INTRODUCTION

On November 6, 2009, President Obama signed the **"The Worker, Home Ownership, and Business Assistance Act of 2009"** *(WHBA 2009),* which *substantially expands* the widely popular home buyer's refundable tax credit by: extending it to contracts signed by April 30, 2010 (if closed by June 30, 2010); substantially increasing the income phase-out levels; expanding the credit to certain long-term homeowners; and liberalizing the rules for certain military personnel. In addition, *WHBA 2009* opens up new opportunities for many businesses (regardless of size) that incurred tax losses (net operating losses) in 2008 and/or 2009, to recoup all or a portion of the taxes paid in previous profitable years as far back as five years. **In light of these significant changes, we are sending you this letter to keep you abreast of the new tax benefits that this legislation offers you or your business.**

EXPANDED HOME BUYER'S CREDIT OFFERS NEW TAX PLANNING OPPORTUNITIES

In 2008, Congress enacted its initial version of the *first-time* home buyer's tax credit and, in early 2009, expanded and extended the credit. Now, Congress has once again extended the credit and expanded it even to certain taxpayers who are **not** *first-time* home buyers. Consequently, we now have three different versions of this increasingly popular tax credit. The version that applies depends on the date the taxpayer bought the home. For example, if you were a qualifying taxpayer who purchased your *first-time* home **on or before December 31, 2008,** you qualified for a *refundable* credit of up to $7,500 that is required to be paid back to the government in equal installments over 15 years, or earlier if the house is sold or you fail to use the home as your principal residence. **Caution!** These rules continue to apply to qualifying home purchases **before 2009** (including the 15-year payback requirement). On the other hand, if you were a **qualifying *first-time* home buyer who purchased your home *after 2008* and *before November 7, 2009,*** your credit was expanded by 1) increasing the maximum credit from $7,500 to $8,000 (not to exceed 10% of the home's purchase price), 2) eliminating the 15-year payback requirement, and 3) requiring recapture of the credit upon the sale of the residence or failure to use the residence as a principal residence on/ywhere the sale or change of use occurs within 36 months of the date of purchase.

Generally, for **purchases after November 6, 2009,** *WHBA 2009 has* further expanded and extended the credit as follows: **1) Extended Deadline** - The previous sunset date of November 30, 2009 has been extended to qualifying binding home purchase contracts *entered into* **by April 30, 2010,** provided the contract is *closed* **no later than June 30, 2010; 2) Increased Income Phase-Outs Thresholds** -The credit is phased out as your modified adjusted gross income (MAGI) increases from **$225,000 to $245,000** (previously $150,000 to $170,000) **on a joint return; $125, 000 to $145,000** (previously $75,000 to $95,000) **if you are single or married and filing a separate return; 3) Qualifying Long-Term Homeowners Now Qualify - In** addition to qualifying *first-time* home buyers, home owners who have owned and used the same principal residence for any five consecutive year period during the eight-year period immediately preceding the purchase will also qualify for the credit (up to $6,500); and **4) Relief For Certain Military And Government Personnel** - As discussed in more detail below, military and certain government personnel who are on qualified extended assignments will get extended deadlines to purchase a home and relief from the recapture rules. **Planning Alert!** *WHBA 2009* also placed a few *new restrictions* on the home buyer's credit. Generally, for purchases after **November 6, 2009: 1) Cap On Purchase Price** - Home purchases exceeding $800,000 will not qualify; **2) Age Limit** - Purchasers must be at least 18 years old (or married to someone who is at least 18); and **3) Dependents Disqualified** - Anyone who is **eligible** to be claimed as another taxpayer's dependent will not qualify. **Tax Tip.** Regardless of when you bought your home, this is a *refundable* credit that offsets both alternative minimum tax (AMT) and regular tax liabilities, so you will actually get a refund to the extent the credit exceeds your tax liability.

