On Nov. 6, 2009, President Obama signed the "Worker, Homeownership, and Business Assistance Act of 2009" (the 2009 Assistance Act) into law. In addition to providing an extension of unemployment benefits for the longtime jobless, the 2009 Assistance Act includes tax changes for businesses, including liberalized rules for net operating losses and toughened penalties for partnerships and S corporations.

Five-Year Carryback of NOLs Extended to Include 2009 NOLs and to Apply to Most Businesses

Background. A net operating loss (NOL) is the excess of business deductions (computed with certain modifications) over gross income in a particular tax year. The loss can be deducted, through an NOL carryback or carryover, in another tax year in which gross income exceeds business deductions. In general, NOLs may be carried back two years and forward 20 years. The NOL is first carried back to the earliest tax year for which it's allowable as a carryback or a carryover, and is then carried to the next earliest tax year. A taxpayer may elect to forego the entire carryback period for an NOL and instead carry it forward.

Stimulus legislation passed earlier this year allowed eligible small businesses (with average annual gross receipts of $15 million or less for 2006-2008) to elect to carry back NOLs from 2008 for 3, 4 or 5 years rather than the standard 2 years. A taxpayer with a fiscal year (i.e., other than a calendar year) was entitled to choose the extended carryback period for the tax year that began or ended in 2008.

New law. The 2009 Assistance Act provides an election for most taxpayers (not just small businesses) to increase the carryback period for an applicable NOL to 3, 4, or 5 years from 2 years. An applicable NOL means the taxpayer's NOL for any tax year ending after Dec. 31, 2007, and beginning before Jan. 1, 2010. A taxpayer with a fiscal year may effectively choose from among three taxable years, i.e., any taxable year beginning or ending in 2008 or 2009, as the loss year eligible for the extended carryback period.

Taxpayers electing a 5-year carryback can use the NOL to offset up to 50% of taxable income for the 5th tax year preceding the loss year, and 100% of taxable income in the remaining 4 carryback years. The amount of the NOL otherwise carried to tax years after the 5th preceding tax year is adjusted to take into account that the NOL could offset only 50% of the taxable income for the 5th year. That is to say, unlike previous versions of this proposal which were not included in the final legislation, there is no "haircut" for the amount by which the NOL is limited in the 5th preceding year.

In addition, the Act suspends the 90% limitation on the use of an NOL deduction for alternative minimum tax purposes, for alternative tax NOLs attributable to carrybacks for which the extended carryback is elected.

Generally, an extended carryback period election may be made for only one tax year. However, small businesses that have already elected an extended carryback for a 2008 NOL may also elect to extend the carryback for NOLs from 2009.

A similar extended carryback period is available for the loss from operations of a life insurance company.

The election of an extended carryback period must be made by the due date (with extensions) for filing the tax return for the taxpayer's last tax year beginning in 2009. Once made, the election is irrevocable. If the taxpayer had previously elected to forego the carryback of an NOL from a tax year ending before Nov. 6, 2009, the taxpayer may revoke that election before the due date (including extensions) for filing the taxpayer's 2009 return.

The right to elect an extended carryback period does not apply to any taxpayer that has received or will receive financial assistance under the Emergency Economic Stabilization Act of 2008 in the form of an equity infusion or acquisition of a warrant (or other right).

Increased Penalty for Failure to File Partnership or S Corporation Returns

Under pre-Act law, the penalty for the failure to file a partnership or S corporation return is $89 per partner or shareholder for each month or portion of a month the return is not filed, up to a maximum of 12 months. The Act increases the penalty to $195 per month per shareholder or partner, effective for returns for tax years beginning after December 31, 2009.

Additional FUTA Surtax Is Extended Through June of 2011

The Act provides that the 6.2% FUTA tax rate continues to apply through June of 2011, and the 6.0% rate applies for the remainder of calendar year 2011 and for later years. That is, the temporary 0.2% surtax is extended for 11/2 years through June 30 of 2011.

Delay the Application of the Worldwide Interest Allocation Election

The Act delays for seven years (through 2017) an election, previously effective for tax years after Dec. 31, 2010, that would let U.S. multinational companies allocate and apportion interest expense on a worldwide basis.

Corporate Estimated Tax Payments

The Act provides that for large corporations, the required payment of estimated tax otherwise due in July, August, or September of 2014 will be increased by 33%. The amount of the next required installment will be appropriately reduced to reflect the amount of the increase in the earlier installment. This will have the effect of accelerating government revenue for the affected fiscal year.

Expansion of Magnetic Media Filing by Return Preparers

The Act mandates that IRS require tax return preparers who reasonably expect to file more than ten income tax returns for individuals, trusts, or estates to file the tax returns on magnetic media, effective for tax returns filed after December 31, 2010.