Freeman Law Compendium of Recent Coronavirus Legislation and Regulatory Reform[1]

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[1] Freeman Law has prepared the following outline as a public service and to provide businesses and individuals with time-sensitive, accessible guidance summarizing voluminous and complex legislation/promulgations that continue to be released. As a result, in the days ahead our firm will be revising and supplementing this outline, which is intended to be an organic document that will incorporate forthcoming guidance and serve as a comprehensive resource for businesses facing the economic and social challenges posed by the Coronavirus crisis. **Please visit our website at www.freemanlaw.com, where we will provide a continually-updated version**. We welcome your input and recognize that **we are all in this challenge together**. The version represented herein was produced on April 14, 2020.

Recent IRS Coronavirus Guidance

- **IRS Notice 2020-18.** Certain taxpayers automatically qualify to defer their federal income tax filings and payment of income tax until July 15, 2020.
  - Eligibility. Any individual, trust, estate, partnership, association, company, or corporation with a federal income tax filing or payment deadline of April 15, 2020.
  - Effect. For the above eligible taxpayers, the due date for filing a federal income tax return and making any federal income tax payment due April 15, 2020, is automatically postponed to July 15, 2020. These taxpayers do not need to file the applicable extension forms (Forms 4868 or 7004) to obtain the extension.
  - Applicability. The filing and payment deadline relief applies to any federal income tax filing (Forms 1040, 1065, 1120, 1041) and any amount of federal income tax payment (including payments of tax on self-employment income) and federal estimated income tax payments (including payments of tax on self-employment income) due on April 15, 2020.
  - Limitations. The relief does not apply to the payment or deposit of any other type of federal tax or to the filing of any federal information return unless so provided in the Notice.
  - *Observation*. While IRS Notice 2020-18 administratively defers the deadline for filing applicable federal income tax returns, taxpayers may want to consider filing earlier than the deferral date for strategic reasons.
    - *Recovery Rebate Maximization*. Taxpayers may consider filing a 2019 tax return early if the taxpayer's 2019 return would provide a more favorable recovery rebate under the CARE Act's new recovery rebate provisions discussed below. The advance refund amount is calculated based upon the taxpayer's 2019 information if a 2019 tax return is filed before the issuance of the rebate. Otherwise, the taxpayer's 2018 tax return information is used, if it is on file. Some taxpayers may thus have an ability to maximize their recovery rebate by filing an early return.
    - *Statutes of Limitations*. The filing date of a tax return generally triggers the three-year statute-of-limitations period under section 6501(a) of the Internal Revenue Code of 1986, as amended (the "I.R.C.") within which the IRS must, absent an exception, assess additional tax or be barred from imposing such assessments. I.R.C. section 6501(b)(1) provides that a return that is filed "early" is deemed to be filed on "the last day prescribed by law or by regulations promulgated pursuant to law for the filing thereof," thus establishing the date from which the three-year period begins to run. IRS Notice 2020-18 was promulgated pursuant to the IRS's authority under I.R.C. section 7508A(a) and may not constitute a "regulation" for statute-of-

limitations purposes. Thus, taxpayers strategically filing earlier than the deferral period may cause several months of the assessment statute of limitations to lapse during a period where the IRS is, under its new policies, minimizing audit activity.

- *Observation*. The relief in Notice 2020-18 extends to I.R.C. section 965 installment payments due on April 15, 2020. Under I.R.C. section 965(h)(2), the due date of the installment payment associated with a 2019 tax return is the due date of the taxpayer's 2019 Federal income tax return.

- **IRS Notice 2020-20.** Certain taxpayers automatically qualify to defer their gift or generation-skipping transfer tax returns and payment of associated tax until July 15, 2020.
  - Eligibility. Any person with a federal gift tax or generation-skipping transfer tax payment due or the requirement to file Form 709, *United States Gift (and Generation-Skipping Transfer) Tax Return*, on April 15, 2020.
  - Effect. For the above eligible taxpayers, the due date for filing the Form 709 and making any associated gift or generation-skipping transfer tax is automatically postponed to July 15, 2020. These taxpayers do not need to file the applicable extension forms (Form 8892) to obtain the extension.
  - Applicability. The filing and payment deadline relief applies to any gift or generation-skipping transfer tax return and payment of associated tax due on April 15, 2020.

- **IRS Notice 2020-23.** On April 9, 2020, the IRS issued Notice 2020-23, which amplifies the relief provided in Notice 2020-18 and Notice 2020-20. The Notice provides additional relief to taxpayers through the extension of various filing and payment deadlines, which were not covered in Notice 2020-18 and Notice 2020-20. It also provides certain relief for Tax Court petition filings, claims for refund, and complaints for refund in addition to extending certain time periods for the IRS to meet deadlines under the I.R.C.
  - Tax Return Filings and Payment Obligations.
    - Eligibility. Any person with a federal tax payment obligation or a federal tax return filing obligation provided for in Notice 2020-23, which is due to be performed (originally or pursuant to a valid extension) on or after April 1, 2020, and before July 15, 2020.
    - Effect. For the above eligible taxpayers, the filing and payment obligations are postponed to July 15, 2020. These taxpayers do not need to file any applicable extension forms to obtain the extension.
    - Covered Tax Return and Payment Obligations. The covered tax return and payment obligations include:

- Forms 1040, *U.S. Individual Income Tax Return*, 1040-SR, *U.S. Tax Return for Seniors*, 1040-NR, *U.S. Nonresident Alien Income Tax Return*, 1040-NR-EZ, *U.S. Income Tax Return for Certain Nonresident Aliens with No Dependents*, 1040-PR, *Self-Employment Tax Return – Puerto Rico*, 1040-SS, *U.S. Self-Employment Tax Return (including the Additional Child Tax Credit for Bona Fide Residents of Puerto Rico)*;

- Calendar year or fiscal year corporate income tax return payments and return filings on Forms 1120, *U.S. Corporation Income Tax Return*, 1120-C, *U.S. Income Tax Return for Cooperative Associations*; 1120-F, *U.S. Income Tax Return of a Foreign Corporation*, 1120-FSC, *U.S. Income Tax Return of a Foreign Sales Corporation*, 1120-L, *U.S. Life Insurance Company Income Tax Return*, 1120-ND, *Return for Nuclear Decommissioning Funds and Certain Related Persons*, 1120-PC, *U.S. Property and Casualty Insurance Company Income Tax Return*, 1120-POL, *U.S. Income Tax Return for Certain Political Organizations*, 1120-REIT, *U.S. Income Tax Return for Real Estate Investment Trusts,* 1120-RIC, *U.S. Income Tax Return for Regulated Investment Companies*, 1120-S, *U.S. Income Tax Return for an S Corporation*, 1120-SF, *U.S. Income Tax Return for Settlement Funds (Under Section 468B)*;

- Calendar year or fiscal year partnership return filings on Forms 1065, *U.S. Return of Partnership Income*, and 1066, *U.S. Real Estate Mortgage Investment Conduit (REMIC) Income Tax Return*;

- Estate and trust income tax payments and return filings on Forms 1041, *U.S. Income Tax Return for Estates and Trusts*, 1041-N, *U.S. Income Tax Return for Electing Alaskan Native Settlement Trusts*, 1041-QFT, *U.S. Income Tax Return for Qualified Funeral Trusts*;

- Estate and generation-skipping transfer tax payments and return filings on Forms 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*, 706-NA, *United States Estate (and Generation-Skipping Transfer) Tax Return*, 706-A, *United States Additional Estate Tax Return*, 706-QDT, *U.S. Estate Tax Return for Qualified Domestic Trusts*, 706-GS(T), *Generation-Skipping Transfer Tax Return for Terminations*, 706-GS(D-1), *Notification of Distribution from a Generation-Skipping Trust*;

- Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*, filed pursuant to Rev. Proc. 2017-34;

- Form 8971, *Information Regarding Beneficiaries Acquiring Property from a Decedent*, and any supplemental Form 8791, including all requirements contained in I.R.C. section 6035(a);

- Forms 709, *United States Gift (and Generation-Skipping Transfer) Tax Return*, due on the date an estate is required to file Form 706 or Form 706-NA;

    - Estate tax payments of principal or interest due as a result of an election made under I.R.C. sections 6166, 6161, or 6163 and annual recertification requirements under I.R.C. section 6166;

    - Exempt organization business income tax and other payments and return filings on Form 990-T, *Exempt Organization Business Income Tax Return (and proxy tax under I.R.C. Section 6033(e) of the Code)*;

    - Excise tax payments on investment income and return filings on Form 990-PF, *Return of Private Foundation or Section 4947(a)(1) Trust Treated as Private Foundation*, and excise tax payments and return filings on Form 4720, R*eturn of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code*;

    - Quarterly estimated income tax payments calculated on Form 990-W, *Estimated Tax on Unrelated Business Taxable Income for Tax-Exempt Organizations*, 1040-ES, *Estimated Tax for Individuals*, 1040-ES (NR), *U.S. Estimated Tax for Nonresident Alien Individuals*, 1040-ES (PR), *Estimated Federal Tax on Self-Employment and on Household Employees (Residents of Puerto Rico)*, 1041-ES, *Estimated Income Tax for Estates and Trusts*, and 1120-W, *Estimated Tax for Corporations*.

- *Observation*: Notice 2020-23 provides that taxpayers may request an extension to file a return on or before July 15, 2020 but the extension date may not go beyond the original statutory or regulatory extension date. For example, an individual taxpayer may file a Form 4868 by July 15, 2020; however, the taxpayer's extension of time will only be to October 15, 2020 (*i.e.*, not 6 months after July 15, 2020).

- *Observation*. Notice 2020-23 specifically provides that the extension of time to file includes not only the specific forms provided above, but also any schedules, returns, and other forms that are filed as attachments to the forms or required to be filed by the due date of the return. These include Forms 3520, *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*, 5471, *Information Return of U.S. Persons with Respect to Certain Foreign Corporations*, 5472, *Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business*, 8621, *Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*, 8858, *Information Return of U.S. Persons with Respect to Foreign Disregarded Entities (FDEs) and Foreign Branches (FBs)*, 8865, *Return of U.S. Persons with Respect to Certain Foreign Partnerships*, and 8938, *Statement of Specified Foreign Financial Assets*. In addition, Notice 2020-23 also specifically provides that the relief under the Notice includes any I.R.C. section 965(h) installment payments due on or after April 1, 2020, and before July 15, 2020.

    - *<u>Observation</u>*. Although FinCEN Form 114, *Report of Foreign Bank and Financial Accounts (FBAR)*, is not listed in any of the previously referenced Notices, FinCEN has permitted taxpayers an automatic extension of time to file an FBAR to October 15, 2020. Taxpayers are not required to make a formal request for an extension.

  - <u>Tax Court Petitions and Refund Claims</u>.

    - <u>Eligibility</u>. Any person who was required to file a Tax Court petition or notice of appeal on or after April 1, 2020, and before July 15, 2020. In addition, any person who was required to file a claim for credit or refund of any tax and to bring any lawsuit against the Government for credit or refund of any tax on or after April 1, 2020, and before July 15, 2020.

    - <u>Effect</u>. For the above eligible taxpayers, such taxpayers are granted additional time to file a Tax Court petition or notice of appeal on or before July 15, 2020. In addition, such taxpayers may file a refund claim or complaint for refund on or before July 15, 2020.

  - <u>Postponement of Due Dates for Certain IRS Acts</u>.

    - <u>Eligibility</u>. The IRS will have an additional 30 days to: (1) assess tax; (2) give or make any notice or demand for payment of tax; (3) collect by levy; (4) bring suit; and (5) allow a credit or refund of tax. However, the extension of time only applies to:

      - Persons who are currently under examination (including an investigation to determine liability for an assessable penalty under subchapter B of Chapter 68);

      - Persons whose cases are with the Independent Office of Appeals; and

      - Persons who, during the period beginning on or after April 6, 2020, and ending before July 15, 2020, file amended returns or submit payments with respect to a tax for which the time for assessment would otherwise expire during this period.