If you are thinking about taking advantage of this popular credit, there are many things to consider, including:

What Is My "Purchase Date?" Generally, you are subject to the new rules under *WHBA 2009,* described above, if you "purchased" your house **after November 6, 2009.** The IRS says that your "purchase date" is generally the date you "close" on the house. However, if you are constructing your new home, your "purchase date" is the date you actually occupy (i.e., move into) the house.

How Do I Qualify? If you purchase your home **after November 6, 2009,** you will generally qualify if you are either a "qualified first-time home buyer," or a "qualified long-term home owner."

- **Qualified First-Time Home Buyer.** You are a "qualified first-time home buyer" if neither you nor your spouse has owned an interest in a principal residence in the U.S. during the 3-year period ending on the date you purchase the current residence. A principal residence could include a condominium, houseboat, or mobile home. IRS says that a mobile home will qualify even if you place it on a lot that you are leasing.

- **Qualified Long-Term Home Owner.** You are a "qualified long-term home owner" if, on the date you purchase your home, you (and your spouse, if married) have owned and used the same principal residence for any 5-consecutive year period during the 8-year period immediately preceding your home purchase. For example, let's assume that you and your spouse are currently living in an apartment, but you both previously owned and lived in your principal residence from 2001 through 2007. if you purchased a new home on November 30, 2009, you would be a *qualified long-term home owner* because both you and your spouse would have owned and used the same principal residence for at least 5-consecutive years during the 8-year period immediately preceding the purchase of your new home (i.e. December 1, 2001 through November 30, 2009). **Tax Tip.** By allowing this credit to existing home owners, "empty nesters" now have the opportunity to get into a smaller residence and qualify for the credit by either selling or holding onto their existing homes and buying a smaller house.

What If I Qualify But My Fiancé Does Not? If you qualify as either a *first-time home buyer* or a *long-term home owner* and you are planning to marry someone who does not qualify, you can salvage the credit by buying your home *before you many,* since your marital status is determined at the date you purchase your home. This works even if you later marry in the same year.

What Is The Maximum Credit? If you are a *"qualified first-time home buyer"* your credit is the lesser of: 1) $8,000 ($4,000 if married filing separate), or 2) 10% of the home's purchase price. If you are a *"qualified long-term home owner"* your credit is the lesser of: 1) $6,500 ($3,250 if married filing single), or 2) 10% of the home's purchase price.

How Do The Income Phase-Out Limits Apply? For purchases after **November 6, 2009** by **single** taxpayers, the credit is phased out as modified adjusted gross income (MAGI) increases from **$125,000 to $145,000 ($75,000 to $95,000** for purchases **before November** 7, **2009).** For purchases after **November 6, 2009** by **married taxpayers** filing jointly, the credit is phased out as MAGI increases from **$225,000 to $245,000 ($150,000 to $170,000** for purchases **before November 7, 2009). Tax Tip.** If your 2009 MAGI is too high to take the full credit, but you plan to retire next year causing your 2010 MAGI to fall below the MAGI phase-out level, consider deferring your home purchase until next year.

It Is OK To Rent Out Room. The IRS says the credit is allowed for a qualifying home buyer who uses a home as a principal residence and simultaneously rents out one or more rooms to tenants. **Tax Tip.** It appears that a qualifying college student who purchases a new home could rent a room to another student without jeopardizing the credit. **Planning Alert!** The IRS says that if you purchase a duplex and establish only one of the units as your principal residence, you may take the credit only for the purchase price allocable to that unit.

You May Buy Your Qualifying Home From Some Relatives – But Not Others. Generally, you will not qualify for the credit if you purchase your home from a "related party," which generally includes: your spouse, parent, grandparent, child or grandchild. **Tax Tip.** A "related party" **does not include** your brother, sister, aunt, or uncle. **Planning Alert!** In addition, for purchases **after November 6, 2009,** you may not purchase the home from a "related party" of your spouse.

