The tax reform bill, commonly referred to as the Tax Cuts and Jobs Act of 2017 (the Act), was signed into law on December 22, 2017. The Act contains a number of provisions that create significant year-end planning opportunities for businesses. These provisions are summarized below.

NOL Deduction Limits. The Act substantially amends current law regarding the use of net operating losses (NOLs) to offset taxable income. The deduction for NOLs arising in years beginning after December 31, 2017, generally will be limited to 80% of the taxpayer's eligible income (calculated without regard to the NOL deduction). More significantly from a year-end perspective, however, is the Act's elimination of the carryback of NOLs to each of the two taxable years preceding the year of the loss. Losses arising in years beginning after December 31, 2017, may only be carried forward.

Non-Corporate Business Losses. For non-corporate taxpayers, a new limitation on "excess business losses" will apply beginning in 2018. Excess business losses, defined as the excess of trade or business deductions for the year over the trade or business income or gain for the year plus an inflation-adjusted threshold, will be disallowed. The disallowed excess business loss may be carried forward indefinitely as an NOL. The limitation will apply at the partner, member or shareholder level for partnerships, LLCs and S corporations, respectively, and will apply after the application of passive loss limitations.

100% Bonus Depreciation. The Act introduces 100% bonus depreciation for qualified business assets (generally, depreciable tangible personal property) acquired and placed in service after September 27, 2017, and makes used property eligible for bonus depreciation for the first time.

Rate Reductions and Pass-Through Deduction. The top corporate tax rate is reduced from 35% to 21%, and the top individual rate is reduced from 39.6% to 37%. The Act also creates a new 20% deduction for owners of non-corporate businesses, creating an effective top rate of 29.6% on qualified business income of these owners to the extent this deduction is fully available.

A "Perfect Storm" of Tax Savings Opportunities

The foregoing provisions create significant year-end planning opportunities. In general, deductions, particularly those that could result in an NOL or net business loss for an otherwise profitable business, have substantially greater value in 2017 than in 2018 and future years.

To the extent that expensing of depreciable assets or acceleration of other deductions (such as employee bonuses) into 2017 would generate an NOL for tax year 2017, that NOL may be carried back to 2015 and 2016, generating refunds at current higher rates. Beginning on January 1, 2018, those NOLs may only be carried forward, will be subject to the 80% limitation, and will provide a reduced benefit due to the presence of lower rates. Moreover, non-corporate taxpayers may benefit by accelerating deductions that would otherwise generate "excess business losses" or reduce qualifying business income in 2018 and future years. Accordingly, both corporations and non-corporate businesses should consider whether any depreciable property acquisitions or other material deductions may be accelerated into 2017.

Year-end planning issues can be magnified in the context of merger and acquisition transactions.

It is fairly common for a business undergoing an M&A transaction to create a significant NOL for the year the M&A transaction closes as a result of the incurrence of deductible transaction costs, including deductions relating to options and other equity compensation, transaction bonuses and investment banker fees. For otherwise profitable corporations, these NOLs may be carried back to previous taxable years and can generate tax refunds, the value of which typically is retained by the selling shareholders.

Going forward, the inability to carry back NOLs, combined with the reduction in the corporate tax rate, will substantially reduce the value of these NOLs. Similarly, although carrybacks typically are not available in connection with the sale of a non-corporate business, transaction costs can nevertheless produce significant savings by reducing the sellers' ordinary income for the year of the transaction.

Accordingly, to the extent possible, taxpayers involved in an M&A transaction should consider whether the transaction could be closed during 2017, or alternatively whether any deductible transaction costs may be accelerated into 2017. For example, holders of nonqualified stock options (which could include incentive stock options that are converted into nonqualified stock options) could exercise their options in 2017, and the terms of any transaction bonuses could be modified prior to the end of 2017 to remove any conditions that would delay a deduction.

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