- **<u>IR 2020-59</u>.** On March 25, 2020, the IRS unveiled its new People First Initiative, which is a "sweeping series of steps to assist taxpayers by providing relief on a variety of issues ranging from easing payment guidelines to postponing compliance actions."

  - <u>Installment Agreements</u>. For taxpayers under an existing installment agreement, the IRS is suspending any payments due between April 1, 2020, through July 15, 2020. In addition, the IRS has agreed not to default any installment agreements during this period.

  - Note: The IRS has issued frequently asked questions and answers for installment agreements subject to direct debit payments. For these installment agreements, the IRS has indicated it will continue to automatically withdraw funds from the financial institution. However, taxpayers can contact their financial institutions directly to suspend any payments between April 1, 2020, through July 15, 2020. Taxpayers are advised to communicate to the financial institution that payments should continue after July 15, 2020, to avoid potential default of the original installment agreement.

- Offers-in-Compromise. For pending OIC applications, the IRS is permitting taxpayers until July 15, 2020, to provide requested additional information to support a pending OIC. Moreover, the IRS has agreed not to close any pending OIC request before July 15, 2020, without the taxpayer's consent.

  For taxpayers with accepted OICs, such taxpayers may request the suspension of all payments until July 15, 2020.

  - *Observation*. Because the amount of an offer-in-compromise based on doubt as to collectability is based in large part on the taxpayer's current and projected financial situation, taxpayers may find it advantageous to file offers-in-compromise now to resolve their outstanding tax liabilities. Indeed, the IRS has indicated in its People First Initiative guidance that taxpayers should strongly consider doing so in light of the COVID-19 outbreak and its impact on their financial status.

- Field and Automated Collection. The IRS has indicated that it will stay all collection actions (liens and levies) until July 15, 2020. However, field revenue officers may continue to pursue high-income non-filers and perform other similar activities where warranted.

  - *Observation*. It is the experience of the authors that not all IRS personnel, including Revenue Officers, may be aware of the suspension of collection actions. In the event a levy or other collection action was made after March 25, 2020, the IRS employee responsible for the collection action should be made aware of the IRS' guidance. In the event this does not work, tax professionals should request to speak with the IRS employee's manager to request the collection action be suspended.

- Passport Certifications. The IRS will suspend new certifications to the State Department for taxpayers who are "seriously delinquent" until July 15, 2020.

- Audits. The IRS will generally not start any new field, office, and correspondence examination unless deemed necessary to protect the Government's interests in preserving the applicable statute of limitations on assessment. However, the IRS will continue to work on refund claims.

        - Note: On March 25, 2020, IRS LB&I issued a memorandum to its employees indicating a temporary deviation that applies to the Information Document Request ("IDR") Enforcement Process. Pursuant to the memorandum, IDR enforcement procedures (*i.e,* the issuance of Summonses) are suspended through July 15, 2020, for taxpayers who are unable, due to the COVID-19 pandemic, to respond timely to an IDR. However, examiners and specialists continue to have discretion to issue and receive IDRs and managers retain the discretion to enforce IDRs to protect the Government's interests.

          On April 2, 2020, Tax Exempt/Government Entities also issued a memorandum to its employees indicating a temporary deviation that applies to the IDR Enforcement Process. Pursuant to the memorandum, examining agents and managers are advised to exercise reasonable application of business judgment in the exercise of their duties related to IDR requests and follow-ups. The memorandum informs exam personnel that they can and should as appropriate continue issuing and receiving IDRs.

    - Appeals. Appeals employees will continue to work their cases; however, they will not be in-person. Taxpayers are urged to promptly respond to any outstanding requests for information for all cases in Appeals.

- **IRS Notice 2020-22**. The Notice provides relief for I.R.C. section 6656 failure-to-deposit penalties to employers entitled to the new refundable tax credits provided under the FFCRA and CARES Act.

    - Eligibility. The Notice applies to employment tax deposits made in anticipation of paid leave credits under the FFCRA and employee retention credits under the CARES Act. It applies to deposits of employment taxes made for qualified leave wages paid with respect to the period beginning April 1, 2020, through December 31, 2020, and for qualified retention wages paid with respect to the period beginning on March 13, 2020, through December 31, 2020.

    - Applicability.

        - FFRCA Qualified Leave Wages. An employer will not be subject to a failure-to-deposit penalty under I.R.C. section 6656 if: (1) the employer paid qualified leave wages to its employees in the calendar quarter prior to the time of the required deposit; (2) the amount of employment taxes that the employer does not timely deposit is less than or equal to the amount of the employer's anticipated paid leave credits for the calendar quarter as of the time of the required deposit; and (3) the employer did not seek payment of an advance credit by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19, with respect to the anticipated credits it relied upon to reduce its deposits.

  - CARES Act Qualified Retention Wages. An employer will not be subject to a failure-to-deposit penalty under I.R.C. section 6656 if: (1) the employer paid qualified retention wages to its employees in the calendar quarter prior to the time of the required deposit; (2) the amount of employment taxes that the employer does not timely deposit, reduced by the amount of employment taxes not deposited in anticipation of the qualified leave wages is less than or equal to the amount of the employer's anticipated credits under the CARES Act for the calendar quarter as of the time of the required deposit; and (3) the employer did not seek payment of an advance credit by filing Form 7200 with respect to the anticipated credits it relied upon to reduce its deposits.

- **IRS Memorandum for All Services and Enforcement Employees**. On March 27, 2020, the IRS issued a memorandum to its services and enforcement employees. In the memorandum, the IRS indicated that were implementing a temporary deviation that allows IRS employees to accept images of signatures (scanned or photographed) and digital signatures on documents related to the determination or collection of tax liability. These documents include: (1) extensions of statute of limitations on assessment or collection; (2) waivers of statutory notices of deficiency and consents to assessment; (3) agreements to specific tax matters or tax liabilities (closing agreements); (4) any other statement or form needing the signature of the taxpayer or representative traditionally collected by IRS personnel outside of standard filing procedures (e.g., Powers of Attorney). In addition, the memorandum indicates that IRS employees should use all existing and previously allowable means of receiving and transmitting documents, such as eFax or established secured messaging systems, to eliminate mailing documents to the extent possible.

- **Rev. Proc. 2020-23**.

  - Summary. The Bipartisan Budget Act of 2015 ("BBA"), Pub. L. No. 114-74 (Nov. 2, 2015), replaced the existing partnership audit rules under the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), effective for partnership tax years beginning after December 31, 2017. Generally, the BBA rules require a BBA partnership to file an Administrative Adjustment Request ("AAR") to amend partnership-related items on a partnership return. Because of this mechanism, partners in BBA partnerships that filed Forms 1065, *U.S. Return of Partnership Income*, for tax years 2018 and 2019 would not be able to immediately benefit from many of the retroactive tax relief provisions of the CARES Act until the 2021 filing season. Accordingly, Rev. Proc. 2020-23 permits eligible partnerships to file amended partnership returns for taxable years beginning in 2018 and 2019 using a Form 1065 with the "Amended Return" box checked and to issue amended Schedules K-1, *Partner's Share of Income, Deductions, Credits, etc.* to each of its partners for prior years.

  - Eligibility. The relief under Rev. Proc. 2020-23 is available to BBA partnerships that filed Forms 1065 and furnished Schedules K-1 for the partnership taxable years beginning in 2018 or 2019 prior to the issuance of the revenue procedure (*i.e.*, April 8,

2020). However, eligible partnerships must file amended Forms 1065 and furnish corresponding Schedules K-1 prior to September 30, 2020.

- Procedure. The BBA partnership must file a Form 1065 with the "Amended Return" box checked and furnish corresponding amended Schedules K-1. In addition, the BBA partnership must clearly indicate the application of Rev. Proc. 2020-23 on the amended return by writing "FILED PURSUANT TO REV PROC 2020-23" at the top of the amended Form 1065 and attach a statement with each Schedule K-1 sent to its partners with the same notation. These procedures may be done by mail or electronically, although Rev. Proc. 2020-23 notes that filing electronically may allow for faster processing.

  - *Observation*. Rev. Proc. 2020-23 indicates that a BBA partnership currently under examination for the 2018 or 2019 tax year may also take advantage of the relief under the revenue procedure. However, the BBA partnership must send notice to the IRS Revenue Agent coordinating the partnership's examination in writing that the partnership seeks relief under the revenue procedure. Such notice must be done prior to or contemporaneously with the filing of the amended Form 1065, and the BBA partnership must also provide the IRS Revenue Agent with a copy of the amended Form 1065 upon filing.

  - *Observation*. If a BBA partnership has previously filed an AAR and wishes to file an amended Form 1065 for the same tax year, the BBA partnership is instructed to use the items as adjusted in the AAR, where applicable, in lieu of any reporting from the originally filed Form 1065.

Texas Comptroller Coronavirus Guidance

- Sales Tax Collections in February 2020. The Texas Comptroller is offering assistance to businesses that are struggling to pay the full amount of Texas sales tax collected in February 2020. For qualifying businesses, the Texas Comptroller is offering short-term payment agreements to pay the collected sales tax, with the waiver of penalties and interest, in most cases.

- Existing Payment Plans. The Texas Comptroller has announced that it will help taxpayers, affected by the coronavirus, avoid default on existing payment plan agreements with the Comptroller. The Comptroller will consider, on a case-by-case basis, postponement on the deadlines to remit payments to the Comptroller's office. Any postponement will only apply to existing payment plan agreements for periods *prior* to the February 2020 tax report. The potential postponements will not extend or delay a taxpayer's due dates for remitting or reporting tax collected by taxpayers on behalf of state and local governments. It will also not apply to resolution agreements that specify a deadline to make a single lump sum payment of the entire liability. Further, the total amount due under the payment plan will not be reduced. After the expiration of the postponement period, all payment deadlines will resume on the next periodic payment deadlines as provided in the payment plan agreement. Postponed payments will be added to the end of the term of the agreement.

- Audit Field Offices. The Texas Comptroller's audit field offices are temporarily closed. Auditors will continue their operations by working remotely. Audit supervisors and managers will still be able to discuss taxpayer matters via phone conferencing and WebEx when needed. Audit Headquarters will remain open at this time with a limited number of staff to continue to receive and process refund requests, Statement of Grounds, Certificates of No Tax Due, etc.

- Suspension of the 60-Day Deadline to Contest Audit Results. The Texas Comptroller is suspending the 60-day deadline for taxpayers to contest audit results. The suspension of the 60-day deadline will apply to both redetermination and refund administrative hearings. The Texas Comptroller will waive accrued interest during this period.

- Field Office Closures. The Texas Comptroller has temporarily closed its Taxpayer Services and Collections field offices. The Texas Comptroller has recommended that taxpayers use Webfile to file and pay certain taxes electronically.

- Motor Vehicle Tax Extension. Texas Governor Greg Abbott and the Texas Department of Motor Vehicles has granted a temporary extension for the registration and titling of purchased vehicles. The extension is designed to allow auto dealers and individuals more time before they are required to appear in person at a county tax-assessor-collector office. In addition, the Texas Comptroller is providing an extension of up to 90 days past the original due date to pay the motor vehicle tax due on these purchases.

- Extension of Time to File Franchise Tax Returns. The Texas Comptroller has automatically extended the due date to file and pay the 2020 Texas franchise tax reports to July 15, 2020, to be consistent with filing deadline extensions provided by the IRS. The due date extension applies to all franchise taxpayers. In addition, the extension is automatic—*i.e.*, franchise taxpayers do not need to file any additional forms.

United States Tax Court

- Press Release**.** On March 23, 2020, the United States Tax Court issued a press release. In it, the Tax Court indicated that it would keep the Tax Court building in Washington, D.C. closed and that Tax Court personnel were working remotely. The Tax Court reminded practitioners that the eAccess and eFiling systems remain operational and that the Court will continue to process items received electronically, serve orders and opinions, enter and serve decisions, work with litigants, and receive telephone calls. However, mail (including petitions) will not be delivered to the Tax Court until the building reopens. In addition, many trial sessions have been postponed.