You May Elect To Claim The Credit On Your Prior Year's Return. If you purchase your qualifying residence during 2009, you may elect to treat the purchase as made on December 31, 2008. If you purchase your home in 2010, you may elect to treat the purchase as made on December 31, 2009. **Tax Tip.** This election allows you to accelerate the tax benefit of the 2009 or 2010 purchase by one year, and the election may be made on an amended income tax return. If you make this election, your income phase-out will be based on your income for the year you claim the credit, even though your purchase actually occurred in the subsequent year. For example, if you purchase your home in 2010 but your income for 2010 exceeds the phase-out thresholds, electing to claim the credit on your 2009 return could salvage the credit if your 2009 income is below the phaseout thresholds. **Planning Alert!** If you purchased your home **after November 6, 2009 and before 2010,** you will generally be subject to the higher income phase-out limits of *WHBA 2009.* However, if you elect to claim the credit for this same purchase on your amended 2008 return, it appears that you may be subject to the lower income phase-out limits that applied before *WHBA 2009.* If you purchase a qualifying home after **November 6, 2009 and before 2010,** please call our firm. We will help you determine whether claiming the credit on your amended 2008 return will be beneficial.

Although Unmarried Co-Owners Get Only One Credit Per House–Allocation Is Flexible. Two or more unmarried individuals who jointly purchase a home and use it as their principal residence may each qualify for the credit. However, the total amount of the credit allowed to the individuals in the aggregate may not exceed the overall cap of $8,000 for "qualified first-time home buyers," or $6,500 for "qualified long-term home owners." In addition, the IRS says that unmarried co-owners may allocate the credit between themselves in any reasonable manner. Thus, if one unmarried co-owner qualifies for the credit, but the other does not (e.g., due to income limits, etc.), the IRS says that you can allocate the entire credit to the co-owner who qualifies. The IRS website also suggests that this result will not change in a situation where both co-owners are jointly liable on the mortgage, even if only one of the co-owners makes the entire monthly payments on the mortgage.

- **Consider Having Low-Income Adult Child Co-Purchase Home With Parent.** These flexible rules offer planning opportunities for younger, lower income adults with wealthier parents or grandparents. For example, according to various statements on the IRS web site, it appears that the IRS would allow a young adult to co-purchase her first home with her parent, so long as the child co-signs the mortgage. It also appears that: 1) the parent could provide the entire down payment and co-sign the mortgage, and 2) the child and parent could then allocate the entire refundable credit to the qualifying child, even if the parent ends up making the mortgage payments. **Planning Alert!** If the home is purchased **after November 6, 2009,** this strategy will not work unless the child is at least 18 years old, and the parent is not entitled to claim the child as a dependent. In addition, making payments on behalf of a child that is not a dependent could have gift tax consequences.

What Relief Do I Get If I Am On A Military Or Government Assignment? Generally, if you are a member of the uniformed services, U.S. foreign services, or intelligence community, and you (or your spouse) are on "qualified official extended duty service," you may qualify for relief from the recapture rules, and you will have an extended period to purchase your new home.

- You are on **"Qualified Official Extended Duty Service"** if you are serving at a duty station at least 50 miles from your home (or you are ordered to live in Government quarters) for a period exceeding 90 days (or you are on an indefinite assignment).

- **Relief From Recapture Rules.** If you sell (or move out of) your home in connection with Government orders received by you (or your spouse) for *qualified official extended duty,* you will generally not be required to recapture any portion of the credit that you have not previously recaptured. **Tax Tip.** Under this exception, there will be no additional recapture of the tax credit even if you bought your home in 2008 causing you to be subject to the automatic 15-year pay back requirement.

