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The CARES Act: A Guide to the Tax Provisions

The tax provisions of the CARES Act, enacted on March 27, 2020, will provide meaningful relief to taxpayers, both individuals and companies, dealing with the fallout of the COVID-19 crisis.

Key provisions include:

- employee retention payroll tax credits for employers subject to closure due to COVID-19;
- substantial extension of the due date for the payment of the employer portion of payroll taxes (including self-employment taxes);
- substantially expanded use of net operating losses;
- modification of the limitation on the deductibility of excess business losses for taxpayers other than corporations;
- acceleration of refunds for alternative minimum tax credits for corporations;
- modification of the limitation on the deductibility of business interest expense;
- substantially increased depreciation of qualified improvement property;
- recovery rebates for individuals;
- modification of the limitations on the deductibility of charitable contributions during 2020; and
- special ownership change and debt issue price rules for federal government loans and equity investments provided to aviation companies (and other companies critical to national security) under the CARES Act.

The following guide to these tax provisions will help you navigate these changes in these challenging times.

Although the CARES Act contains a substantial amount of detail with respect to these provisions, many details, likely to be important to many taxpayers, remain subject to guidance from the US Treasury Department and the Internal Revenue Service. We expect that in the near term, important additional information will be provided through published regulations and other guidance.

In addition to the federal tax law and considerations outlined below, taxpayers should consider the state and local and foreign tax ramifications and the financial accounting impact of these changes and proposed actions taxpayers may undertake to benefit from the federal tax incentives. Careful tax planning is essential to best position taxpayers in this changing environment.

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Please contact the Weil Tax team for further information and assistance.

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I. Business Provisions (Division A; Title II; Subtitle C)

A. *Employee Retention Credit for Employers Subject to Closure due to COVID-19 (Section 2301).*

1. Overview.

a) Eligible Employers. Employers operating a trade or business (i) which is fully or partially suspended during a calendar quarter of 2020 due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19, or (ii) during a calendar quarter of 2020, for which gross receipts are less than 50% of gross receipts for the same calendar quarter in the prior year, are allowed, subject to limitations, a credit against the employer portion of social security taxes in an amount equal to 50% of "qualified wages" paid after March 12, 2020 and before January 1, 2021 up to a maximum of $5,000 per employee.

b) Qualified Wages.

(1) Large Employers. For employers with more than 100 employees, "qualified wages" are wages, including the cost of certain employer-provided health care costs, paid to an employee who is not providing services due to the employer experiencing a COVID-19-related suspension of business or decline in gross receipts.

(2) Small Employers. For employers with no more than 100 employees, "qualified wages" are wages, including the cost of certain employer provided health care costs, paid during periods in which the employer experiences a COVID-19-related suspension of business or decline in gross receipts.

(3) Limit. Qualified wages are limited to $10,000 per employee and, in the case of a large employer, may not exceed what an employee would have been paid for an equivalent duration during the 30 days preceding the applicable period.

2. Eligibility. Employers that receive a small business interruption loan under Section 1102 of the CARES Act are not eligible for the benefits of this provision.

3. Conditions. Employers may credit up to the total amount of payroll taxes for each quarter with any excess amounts being refunded.

4. Weil Insight. This provision will provide a significant cash benefit to impacted large and small employers.

B. *Delay of Payment of Employer Payroll Taxes (Section 2302).*

1. Overview. The due date for payments and deposits of the employer portion of social security taxes (imposed at a 6.2% rate) and 50% of the self-employment taxes of individuals (imposed at a 12.4% rate) for the post-enactment portion of 2020 is delayed: 50% of the delayed amount is due on December 31, 2021 and the remaining amount is due on December 31, 2022. Officers and responsible persons, who may have personal liability for such taxes, are relieved from such liability to the extent the employer directs the deferral of tax payments under this provision. Similar relief is provided for certified professional employer organizations to the extent their customers direct the deferral of tax payments under this provision.

2. Eligibility. Taxpayers who have certain small business administration loans forgiven under Section 1106 of the CARES Act are not eligible to benefit from this provision. Certain small business administration loans made before June 30, 2020 are available for individuals and companies to cover payroll costs, employee salaries, health care benefits, interest on debt (including mortgages), and utilities. Such loans are eligible for forgiveness, subject to certain limitations, to the extent used to pay payroll costs, interest on certain mortgage obligations, rent, or utilities. The forgiveness of such loans is excluded from gross income.
3. Weil Insight. Delayed payment of payroll taxes will provide significant liquidity to many taxpayers. Consideration should be given to whether to treat deferred amounts as a debt-like item in merger and acquisition transactions. To benefit from this provision, it is important that employers follow procedures under forthcoming implementing guidance.

