxable year ending after December 31, 2007, and beginning before January 1, 2010 (Applicable CNOL) for which the group has made an election pursuant to section 172(b)(1)(H), the acquiring group may make an irrevocable election to relinquish, for the part of the Applicable CNOL attributable to such member, the portion of the carryback period during which the corporation was a member of another group. This election could thus operate to relinquish carryback for up to five taxable years, including the Extended Carryback Period (as defined in paragraph (b)(3)(v) of this section). However, any other corporation joining the acquiring group that was affiliated with the member immediately before it joined the acquiring group must also be included in the waiver, and the conditions of this paragraph (b)(3)(ii)(C)(2) must be satisfied. The acquiring group cannot make the election described in this paragraph (b)(3)(ii)(C)(2) with respect to any particular portion of an Applicable CNOL if any carryback is claimed, as provided in paragraph (b)(3)(ii)(C)(4) of this section, with respect to any such loss on a return or other filing by a group of which the acquired member was previously a member and such claim is filed on or before the date the election described in

this paragraph (b)(3)(ii)(C)(2) is filed. The election must be made in a separate statement entitled "THIS IS AN ELECTION PURSUANT TO §1.1502-21T(b)(3)(ii)(C)(2) TO WAIVE THE PRE-[insert the first day of the first taxable year for which the member (or members) was a member of the acquiring group] CARRYBACK PERIOD FOR THE CNOL ATTRIBUTABLE TO THE [insert taxable year of loss] TAXABLE YEAR OF [insert names and employer identification numbers of members]." Such statement must be filed as provided in paragraph (b)(3)(ii)(C)(5) of this section.

(3) Partial waiver of pre-acquisition Extended Carryback Period. If one or more members of a consolidated group become members of another consolidated group, then, with respect to the Applicable CNOL for which the acquiring group has made an election pursuant to section 172(b)(1)(H), the acquiring group may make an irrevocable election to relinquish, for the part of the Applicable CNOL attributable to such member, the portion of the Extended Carryback Period (as defined in paragraph (b)(3)(v) of this section) during which the corporation was a member of another group. This election could thus operate to relinquish carryback for up to three taxable years. However, any other corporation joining the acquiring group that was affiliated with the member immediately before it joined the acquiring group must also be included in the waiver, and the conditions of this paragraph (b)(3)(ii)(C)(3) must be satisfied. The acquiring group cannot make the election described in this paragraph (b)(3)(ii)(C)(3) with respect to any particular portion of an Applicable CNOL if a carryback to one or more taxable years that are prior to

the taxable year that is two taxable years preceding the taxable year of the Applicable CNOL is claimed, as provided in paragraph (b)(3)(ii)(C)(4) of this section, with respect to any such loss on a return or other filing by a group of which the acquired member was previously a member, and such claim is filed on or before the date the election described in this paragraph (b)(3)(ii)(C)(3) is filed. The election must be made in a separate statement entitled "THIS IS AN ELECTION PURSUANT TO §1.1502-21T(b)(3)(ii)(C)(3) TO WAIVE THE PRE-[insert the first day of the first taxable year for which the member (or members) was a member of the acquiring group] EXTENDED CARRYBACK PERIOD FOR THE CNOL ATTRIBUTABLE TO THE [insert taxable year of losses] TAXABLE YEAR OF [insert names and employer identification numbers of members]." Such statement must be filed as provided in paragraph (b)(3)(ii)(C)(5) of this section.

(4) Claim for a carryback. For purposes of paragraphs (b)(3)(ii)(C)(2) and (b)(3)(ii)(C)(3) of this section, a carryback is claimed with respect to a net operating loss if there is a claim for refund, an amended return, an application for a tentative carryback adjustment, or any other filing that claims the benefit of the NOL or CNOL in a taxable year prior to the taxable year of the loss, whether or not subsequently revoked in favor of a claim based on an Extended Carryback Period provided under section 172(b)(1)(H).

(5) Time and manner for filing statement. A statement described in paragraph (b)(3)(ii)(C)(2) or (b)(3)(ii)(C)(3) of this section that relates to an

Applicable CNOL shall be made by the due date (including extension of time) for filing the return for the taxpayer's last taxable year beginning in 2009.