    - *Observation*. The press release also indicates that the "Court expects that the parties will continue to work together to exchange information and address pending issues." By way of example, taxpayers are expected to respond to any pending motions, such as motions for summary judgment, by the specific deadlines. *See, e.g., Kathy Trembly v. Comm'r*, Docket No. 25285-17L (Apr. 10, 2020).

H.R. 748: Coronavirus Aid and Economic Security Act ("CARES Act")

Background. On March 27, 2020, President Trump signed into law H.R. 748, the Coronavirus Aid and Economic Security Act or the CARES Act, following a unanimous 96-0 vote in the U.S. senate and a voice-vote of approval in the House of Representatives. The $2 trillion coronavirus-relief legislation provides financial assistance to small businesses and taxpayers through a host of mechanisms, including through newly-established "advanced recovery rebates" and programs designed to encourage employee retention during the coronavirus epidemic. The Act relaxes the ability to withdraw funds and loans from certain qualified retirement plans without adverse tax consequences and establishes favorable small business loan programs, tax credits, and a number of amendments to the I.R.C. In addition, the economic stimulus Act retroactively amends several provisions of the Tax Cuts & Jobs Act of 2017 (the "TCJA"), including certain restrictions on net operating losses and carrybacks, excess-loss deductions, business-interest deductions, and bonus depreciation rules relating to qualified improvement property, among other changes.

Paycheck Protection Program SBA Loans ("PPP Loans").

- Summary. The CARES Act creates the Paycheck Protection Program ("PPP"), a new loan program to be administered through the U.S. Small Business Administration ("SBA"), and authorizes commitments for general business loans of up to $349 billion to be guaranteed by the SBA. The PPP is designed to provide loans of up to $10 million to qualifying small businesses in order to encourage employee retention during the coronavirus crisis by providing financial assistance with the payment of certain operational costs. If applicable requirements are met, part or all of the amount of the loan may be forgiven without giving rise to cancellation-of-indebtedness income for federal tax purposes.

- Eligibility. Generally, businesses (including nonprofits) qualify if they have 500 or fewer employees, provided that the loans are made between February 15, 2020, through June 30, 2020. For these purposes, an employee means an individual employed on a full-time, part-time, or other basis. More specifically, in addition to small business concerns, any business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) of the Small Business Act is eligible to receive a covered loan if the business concern, nonprofit organization, veterans organization, or Tribal business concern employees not more than the *greater of* (i) 500 employees or (ii) if applicable, the size standard for number of employees established by the SBA for the applicable industry in which the entity or organization operates.

    - Sole Proprietors, Independent Contractors and Eligible Self-Employed Individuals. The CARES Act specifically provides that individuals who operate under a sole proprietorship or as an independent contractor and eligible self-employed individuals are eligible to receive a covered loan. Such persons may be required to submit documentation in order to establish eligibility, including payroll tax filings, Forms 1099-MISC, and income and expenses from the sole proprietorship, as determined by the SBA.

- Special Rules for Hospitality and Dining Industry. The CARES Act provides for a special exception targeted to the hospitality and dining industry—an industry sector that is expected to suffer particular economic challenges during the crisis. Under this special exception, a business concern that is designated under Sector 72 of the North American Industry Classification System (NAICS) and employs not more than 500 employees per physical location is eligible for a covered loan under the PPP.

- Nonprofit Organization and Veterans Organizations. The CARES Act specifically defines "nonprofit organizations" to mean those organizations described in I.R.C. section 501(c)(3) that are exempt from taxation under I.R.C. section 501(a). In addition, on April 2, 2020, the SBA issued an Interim Final Rule ("SBA Rule") that specified that veteran organizations means those organizations described in I.R.C. section 501(c)(19).

- Maximum Loan Amount. Generally, the maximum loan amount is limited to the **lesser of** (i) the average total monthly payments by the applicant for payroll costs incurred during the 1-year period prior to the date on which the loan is made, multiplied by 2.5, or (ii) $10 million. However, if the applicant was not in business during the period beginning on February 15, 2019, and ending on June 30, 2019, the maximum loan amount is limited to the **lesser of** (i) the average total monthly payments by the applicant for payroll costs incurred during the period beginning on January 1, 2020, and ending February 29, 2020, multiplied by 2.5, or (ii) $10 million.

  - Payroll Costs. For these purposes, "payroll costs" are generally defined as any compensation paid to an employee (salary, wages, commissions); payment for vacation; parental, family, medical, or sick leave; allowances for dismissal or separation; payments for group health care plans; retirement benefits; and State or local taxes assessed on the employee's compensation. In addition, payroll costs include the payment of any compensation or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation not in excess of $100,000.

  - Exclusions from Payroll Costs. Under the CARES Act, payroll costs do not include any compensation of employees in excess of $100,000; any compensation to employees whose principal residences are outside of the United States; and any compensation for qualified sick leave or qualified family leave wages under the Families First Coronavirus Response Act. In addition, the statute specifically provides that payroll costs do not include any taxes imposed or withheld under chapters 21 (employee and employer portion of FICA taxes), 22 (taxes under the Railroad Retirement Tax Act), or 24 (withholding of income taxes) of the Code during the covered period, which for these purposes if defined as the period from February 15, 2020, through June 30, 2020.

  - SBA FAQs. The SBA, in consultation with the Treasury Department, has periodically issued frequently asked questions and answers ("SBA FAQs") regarding the PPP loan program. The SBA FAQs indicate that borrowers and lenders may rely on the SBA

FAQs as the SBA's interpretation of the CARES Act and its SBA Rule. The SBA FAQs provide that:

- Payroll costs should be calculated on a gross basis. Therefore, payroll costs are not reduced by taxes imposed on the employee and required to be withheld by the employer—however, the definition of payroll costs does not include the employer's share of payroll tax (FICA). Significantly, the SBA has indicated it will utilize this definition of payroll costs for purposes of computing the maximum loan amount, the borrower's eligible uses for the loan proceeds, and for purposes of determining the forgivable amount.

- For purposes of the exclusion of payroll costs in excess of an annual salary of $100,000, the exclusion applies only to cash compensation and not to non-cash benefits, such as employer contributions to a defined-benefit or defined-contribution retirement plan; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and payment of state and local taxes assessed on compensation of employees.

- Any payments an eligible borrower made to an independent contractor or sole proprietor should not be included in the calculations of the eligible borrower's payroll costs.

- Generally, borrowers can calculate their aggregate payroll costs using data either from the previous 12 months (*i.e.*, a rolling period) or from calendar year 2019.

- Allowable Uses. The recipient may use the loan proceeds to pay: (1) payroll costs; (2) costs related to the continuation of group health care benefits; (3) employee salaries, commissions, or similar compensations; (4) interest on mortgage obligations; (5) rent; (6) utilities; and (7) interest on debt obligations incurred prior to February 15, 2020.

  - Note: The SBA Rule cautions PPP applicants that SBA will direct borrowers who use PPP funds for unauthorized purposes to repay those amounts. In addition, such borrowers may be held liable for charges of fraud.

- Non-recourse. Generally, the loans will be non-recourse including against any individual shareholder, member, or partner if the loan is not repaid, provided such person uses the loan proceeds for purposes authorized under the Act.

- No Personal Guarantee or Collateral. No personal guarantee is required for the loan nor is any collateral required.

- Interest Rate. The interest rate cannot exceed 4%.

  - The SBA Rule provides that the interest rate on PPP loans will be 1%. In addition, the maturity for PPP loans will be 2 years.

- Payment Deferral. Generally, any payment (principal, interest, and fees) is deferred for "impacted borrowers" with PPP Loans for a period of not less than 6 months and not more than 1 year. For these purposes, "impacted borrowers" means a PPP Loan recipient that was in operation as of February 15, 2020, and has an application approved or pending approval on or after March 27, 2020.

  - The SBA Rule provides that any payment obligations for PPP loans will not be due until 6 months following the disbursement of the loan

- No Prepayment Penalty. There is no prepayment penalty for any payment.

- SBA Fee Waiver. The SBA will not charge a fee on a PPP Loan during the covered period.

- Waiver of Requirement of Inability to Obtain Credit Elsewhere. During the covered period, the requirement that a small business concern be unable to obtain credit elsewhere is waived with respect to a covered loan under the PPP.

- Certification. A borrower under the PPP must make a good-faith certification that:

  - That uncertainty of current economic conditions makes necessary the loan request to support ongoing business operations;

  - Acknowledging that funds will be used to retain workers and maintain payroll or make mortgage, lease, or utility payments;

  - That there are no other duplicative loan applications; and

  - During the period from February 15, 2020, through December 31, 2020, the borrower has not received other loan amounts under the Act.

- Forgiveness of Loan Amounts. A loan amount may be forgiven in an amount equal to the sum of the following costs incurred and payments made in the "covered period," which is the 8-week period beginning on the date of the origination of a covered loan (collectively, "Eligible Costs"):

  - Payroll costs;

    - For these purposes, "payroll costs" are generally defined as any compensation paid to an employee (salary, wages, commissions), payment for vacation, parental, family, medical, or sick leave, allowances for dismissal or separation, payments for group health care plans, retirement benefits, and State or local taxes assessed on the employee's compensation. In addition, payroll costs

include the payment of any compensation or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation not in excess of $100,000.

- Payroll costs do not include any compensation of employees in excess of $100,000; any compensation to employees whose principal residence is outside the United States; and any compensation for qualified sick leave or qualified family leave wages under the Families First Coronavirus Response Act.

- *Observation*. It should be noted that the term "payroll costs" has the same meaning as above for purposes of the PPP loan program.

- Any payment of interest on a covered mortgage obligation;

  - A "covered mortgage obligation" is defined as any debt or debt instrument incurred in the ordinary course of business that is a liability of the borrower, is a mortgage on real or personal property, and was incurred before February 15, 2020.

- Any payment on a covered rent obligation;

  - A "covered rent obligation" is defined as rent obligated under a leasing agreement in force before February 15, 2020.

- Any covered utility payment;

  - A "covered utility payment" is defined as payment for a service for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020.

- Documentation Required. Note that the CARES Act specifically prohibits forgiveness of loan amounts without submission of required documentation to the lender that is servicing the covered loan. The required documentation for loan forgiveness treatment is as follows:

  - documentation verifying the number of full-time equivalent employees on payroll and pay rates for the periods at issue, including:

    - payroll tax filings reported to the Internal Revenue Service; and
    - State income, payroll, and unemployment insurance filings;

  - documentation, including cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, payments on covered lease obligations, and covered utility payments;

- a certification from a representative of the eligible recipient authorized to make such certifications that—
  - the documentation presented is true and correct; and
  - the amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, or make covered utility payments; and
- any other documentation the SBA determines to be necessary.

- Limitations.
  - Principal Amount Limitation. The amount of the loan forgiveness cannot exceed the principal amount of the financing available under the loan.
  - Reduction in Number of Employees. The amount of the loan forgiveness is reduced by multiplying the Eligible Costs by (1) the average number of full-time equivalent employees per month employed by the recipient during the 8-week period beginning on the date of the origination of the loan, over (2) at the election of the borrower, either (i) the average number of full-time equivalent employees per month employed by the borrower during the period February 15, 2019, and ending June 30, 2019, or (ii) the average number of full-time equivalent employees per month employed by the borrower during the period beginning on January 1, 2020, and ending February 29, 2020.
    - Computation of Full-Time Equivalent Employees. Generally, the average number of full-time equivalent employees shall be determined by calculating the average number of full-time equivalent employees for each pay period falling within a month.
  - Reduction for Reduced Salary and Wages. The amount of the loan forgiveness is reduced by the amount of any reduction in total salary or wages for an employee that is in excess of 25% of the total salary or wages of the employee during the most recent full quarter during which the employee was employed prior to the origination of the loan. For these purposes, employees who had compensation in excess of $100,000 are generally exempt from this requirement.
  - SBA Interim Final Rule. On April 2, 2020, the SBA issued an Interim Final Rule. In the Rule, the SBA held that "not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs." The SBA acknowledged that the statutory text of the CARES Act provides that borrowers are eligible for forgiveness of all eligible costs but that "the non-payroll portion of the forgivable loan amount should be limited to effectuate

the core purpose of the statute and ensure finite program resources are devoted primarily to payroll."

