ALERT MEMORANDUM

Tax Highlights of the CARES Act Stimulus

March 26, 2020

By a unanimous vote late last night, the Senate passed a $2 trillion stimulus package in the form of H.R. 748, the Coronavirus Aid, Relief, and Economic Security Act, or the "CARES Act." The bill 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 House is expected to pass the bill on Friday, and the President has said that he will immediately sign it into law.

If you have any questions concerning this memorandum, please reach out to your regular firm contacts or the following authors.

NEW YORK

Jason R. Factor
+1 212 225 2694
jfactor@cgsh.com

Meyer H. Fedida
+1 212 225 2747
mfedida@cgsh.com

Jonathan Gifford
+1 212 225 2279
jgifford@cgsh.com

Susanna E. Parker
+1 212 225 2913
sparker@cgsh.com

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%) decline in gross receipts, can receive tax credits equal to 50% of the first $10,000 of wages paid to each employee that has been idled. To the extent the credit in any quarter exceeds the employer's portion of the FICA 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.

— Deferral of tax payments

- The employer's portion of FICA 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 Federal self-employment taxes.
- The Social Security trust funds will be made whole by appropriating Treasury funds to make up the difference.[1]

— 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 would lift that restriction for 2020, and reinstate 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.
- 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.

— Restrictions on business loan recipients

- The CARES Act appropriates $500 billion to provide financing for industries affected by coronavirus, but the businesses 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 bill, 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. These provisions raise interpretative questions, including how the restrictions are to be applied to various types of deferred compensation. We expect these issues will be addressed by subsequent guidance.

[1] In addition, the Treasury Department has issued guidance providing that federal income tax payments and returns that were due April 15, 2020, including payments of estimated taxes, will be due July 15, 2020. Taxpayers do not need to take any action to benefit from the postponed due dates. *See* Notice 2020-18.

— 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

- Suspends certain aviation excise taxes from the date of enactment through the end of calendar 2020, including taxes on kerosene used in commercial aviation and taxes on amounts paid by credit card issuers and other companies to acquire frequent flyer miles or points to give to their customers.

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.

— 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).
- Individuals may borrow up to $100,000 from qualified employer plans, rather than the normal limit of $50,000.

— Student loan repayment assistance

- Payments of up to $5,250 before January 1, 2021 by an employer to repay qualified student loans are excluded from the employee's gross income, and not deductible by the employer.

— 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 bill 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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