(6) Example. (i) Waiver in case of pre-consolidation separate return years. T was a separate corporation that was not part of a consolidated group, until December 31, 2004, when it was acquired by the X Group. On December 31, 2007, the X Group sold all of the stock of T to the P Group. P did not make the election described in §1.1502-21(b)(3)(ii)(B) to relinquish, with respect to all CNOLs attributable to T, the portion of the carryback period for which T was a member of the X Group. In 2008, the P Group sustained a \$1,000 CNOL, \$600 of which was attributable to T under §1.1502-21(b)(2)(iv)(A). P elected a Five-Year Carryback (as defined in paragraph (b)(3)(v) of this section) pursuant to section 172(b)(1)(H) with regard to the P Group's 2008 CNOL, and the P Group elected, pursuant to paragraph (b)(3)(ii)(C)(2) of this section, to waive the portion of the carryback period during which T was included in any other consolidated group. T's fifth and fourth taxable years preceding the year of the loss were its 2003 and 2004 separate return years. Due to the P Group's election pursuant to paragraph (b)(3)(ii)(C)(2) of this section, T's allocable portion of the P Group's 2008 CNOL will not be carried back to the years for which it was a member of the X Group. However, T's allocable portion of the P Group's 2008 CNOL will be carried back to T's non-consolidated taxable years (2003 and 2004), subject to the limitation provided in section 172(b)(1)(H)(iv).

(ii) Split-waiver election made. The facts are the same as in paragraph (i) except that the group made the election described in §1.1502-21(b)(3)(ii)(B) with regard to its acquisition of T in 2007. Due to the P Group's election pursuant to §1.1502-21(b)(3)(ii)(B), T's allocable portion of the P Group's 2008 CNOL will not be carried back to the years for which T was a member of the X Group. However, T's allocable portion of the P Group's 2008 CNOL will be carried back to T's non-consolidated taxable years (2003 and 2004), subject to the limitation provided in section 172(b)(1)(H)(iv).

(b)(3)(iii) and (b)(3)(iv) [Reserved]. For further guidance, see §1.1502-21(b)(3)(iii) and (b)(3)(iv).

(v) Extended Carryback Period under section 172(b)(1)(H). Section 172(b)(1)(H) allows a taxpayer to elect to carry back a single net operating loss arising in a taxable year ending after December 31, 2007, and beginning before January 1, 2010 (Applicable NOL) to its third, fourth, or fifth taxable

year preceding the taxable year of the loss (Extended Carryback Period). As contemplated by section 172(b)(1)(H), the designated taxable year within the Extended Carryback Period may be the fifth taxable year preceding the year of the loss (Five-Year Carryback), and section 172(b)(1)(H)(iv) limits the amount of the Applicable NOL that may be carried back to 50 percent of the taxpayer's taxable income (computed without regard to any NOL deduction attributable to the loss year or any taxable year thereafter) for such fifth preceding taxable year. This paragraph (b)(3)(v) provides rules for computing the 50 percent limitation under section 172(b)(1)(H)(iv) where a Five-Year Carryback is made to a consolidated return year from any consolidated return year or separate return year.

(A) Election--(1) In general. Except as otherwise provided in this section, a consolidated group may elect an Extended Carryback Period pursuant to section 172(b)(1)(H) with regard to a consolidated net operating loss arising in a taxable year ending after December 31, 2007 and beginning before January 1, 2010 (Applicable CNOL). However, no election may be made under this paragraph for a taxpayer described in section 13(f) of the Worker, Homeownership, and Business Assistance Act of 2009, Public Law 111-92, 123 Stat. 2984 (November 6, 2009). The election pursuant to section 172(b)(1)(H) applies to the entire Applicable CNOL, except as otherwise provided in paragraph (b)(3)(ii)(C) of this section or in this paragraph (b)(3)(v). See also paragraph (c) of this section (SRLY limitation).

(2) Revoking a previous carryback waiver. A consolidated group may revoke a prior election pursuant to §1.1502-21(b)(3)(i) to relinquish the entire carryback period with respect to an Applicable CNOL, but only if the group makes the election pursuant to section 172(b)(1)(H) with regard to such Applicable CNOL.

(3) Pre-acquisition electing member. If a member (Electing Member) of a consolidated group makes an Extended Carryback Period election pursuant to section 172(b)(1)(H) with regard to a loss from a separate return year ending before the Electing Member's inclusion in a consolidated group, the election will not disqualify the acquiring group from making an otherwise available election pursuant to section 172(b)(1)(H) with regard to an Applicable CNOL incurred in a consolidated return year that includes the Electing Member.

(B) Taxpayer's taxable income. For purposes of computing the limitation under section 172(b)(1)(H)(iv) on a Five-Year Carryback to any consolidated return year from any consolidated return year or separate return year, taxpayer's taxable income as used in section 172(b)(1)(H)(iv)(I) means consolidated taxable income (CTI) (computed without regard to any CNOL deduction attributable to Five-Year Carrybacks to such year or any NOL from any member's equivalent taxable year as defined in §1.1502-21(b)(2)(iii), or any taxable year thereafter) in the consolidated return year that is the fifth taxable year preceding the year of the loss.

