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U.S. Congress Provides COVID-19 Relief by Passing CARES Act

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The emergence of COVID-19 has sent a shock wave through the world economy, resulting in significant disruption to the financial markets, the shuttering of entire industries and the lockdown of major cities across the globe. As a result, many national governments are applying every policy tool at their disposal to see their citizens through this unprecedented crisis. Naturally, these efforts include offering relief through changes to tax laws.

In the United States, Congress has made history by providing over US\$2 trillion in relief for individuals and business in the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act), which was signed into law on March 27, 2020. The CARES Act provides direct payments to U.S. citizens, loans to businesses and a number of amendments to tax provisions intended to increase deductions and defer tax payments.

Specifically, the CARES Act relaxes some of the limitations on the deductibility of business interest expense in section 163(j) of the Internal Revenue Code (Code); rolls back some of the changes to the treatment of net operating losses (NOLs) made by the *Internal Revenue Code* (the Code), rolls back some of the changes to the treatment of NOLs made by the *Tax Cuts and Jobs Act of 2017* (TCJA); provides certain long-awaited technical corrections to the TCJA that should expand taxpayers' access to bonus depreciation; provides refundable tax credits to individuals and certain businesses; and authorizes the Small Business Administration to make loans to eligible small businesses that may be forgiven if certain requirements are met. In addition, the Internal Revenue Service (IRS) and many state tax authorities have postponed upcoming tax return filing and tax payment deadlines.

Some provisions of the new law and certain other taxpayer relief measures are described below.

Postponement of Federal and State Tax Filing Deadlines

The IRS released guidance in Notice 2020-18 permitting **U.S. federal tax returns and tax payments** (including self-employment and estimated tax payments) ordinarily due on April 15, 2020, **to be automatically postponed without interest or penalty until July 15, 2020**. Under Notice 2020-18, there is no limit to the amount of a payment that may be postponed. The automatic postponement applies only to annual federal income tax returns due on April 15, and not to other returns, such as FBARs (Report of Foreign Bank and Financial Accounts).

Many states, including New York, are following the IRS's example and postponing state tax return and tax payment deadlines.

New York has also waived interest and penalties on certain sales tax collections due on March 20, 2020, as long as the payments are made within 60 days of the deadline.

Changes to NOL Rules

The CARES Act suspends the limitations on NOLs provided by the TCJA for tax years beginning before January 1, 2021. Specifically, for the affected years, NOLs will no longer be subject to a cap of 80% of net income; NOLs arising in tax years beginning after December 31, 2017, and before January 1, 2020, may be carried back for five years.

Although this provision of the CARES Act is expected to generally benefit taxpayers, there may be unintended consequences in the international context. For example, if a taxpayer elects to carry a NOL back to a year during which the base erosion anti-abuse tax (BEAT) applies to such taxpayer, the resulting decrease in that taxpayer's regular taxable income for the year could cause the taxpayer to have a BEAT liability or could cause the amount of the taxpayer's BEAT liability to potentially be increased for that year. In addition, if a taxpayer

elects to carry a NOL back to a year in which a deduction for global intangible low-taxed income (GILTI) or foreign-derived intangible income (FDII) is available, the deduction for GILTI or FDII (which generally is subject to reduction if the sum of a taxpayer's FDII and GILTI exceeds its taxable income for the year) could potentially be reduced. This is because the NOL, which offsets the taxpayer's taxable income, would also reduce taxable income for the purpose of determining the limitation on the GILTI and FDII deductions. Finally, a taxpayer electing to carry a NOL back should also consider the extent to which such carryback and increased NOL deduction could affect the taxpayer's foreign tax credit limitation in the year that the NOL is used and the resulting impact on subsequent tax years.

A taxpayer that elects to carry a NOL back should carefully consider the extent to which that election could affect the calculation of, and limitations applicable to, previously claimed tax credits, deductions and other tax attributes. In addition, the CARES Act contains a number of rules to coordinate the NOL provisions with other tax provisions, which should be considered in connection with an election to carry a NOL back to previous years.

Suspension of Limitation on Excess Business Losses

The TCJA limited the ability of non-corporate taxpayers to use business losses to offset non-business income in section 461(l) of the Code. Under this provision, the amount of losses that a non-corporate taxpayer can claim from a trade or business is limited to the amount of income from the business plus US\$250,000 (indexed for inflation). Losses in excess of this limitation, referred to as "excess" business losses, become a NOL and are carried forward. **The CARES Act increases the losses potentially available to non-corporate taxpayers by suspending this provision until tax years beginning after December 31, 2020.**

Section 163(j) Relaxation

The TCJA overhauled the limitation on interest deductibility under section 163(j). One aspect of this change was that the deduction for business interest expense was generally limited to 30% of a taxpayer's adjusted taxable income. **The CARES Act increases that limitation to 50% for 2019 and 2020.**

In addition, taxpayers may elect to use their adjusted taxable income from 2019 to determine their 163(j) limitation for 2020. This would provide a higher business interest expense deduction for taxpayers who have unexpectedly low income for 2020.

Employer Relief

Under the CARES Act, **employers whose businesses are subject to a government order to close or suffer a 50% decrease in gross receipts compared with the first quarter of 2019 are generally eligible for a refundable tax credit equal to 50% of wages paid with respect to the period from March 12, 2020 to January 1, 2021.** To determine the amount of wages paid, employers may only take into account the first US\$10,000 of wages paid to each employee and, in the case of employers with more than 100 employees, wages are only taken into account if they are paid to employees who are not working because of a government order.

In addition, **the CARES Act defers employers' portion of payroll taxes and payroll taxes paid by self-employed individuals otherwise due in 2020.** One-half of the deferred payroll taxes will not be due until December 31, 2021, and the other half will not be due until December 31, 2022.

Correction of the "Retail Glitch" in the TCJA

A drafting mistake in the TCJA prevented some businesses from taking advantage of 100% expensing for improvements to building interiors. The CARES Act increases taxpayers' access to bonus depreciation deductions by correcting this mistake.

Stay Tuned for More

The CARES Act is not likely to be the last legislative effort to address the COVID-19 pandemic. As this article went to press, **Congress was reported to already be working on another relief package.** We will continue to provide updates on tax and legal developments resulting from the coronavirus crisis.

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