- Application for Loan Forgiveness.

  - Requirements. A borrower seeking loan forgiveness must submit to the lender servicing the loan an application, including: (1) documentation verifying the number of full-time equivalent employees on payroll and pay rates for the applicable pay periods (e.g., IRS payroll tax filings and state tax filings); (2) documentation to show payments were made on covered mortgage obligations, covered lease obligations, and covered utility payments; (3) certification from borrower or representative that the documentation is true and correct and that amount of loan forgiveness was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, or make covered utility payments; and (4) any other documentation the SBA may require.

  - 60-Day Decision. The lender who receives the application for loan forgiveness must issue a decision on the loan forgiveness application within 60 days.

- Taxability of Loan Forgiveness. While the forgiveness or cancellation of indebtedness is generally taxable under the I.R.C., the Act specifically provides that such amounts forgiven with respect to an amount equal to the sum of the costs described above are excluded from gross income.

- Authorized Lenders. Lenders that are authorized to extend loans under the SBA's already-existing section 7(a) loan program are eligible to make loans under the SBA's new PPP. The Act provides the SBA and Secretary of the Treasury with authority to extend authorization to make loans under the PPP to additional lenders who are determined to have the necessary qualifications to process, close, disburse and service loans made with the guarantee of the SBA.

  - Note: The SBA Rule directs SBA authorized lenders to conduct their own underwriting, which includes: (1) confirming receipt of the borrower certifications in the PPP SBA application forms; (2) confirm receipt of information showing that the applicant had employees for whom the applicant paid salaries and payroll taxes on or around February 15, 2020; (3) confirm the dollar amount of average monthly payroll costs for the preceding calendar year by reviewing the payroll documentation submitted with the borrower's application; and (4) follow all applicable Bank Secrecy Act (BSA) requirements.

    The SBA Rule indicates that the lender's underwriting obligation under the PPP loan program is limited to the above steps and reviewing the PPP SBA application form. Applicants are requested to submit any documentation necessary to establish eligibility for a PPP loan, including payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship. Lenders are entitled to rely on the borrower's loan documentation for loan forgiveness.

In addition, lenders are entitled to fees for processing PPP loans but such fees are to be paid from the SBA and not the applicant.

- Agent Fees. An agent that assists an eligible recipient to prepare an application for a PPP loan may not collect a fee in excess of the limits established by the Administrator.
  - According to a Treasury information sheet, agents are authorized representatives and can be: (1) an attorney; (2) an accountant; (3) a consultant; (4) someone who prepares an applicant's application for financial assistance and is employed and compensated by the applicant; (5) someone who assists a lender with originating, disbursing, serving, liquidating, or litigating SBA loans; (6) a loan broker; or (7) any other individual or entity representing an applicant by conducting business with the SBA.
  - According to the same Treasury information sheet, agent fees are payable out of lender fees, and the lender will pay the agent. Agents may not collect any fees from the applicant. The total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan may not exceed: (1) 1% for loans of not more than $350,000; (2) 0.50% for loans of more than $350,000 and less than $2 million; and (3) 0.25% for loans of at least $2 million.
  - *Observation*: There has been a lot of controversy regarding the agent fee limitation. Arguably, fees paid to agents that are outside the scope of the application process would not be subject to the agent fee limitation.

Internal Revenue Code Revisions.

- Summary. The I.R.C. was revised to provide tax incentives to both individuals and businesses. For individuals, the CARES Act provides for "advanced recovery rebates," which are intended to be issued to qualifying individuals "as rapidly as possible." In addition, the CARES Act allows qualifying individuals to make withdrawals from eligible retirement plans without incurring a 10% early-withdrawal penalty and provides for the repayment of such funds within three years on a tax-free basis, provided the distribution relates to a specified coronavirus-related distribution. The CARES Act similarly expands the ability for individuals to receive loans from eligible retirement plans. Finally, the CARES Act provides a new above-the-line deduction for charitable contributions (up to $300) and added tax benefits for employer-provided education assistance.

  For businesses, the CARES Act contains a number of provisions designed to encourage employee retention during the coronavirus epidemic and to provide employers with increased cash flow and liquidity to confront the economic challenges posed by the crisis. The CARES Act provides for an employee-retention credit with respect to "applicable employment taxes" and delays the due date for depositing certain employer FICA or self-employment taxes, subject to certain restrictions discussed below. In addition, the Act's economic-stimulus provisions retroactively amend several aspects of the TCJA, including its restrictions on net

operating losses and carrybacks, excess-loss deductions, business-interest deductions, and bonus depreciation rules relating to qualified improvement property, among other changes.

- Individuals.
  - Recovery Rebates. The CARES Act adds new I.R.C. section 6428, which provides credits and advanced refunds to qualifying taxpayers.
    - Amount of Credit.
      - $1,200 for taxpayers who file single, head of household, and married filing separately.
      - $2,400 if married filing jointly.
      - Plus $500 for each qualifying child, which are generally dependents under the age of 17.
    - Phase-Out. The amount of the credit is phased out for higher-income earners. These phase-outs begin for taxpayers whose AGI exceeds: (1) $150,000 for joint returns; (2) $112,500 for head of households; and (3) $75,000 for all others. The rebate is phased out at a rate of 5 percent of AGI above the applicable threshold. The rebate is therefore completely phased out for joint filers with no children and AGI exceeding $198,000; head-of-household filers with no children and AGI exceeding $146,000; and single filers with no children and AGI over $99,000.
    - Eligibility. Generally, all individuals qualify for the credit. Rebates are available even if the taxpayer does not have income. However, nonresident alien individuals, people claimed as dependents, and trusts or estates do not qualify.
    - Advanced Refund Mechanism. The credit applies to the 2020 tax year. But the IRS is directed to issue advanced refunds of the credit amount based on the taxpayer's 2019 tax return unless the taxpayer has not filed a return for such year. In this latter case, the IRS is directed to issue the advanced refund of the credit amount based on the taxpayer's 2018 tax return. Taxpayers who receive advanced refunds of the credit amounts will have their 2020 credit amount reduced by such payment. Any failure to reduce the credit on the 2020 return by the payment will be treated as a mathematical or clerical error and assessed according to I.R.C. section 6213(b)(1). The CARES Act directs the IRS to issue the advanced refunds "as rapidly as possible." Finally, the CARES Act contemplates that the advanced refund will be disbursed to bank accounts electronically based on information the IRS has available for tax filings on or after January 1, 2018.

- IR 2020-69. On April 10, 2020, the IRS issued a news release, which indicated that the IRS and Treasury Department had launched a new web tool designed to provide a portal for taxpayers who had not filed 2018 or 2019 returns to submit information to the IRS "so they can receive their Economic Impact Payments as soon as possible." The new IRS portal can be found at https://www.irs.gov/coronavirus/non-filers-enter-payment-info-here.

    - *Observation*. Generally, U.S. taxpayers are not required to file federal income tax returns if their income is below certain thresholds. For example, a single taxpayer under the age of 65 with gross income of less than $12,200 is not required to file a federal income tax return for 2019. Because the advanced refund credit is based on each taxpayer's 2018 and/or 2019 tax return filings, taxpayers who did not file a tax return for either year would not receive the advanced refund but rather would receive the credit, if eligible, when their 2020 return was filed. To fix this, the new IRS portal permits taxpayers in such instances to provide their financial and other information directly to the IRS. Taxpayers who did not file a 2018 or 2019 tax return but who received Social Security retirement, disability (SSDI), or survivor benefits or Railroad Retirement benefits do not need to use the IRS web portal.

    - *Observation*. In IR 2020-69, the IRS also indicated that it was "building a second new tool expected to be available for use by April 17." The new portal will be referred to as the *Get My Payment* tool and will provide taxpayers with the status of their payment, including the date their payment is scheduled to be deposited into their bank account or mailed to them.

- Notice. After payment is delivered to the taxpayer, the IRS is required to issue a notice of payment within 15 days to the taxpayer's last known address. The notice is required to inform the taxpayer the method in which the advanced refund of the credit was made, the amount of the payment, and a phone number for the appropriate point of contact at the IRS to report any failure to receive such payment.

- Past-Due Debts. The credit may not be reduced for certain unpaid debts, which include debts owed to other federal agencies (excluding support payments), state income tax obligations, and unemployment compensation debts.

- Territories. The CARES Act provides that the U.S. Treasury is to make payments to each possession of the United States that has a mirror code tax system in an amount equal to the loss (if any) to that possession by reason of the rebate provisions. The CARES Act provides for similar payments to each possession of the United States which does not have a mirror code tax system as if the possession had a mirror code tax system in effect. However, no

possession of the United States may receive a payment unless the possession has a plan, which has been approved by the Treasury, under which such possession will promptly distribute such payments to its residents.

- Retirement Fund Withdrawals. Generally, the I.R.C. imposes a 10% withdrawal penalty on early distributions from qualified retirement plans, *i.e.*, distributions made on or before the date on which an employee attains the age of 59 ½ or prior to the separation of service by the employee and attainment of age 55. Moreover, withdrawals of retirement funds via distributions are taxed at ordinary income tax rates. The Act provides relief for certain retirement fund withdrawals.

  - No Early-Withdrawal Penalty. The CARES Act provides that the early 10% withdrawal penalty does not apply to any "coronavirus-related distribution."

    - For these purposes, "coronavirus-related distribution" means any distribution from an eligible retirement plan made on or after January 1, 2020, and before December 31, 2020, to an individual: (1) who is diagnosed with SARS CoV-2 or COVID-19 by a test approved by the Centers for Disease Control and Prevention; (2) whose spouse or dependent is diagnosed with such virus or disease by such test; or (3) who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors determined by the Treasury Secretary.

    - Note. The persons covered by this relief do not appear to include persons who continue to work despite a salary reduction resulting from the coronavirus pandemic. Nonetheless, the CARES Act does provide the Secretary of the Treasury with authority to expand the scope of persons receiving relief.

  - Self-Certification. The CARES Act provides that a plan administrator may rely on a certification provided by the participant that they fall within one of the three categories.

  - Eligible Retirement Plans. Eligible retirement plans are defined as those plans described by existing I.R.C. section 402(c)(8)(B):

    - an individual retirement account described in I.R.C. section 408(a),
    - an individual retirement annuity described in I.R.C. section 408(b) (other than an endowment contract),
    - a qualified trust,
    - an annuity plan described in section I.R.C. section 403(a),

an eligible deferred compensation plan described in I.R.C. section 457(b) which is maintained by an eligible employer described in I.R.C. section 457(e)(1)(A), and

- an annuity contract described in I.R.C. section 403(b).[2]

- Limitations. The taxpayer may only withdraw up to $100,000 in the aggregate.

- Three-Year Repayment Period. If the individual who receives a coronavirus-related distribution pays back the funds at any time during the three-year period beginning on the date after the distribution date then the receipt and repayment are treated as a rollover transfer payment made within 60 days after the distribution. In other words, the amounts are treated as non-taxable.

- Income Inclusion Spread. If a taxpayer fails to repay the amount of the "coronavirus-related distribution," the CARES Act provides that such unpaid amount shall be included in income. Unless the taxpayer elects otherwise, any amount required to be included in gross income as a result of the distribution may be included ratably over the 3-year period beginning with the distribution date.

- Loans from Qualified Plans.

  - Eligible Persons. The CARES Act increases the ability to obtain loans from qualified plans and extends this benefit to the same persons exempted from early-withdrawal penalties for a "coronavirus-related distribution" from a qualified retirement plan.

  - Increased Loan Limits. The CARES Act increases the amount of any loans from a qualified employer plan to a qualified individual (within a 180-day period from the date of the Act) that can be made without being deemed to be a distribution. The loan threshold is increased from $50,000 to $100,000.

  - Increased Percentage-Test Limit. The CARES Act increases the percentage test limit from one-half of the present value of the of the participant's benefit to the present value of the participant's benefit under the plan.