(C) Limitation on Five-Year Carrybacks to a consolidated group.--(1)

Annual Limitation. The aggregate amount of Five-Year Carrybacks to any consolidated return year may not exceed 50 percent of the CTI for that year (computed without regard to any CNOL deduction attributable to Five-Year Carrybacks to such year or any NOL from any member's equivalent taxable year as defined in §1.1502-21(b)(2)(iii), or attributable to any taxable year thereafter) (Annual Limitation).

(2) Pro rata absorption of limited and non-limited losses. All Five-Year Carrybacks and other net operating losses from years ending on the same date that are available to offset CTI in the same year are absorbed on a pro rata basis. See §1.1502-21(b)(1).

(D) Election by small business. This paragraph (b)(3)(v) does not apply to any loss of an eligible small business as defined in section 172(b)(1)(H)(v)(II) with respect to any election made pursuant to section 172(b)(1)(H) as in effect on the day before the date of the enactment of the Worker, Homeownership, and Business Assistance Act of 2009.

(E) Examples. The rules of this paragraph (b)(3)(v) are illustrated by the following examples. For purposes of the examples, all affiliated groups file consolidated returns, all corporations are includible corporations that have calendar taxable years, the facts set forth the only relevant corporate activity, and all transactions are with unrelated parties.

Example 1. Computation and Absorption of Five-Year Carrybacks. (i) Facts. P is the common parent of the P Group. On June 30, 2006, P acquired all of the stock of T from X, the common parent of the X Group. The X Group has been in existence since 1996. P did not make the election

described in §1.1502-21(b)(3)(ii)(B) to relinquish, with respect to all CNOLs attributable to T, the portion of the carryback period for which T was a member of the X Group. In 2008, the P Group sustained a \$1,000 CNOL, \$600 of which was attributable to T under §1.1502-21(b)(2)(iv)(A). P elected a Five-Year Carryback pursuant to section 172(b)(1)(H) with regard to the P Group's 2008 CNOL. P did not make an election pursuant to paragraph (b)(3)(ii)(C) of this section to waive any portion of the period during which T was included in the X Group. T's fifth taxable year preceding the year of the loss was the X Group's 2004 consolidated return year. For 2004, T's separate return limitation year (SRLY) limitation for losses carried into the X Group was \$400. The X Group's CTI for 2004 is \$200. The X Group did not make a Five-Year Carryback election for a CNOL from its 2008 or 2009 taxable year. There are no other NOL carrybacks into the X Group's 2003 or 2004 consolidated taxable year.

(ii) Five-Year Carryback from separate return year. Pursuant to paragraph (b)(3)(v)(C)(1) of this section, the amount of T's apportioned loss that is eligible for Five-Year Carryback is limited to 50 percent of the X Group's CTI for 2004, or \$100 ($\200×50 percent). Therefore, \$100 of T's apportioned loss will be carried into the X Group's 2004 consolidated return year. In addition, T's 2008 loss is subject to the SRLY limitation of \$400 with respect to the X Group. Thus, the amount of T's portion of the P Group's 2008 CNOL that may offset the X Group's 2004 CTI is \$100 (the lesser of \$400 (T's SRLY limitation) or \$100 (the amount of T's Five-Year Carryback)).

(iii) Pro rata absorption of limited and non-limited losses within a single consolidated return year. The facts are the same as in paragraph (i), except that the X Group sustained a \$750 CNOL in 2008, which X elected to carry back four years to its 2004 consolidated return year (no Five-Year Carryback). Further, the X Group had CTI of \$500 in 2004. Therefore, the X Group and the P Group both carry back CNOLs from years ending December 31, 2008, although only the P Group's CNOL (including the portion allocable to T) constitutes a Five-Year Carryback. The Annual Limitation on Five-Year Carrybacks will be \$250 [$\500×50 percent]. The \$750 CNOL carryback within the X Group is subject to no limitation. Under §1.1502-21(b)(1), because the 2008 CNOL of the X Group and the 2008 SRLY loss of T are losses from years ending on the same date and are available to offset CTI in the same year, the two losses offset the X Group's \$500 CTI on a pro rata basis. Accordingly, \$375 of the X's Group's 2008 CNOL [$\$500 \times \$750 / (\$750 + \$250)$] and \$125 of T's portion of the P Group's 2008 CNOL [$\$500 \times \$250 / (\$750 + \$250)$] offset the X Group's 2004 CTI.

