Clearinghouse Rule 12-006

PROPOSED ORDER OF THE DEPARTMENT OF REVENUE REPEALING, RENUMBERING, AMENDING, REPEALING AND RECREATING, AND CREATING RULES

The Wisconsin Department of Revenue proposes an order to: **repeal** Tax 2.61(9)(b)1.; **renumber** Tax 2.61(9)(b)2. and 3.; **amend** Tax 2.61(9)(intro.), (a)(intro.) and 1., (b)(intro.), and (d)(intro.); **repeal and recreate** Tax 2.61(9)(c); and **create** Tax 2.60(2)(Lm) and 2.61(9)(dm); **relating to** pre-2009 net business loss carryforwards.

The scope statement for this rule, SS 007-11, was approved by the Governor on July 25, 2011, published in Register No. 668 on August 14, 2011, and approved by the Secretary of Revenue on August 25, 2011.

Analysis by the Department of Revenue

Statutes interpreted: ss. 71.255 (6) (bm), 71.26 (4) (a) and (b), and 71.45 (4) (a) and (b), Stats.

Statutory authority: s. 71.255 (6) (bm) 4., Stats.

Explanation of agency authority: Section 71.255 (6) (bm) 4., Stats., requires the department to promulgate rules to administer the provisions of 2011 Wisconsin Act 32 concerning the treatment of pre-2009 net business loss carryforwards under combined reporting.

Related statute or rule: There are no other applicable statutes or rules.

Plain language analysis: This proposed rule prescribes the method that members of the same combined group must use to share net business losses with other members of the same commonly controlled group for net business losses incurred prior to January 1, 2009, and not fully used before January 1, 2012, for purposes of s. 71.255 (6) (bm), Stats. It also provides clarity regarding the 15 year and 20 year net business loss carryforwards for purposes of ss. 71.26(4) (a) and (b) and 71.45(4) (a) and (b), Stats.

Summary of, and comparison with, existing or proposed federal regulation:

There is no existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule.

Comparison with rules in adjacent states: Illinois is the only adjacent state that allows net business loss carryforwards to be shared among combined group members. Michigan and Minnesota have combined reporting laws but do not allow the sharing of net business loss carryforwards among other companies in the combined group.

Illinois has its own unique regulations relating to the net business loss carryforward statute, including: IL Regs. 100.2310, 100.2330, 100.2340, 100.2350, and 100.5270.

Summary of factual data and analytical methodologies: The department has created this proposed rule order to comply with the statutory requirement to administer the changes under 2011 Wisconsin Act 32 to the treatment of pre-2009 net business loss carryforwards under combined reporting. No other data was used in the preparation of this proposed rule order or this analysis.

Analysis and supporting documents used to determine effect on small business: As explained above, this proposed rule is created to administer changes in Wisconsin's income and franchise tax laws. As the rule itself does not impose any significant financial or other compliance burden, the department has determined that it does not have a significant effect on small business.

Anticipated costs incurred by private sector: This proposed rule does not have a significant fiscal effect on the private sector.

Effect on small business: This proposed rule does not have a significant effect on small business.

Agency contact person: Please contact Dale Kleven at (608) 266-8253 or dale.kleven@revenue.wi.gov, if you have any questions regarding this proposed rule.

Place where comments are to be submitted and deadline for submission: Comments may be submitted to the contact person shown below no later than the date on which the public hearing on this proposed rule is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

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SECTION 1. Tax 2.60(2)(Lm) is created to read:

Tax 2.60(2)(Lm) "Pre-2009 net business loss carryforward" has the meaning given to "pre-2009 net business loss carry-forward" in s. 71.255(6)(bm)1., Stats.

SECTION 2. Tax 2.61(9)(intro.), (a)(intro.) and1., and (b)(intro.) are amended to read:

Tax 2.61(9)(intro.) A combined group member may carry forward its net business loss as provided in ss. 71.26 (4) and 71.45 (4), Stats. A net business loss carryforward is an attribute of the separate corporation rather than of the combined group. However, s. 71.255 (6) (b) <u>and (bm)</u>, Stats., provides that a combined group member may share all or a portion of its net business loss carryforward with the other members of its combined group if certain conditions are met. This subsection explains which net business loss carryforwards are sharable, how to compute the sharable amount, and how to apply the shared losses. The following rules apply:

(a)(intro.) A combined group member may share its net business loss carryforward incurred in a taxable year beginning on or after January 1, 2009 with other combined group members to the extent that all of the following conditions are met:

1. The net business loss ~~originated in a taxable year beginning on or after January 1, 2009 and~~ is attributable to combined unitary income included in a combined report.