- **Extended Deadline To Purchase Home.** If you would otherwise qualify for the home buyer's credit and you or your spouse served on *qualified official extended duty* **outside the United States** for at least 90 days any time **after December 31, 2008 and before May 1, 2010,** you may qualify for the home buyer's credit so long as you enter into a binding contract to purchase the home **by April 30, 2011,** and you close by **June 30, 2011.**

5-YEAR NOL CARRY BACK ELECTION PROVIDES TAX RELIEF TO STRUGGLING BUSINESSES

Generally, taxpayers that have a net operating loss (NOL) may carry the NOL back and offset taxable income reported in the 2 previous tax years (NOL carry back period). Any remaining unused NOL may then be carried forward to each of the following 20 years until the NOL is used up. Earlier in 2009, Congress changed the rules by allowing an **"eligible small business"** (generally, a business with average gross receipts of no more than

$15 million) to "elect" an extended NOL carry back period of up to 5 years for certain 2008 NOLs. *WHBA 2009* has now expanded and extended this 5-year NOL carry back *election,* as follows: **1) Extended To 2009 NOLs** - The election to carry back an NOL up to 5 years is available for an NOL generated in a tax year **ending in 2008 or 2009,** or a tax year **beginning in 2008 or 2009,** for fiscal year taxpayers, **and for calendar year 2008 or 2009,** for calendar year taxpayers. **2) No Gross Receipts Limit -** A business of any size (regardless of its gross receipts) may make this election; **3) 50% Limit For Fifth Year -** A qualifying 2008 or 2009 NOL may not offset more than 50% of the taxable income of the 5th carryback year (it may reduce 100% of the taxable income for the other carryback years); and **4) Election Generally Available For Only One Year** - The election is generally available for **either a** 2008 NOL or a 2009 NOL, but not both. **Tax Tip.** As discussed in more detail below, if an "eligible small business" previously made a timely 5-year carry back election for a 2008 NOL, it may also make the election for its 2009 NOL. **Planning Alert!** This temporary 5-year NOL carryback election is generally not available to businesses that issued an equity interest to the Federal government as part of the recent government bailout programs.

If your business has a net operating loss for either 2008 or 2009, and you are thinking about taking advantage of this election, there are many things to consider, including:

Using This Election To Recoup Prior Year Taxes. If your business is currently generating a tax loss (NOL) but was profitable in prior years, this election to carry back your 2008 or 2009 NOL for up to 5 years may provide cash from the refund of taxes you paid in previous profitable years. For example, prior to this change, your business would have been able to carry back a 2009 NOL to only the two most recent years and recoup taxes it paid in 2007 and 2008. Now, under this new provision, you may elect to carry back that same 2009 NOL and offset 50% of your taxable income reported up to 5 years back (i.e., the 2004 tax year) and get a refund of those 2004 taxes. In addition, any remaining portion of your 2009 NOL that exceeded 50% of your 2004 taxable income can then be carried forward and reduce up to 100% of your taxable income for 2005, and subsequent years. **Tax Tip.** Certain "qualified farming losses" and "qualified disaster losses" may also be carried back 5 years, and offset up to 100% (not just 50%) of the taxable income of the 5th carry back year.

Years For Which The 5-Year NOL Carry Back Election Is Available. You may make this election for an NOL for a taxable year *ending* **in 2008 or 2009,** or for a taxable year *beginning* **in 2008 or 2009. Planning Alert!** Except for certain "eligible small businesses," discussed below, you generally may make this election for only one tax year, you may not make it for multiple tax years.

"Eligible Small Businesses" May Get The 5-Year NOL Carry Back For 2008 And 2009. An "Eligible Small Business" (generally, a business that satisfied a $15 million average gross receipts test) that timely made an extended carryback election for its 2008 NOL, may also make this election for its 2009 NOL.

5-Year NOL Carryback Election May Benefit Businesses Having Large Built-In Loss Assets. Businesses holding assets that have current values well below their original cost may particularly benefit from this 5-year NOL carryback election. For example, let's assume that you are in the real estate construction or development business, and you are sitting on several pieces of real estate that have fallen in value well below your original cost. You might consider selling these "built-in loss" assets to unrelated parties if the sale would generate a 2009 NOL. You could then elect to carry the 2009 NOL back up to 5 years, and recoup all or a portion of the taxes you paid in those profitable years.