Example 2. Multiple carryback years. (i) Facts. On January 1, 2004, Individual A formed X, which formed corporations S and T, and X elected to file a consolidated Federal income tax return. For its 2004 consolidated taxable year, the X Group's CTI was \$1,100. For its 2005 consolidated

taxable year, the X Group's CTI was \$1,000. On June 30, 2007, the X Group sold all of the S stock to the Y Group and sold all of the T stock to the Z Group. The X Group terminated in 2007. Neither Y nor Z made the election described in §1.1502-21(b)(3)(ii)(B) to relinquish, with respect to all CNOLs attributable to S and T, respectively, the portion of the carryback period for which S and T were members of the X Group. In 2008, the Y Group sustained an \$800 CNOL, \$400 of which was attributable to S under §1.1502-21(b)(2)(iv)(A). Y elected a Five-Year Carryback with regard to the Y Group's 2008 CNOL pursuant to section 172(b)(1)(H). Y did not make an election pursuant to paragraph (b)(3)(ii)(C) of this section to waive any portion of the period during which S was included in the X Group. In 2009, the Z Group sustained a \$1,000 CNOL, \$600 of which was attributable to T under §1.1502-21(b)(2)(iv)(A). Z elected a Five-Year Carryback with regard to the Z Group's 2009 CNOL pursuant to section 172(b)(1)(H). Z did not make an election pursuant to paragraph (b)(3)(ii)(C) of this section to waive any portion of the Extended Carryback Period during which T was included in the X Group.

(ii) Analysis. The \$400 of Y Group's 2008 CNOL that is apportioned to S is carried back as a separate return year Five-Year Carryback to the X Group's 2004 consolidated return year. The \$600 of Z Group's 2009 CNOL that is apportioned to T is also a separate return year Five-Year Carryback to the X Group's 2005 consolidated return year. The Annual Limitation on Five-Year Carryback to the X Group's 2004 consolidated return year computed under paragraph (b)(3)(v)(C)(1) of this section equals \$550 (\$1,100 of CTI x 50 percent). Because S is making the sole Five-Year Carryback to the X Group's 2004 consolidated return year, S will make a Five-Year Carryback of the full \$550. Similarly, the Annual Limitation for Five-Year Carryback to the X Group's 2005 consolidated return year computed under paragraph (b)(3)(v)(C)(1) of this section equals \$500 (\$1,000 of CTI x 50 percent). Because T is making the sole Five-Year Carryback to the X Group's 2005 consolidated return year, T will make a Five-Year Carryback of the full \$500. The SRLY limitations for S and T, respectively, may limit the absorption of the Five-Year Carrybacks within the X Group.

Example 3. Pre-acquisition election by T. P is the common parent of the P Group. On December 31, 2008, P acquired all of the stock of T from X, the common parent of the X Group. T had been a member of the X Group since 1999. P did not make the election described in §1.1502-21(b)(3)(ii)(B) to relinquish, with respect to all CNOLs attributable to T, the portion of the carryback period for which T was a member of the X Group. Pursuant to section 172(b)(1)(H), the X Group elected to make a Five-Year Carryback of its 2008 CNOL back to 2003. A portion of this CNOL is attributable to T pursuant to §1.1502-21(b)(2)(iv)(A). In 2009, the P Group incurred a CNOL of \$1,000, \$600 of which is attributable to T pursuant to §1.1502-21(b)(2)(iv)(A). Pursuant to section 172(b)(1)(H), the P Group elected a Five-

Year Carryback with regard to its 2009 CNOL. P did not make the election pursuant to paragraph (b)(3)(ii)(C) of this section to waive any portion of the period during which T was included in the X Group. The Five-Year Carryback election by the X Group with respect to its 2008 CNOL (which includes the portion of the CNOL attributable to T) does not disqualify the P Group from electing a Five-Year Carryback with regard to its 2009 CNOL. Therefore, the P Group may carry back its CNOL, including the portion attributable to T, in accordance with §1.1502-21 and the rules of this section.

(c) through (h)(8) [Reserved]. For further guidance, see §1.1502-21(c) through (h)(8).

(9) Section 172(b)(1)(H)--(i) Applicability date. This section applies to any consolidated Federal income tax return due (without extensions) after

[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER], if such return was not filed on or before such date.

However, a consolidated group may apply this section to any consolidated Federal income tax return that is not described in the preceding sentence.

(ii) Expiration date. The applicability of this section will expire on June 21, 2013.

PART 602--OMB CONTROL NUMBERS UNDER THE PAPERWORK
REDUCTION ACT

Par. 4. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 5. In §602.101, paragraph (b) the entry for §1.1502-21T is revised to read as follows:

§602.101 OMB Control Numbers.

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(b) * * *

<u>CFR part or section where Identified and described</u>	<u>Current OMB control No.</u>
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1.1502-21T.....	1545-2171
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Steven T. Miller
Deputy Commissioner for Services and Enforcement.

Approved: June 16, 2010

Michael F. Mundaca
Assistant Secretary of the Treasury (Tax Policy).

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