(b)(intro.) A combined group member's net business loss carryforward incurred in a taxable year beginning on or after January 1, 2009 that cannot be shared with other combined group members includes amounts attributable to the following:

SECTION 3. Tax 2.61(9)(b)1. is repealed

SECTION 4. Tax 2.61(9)(b)2. and 3. are renumbered 2.61(9)(b)1. and 2.

SECTION 5. Tax 2.61(9)(c) is repealed and recreated to read:

Tax 2.61(9)(c) *Order of carryforwards.* A combined group member shall apply net business loss carryforwards in the following order:

1. Net business loss carryforwards incurred by that same member in taxable years beginning before January 1, 2009, in the order that the underlying net business losses were incurred.

2. Sharable and non-sharable net business loss carryforwards under par. (d) incurred in taxable years beginning on or after January 1, 2009, in the order that the underlying net business losses were incurred. If the net business loss carryforward to be used consists of both a sharable amount and a non-sharable amount incurred in the same taxable year, the amount of sharable and non-sharable carryforward used shall be determined on a pro rata basis according to the amount of each type of carryforward available from that year.

3. For loss carryforwards shared in a taxable year that begins after December 31, 2011, pre-2009 net business loss carryforwards under par. (dm).

Example: Combined Group EFG consists of Member E, Member F, and Member G. E has the following loss carryforwards:

Year Incurred	Sharable Carryforward	Non−sharable Carryforward
2008	−−	($10,000)
2009	($6,000)	($2,000)

In 2010, E's share of combined unitary income plus its separate entity items equal $14,000. After using its carryforwards to offset this income, E has $4,000 of remaining net business loss carryforward (= ($10,000) + ($6,000) + ($2,000) + $14,000). Of this amount, a portion is a sharable carryforward that may be applied against F and G's shares of combined unitary income in the manner described in par. (d). Since loss carryforwards are applied in the order incurred, the $10,000 carryforward from 2008 is used in its entirety, and $4,000 of the 2009 carryforward is used. The portion of E's remaining carryforward from 2009 that is sharable is $3,000 (= $4,000 x [$6,000 / $8,000]) and the portion that is non−sharable is $1,000 (= $4,000 x [$2,000 / $8,000]).

In 2012, E has the following loss carryforwards:

Year Incurred	Sharable Carryforward	Non−sharable Carryforward
2009	($3,000)	($1,000)
2010	--	--
2011	($4,000)	($6,000)

In addition, E has a pre-2009 net business loss carryforward of $3,000. E's share of combined unitary income plus its separate entity items for 2012 equal $16,000. After using its carryforwards to offset this income, E has $1,000 of remaining net business loss carryforward (= ($3,000) + ($3,000) + ($1,000) + ($4,000) + ($6,000) + $16,000). Since the loss carryforwards are first applied to the net business loss carryforwards incurred in 2009 and after, the $4,000 carryforward from 2009 and the $10,000 carryforward from 2011 are used in their entirety. The remaining $2,000 of loss carryforwards are applied to the pre-2009 net business loss carryforward. The remaining pre-2009 net business loss carryforward is $1,000.

SECTION 6. Tax 2.61(9)(d)(intro.) is amended to read:

Tax 2.61(9)(d)(intro.) *Method of sharing.* The amount of net business loss carryforward <u>under par. (c) 2.</u> eligible for sharing shall be computed and assigned as follows:

SECTION 7. Tax 2.61(9)(dm) is created to read:

Tax 2.61(9)(dm) *Pre-2009 net business loss carryforwards.* 1. For a combined group member's first taxable year beginning after December 31, 2011, the member may, after using the pre-2009 net business loss carryforward to offset its own income for the taxable year, and after using sharable losses to offset its own income for the taxable year, use 5 percent of the pre-2009 net business loss carryforward to offset the income of all other members of the combined group for the taxable year and for each of the 19 subsequent taxable years.

