NEW LAW SIGNED BY PRESIDENT OBAMA EXTENDS THE NET OPERATING LOSS CARRYBACK PERIOD FOR ALL BUSINESSES

On November 6, 2009, President Obama signed into law the Worker, Homeownership, and Business Assistance Act of 2009 (the "Act"). The Act, first introduced on September 10, 2009 to extend unemployment insurance benefits, will expand the net operating loss ("NOL") carryback period for all businesses.

In general, a taxpayer may carry an NOL back to the preceding two years and forward to the succeeding 20 years to offset taxable income in those years. The economic stimulus package enacted in February 2009 (the American Recovery and Reinvestment Act of 2009 (the "ARRA")) provides small businesses (generally businesses with average annual gross receipts not exceeding $15 million) with an election to increase the carryback period for up to five years with respect to any NOL for a taxable year ending in 2008 (or, alternatively, for a taxable year beginning in 2008 if the taxpayer so elects).

The Act extends the NOL carryback election under ARRA to all taxpayers (other than institutions receiving funds under the Troubled Asset Relief Program (TARP) and their affiliates). The Act expands the definition of eligible NOL to include an NOL arising in years ending after December 31, 2007 and beginning before January 1, 2010. Certain special rules apply to life insurance companies.

If the election is made under the Act with respect to a loss year, the amount of an NOL that may be carried back to the fifth taxable year preceding the loss year is limited to 50 percent of the taxable income for such year (computed prior to the NOL carryback) unless the taxpayer is an eligible small business that makes an election under the ARRA. This limitation does not apply to the first four years of the carryback period. This is illustrated in the following example: Assume a company has taxable income of $2 million per year from 2003 through 2007, and incurs NOL of $5 million in each of 2008 and 2009. If an election is made with respect to 2008, the 2008 NOL can be carried back to 2003 but the amount would be limited to $1 million, i.e., 50% of the taxable income of that year. Thereafter, $2 million of the 2008 NOL would be carried back to each of 2004 and 2005, reducing the taxable income to zero in those years. If an election is then made with respect to 2009, the 2009 NOL would be carried back only to 2006 and 2007 in the amount of $2 million each. The remaining $1 million 2009 NOL would be carried forward to the succeeding years.

In applying the 50 percent taxable income limitation with respect to the carryback of an alternative tax NOL deduction to the fifth preceding taxable year, the limitation is applied separately based on alternative minimum taxable income. In this regard, the Act also suspends the 90 percent limitation under current law on the use of any alternative tax NOL deduction attributable to the extended carrybacks.

An election under the Act can only be made with respect to one taxable year. Once made, it is irrevocable. A taxpayer must make the election by the due date (including extension) for filing its return for the taxpayer's *last taxable year* beginning in 2009. It is anticipated that the procedures for making the election will be substantially similar to those prescribed for eligible small businesses under the ARRA. If a taxpayer made an election to waive the carryback period with respect to an applicable NOL for a taxable year ending before the enactment of the Act, it may revoke the election before the due date (including extension) for filing its return for the taxpayer's *last taxable year* beginning in 2009. In addition, the Act intends that an eligible small business may continue to make

an election under the ARRA in accordance with the procedures prescribed in Rev. Proc. 2009-26, and an eligible small business that timely made or makes an election under the ARRA to carry back its applicable 2008 NOL may also elect under the Act to carry back a 2009 NOL.

In order to prevent abuses of the provisions in the Act, the Treasury Department is authorized to prescribe regulations on anti-stuffing, anti-churning or sale-leasebacks, and losses from wash sales.

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FOR FURTHER INFORMATION, CONTACT:

Alan S. Berlin, Partner
e-mail: aberlin@curtis.com
tel: +1 (212) 696-6038

Eduardo A. Cukier, Partner
e-mail: ecukier@curtis.com
tel: +1 (212) 696-6107

Marco Blanco, Partner
e-mail: mblanco@curtis.com
tel: +33 1-42-68-72-18

Christian Fingerhut, Partner
e-mail: cfingerhut@curtis.com
tel: +49 69 247576 0

William L. Bricker, Jr., Partner
e-mail: wbricker@curtis.com
tel: +1 (212) 696-6039

Kuang-Chu Chiang, Counsel
e-mail: kchiang@curtis.com
tel: +1 (212) 696-6058

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