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CARES Act Retroactively Corrects Depreciation Rules Expands Bonus Depreciation to Building Improvements

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On March 25, 2020, the United States Senate passed a third "Coronavirus" relief bill (which was ultimately signed into law on March 27, 2020): the Coronavirus Aid, Relief, and Economic Security Act or "CARES Act." The Act uses numerous relief mechanisms. Its most effective likely include amendments to the Internal Revenue Code ("Code"). Those amendments liberalize rules applicable to Sections 172 (NOLs), 461(l) (excess business losses), 53(e) (alternative minimum tax), 163(j) (business interest expense), and 168 (qualified improvement property). This note focuses on Section 168's depreciation rules.

Before the Tax Cuts and Jobs Act of 2017 ("TCJA"), the Code classified the following property as "15-year property": (1) "qualified leasehold improvement property," (2) "qualified restaurant property," and (3) "qualified retail improvement property." In the TCJA, Congress attempted to "simplify" rules affecting this type of property, and others, by amending Section 168 to permit 100% first-year depreciation ("Bonus Depreciation") for "qualified improvement property." Unfortunately, apparent TCJA omissions inadvertently extended this property's depreciation schedule to 39 years (i.e., classified it as nonresidential real property) while also preventing it from qualifying for Bonus Deprecation. The omission's harmful effects on retail businesses led to tax practitioners referring to it as the "Retail Glitch."

The CARES Act remedies the Retail Glitch by adding qualified improvement property to the "15-year property" list for deprecation purposes. Thus, qualified improvement property – e.g., interior

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improvement to buildings – is now eligible for immediate expensing, or Bonus Depreciation. Alternatively, qualified improvement property now carries a 20-year class life for depreciation purpose, thus permitting it to be depreciated over 20 years rather than 39.

What is more, these CARES Act Retail Glitch remedies are retroactive, and apply as if they were originally included in the TCJA. Taxpayers can therefore amend their 2018 and 2019 tax returns (if filed) to claim Bonus Depreciation that was not previously available. This could generate significant refunds for retail sector businesses.