C. *Modifications for Net Operating Losses ("NOLs").*

1. Overview.
   a) Modifications of Rules Related to NOL Carrybacks (Section 2303(b)).
      (1) General. NOLs generated in taxable years beginning after December 31, 2017 and before January 1, 2021 ("post-2017/pre-2021 NOLs") are permitted to be carried back to the five taxable years preceding the taxable year in which such NOLs were generated and can be carried forward to all subsequent taxable years. Prior to the enactment of this provision, post-2017/pre-2021 NOLs were only permitted to be carried forward (but not carried back). Taxpayers generally can elect to waive carryback treatment.
      (2) Mandatory Repatriation Tax. NOLs carried back to a taxable year in which a taxpayer has a mandatory repatriation income inclusion under section 965 of the Internal Revenue Code do not offset such income inclusion (which is taxable at lower rates with such tax liability eligible to be paid in installments over several years). In lieu of the general carryback waiver rule, a taxpayer may selectively waive carrybacks for any taxable year in which it has a mandatory repatriation income inclusion under section 965 of the Internal Revenue Code.
   b) Temporary Repeal of NOL Taxable Income Limitation (Section 2303(a)).
      (1) Prior Law. Prior to the enactment of this provision, pre-2018 NOLs could be used to offset up to 100% of taxable income, but post-2017 NOLs could be used to offset only up to 80% of taxable income. This provision effectively delays the application of the 80% limitation until post-2020 taxable years.
      (2) Pre-2021 Taxable Years. All NOLs carried to a taxable year beginning before December 31, 2020 are permitted to offset up to 100% of taxable income for such year.
      (3) Post-2020 Taxable Years. NOLs generated in taxable years beginning before January 1, 2018 ("pre-2018 NOLs") carried to a taxable year beginning after December 31, 2020 are permitted to offset up to 100% of taxable income for such year. NOLs generated in taxable years beginning after December 31, 2017 ("post-2017 NOLs") are permitted to offset up to 80% of taxable income for such year (to the extent not offset by pre-2018 NOLs).
2. Eligibility. These provisions are generally applicable to companies and individuals with NOLs. Special limitations on NOL carryback treatment apply to real estate investment trusts ("REITs") and life insurance companies. NOLs generated in a taxable year in which a taxpayer is a REIT cannot be carried back, and NOLs generated in a taxable year in which a taxpayer is not a REIT cannot be carried back to a taxable year in which the taxpayer was a REIT. NOLs carried

back by a life insurance company to a taxable year beginning before January 1, 2018 in which it was a life insurance company are treated in the same manner as operations loss carrybacks were treated under provisions of law repealed by the Tax Cuts and Jobs Act.

3. Conditions. Taxpayers may be required to file amended tax returns to receive the benefit of these provisions.

4. Weil Insight.

   a) General. The ability to carryback NOLs presents a valuable tax planning opportunity to generate cash for companies and individuals. In addition to cash tax savings, the increased value of NOLs resulting from these provisions may have financial statement implications for companies. The increased ability to use NOLs under these provisions (despite the application of existing loss limitation rules, including change in ownership limitations for corporate taxpayers) may also increase the value of companies.

   b) Tax Planning Opportunities. Taxpayers should carefully examine their holdings to identify built-in loss assets (especially in light of recently depressed valuations) for potential use through sale-leaseback and other transactions. For corporations, the character of such losses is less meaningful now that both ordinary and capital losses have multi-year carryback periods.

   c) Carryback Waiver Considerations. Subject to the special rule discussed above for years with a mandatory repatriation inclusion, taxpayers can relinquish carrying back NOLs for the entire carryback period subject to an all-or-nothing election (and cannot selectively waive for particular years during the carryback period). For corporations, the potential value of carrying back NOLs generated in a 21% rate environment to pre-2018 years to offset income taxable at a 35% rate, must be balanced with the potential detriment of carrying back to post-2017 years to offset income effectively taxable at rates as low as 10.5% (as a result of the ordering rule applicable to deductions for “GILTI” and “FDII” under section 250 of the Internal Revenue Code). Noncorporate taxpayers face similar tax rate considerations, including as a result of the ordering rule applicable to deductions for qualified business income under section 199A of the Internal Revenue Code. Taxpayers should also consider the impact of carrybacks on foreign tax credit utilization and other attributes.