  - Loan Repayment Delays. The CARES Act allows for repayment of an outstanding loan from a qualified employer plan to a qualified individual to be delayed if the due date for a repayment with respect to such loan falls between the date of the enactment of the Act and December 31, 2020.

[2] Under I.R.C. section 402(c)(8)(B)(vi), "[i]f any portion of an eligible rollover distribution is attributable to payments or distributions from a designated Roth account (as defined in section 402A), an eligible retirement plan with respect to such portion shall include only another designated Roth account and a Roth IRA.

- One-Year Delay for Required Minimum Distributions. The CARES Act provides for a one-year delay in required minimum distributions with respect to certain defined contribution plans and individual retirement plans.

- Charitable Contributions.

  - Summary. For tax years beginning in 2020, individual taxpayers may claim an above-the-line deduction for qualified charitable contributions of up to $300. Thus, taxpayers who do not itemize deductions may nonetheless qualify for this deduction.

  - Qualified Charitable Contribution. The term "qualifying charitable contribution" is defined as a charitable contribution under I.R.C. section 170(c): (1) which is made in cash; (2) for which a deduction is allowable under I.R.C. section 170 (determined without regard to subsection (b) thereof); and (3) which is made to an organization described in I.R.C. section 170(b)(1)(A) and not to an organization described in I.R.C. section 509(a)(3) or for the establishment of a new, or maintenance of an existing, donor advised fund (as defined in I.R.C. section 4966(d)(2)). However, the term "qualifying charitable contribution" does not include any amount treated as a charitable contribution made in such tax year due to the carryover rules of I.R.C. section 170(b)(1)(G)(ii) or I.R.C. section 170(d)(1).

  - Modification of Limitations. For tax years beginning after December 31, 2017, and before January 1, 2026, taxpayers making contributions of cash to organizations described in I.R.C. section 170(b)(1)(A) were limited to deductions not to exceed 60% of the taxpayer's contribution base for such year, which was generally the taxpayer's adjusted gross income (computed without regard to any NOL carryback). For any contributions that exceeded such amount, the taxpayer could carry the amount forward in each of the five succeeding tax years. The CARES Act suspends the 60% limitation with respect to individuals. For qualifying cash contributions in 2020, individual taxpayers may claim charitable contribution deductions to the extent such contributions do not exceed the excess of the individual's contribution base over the amount of all other charitable contributions allowed as a deduction for the contribution year. Any excess is carried forward as a charitable contribution deduction in each of the five succeeding tax years. However, taxpayers must affirmatively make an election on their 2020 tax return to take advantage of the new provision. For corporations, the CARES Act temporarily increases the limitation on the deductibility of cash charitable contributions during 2020 from 10% to 25% of the corporation's taxable income. The CARES Act also increases the limitation on deductions for contributions for food inventory from 15% to 25%.

- Employer-Provided Payment of Student Loans.

  - Summary. The CARES Act expands the scope of employer-provided education assistance for an employer's payment of up to $5,250 of principal or interest on

employee student loans from the date of the enactment of the Act through December 31, 2020.

- Employee Retention Credit For Employers.

  - Summary. Eligible employers are allowed a credit against applicable employment taxes for each calendar quarter in an amount equal to 50% of the qualified wages of an employee for such calendar quarter.

    - "Eligible employer" means an employer carrying on a trade or business (including tax-exempt organizations) during 2020 and with respect to which in any calendar quarter: (1) the operation of the trade or business in 2020 is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19, or (2) in a calendar quarter in 2020, gross receipts for the calendar quarter are less than 50% of the gross receipts for the same calendar quarter in the prior year.

    - "Applicable employment taxes" generally means the taxes imposed on employers under I.R.C. section 3111(a) (i.e., the Social Security employer-paid portion of FICA but not the Medicare portion under section 3111(b)).

    - "Qualified wages" generally means the payment of wages due to the circumstances described above. However, it does not include wages that are taken into account under section 7001 or section 7003 of the Families First Coronavirus Response Act. Section 7001 of the Families First Coronavirus Response Act provides for a credit with respect to the qualified sick leave wages paid by an employer with respect to a calendar quarter. Section 7003 provides for a credit with respect to the qualified family leave wages paid by an employer with respect to a calendar quarter.

    - For employers with an average number of full-time employees employed during 2019 that was greater than 100, "qualified wages" are limited to those wages paid by such eligible employers with respect to which, an employee who is not providing services due to circumstances described above. Thus, unlike the treatment afforded to smaller employers, qualified employers with an average of more than 100 full-time employees may only receive the applicable credit with respect to wages paid to employees who are not providing services.

  - Limitations.

    - The amount of qualified wages with respect to any employee which may be taken into account by the eligible employer for all calendar quarters cannot exceed $10,000.

- If an employer receives a covered SBA loan, the employer cannot take a credit.

- Only applies to wages paid after March 12, 2020, and before January 1, 2021.

- The credit is not available with respect to any employee for a period if the employer is allowed a credit under I.R.C. section 51 with respect to such employee for such period.

- Refundable Credit. If the 50-percent-of-qualified-wages credit exceeds the limitation described above, the excess is treated as an overpayment that will be refunded under I.R.C. sections 6402(a) and 6413(b).

- Tax-Exempt Organizations. The relief described in this section is made available to organizations that are described in I.R.C. section 501(c) and exempt from tax under section 501(a) and extends to all operations of such organizations.

- Aggregation Rule. The CARES Act provides that all persons who are treated as a single employer under I.R.C. section 52(a) or (b) or section 414(m) or (o) are treated as a single employer for purposes of this credit.

- Election Out. The CARES Act provides that an employer may elect out of this provision "in such manner as the Secretary may prescribe."

- Reasonable Cause. The IRS is directed to waive any failure-to-deposit penalty under Section 6656 of the Code for any failure to make a deposit of applicable employment taxes if the IRS determines that the failure to deposit was due to the reasonable anticipation of the credit permitted under this section.

- IR 2020-62. The IRS has issued informal guidance on the employee retention credit on its coronavirus tax relief website. This informal guidance can be found at https://www.irs.gov/newsroom/irs-employee-retention-credit-available-for-many-businesses-financially-impacted-by-covid-19. In IR 2020-62, the IRS has indicated that employers can be immediately reimbursed for the credit by reducing the required deposits of payroll taxes that have been withheld from employees' wages by the amount of the credit. The eligible employer will report the qualified wages and related health insurance costs for each quarter on their quarterly employment tax returns (Forms 941) beginning with the second quarter of 2020. If the employer's employment tax deposits are not sufficient to cover the credit, the employer may receive an advance payment from the IRS by submitting new Form 7200, Advance Payment of Employer Credits Due to COVID-19.

- IRS FAQs. The IRS has also issued frequently asked questions and answers on the employee retention credit on its coronavirus tax relief website. These frequently asked questions can be found at https://www.irs.gov/newsroom/faqs-

employee-retention-credit-under-the-cares-act. Some highlights in the FAQs include:

- For purposes of the "eligible employer" definition, the operation of a trade or business is considered partially suspended during any calendar quarter if an appropriate government agency has imposed a restriction on the business operations by limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 such that the operation can still continue to operate but not at its normal capacity. By way of example, the IRS FAQs indicate that a restaurant, bar, or similar establishment subject to a State executive order closing all such establishments to the public to reduce the spread of COVID-19 except to the extent that such establishments can provide food or beverage sales to the public on a carry-out, drive-through, or delivery basis would qualify.

- The credit is fully refundable. However, any overpayment and refund due to the eligible employer is subject to the offset rules of I.R.C. section 6402(a) prior to being refunded to the employer.

- An eligible employer may receive a tax credit for qualified leave wages under the FFCRA and the employee retention credit under the CARES Act; however, the employer may not receive both credits for the same wages. Thus, the amount of qualified wages for which an eligible employer may claim the employee retention credit does not include the amount of qualified sick and family leave wages for which the employer received tax credits under the FFCRA.

- Self-employed individuals are not eligible for the employee retention credit for their self-employment services or earnings.

- Example: An eligible employer paid $20,000 in qualified wages, resulting in an employee retention credit of $10,000. The employer is otherwise required to deposit $8,000 in federal employment taxes, including taxes withheld from all of its employees, on wage payments made during the same calendar quarter. The employer has no paid sick leave or family leave credits under the FFCRA. The employer can keep the entire $8,000 of taxes that the employer was otherwise required to deposit without penalties as a portion of the credits it is otherwise entitled to claim on the Form 941. The employer may file a request for an advance credit for the remaining $2,000 by completing Form 7200.

- Delay of Employer Payroll Taxes.

  - Summary. The CARES Act postpones the due date for depositing the employer portion of payroll taxes and 50 percent of self-employment taxes attributable to wages paid during 2020. The deferred amounts are payable in two installments

over the next two years: one-half on December 31, 2021 and the one-half on December 31, 2022.

- Payment for applicable employment taxes for the payroll tax deferral period shall not be due before the applicable date.

  - "Applicable employment taxes" means FICA taxes imposed on employers under I.R.C. section 3111 of the Code.

  - "Payroll tax deferral period" means the period beginning on the date of the enactment of this Act (March 28, 2020) and ending before January 1, 2021.

  - "Applicable date" means: (1) December 31, 2021, with respect to 50% of the amounts due for self-employment and FICA and (2) December 31, 2022, with respect to any remaining amounts.

- Estimated Taxes. The CARES Act provides that section 6654 (which provides for penalties for delinquent estimated taxes) will not apply with respect to 50 percent of the taxes imposed under I.R.C. section 1401(a) (i.e., SECA taxes) for the payroll deferral period.

- Limitation. This provision, allowing for a delay in the payment of applicable employment taxes, is not available to a taxpayer if the taxpayer has had indebtedness forgiven under section 1106 of the CARES Act with respect to a loan under paragraph (36) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)) (as added by section 1102 of the Act) or indebtedness forgiven under section 1109 of the Act. There is apparently no parallel provision denying such relief to self-employed persons with respect to the payment of 50 percent of taxes imposed under section 1401(a).

- Third-Party and Certified-Professional-Employer-Organizations Relief. The CARES Act provides liability protection for agents who are instructed by an employer to defer payment of any applicable employment taxes during the payroll tax deferral period. The CARES Act provides that such employer shall be solely liable for the payment of such applicable employment taxes before the applicable date under such circumstances. The CARES Act specifically provides similar relief to a certified professional employer organization (as defined in section 7705(a)) that has entered into a service contract described in section 7705(e)(2) with a customer if such customer directs the CPEO to defer payment of any applicable employment taxes during the payroll tax deferral period.

- Modifications for Net Operating Losses.

  - Summary. The CARES Act suspends the Tax Cuts & Jobs Act of 2017's 80-percent-of-taxable-income limitation on net operating loss ("NOL") carryovers

with respect to tax years 2018, 2019, and 2020, and allows NOLs arising in those years to be carried back five years.

- <u>Temporary Repeal of Taxable Income Limitation</u>. Prior to the CARES Act, the TCJA generally limited NOL deductions to 80% of taxable income. For tax years beginning in 2018, 2019, and 2020, the 80-percent limitation is suspended. NOLs from such years can thus be used to fully offset net taxable income.

- <u>Modifications to Carryback Rules</u>. Prior to the CARES Act, businesses were generally precluded from carrying back NOL deductions. For tax years beginning after December 31, 2017, and before January 21, 2021, the business may carryback the NOL to each of the 5 years preceding the taxable year of such loss.

- <u>Technical Correction for Fiscal Year Taxpayers</u>. The CARES Act provides a technical correction to the TCJAs treatment of fiscal year taxpayers. The TCJA provided that fiscal-year taxpayer reporting an NOL for tax years including, but ending after, December 31, 2017 were subject to the TCJA's restrictions on NOL carrybacks. The Act corrects this and provides that fiscal-year taxpayers with NOLs in such years may carry back those NOLs.

- <u>Special Rule for REITs</u>. The CARES Act provides certain restrictions that prohibit a REIT from carrying back NOLs to non-REIT years.