Election May Enhance Tax Benefit From 50% Bonus Depreciation Deduction. As part of the economic stimulus legislation enacted last February, Congress extended the 50% bonus depreciation to "qualifying property" acquired and placed-in-service during the 2009 calendar year. Generally, *qualifying property includes* new property that has a depreciable life for tax purposes of *20 years or less* (e.g., machinery and equipment, furniture and fixtures, cars and light general purpose trucks, sidewalks, roads, landscaping, depreciable computer software, farm buildings, qualified leasehold improvements, and qualified motor fuels facilities). Tax Tip. The 50% bonus depreciation can create or add to a 2009 NOL. If your business anticipates a loss (or minimal income) for 2009, but has generated healthy profits within the past 5 years, it may be prudent to take the 50% bonus depreciation deduction for qualifying purchases **made by December 31, 2009.** This could create or increase the 2009 NOL, which might allow you to recoup more prior year taxes paid during the preceding 5 years. Please call our firm and we will gladly help you determine whether taking full advantage of the 50% bonus depreciation for 2009 will save you and your business taxes.

Using The Election For 2008 Or 2009 Theft Losses From Investments. Ponzi schemes and similar scams have victimized taxpayers for years. In response to the significant investor losses caused by Bernard Madoffs fraudulent activities, the IRS recently issued comprehensive guidance that applies to investors caught in Ponzi-style fraud whether perpetrated by Madoff or someone else. Overall, the guidance takes a generous, pro-taxpayer position. Among other things, the IRS allows qualifying investment theft losses to be claimed as ordinary losses rather than as capital losses. The IRS guidance also establishes safe-harbors for qualifying taxpayers that provide more certainty regarding: 1) the year that the theft loss may be deducted, and 2) the amount of the theft loss. Generally, qualifying investment losses caused by theft or other fraudulent actions that cause you to have an overall tax loss (NOL), can be carried back and offset your income for the three prior years. *WHBA 2009* would presumably allow a taxpayer to elect to carry a 2009 investment theft loss back for up to 5 years (subject to the 5th year 50% of income limit discussed above). **Planning Alert!** The rules for determining whether you have an investment theft loss, the amount of the loss, and the year you are entitled to deduct the loss are complicated. **Please call** our firm if you need additional information.

Using The 5-Year Carry Back Election To Preserve The Tax Benefit Of An Anticipated 2010 NOL. If you do not make the election to carry your 2009 NOL back for 3, 4, or 5 years, you may limit the benefits of any 2010 NOL. Even if your 2009 NOL does not exceed your aggregate 2007 and 2008 taxable income, it might still be advisable to elect to carry the 2009 NOL back 3, 4, or 5 years if you are anticipating a 2010 NOL. In this situation, electing to carry your 2009 NOL back 3, 4, or 5 years could preserve 2008 taxable income to be offset by any 2010 NOL carryback (which, unless this law is extended to 2010, may only be carried back 2 years).

Due Date For Making The Election. The election to extend the 2-year NOL carry back period to 3, 4, or 5 years for either a 2008 NOL or 2009 NOL must be made by the extended due date for filing the return for the taxpayer's **last taxable year beginning in 2009** and, once made, is irrevocable. For example, a calendar-year **individual taxpayer** would have to make the election **by October 15, 2010,** and a calendar-year **regular "C" corporation** would have a **September 15, 2010** deadline. **Tax Tip.** There are certain NOL carryback filing procedures available that will allow your business to obtain a much quicker refund of taxes paid in the profitable carryback years. If you have a qualifying 2008 NOL or you anticipate a 2009 NOL, please call our firm and we will help you file for the carryback refunds as soon as possible.

FINAL COMMENTS

Tax law constantly changes due to new legislation, cases, regulations, and IRS rulings. Our firm closely monitors these changes. **We urge you to call us before implementing any planning ideas addressed in this letter so that we can update you on any late breaking changes. Note:** The information contained in this material represents a general overview of tax developments and should not be relied upon without an independent, professional analysis of how any of these provisions may apply to a specific situation.

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