D. *Modification of Limitation on Losses for Taxpayers other than Corporations (Section 2304).*

1. Overview. This provision delays until taxable years beginning after December 31, 2020 the limitation on deductions for excess business losses of noncorporate taxpayers (i.e., losses is in excess of $250,000 or in the case of a joint return $500,000) that enacted as part of the Tax Cuts and Jobs Act. Under prior law, the limitation was applicable to taxable years beginning after December 31, 2017. As under prior law, the limitation sunsets for taxable years beginning after December 31, 2025.

2. Weil Insight. The delay of the limitation will provide cash tax savings for many noncorporate taxpayers. Noncorporate taxpayers with previously limited excess business losses may be able to obtain refunds of 2018 and 2019 taxes.

E. *Modification of Credit for Prior Year Minimum Tax Liability of Corporations (Section 2305).*

1. Overview.

   a) Prior Law. In connection with the repeal of the corporate alternative minimum tax (“AMT”) by the Tax Cuts and Jobs Act, AMT credits became refundable between 2018 and 2021.

   b) Acceleration of AMT Credits. AMT refundable credits are accelerated and applied to taxable years beginning in 2018 and 2019. Corporations may elect to take the entire AMT

refundable credit amount in the first taxable year beginning in 2018. Corporations may claim these refunds under the "quick" refund provisions of existing law pursuant to which such refunds are generally processed within 90 days. Such "quick" refunds under existing law are claimed by filing IRS Form 4466.

2. Eligibility. Only corporations with existing AMT refundable credits can benefit from this provision.

3. Weil Insight. Acceleration of the AMT refundable credits will increase liquidity for many corporations.

F. *Modifications of Limitation on Business Interest (Section 2306).*

1. Overview.

   a) For taxable years beginning in 2019 and 2020, the limitation on the deductibility of business interest is increased from 30% to 50% of EBITDA. Taxpayers may elect out of this treatment.

   b) For taxable years beginning in 2020, taxpayers may elect to use their 2019 EBITDA (rather than their 2020 EBITDA) for purposes of computing the limitation. For a short taxable year beginning in 2020, 2019 EBITDA is prorated based on the number of months in the short taxable year.

2. Eligibility. For taxable years beginning in 2019, partnerships are not eligible for the increased 50% limitation, but 50% of the excess business interest of a partnership (i.e., business interest in excess of the 30% limitation) allocated to its partners for such a taxable year is permitted to be deducted by the partners in their first taxable year beginning in 2020 (subject to any separate interest deduction limitations of the partners), with the remaining 50% of such excess business interest treated in accordance with existing law. Partners can elect out of the provision's treatment of allocable excess business interest. Partners that disposed of their partnership interests in 2019 may be unable to benefit from the carryforward of 2019 excess business interest to 2020.

3. Weil Insight.

   a) General. This provision will generate cash tax savings for many businesses and their owners. All taxpayers, whether corporate, partnership or otherwise, and whether US or non-US, should quickly reassess and potentially restructure their debt structure to ensure the maximum benefit is achieved under this provision. Many non-US investors will find this provision to generate significant cash savings. In that light, those investors should look at the method and amount of funding for their US operations.

   b) 2020 CODI Events. Although for many taxpayers 2020 EBITDA from operations will be much lower than 2019 EBITDA from operations due to the COVID-19 crisis, certain 2020 transactions, such as discounted debt repurchases or out-of-court restructurings, may result in significant cancellation of indebtedness income, making the 2019 EBITDA election less meaningful than anticipated.

G. *Technical Amendments Regarding Qualified Improvement Property (Section 2307).*

1. Overview. Certain improvements made after December 31, 2017 and before January 1, 2023 to the interior of buildings that are nonresidential real property are permitted to be immediately expensed. Under prior law, such improvements were depreciable over the 39-year useful life of the building.

2. Weil Insight. The ability to expense such improvements made since December 31, 2017 will enable many taxpayers to generate cash from refunds for 2018 and 2019, as applicable. These

types of improvements are common in the hospitality and retail industries, which are particularly affected by COVID-19.