- <u>Section 965</u>. The CARES Act provides a special rule that prevents any NOL carryback pursuant to the relief provisions from being used to offset income for purposes of the I.R.C. section 965 transition tax. Specifically, the Act provides that if a taxpayer elects to carryback NOLs to a taxable year in which the taxpayer had I.R.C. section 965 income, the taxpayer will be treated as having made the election under section 965(n) not to use NOLs to offset the I.R.C. section 965 income.

- <u>IR 2020-67</u>. On April 9, 2020, the IRS issued guidance to taxpayers on the new net operating loss rules under the CARES Act. The guidance includes Rev. Proc. 2020-24 and Notice 2020-26.

  - <u>Rev. Proc. 2020-24</u>.

    - <u>Summary</u>. Rev. Proc. 2020-24 provides guidance to taxpayers who wish to make the following elections: (1) I.R.C. section 172(b)(3) election to waive the carryback period for an NOL arising in a tax year beginning after December 31, 2017, and before January 1, 2020; (2) I.R.C. section 172(b)(1)(D)(v)(I) election to exclude from the carryback period for an NOL arising in a tax year beginning after December 31, 2017, and before January 1, 2021, any tax year in which the taxpayer has an I.R.C. section 965(a) inclusion; and (3) to waive any carryback period, to reduce any carryback period,

or to revoke any election made under I.R.C. section 172(b) to waive any carryback period for a tax year that began before January 1, 2018, and ended after December 31, 2017.

- Election to Waive the Carryback Period. Taxpayers may waive the carryback period for an NOL arising in a tax year beginning in 2018 or 2019, but such election must be made no later than the due date, including extensions, for filing the taxpayer's federal income tax return for the first taxable year ending after March 27, 2020. The taxpayer makes this election by attaching to its federal income tax return filed for the first taxable year ending after March 27, 2020, a separate statement for each taxable year 2018 or 2019 for which the taxpayer intends to make the election. The election statement must state that the taxpayer is electing to apply I.R.C. section 172(b)(3) under Rev. Proc. 2020-24 and the taxable year for which the statement applies. If the election is made, it is irrevocable.

- Election to Exclude Section 965 Years from Carryback Period. Taxpayers may elect under I.R.C. section 172(b)(1)(D)(v)(I) to exclude all I.R.C. section 965 years from the carryback period for an NOL arising in a tax year beginning in 2018, 2019, or 2020. If the election relates to an NOL arising in a tax year beginning in 2018 or 2019, it must be made no later than the due date, including extensions, for filing the taxpayer's federal income tax return for the first taxable year ending after March 27, 2020. For an NOL arising in a tax year beginning after December 31, 2019, and before January 1, 2021, the election must be made by no later than the due date, including extensions, for filing the taxpayer's federal income tax return for the tax year in which the NOL arises. The taxpayer must attach an election statement to the earliest filed (after April 9, 2020) of: (1) the federal income tax return for the tax year in which the NOL arises; (2) the taxpayer's claim for tentative carryback adjustment (Form 1045 or Form 1139) applying the NOL to a tax year in the carryback period; or (3) the amended federal income tax return applying the NOL to the earliest tax year in the carryback period that is not an I.R.C. section 965 year. If the taxpayer making the election claims a refund or credit as a result of the NOL carryback by filing an amended federal income tax return for tax years in the carryback period, the taxpayer must also attach an election statement to each amended return, which must state the taxpayer is electing to apply I.R.C. section 172(b)(1)(D)(v)(I) under Rev. Proc. 2020-24, the taxable year in which the NOL arose, and the taxpayer's I.R.C. section 965 years. If the election is made, it is irrevocable.

- Applications under I.R.C. section 6411(a). A taxpayer may make an election under I.R.C. section 6411(a) for an NOL arising in a tax year that began before January 1, 2018, and ended after December 31, 2017, by filing the application no later than July 27, 2020. In addition, elections for such tax years with an NOL to waive any carryback period, to reduce any carryback period, or to revoke any election made under I.R.C. section 172(b) to waive any carryback period will be treated as timely filed if filed no later than July 27, 2020. The taxpayer may file these elections where the taxpayer files its federal income tax return. The taxpayer must attach the statement required to make the election with "Filed pursuant to Rev. Proc. 2020-24" at the top, to an amended return, Form 1045, or Form 1139 containing only the taxpayer's name, address, and taxpayer identification number. The statement required to make the election must indicate the section under which the election is being made and shall set forth information to identify the election, the period for which it applies, and the taxpayer's basis and entitlement to make the election.

- Note. Rev. Proc. 2020-24 provides that taxpayers with NOLs arising in tax year beginning after December 31, 2017, may consult Notice 2020-26 for procedures on how to file applications under I.R.C. section 6411(a) for tax years that may otherwise be outside of the period for filing such applications.

▪ Notice 2020-26.

- Summary. I.R.C. section 6411 permits a taxpayer to file an application (Form 1139 for corporations and Form 1045 for other taxpayers) for a tentative carryback adjustment of the tax liability for a prior tax year that is affected by an NOL carryback or by carrybacks in other provisions of the Code. However, I.R.C. section 6411 and the governing regulations require the application to be filed with the IRS within 12 months of the close of the tax year in which the NOL arose. Because some taxpayers would be foreclosed from claiming the quick refunds for certain tax years, Notice 2020-26 extends the deadline for filing an application for a tentative carryback adjustment under I.R.C. section 6411 with respect to the carryback of an NOL that arose in any tax year that began during calendar year 2018 and that ended on or before June 30, 2019.

    - *Observation*. By way of example, if a corporate taxpayer had an NOL that arose in a taxable year ending on December 31, 2018, the taxpayer would generally have until December 31, 2019, under I.R.C. section 6411 and the

governing regulations to file a Form 1139. Under Notice 2020-26, the corporation will now have until June 30, 2020, to file the Form 1139.

- Procedures for Filing Tentative Refund. Under Notice 2020-26, the taxpayer must: (1) file the applicable form no later than 18 months after the close of the tax year in which the NOL arose (that is, no later than June 30, 2020, for a tax year ending December 31, 2018); and (2) include on the top of the applicable form "Notice 2020-26, Extension of Time to File Application for Tentative Carryback Adjustment."

- Modification of Loss Limitations on Taxpayers other than Corporations.

  - Summary. The CARES Act removes the TCJA's restrictions prohibiting non-corporate taxpayers from deducting "excess business losses" for tax years beginning before 2021.

  - Pursuant to the TCJA, for tax years beginning after December 31, 2017, and before January 1, 2026, non-corporate taxpayers were not permitted to recognize an "excess business loss," which was generally defined as the excess (if any) of the aggregate deductions of the taxpayer for the tax year which were attributable to trades or businesses of such taxpayer, over the sum of: (1) the aggregate gross income or gain of such taxpayer for the taxable year attributable to the trade or business, plus (2) $250,000 or 200% of such amount in the case of a joint return, adjusted for inflation. The CARES Act removes this restriction with respect to tax years beginning before 2021.

- Modification of Limitation on Business Interest.

  - Summary. The CARES Act increases the ability to deduct business interest expenses by relaxing limitations that were imposed by the TCJA under I.R.C. section 163(j).

  - Background. Under the TCJA, business interest deductions were limited to the sum of: (1) the business interest income for such year; (2) 30% of the adjusted taxable income of the taxpayer; and (3) the floor plan financing interest of such taxpayer. If the taxpayer was unable to take the business interest deduction, it could be carried forward.

  - The CARES Act generally increases the TCJA's 30%-of-adjusted-taxable-income limitation to 50%. As a result, for tax years 2019 and 2020, the business interest deduction is now limited to the sum of: (1) the business interest income for such year; (2) 50% of the adjusted taxable income of the taxpayer; and (3) the floor plan financing interest of such taxpayer.

- Special Rules for Partnerships. The section 163(j) limitation is applied at the partnership level. Under the CARES Act, the 30-percent limitation continues to be applied at the partnership level to partnership interest expense for 2019. But 50 percent of the excess business interest that is allocated to a partner that is carried over from 2019 is treated as business interest expense that was paid or accrued by the partner in 2020 and is not subject to the limitations for business interest income for 2020. The partner is free to elect out of this provision if preferred, but the partner may only revoke the election with the consent of the IRS. The IRS will likely provide further guidance on the election procedure.

- Election Regarding Applicable Taxable Year. The CARES Act provides that a taxpayer may elect to apply these new rules by substituting the adjusted taxable income of the taxpayer for the last taxable year beginning in 2019 for the adjusted taxable income for such current taxable year. In the case of a partnership, any such election shall be made by the partnership. As many taxpayers will have higher adjusted gross incomes in tax year 2019, this should raise the ceiling for business interest deductions for many taxpayers, particularly businesses.

  - If an election under this subsection is made for a short taxable year of a fiscal year taxpayer, the adjusted taxable income for the taxpayer's last taxable year beginning in 2019 will be equal to the amount that is the same ratio of the short taxable year.

- Qualified Improvement Property.

  - Summary. The CARES Act provides a long-awaited technical correction to the TCJA by retroactively amending I.R.C. section 168's bonus depreciation rules to allow taxpayers to claim 100-percent bonus depreciation with respect to "qualified improvement property."

  - Background. The TCJA of 2017 expanded the I.R.C.'s so-called "bonus depreciation" provisions to permit businesses to claim an immediate deduction for 100 percent of certain qualifying capital outlays. The TCJA, however, contained a technical error that inadvertently denied taxpayers the ability to claim bonus depreciation deductions with respect to "qualified improvement property."

  - The legislative glitch particularly impacted certain real estate, restaurant and retail industry groups. The Act's legislative fix retroactively adds "qualified improvement property" to the list of items qualifying for 100-percent bonus depreciation. In addition, the Act expands the definition of "qualified improvement property" to include certain types of improvements.

  - Insight: Partnerships. Note that there may be unintended complexities with respect to partnerships governed by the Bipartisan Budget Act of 2015. Such

partnerships are required to file an administrative adjustment request ("AAR"), rather than an amended return, to see a "refund claim." However, if the AAR results in a reduction of a prior year's tax liabilities of the partnership's partners, the adjustment is taken into account as an adjustment to the partners' 2020 income tax returns, rather than as a tax refund. Thus, the congressional goal to provide taxpayers with immediate relief may be limited in the context of partnerships (which, it should be noted, are a common form of entity with respect to the expenditures at issue).

- Acceleration of Alternative Minimum Tax.

  - Summary. The CARES Act accelerates the ability of corporations to claim refundable Alternative Minimum Tax ("AMT") credits and, thereby, obtain additional cash flow during the COVID-19 emergency.

  - Background. The TCJA repealed the corporate AMT but allowed a credit of AMT paid in prior tax years to be used against a corporation's normal tax liability in taxable years 2018, 2019, 2020, and 2021 and to treat 50% of the credit as refundable in taxable years 2018-2020 and 100% for taxable years beginning in 2021.

  - The CARES Act amends I.R.C. section 53 to accelerate a corporation's ability to recover refundable AMT credits under I.R.C. section 53(e). AMT credits that otherwise could have been claimed in 2020 and 2021 are now made available for 2019, with an option to elect recovery of the full credit amount for 2018. As a result, corporations may obtain additional cash flow that can be used to address the impacts of COVID-19.

  - Expedited Tentative Refund Process. Additionally, the CARES Act provides a special procedure to file a tentative refund claim no later than December 31, 2020. The CARES Act provides that such application is to be verified and processed in a manner similar to tentative refund claims filed under I.R.C. section 6411. The CARES Act requires the Secretary of the Treasury to review the application, determine the amount of the overpayment, and apply, credit, or refund such overpayment, within 90 days of filing in the same manner as I.R.C. section 6411(b). If a corporation filed or was required to file a consolidated return, either for the taxable year in which the credit arose or for the preceding taxable year affected by such loss or credit, the provisions of I.R.C. section 6411(c) shall apply to adjustments to the same extent and manner as the Secretary of Treasury may provide.

  - *Observation*. Taxpayers wishing to accelerate an AMT credit refund for 2018 may use a quick refund procedure (e.g., Form 1139) to claim these credits.