Example: Member A of Wisconsin Combined Group ABC has pre-2009 net business loss carryforwards of $100 million as of December 31, 2008. A's share of the combined group's income is $2 million in 2009, $3 million in 2010, and $5 million in 2011. A's one-time calculation of the annual 5% sharable amount is $4.5 million, computed as follows: [$100 million pre-2009 net business loss carryforward less the taxable income offset by the net business loss carryforward ($2 million in 2009, $3 million in 2010, and $5 million in 2011) multiplied by 5 percent].

In 2012 Member A's share of the combined group's Wisconsin income is $1 million. Member A first applies its pre-2009 net business loss carry-forward against its $1 million share of the combined group's Wisconsin income. The remaining members of the group may use the $4.5 million sharable loss to offset the remaining group income on a proportionate basis. Assuming the combined group has enough income in 2012 to fully use the entire $4.5 million in pre-2009 net business loss carryforward, the pre-2009 net business loss carryforward available in 2013 is $84.5 million ($90 million total sharable loss less $1 million of Member A's income offset by the net business loss carry-forward, less $4.5 million sharable loss utilized by the corporation in 2012). If Member A's share of the combined group's income is $0 for all the remaining years of the pre-2009 carry-forward, and the remaining members of the combined group were eligible to share the full $4.5 million net business loss carry-forward each year, the sharable pre-2009 net business loss available in 2031 will be $3.5 million ($4.5 million annual sharable loss computed in 2012 less $1 million loss used by Member A in 2012).

2. Except as provided in par. (g), relating to insurance companies, the sharable pre-2009 net business loss carryforward under subd. 1. shall be assigned to each combined group member in proportion to its share of combined unitary income as computed in subs. (6) to (8), net of any losses from separate entity items or loss carryforwards already applied. An amount may not be assigned to a combined group member whose share of combined unitary income is zero or less. Any remaining sharable amount becomes part of the combined group's pre-2009 net business loss carryforward that may be shared by all combined group members in subsequent years.

Example: Member D of Combined Group DEF has a pre-2009 net business loss carry-forward of $2 million as of January 1, 2012. The 5% sharable amount allowed to members E and F in each year for taxable years 2012 through 2031 is $100,000 ($2 million net business loss carryforward multiplied by 5%). Member E's proportional share of the $100,000 sharable net business loss in 2012 is $30,000. After using all other allowable losses, Member E has $20,000 in income remaining to offset against its share of the pre-2009 net business loss carryforward. The remaining $10,000 net business loss carryforward not used by Member E in 2012 becomes part of the combined group's pre-2009 net business loss carryforward that may be shared by all combined group members in 2013 and is in addition to the 5% net business loss carryforward previously computed. As a result, the net business loss carryforward available in 2013 is $110,000 ($100,000 combined group yearly sharable loss plus Member E's $10,000 proportional share of the $100,000 loss in 2012 that was not fully utilized by Member E in 2012).

3. Notwithstanding the provisions of ss. 71.26(4)(a) and 71.45(4)(a), Stats., under ss. 71.26(4)(b) and 71.45(4)(b), Stats., any unused pre-2009 net business loss carryforward under subd. 1. may be offset against the income of the members of the combined group for the 20 taxable years that begin after December 31, 2011.

Example: As of December 31, 2008, Member G of Combined Group GHI has a loss carryforward of $30,000 that is in the 14th year of the 15 year carryforward period under s. 71.26(4)(a), Stats. Member G does not have any income to offset the $30,000 loss carryforward in its taxable years beginning in 2009, 2010, or 2011. For taxable years beginning on or after January 1, 2012, Member G is allowed to use the $30,000 pre-2009 net business loss carryforward to offset any of its own income first, then offset its proportional share of Combined Group GHI's income, and finally, any remaining loss may be shared proportionately among the other members of Combined Group GHI. Under s. 71.26(4)(b), Stats., Member G's pre-2009 net business loss carryforward of $30,000 begins a new carryforward period of 20 years from its taxable year beginning in 2012.

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

Initial Regulatory Flexibility Analysis

This proposed rule order does not have a significant economic impact on a substantial number of small businesses.

DEPARTMENT OF REVENUE

Dated: ____________________________ By: ____________________________
Richard G. Chandler
Secretary of Revenue

E:Rules/Chapter 2 Proposed Order (v2)