II. Rebates and Other Individual Provisions (Division A; Title II; Subtitle B)

A. *2020 Recovery Rebates for Individuals (Section 2201).*

1. Overview. In general, many individual taxpayers will receive as rapidly as possible a $1,200 rebate ($2,400 for joint filers) and an additional $500 for each qualifying child.
2. Eligibility. Nonresident aliens, dependents, estates, and trusts are not eligible for rebates.
3. Conditions. Eligible individuals must have filed a 2018 or 2019 tax return to receive the rebate. Based on the adjusted gross income reported on the 2019 tax return (or if not yet filed, the 2018 tax return), the rebate is phased-out by 5% of the excess of the individual's adjusted gross income that exceeds $150,000 for joint filers, $112,500 for heads of households, and $75,000 for others. The rebate is phased-out entirely for filers whose income exceeds $198,000 in the case of joint filers, $146,500 for heads of household with one child, and $99,000 for others.
4. Weil Insight. These rebates will provide much needed cash for many individual taxpayers.

B. *Modification of Limitations on Charitable Contributions During 2020 (Sections 2204 & 2205).*

1. Overview.
   a) Cash Contributions. Individuals who do not itemize deductions are permitted to deduct up to $300 of charitable contributions paid in cash during the 2020 calendar year ("qualified contributions"). Individual taxpayers who itemize deductions are permitted to fully deduct qualified contributions. Corporations are permitted to deduct qualified contributions up to 25% of their taxable income. Under prior law, individuals who did not itemize deductions were not permitted a charitable contribution deduction and the deduction for charitable contributions by other taxpayers was limited to 60% of an individual's adjusted gross income and 10% of a corporation's taxable income.
   b) Food Contributions. The 15% of income limitation on deductions for charitable contributions of food inventory is increased to 20% for contributions made in 2020.
2. Eligibility. Increased deductibility for cash contributions does not apply to contributions to donor advised funds or public charities that are supporting organizations.
3. Conditions. Taxpayers must elect to apply the modified income limitation for qualified contributions. Taxpayers who itemize deductions may fully deduct qualified contributions to the extent they do not exceed the excess of such taxpayer's adjusted gross income over other charitable contributions allowed as deductions. In the case of partnerships and subchapter S corporations, the election is made separately by each partner and shareholder.
4. Weil Insight. The increased ability to deduct charitable contributions may provide cash tax savings to companies and individuals. Charities should be mindful of this change for their 2020 fundraising campaigns.

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III. Tax Provisions Related to Emergency Relief Loans, Loan Guarantees and Other Investments (Division A; Title IV; Subtitle A)

A. *Forthcoming Section 382 Regulations.*

1. Prior Law. Section 382 of the Internal Revenue Code imposes an annual limitation on the use of NOL carryforwards and other tax attributes of a corporation if the corporation undergoes a 50% "ownership change" (as specially defined for this purpose). In general, an ownership change occurs if one or more 5% or greater shareholders collectively increase their ownership by 50 percentage points over a prescribed testing period (typically three years).
2. Section 4003(h)(2) of the CARES Act. The Treasury Department will prescribe regulations providing that the acquisition of warrants, stock options, common or preferred stock or other equity under Section 4003 of the CARES Act does not result in an ownership change for purposes of section 382 of the Internal Revenue Code.
3. 2008 Bail-out Section 382 Regulations. After the 2008 financial crisis, the government created several programs which provided liquidity to struggling businesses, including acquisition by the federal government of equity in such businesses. Special section 382 guidance was issued with respect such equity, and it is possible that the Treasury Department will issue similar guidance under the CARES Act. Under the special section 382 guidance addressing the 2008 bail-out, such governmental equity investments (including warrants) generally were not treated as stock for section 382 purposes, thereby causing no ownership changes, and no ownership changes were considered to have resulted from public group acquisitions of such equity investments from the federal government.

B. *Issue Price of Loans.*

1. Prior Law. Under the investment unit rules, when a debt instrument is issued together with an option, security or other property (an "investment unit"), the issue price of the entire investment unit is allocated between the debt instrument and the other property based on their respective fair market values, ensuring the proper amount of the debt instrument is treated as issued with the appropriate amount of original issue discount ("OID"), if any.
2. Section 4003(h)(1) of the CARES Act. Any loans made to eligible airlines and companies critical to national security are treated as indebtedness for tax purposes. Such loans are issued for their stated principal amount and all stated interest is qualified interest. In other words, the investment unit rule will not apply to these loans. Thus, the loans are treated as issued without OID (even if the application of the investment unit rules (or other applicable rules) would have otherwise treated the loans as issued with OID). As a result, the only deductible interest on such loans is the stated interest.

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If you have questions concerning the contents of this alert, or would like more information, please speak to your regular contact at Weil or to any of the following:

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