- Relief from Excise Tax For Alcohol Used to Produce Hand Sanitizer.

  - The CARES Act removes the excise tax on certain distilled spirits removed in 2020 and used in or contained in hand sanitizer produced and distributed according to guidance from the Food and Drug Administration ("FDA") that is related to the outbreak of COVID-19.

- Aviation Excise Tax Relief.

  - The CARES Act provides for an "excise tax holiday" through the end of 2020 with respect to tickets for air transportation, which extends to transportation of both passengers and goods. The CARES Act also extends tax relief to the use of kerosene in commercial aviation through the end of 2020.

H.R. 6201: Families First Coronavirus Response Act

Background. On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act, which includes the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act (collectively, the "FFCRA"). The FFCRA is effective for leave requested from April 1, 2020, through December 31, 2020.

Emergency Family and Medical Leave Expansion Act.

- Summary. The FFCRA amends the Family and Medical Leave Act of 1993 ("FMLA") to include FMLA paid leave ("FMLA COVID-19 Leave") for a "qualifying need" related to a COVID-19 emergency declared by a Federal, State, or local authority. For these purposes, a "qualifying need" means the employee is unable to work (or telework) due to the need for leave to care for a son or daughter under the age of 18 if the school or place of work has been closed, or the child care provider for the child is unavailable, due to a COVID-19 emergency declared by a Federal, State, or local authority.

- Eligibility. Not all employees qualify under the FFCRA. Specifically, to qualify for FMLA COVID-19 Leave, the employee must have been employed with the business for at least 30 calendar days prior to the request for leave and the business must have less than 500 employees.

  In addition, the Secretary of Labor has authority to issue regulations for "good cause" to exclude certain employees in the medical field. Moreover, the Secretary of Labor has the authority to exempt certain small businesses with fewer than 50 employees from the new FMLA requirements if the imposition of the new requirements would jeopardize the viability of the business as a going concern ("Small Business Exemption").

  - Small Business Exemption. To qualify for the Small Business Exemption, the business must have fewer than 50 employees and an authorized officer of the business must determine that: (1) the provision of FMLA COVID-19 Leave or paid sick leave (discussed later) would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting FMLA

COVID-19 Leave or paid sick leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or (3) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting FMLA COVID-19 Leave and paid sick leave, and these labor or services are needed for the small business to operate at a minimal capacity.

- FMLA COVID-19 Paid Leave. If the employee qualifies and elects FMLA leave for a COVID-19 emergency, the employer must provide paid FMLA COVID-19 Leave to the employee based on: (1) an amount not less than two-thirds of the employee's regular rate of pay (as determined under 29 U.S.C. 207(e)), and (2) the number of hours the employee would otherwise be normally scheduled to work.

  - Varied Pay Schedules. If the employee's schedule varies from week to week to the extent that the employer is unable to determine with certainty the number of hours the employee would have worked had leave not been taken, then the employer must determine the average number of hours the employee was scheduled per day over a 6-month period ending on the date on which the employee claims FMLA leave, including any hours for which the employee took leave of any type. However, if the employee did not work over the 6-month period, the employer must determine the average number of hours per day that the employee would normally be scheduled to work, based on the reasonable expectation of the employee at the time of his or her hiring.

- Duration. The employer is not required to pay FMLA COVID-19 Leave for the first 10 working days, although the employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave. In addition, the employer is not required to pay FMLA COVID-19 Leave in excess of $200 per day and $10,000 in the aggregate. The FMLA COVID-19 Leave can continue for 12 weeks after the date the employee claims the leave unless the qualifying need ceases to exist.

Emergency Paid Sick Leave Act.

- Summary. The FFCRA mandates employer paid sick time ("COVID-19 Sick Leave") to the extent an employee is unable to work (or telework) due to various prescribed events relating to COVID-19.

- Eligibility. Not all employees qualify under the FFCRA. Specifically, to qualify for COVID-19 Sick Leave, the employee must work for a business with less than 500 employees. Unlike FMLA COVID-19 Leave, there is no requirement that the employee have been employed with the employer for 30 days.

  In addition, the Secretary of Labor has authority to issue regulations for "good cause" to exclude certain employees in the medical field. Moreover, the Secretary of Labor has the authority to exempt certain small businesses with fewer than 50 employees from the new

COVID-19 Sick Leave requirements if the imposition of the new requirements would jeopardize the viability of the business as a going concern ("Small Business Exemption"). The Small Business Exemption is the same as that described above for FMLA COVID-19 Leave.

- COVID-19 Paid Sick Leave. The FFCRA mandates employer paid sick time to the extent an employee is unable to work (or telework) due to the following: (1) the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) the employee is caring for an individual who is subject to an order described in (1) or has been advised as described in (2); (5) the employee is caring for a son or daughter if the school or place of care has been closed, or the child care provider of such child is unavailable, due to COVID-19 precautions; or (6) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and Secretary of Labor.

  - Observation. On April 6, 2020, the U.S. Department of Labor issued a temporary rule ("Rule") regarding FFCRA and paid leave credits. *See* 29 C.F.R. § 826 (Apr. 6, 2020). The Rule is effective from April 2, 2020, through December 31, 2020, but became operational on April 1, 2020. The Rule provides that an employee is "subject to a quarantine or isolation order" if the employee is subject to a "quarantine, isolation, containment, shelter-in-place, or stay-at-home order[ ] issued by any Federal, State, or local government authority that causes the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order." 29 C.F.R. § 826.10(a). However, the Rule further provides that an employee is subject to a quarantine or isolation order and eligible for paid COVID-19 Sick Leave only if, but for being subject to the order, he or she would be able to perform work that is otherwise allowed or permitted by his or her employer, either at the employee's normal workplace or by telework. 29 C.F.R. § 826.20(a)(2). Thus, a careful analysis of the individual facts of each employee in addition to the applicable State or local government order must be performed where employees request COVID-19 Sick Leave for being subject to that quarantine or isolation order.

- Duration. Full-time employees are entitled to paid sick time for up to 80 hours of work and part-time employees are entitled to paid sick time equal to the number of hours in which the employee typically works, on average, over a 2-week pay period. For circumstances described in (1) through (3) above, the employee's paid sick time cannot exceed $511 per day and $5,110 in the aggregate. For circumstances described in (4) through (6) above, the employee's paid sick time cannot exceed $200 per day and $2,000 in the aggregate. The employer is prohibited from requiring the employee to use other paid sick time available to the employee prior to using the COVID-19 Sick Leave.

Notice Requirements and Penalties for Failure to Comply.

- Notice. The FFCRA requires that each employer post and keep posted, in conspicuous places on the premises of the employer, a notice of the requirements for FMLA COVID-19 Leave

and COVID-19 Sick Leave. The notice must be posted by April 1, 2020. A model notice provided by the DOL can be found at:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

The DOL has indicated that employers may satisfy the notice requirement by emailing or direct mailing the notice to employees or posting the notice on an employee information internal or external website.

- Employer Violations. If the employer fails to provide FMLA COVID-10 Leave and/or COVID-19 Sick Leave where required, the employer may be liable for penalties with respect to each violation. In addition, an employer may be liable for penalties if the employer discharges, disciplines, or in any other way discriminates against an employee who takes paid leave in accordance with the Act.

  The DOL has indicated that it will observe a temporary period of non-enforcement until April 18, 2020, provided the employer has acted reasonably and in good faith to comply with the Act. For these purposes, "good faith" exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the DOL receives a written commitment from the employer to comply with the Act in the future. See DOL Field Assistance Bulletin No. 2020-1 (Mar. 24, 2020).

Payroll Tax Credits.

- Summary. Because employers are required to pay FMLA COVID-19 Leave and COVID-19 Sick Leave where applicable, the Act provides payroll tax credits to employers. Employers can obtain the payroll tax credits through a credit on their quarterly employment tax returns (e.g., Forms 941). If the payroll tax credit exceeds the amount of payroll tax for the quarter, the excess is treated as an overpayment and will be refunded by the IRS to the employer.

- Credit Amount. The credit amount is equal to 100% of the qualified family leave wages or the qualified sick leave wages paid by the employer with respect to such calendar quarter. The credit is generally allowed against the tax imposed by Sections 3111(a) or 3221(a) (e.g., the employer portion of FICA). However, the amount of the applicable credit cannot exceed the maximum permissible amount for the qualified family leave wages or the qualified sick leave wages. The amount of any wages required to be paid by reason of the Act are not considered wages for purposes of I.R.C. section 3111(a) (e.g., the employer portion of Social Security taxes).

- Refund Amount. If the amount of the credit exceeds the tax imposed by Sections 3111(a) or 3221(a), the excess is treated as an overpayment and shall be refunded to the employer.

  For these purposes, the credit may be increased to the extent of qualified health plan expenses are paid with respect to the employee's wages. Qualified health plan expenses are those expenses paid or incurred by the employer to provide and maintain a group health plan (as

defined in Section 5000(b)(1) of the Code), but only to the extent that such amounts are excluded from the gross income of the employee under Section 106(a) of the Code. In addition, the credit is increased by the amount of tax imposed by I.R.C. section 3111(b) (e.g., the employer portion of Medicare tax).

- Self-Employed Individuals. The FFCRA also provides relief for self-employed individuals with FMLA COVID-19 Leave and COVID-19 Sick Leave equivalents. A self-employed individual is eligible for these equivalents if the individual regularly carries on any trade or business and would be entitled to FMLA COVID-19 Leave and/or COVID-19 Sick Leave if the individual were an employee of an employer (other than himself or herself).

    - FMLA COVID-19 Leave. If the self-employed individual qualifies, he or she is entitled to a credit against self-employment tax in an amount equal to 100% of the qualified family leave equivalent amount. The qualified family leave equivalent amount is equal to: (1) the number of days (not to exceed 50) during the taxable year that the individual is unable to perform services in the trade or business for a reason outlined in the FMLA for COVID-19, multiplied by the lesser of (2) 67% of the average daily self-employment income of the individual for the tax year, or (3) $200. For these purposes, the term "average daily self-employment income" means an amount equal to the net earnings from self-employment income of the individual for the tax year, divided by 260.

      The credit is refundable. However, no credit (refundable or not) shall be allowed unless the individual maintains documentation required by the IRS, which should be forthcoming.

      COVID-19 Sick Leave. If the self-employed individual qualifies, he or she is entitled to a credit against self-employment tax in an amount equal to the qualified sick leave equivalent amount. The qualified sick leave equivalent amount is equal to: (1) the number of days during the taxable year (but no more than the applicable number of days) that the individual is unable to perform services in the trade or business for a reason outlined in the Emergency Paid Sick Leave Act for COVID-19, multiplied by the lesser of (2) $200 (or $511 in the case of sick time described in (1), (2), or (3) of the Emergency Paid Sick Leave Act), or (3) 67% (100% in the case of any day of paid sick time described in (1), (2), or (3) of the Emergency Paid Sick Leave Act) of the average daily self-employment income of the individual for the taxable year. For these purposes, the term "average daily self-employment income" means an amount equal to the net earnings from self-employment income of the individual for the tax year, divided by 260.

      The credit is refundable. However, no credit (refundable or not) shall be allowed unless the individual maintains documentation required by the IRS, which should be forthcoming.

IRS Guidance.

- The IRS has issued guidance on the Families First Coronavirus Act. Generally, that guidance can be found at https://www.irs.gov/coronavirus. This guidance includes frequently asked questions and answers, which can be found at http://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs. Some highlights in the FAQs include:

    - Eligible employers can claim the credits on FMLA COVID-19 Leave and COVID-19 Sick Leave credits on their federal employment tax returns (e.g., Forms 941). However, employers can more quickly benefit from the credits by reducing their federal employment tax deposits. If there are insufficient federal employment taxes to cover the amount of the credits, the employer may request an advance payment of the credits from the IRS by submitting a Form 7200, Advance Payment of Employer Credits Due to COVID-19.

    - Eligible employers claiming the credits for qualified leave wages must retain records and documentation related to and supporting each employee's leave to substantiate the claim for the credits, and retain Forms 941 and 7200 and any other applicable filings made to the IRS requesting the credit.

