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ALERT MEMORANDUM

Tax Highlights of the CARES Act Stimulus

March 28, 2020 (revised March 30, 2020)

The President yesterday signed into law a $2 trillion stimulus package known as the Coronavirus Aid, Relief, and Economic Security Act, or the "CARES Act" (H.R. 748, Public Law 116-136). The Act provides for loans, loan guarantees and tax relief for businesses and individuals hit hardest by COVID 19, and authorizes the government to make direct investments in affected companies. Both the Senate and House passed the CARES Act with broad bipartisan support.

The Act contains a number of tax provisions likely to be of interest to corporations and individuals, the highlights of which are summarized below. Very generally, these provisions provide short-term liquidity by deferring certain tax payments, allowing the carryback of net operating losses ("NOLs") to claim refunds of previously-paid taxes, and increasing the allowable amounts of interest expense and NOL deductions. The Act also makes retroactive amendments to certain provisions of the 2017 tax reform that may allow taxpayers that had been adversely affected by those provisions to claim refunds of past taxes.

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Provisions Relevant to Corporations

— Employee retention tax credit

- Employers whose business has been fully or partially suspended as a result of governmental orders relating to COVID-19, or who have suffered a significant (*i.e.* greater than 50%, on a year-over-year quarterly basis) decline in gross receipts, can receive tax credits equal to 50% of the first $10,000 of eligible wages (including the cost of health care benefits) paid from March 13, 2020 through December 31, 2020 to each employee that has been idled. To the extent the credit in any quarter exceeds the employer's portion of the Social Security taxes for all of the employer's employees in the quarter, the excess is treated as an overpayment that will be refunded. Businesses with fewer than 100 employees can claim the credit for all employees, whether idled or not.
- The credit is not available to an employer that receives a small business interruption loan under the CARES Act.

— Deferral of certain tax payments and filings

- The employer's portion of Social Security taxes for the period from enactment up to January 1, 2021 will not be due until December 31, 2021, when half of the deferred amount is due, and December 31, 2022, when the other half is due. Similar rules allow deferral of 50% of the corresponding Federal self-employment taxes.
- The Social Security trust funds are to be made whole by appropriating Treasury funds to make up the difference.
- In addition, separately from the CARES Act, the Treasury Department has issued guidance for all taxpayers (*i.e.* not just corporations) providing that federal income, gift, and generation-skipping transfer tax payments and returns that were due April 15, 2020, including payments of 2020 Q1 estimated taxes, will be due July 15, 2020. Taxpayers do not need to take any action to benefit from the postponed due dates. See Notices 2020-18 and 2020-20.

— NOL limitations temporarily lifted

- 80% limitation lifted for 2020: The 2017 tax reform act provided that NOL carryovers could be used to offset a maximum of 80% of a taxpayer's taxable income. The CARES Act lifts that restriction for 2020, and reinstates it (with slight modifications) for tax years beginning after December 31, 2020.
- NOLs arising in 2018 through 2020 can be carried back to the five years preceding the loss, for taxpayers other than REITs. Companies that paid taxes in recent years but subsequently had losses may be able to carry back their NOLs to obtain refunds.

— Interest expense limitations temporarily lifted

- The limitation on deductibility of interest expense under section 163(j) is increased to 50% from 30% for tax years beginning in 2019 or 2020. For partnerships, the increase applies only to tax years beginning in 2020 and other special rules apply.
- In addition, taxpayers can elect to calculate the interest limitation for 2020 using their 2019 adjusted taxable income as the relevant base, which often will be significantly higher.

— Bonus Depreciation for Qualified Improvement Property

- The Act allows taxpayers to immediately expense the costs of certain improvements to the interior of nonresidential real property. The change is a technical correction to changes made by the TCJA, and applies retroactively to property placed in service after December 31, 2017. Subject to guidance from the IRS as to how to claim the accelerated depreciation for past years, taxpayers that had been depreciating qualifying improvements over 39 years may be able to claim refunds of past taxes.