    - If an eligible employer receives a request from an employee for FMLA COVID-19 Leave or COVID-19 Sick Leave, the employer should request the employee to make the request in writing and provide: (1) the employee's name; (2) the date or dates for which leave is requested; (3) a statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and (4) a statement that the employee is unable to work, including by means of telework, for such reason.

      If the request is based on a quarantine order or self-quarantine advice, the employee should also include the name of the governmental entity ordering the quarantine or the name of the health care professional advising self-quarantine and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

        - If the request is for leave due to a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

        - In addition to the information above, the employer must create and maintain records that include: (1) documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework,

and qualified sick leave and qualified family leave; (2) documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages; (3) copies of any completed Forms 7200 that the employer submitted to the IRS; and (4) copies of the completed Forms 941 that the employer submitted to the IRS.

- The IRS advises that employers should keep the above records of employment taxes for 4 years after the date the tax becomes due or is paid, whichever becomes first.

- The IRS considers any qualified leave wages paid to an employee to be taxable to the employee. The IRS does not consider qualified leave wages excludible from gross income as qualified disaster relief payments under I.R.C. section 139.

- Employers must continue to withhold the employee's share of Social Security and Medicare taxes on qualified leave wages paid.

- Employers must include the full amount of the credits for qualified leave wages in gross income. However, the payments of qualified leave wages including federal employment taxes should be deductible by the employer as ordinary and necessary business expenses in the tax year that the wages are paid or incurred.

- Employers may fund qualified leave wages by using federal employment taxes related to wages paid between April 1, 2020, through December 31, 2020, including withheld taxes, that would otherwise be required to be deposited with the IRS. These include federal income taxes withheld from employees, the employees' share of Social Security and Medicare taxes, and the employer's share of Social Security and Medicare taxes with respect to all employees. The Form 941 will provide instructions to employers on how to reflect the reduced liabilities for the quarter related to the deposit schedule.

- The eligible employer may receive both the tax credits for the qualified leave wages under the FFCRA and the PPP loan under the CARES Act. However, if the employer receives tax credits for qualified wages, those wages are not eligible as "payroll costs" for purposes of receiving loan forgiveness.

- Self-employed individuals can claim refundable credits for qualified sick leave equivalents on their Forms 1040, U.S. Individual Income Tax Return, for the 2020 tax year. However, the self-employed individual may fund sick leave and family leave equivalents by taking into account the credit to which the individual is entitled and will claim on Form 1040 when determining estimated tax payments.

DOL Guidance.

- DOL Guidance.

  - Questions and Answers. The DOL has issued several questions and answers related to the Act. DOL has indicated in this guidance that:

    - Employees may qualify for both FMLA COVID-19 Leave and COVID-19 Sick Leave at the same time but only for a total of 12 weeks of paid leave. For example, the employee may qualify for COVID-19 Sick Leave for the first 80 hours or two weeks and then qualify for paid FMLA COVID-19 Leave if the employee's child's school or place of care has closed. However, FMLA COVID-19 Leave does not require the employer to pay leave for the first 10 working days. Thus, after the first 10 working days, the employee would lose paid COVID-19 Sick Leave but be entitled to FMLA COVID-19 Leave.

    - FMLA COVID-19 Leave and COVID-19 Sick Leave are not retroactive, that is, they do not apply for periods prior to April 1, 2020.

    - If the employer permits teleworking, the employee is entitled to COVID-19 Sick Leave if the employee is unable to perform such tasks or work the required hours because of a qualifying reason for paid sick leave. In addition, a teleworking employee is entitled to FMLA COVID-19 Leave if the employee is unable to perform such tasks or work the required hours because the employee needs to care for his or her child whose school or place of business is closed or the child care provider is unavailable because of COVID-19 related reasons.

    - If an employer closed a worksite prior to April 1, 2020 and stopped paying the employee because it does not have work for the employee to do, the employee is not eligible for FMLA COVID-19 Leave or COVID-19 Sick Leave. Rather, the employee should file for unemployment insurance benefits.

    - If the employer is open and furloughs the employee on or after April 1, 2020, because it does not have enough work or business for the employee, the employee is not entitled to take FMLA COVID-19 Leave or COVID-19 Sick Leave. Rather, the employee should file for unemployment insurance benefits.

    - If the employer reduces the employee's scheduled work hours because it does not have work for the employee to perform, the employee may not use FMLA COVID-19 Leave or COVID-19 Sick Leave for the hours that the employee is no longer scheduled to work.

    - The term "son or daughter" for purposes of FMLA COVID-19 Leave and COVID-19 Sick Leave includes the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee is standing in

loco parentis—that is, someone with day-to-day responsibilities to care for or financially support the child. In addition, "son or daughter" also includes an adult son or daughter (someone over 18 years of age) who: (1) has a mental or physical disability; and (2) is incapable of self-care because of the disability.

The Federal Reserve's "Main Street New Loan Facility" Initiative

The Federal Reserve established the new Main Street Lending Program to enhance support for small and mid-sized businesses that were in good financial standing before the crisis by offering 4-year loans to companies employing up to 10,000 workers or with revenues of less than $2.5 billion. Under the new program, principal and interest payments will be deferred for one year. The current details of the program are set forth below:

- Program: The Main Street New Loan Facility ("Facility"), which has been authorized under section 13(3) of the Federal Reserve Act, is intended to facilitate lending to small and medium-sized businesses by Eligible Lenders. Under the Facility and the Main Street Expanded Loan Facility ("MSELF"), a Federal Reserve Bank ("Reserve Bank") will commit to lend to a single common special purpose vehicle ("SPV") on a recourse basis. The SPV will purchase 95% participations in Eligible Loans from Eligible Lenders. Eligible Lenders would retain 5% of each Eligible Loan. The Department of the Treasury, using funds appropriated to the Exchange Stabilization Fund under section 4027 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), will make a $75 billion equity investment in the single common SPV in connection with the Facility and the MSELF. The combined size of the Facility and the MSELF will be up to $600 billion.

- Eligible Lenders: Eligible Lenders are U.S. insured depository institutions, U.S. bank holding companies, and U.S. savings and loan holding companies.

- Eligible Borrowers: Eligible Borrowers are businesses with up to 10,000 employees or up to $2.5 billion in 2019 annual revenues. Each Eligible Borrower must be a business that is created or organized in the United States or under the laws of the United States with significant operations in and a majority of its employees based in the United States. Eligible Borrowers that participate in the Facility may not also participate in the MSELF or the Primary Market Corporate Credit Facility.

- Eligible Loans: An Eligible Loan is an unsecured term loan made by an Eligible Lender(s) to an Eligible Borrower that was originated on or after April 8, 2020, provided that the loan has the following features:

    - 4-year maturity;
    - Amortization of principal and interest deferred for one year;
    - Adjustable rate of SOFR + 250-400 basis points;
    - Minimum loan size of $1 million;
    - Maximum loan size that is the lesser of (i) $25 million or (ii) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn

debt, does not exceed four times the Eligible Borrower's 2019 earnings before interest, taxes, depreciation, and amortization ("EBITDA"); and
    - Prepayment permitted without penalty.

- Loan Participations: The SPV will purchase a 95% participation in an Eligible Loan at par value, and the Eligible Lender will retain 5% of the Eligible Loan. The SPV and the Eligible Lender will share risk on a pari passu basis.

- Required Attestations: In addition to certifications required by applicable statutes and regulations, the following attestations will be required with respect to each Eligible Loan:

    - The Eligible Lender must attest that the proceeds of the Eligible Loan will not be used to repay or refinance pre-existing loans or lines of credit made by the Eligible Lender to the Eligible Borrower.
    - The Eligible Borrower must commit to refrain from using the proceeds of the Eligible Loan to repay other loan balances. The Eligible Borrower must commit to refrain from repaying other debt of equal or lower priority, with the exception of mandatory principal payments, unless the Eligible Borrower has first repaid the Eligible Loan in full.
    - The Eligible Lender must attest that it will not cancel or reduce any existing lines of credit outstanding to the Eligible Borrower. The Eligible Borrower must attest that it will not seek to cancel or reduce any of its outstanding lines of credit with the Eligible Lender or any other lender.
    - The Eligible Borrower must attest that it requires financing due to the exigent circumstances presented by the coronavirus disease 2019 ("COVID-19") pandemic, and that, using the proceeds of the Eligible Loan, it will make reasonable efforts to maintain its payroll and retain its employees during the term of the Eligible Loan.
    - The Eligible Borrower must attest that it meets the EBITDA leverage condition stated in section 5(ii) of the paragraph above specifying required features of Eligible Loans.
    - The Eligible Borrower must attest that it will follow compensation, stock repurchase, and capital distribution restrictions that apply to direct loan programs under section 4003(c)(3)(A)(ii) of the CARES Act.
    - Eligible Lenders and Eligible Borrowers will each be required to certify that the entity is eligible to participate in the Facility, including in light of the conflicts of interest prohibition in section 4019(b) of the CARES Act.

- Facility Fee: An Eligible Lender will pay the SPV a facility fee of 100 basis points of the principal amount of the loan participation purchased by the SPV. The Eligible Lender may require the Eligible Borrower to pay this fee.

- Loan Origination and Servicing: An Eligible Borrower will pay an Eligible Lender an origination fee of 100 basis points of the principal amount of the Eligible Loan. The SPV will pay an Eligible Lender 25 basis points of the principal amount of its participation in the Eligible Loan per annum for loan servicing.

- Facility Termination: The SPV will cease purchasing participations in Eligible Loans on September 30, 2020, unless the Board and the Treasury Department extend the Facility. The Reserve Bank will continue to fund the SPV after such date until the SPV's underlying assets mature or are sold.

Currently Unanswered Questions and Ambiguities.

- Recovery Rebates. The consequences and logistical process are not clear with respect to the following scenario: a taxpayer who has adjusted gross income in 2019 that is above the phase-out threshold, but who has adjusted gross income in 2020 that is below the phase-out threshold. It is not clear whether and how such a taxpayer will receive a credit in 2020.

- Recovery Rebates. The consequences and logistical process are not clear with respect to the following scenario: a taxpayer who has adjusted gross income in 2019 that is below the phase-out threshold, but who has adjusted gross income in 2020 that is above the phase-out threshold. It would appear that such a taxpayer will have an obligation to repay or offset such amount with respect to such taxpayer's 2020 taxes.

- Manual Signatures. It remains to be seen whether the IRS will provide relief from manual signature requirements. For example, for electronic transactions, IRS guidance currently requires a manual signature on Form 8868, *IRS e-file Signature Authorization for Form 4868 or Form 2350*, Form 8878-A, *IRS e-file Electronic Funds Withdrawal Authorization for Form 7004*, and Form 8879, *IRS e-file Signature Authorization*. It is also uncertain whether such relief will be extended to gift and estate tax returns that generally require manual signatures and paper submission.

- Non-Resident Alien Taxpayers Unable to Leave the U.S. It is not clear whether non-resident alien taxpayers who are unable to leave the U.S. due to the COVID-19 crisis will run afoul of the substantial presence test, or whether additional relief may be granted.

- S-Corporation Relief for Certain Built-In Gains Tax Payments. It is not clear that S-Corporations obligated to make estimated payments with respect to certain built-in gains taxes are currently entitled to relief.

- Affordable Care Act Employer Mandate. It is not clear that relief has been extended to employers who are currently assessed with the ACA's Employer Mandate penalties under I.R.C. sections 4980H(a) and 4980(H)(b).

- Early-Withdrawal Penalty Relief. It is not clear whether persons who continue to work despite a salary reduction resulting from the coronavirus pandemic will be covered by the no-early-withdrawal penalty with respect to coronavirus-related distributions from eligible retirement plans. As currently drafted, the provision does not appear to extend to such persons; however, the Treasure of the Secretary is granted authority under the CARES Act to expand the scope of persons entitled to relief.

Please send inquiries, comments, and additional unanswered questions to info@freemanlaw.com. We welcome your comments and, again, recognize that **we are all in this together**.