— Restrictions on business loan recipients

- The CARES Act appropriates $500 billion to provide financing for industries affected by coronavirus, but any recipient business must contractually agree that it will not, until one year after the loan (or loan guarantee) is no longer outstanding, (i) pay dividends or buy back publicly-traded stock or (ii) pay increased compensation (or severance over certain limits) to any officer or employee whose total compensation exceeded $425,000 in 2019, other than certain employees subject to collective bargaining agreements. In addition, the company must agree to reduce the compensation of officers or employees whose total compensation in 2019 exceeded $3 million. For air carriers and contractors, which are eligible for industry-specific financial assistance under the Act, the restrictions on dividends and buybacks apply until September 30, 2021 and the restrictions on compensation apply from March 24, 2020 through March 24, 2022. We expect interpretative questions, such as how the restrictions are to be applied to various types of deferred compensation, will be addressed by subsequent guidance.

— Suspension of excise tax on alcohol produced for hand sanitizer

- Distilled spirits may be removed from bonded premises and used for production of hand sanitizer free of federal excise tax during calendar 2020.

— Suspension of certain aviation excise taxes

- The CARES Act suspends aviation excise taxes on kerosene used in commercial aviation and on transportation of passengers and cargo (including in respect of amounts paid by credit card issuers and other companies to acquire frequent flyer miles or points to give to their customers), from the date of enactment through the end of calendar 2020.

Provisions for Individuals

— Excess business loss limitations for noncorporate taxpayers deferred to 2021

- The 2017 tax reform act limited noncorporate taxpayers' ability to use "excess business losses" to offset nonbusiness income, for tax years beginning after December 31, 2017. The CARES Act will apply those limitations only to tax years beginning after December 31, 2020, retroactively removing the limitations for the 2018 and 2019 tax years.

— Rebates for individuals

- Many individual taxpayers will receive refunds of $1,200 ($2,400 for joint filers) plus $500 per qualifying child. The refunds are advance credits against 2020 taxes, and phase out by 5% of adjusted gross income over $75,000 ($150,000 for joint filers, or $112,500 for heads of household). Nonresident aliens and dependents of other taxpayers are not eligible.

— Access to retirement funds

- Individuals may withdraw up to $100,000 from IRAs and certain other retirement savings plans during calendar 2020 without being subject to the 10% tax on early distributions that would normally apply. The individual must have been furloughed or experiencing other adverse financial consequences as a result of COVID-19, or have been diagnosed with the disease or have a spouse or dependent who has been so diagnosed. Any taxable income from the withdrawal may be spread over three years. Alternatively, the individual may repay the withdrawal during that period (in which case the withdrawal is treated as a rollover distribution).
- For the 180-day period beginning with the date of enactment of the Act, the dollar cap on loans from qualified employer plans is increased from $50,000 to $100,000. In addition, the Act provides for delay by 1 year of the maturity for any such loan if the expiration of the five-year

maximum term of the loan occurs between the date of enactment and December 31, 2020.

- The Act also waives required minimum distributions for calendar 2020 for certain retirement plans, so that distributions will not be required while stock prices are depressed due to the current crisis.

— Student loan repayment assistance

- Payments of up to $5,250 with respect to qualified student loans between March 27, 2020 and January 1, 2021 by an employer under a qualified educational assistance program are excluded from the employee's gross income, and are not deductible as interest on a qualified educational loan. Any such payment may nevertheless be treated as wages for payroll tax purposes.

— Increased deductions for charitable donations

- For individuals, the CARES Act temporarily lifts the income-based limitation on deductions for donations of cash in 2020 to charitable organizations (other than certain private foundations and donor-advised funds). For corporations, the Act temporarily raises the income-based limitation for donations of cash or food inventory to 25% of taxable income (from 10% for donations of cash and 15% for donations of food).

- The CARES Act allows individuals who do not itemize their deductions to claim a new above-the-line deduction for up to $300 of donations of cash to certain charitable organizations (other than certain private foundations and donor advised funds).

Each of the foregoing provisions is complex, and many if not all are subject to limitations and exceptions that are not addressed in this summary. We would be happy to discuss any of these provisions with you at your convenience.

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