TaxViews
A tax periodical for the private club community

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The Coronavirus Aid, Relief, and Economic Security Act

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") was signed into law by President Trump on March 27, 2020 in response to the coronavirus emergency. The CARES Act, which is 880 pages long, provides a variety of relief to many Americans including financial support for small businesses and certain sectors of the economy. This publication contains our initial thoughts, and for the purposes of this publication, we will restrict our discussion to the Paycheck Protection Program ("PPP"), Employee Retention Payroll Tax Credits, Economic Injury Disaster Loans ("EIDL"), and the Exchange Stabilization Fund.

Paycheck Protection Program

The CARES Act a) provides that the Small Business Administration ("SBA") will administer the PPP, with existing SBA lenders invested with the authority to make loans thereunder, b) waives fees for borrowers and lenders, and c) limits a lender's consideration exclusively to whether the borrower was in operation on February 15, 2020 and had employees that were paid salaries and payroll taxes. The PPP provisions cover loans that are made between February 15, 2020 and June 30, 2020.

Generally speaking, the PPP is available to businesses, Internal Revenue Code ("IRC") Section 501(c)(3) charities, IRC Section 501(c)(19) veterans organizations, and tribal business concerns that employ not more than 500 employees.

Limited Availability for Nonprofits

The PPP is only available to nonprofit organizations tax-exempt under IRC Section 501(c)(3) and IRC Section 501(c)(19). Other non-profit entities are not eligible to participate in this program.

Financial assistance for other types of nonprofits, such as IRC Section 501(c)(4) social welfare organizations, IRC Section 501(c)(6) trade and professional associations and IRC Section

501(c)(7) social clubs, may be available under sections of the CARES Act covering EIDL loans (and emergency grants) and Employee Retention Payroll Tax Credits (**discussed below**).

Certification

There are limited borrower requirements to obtain a PPP loan; such requirements include a good-faith certification:

- The loan is required to continue operations during the coronavirus emergency;
- The loan proceeds will be used to retain workers and maintain payroll, make mortgage, lease, and utility payments;
- The loan applicant does not have any other application pending under the PPP for the same purpose; and
- The loan applicant has not received duplicative amounts under the PPP during the period February 15, 2020 through December 31, 2020.

The SBA has no recourse against any individual, shareholder, member, or partner of an eligible loan recipient for non-payment, unless the loan proceeds are used for unauthorized purposes.

Loan Maximum and Permissible Uses

The PPP provides that small businesses and other eligible organizations, such as IRC Section 501(c)(3) and 501(c)(19) organizations, may receive a loan of up to $10 million with loan repayments eligible for deferment for up to a year and interest rates capped at 4%.

The maximum loan amount (capped at $10 million) is the lesser of:

1. 2.5 times the average total monthly payroll costs incurred in the one-year period before the loan is made (or for seasonal employers the average monthly payroll costs for the 12 weeks beginning on February 15, 2019, or from March 1, 2019 to June 30, 2019), plus the outstanding amount of a loan made under the SBA's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this program;

2. for businesses that were not in existence during the period from February 15, 2019 to June 30, 2019 – 2.5 times the average total monthly payroll costs from January 1, 2020 to February 29, 2020, plus the outstanding amount of a loan made under the SBA's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this new program; or

3. $10 million.

The PPP provides a definition of payroll costs (e.g. salary, cash tips, leave benefits, insurance and retirement benefits) — a definition that, simply stated, excludes (a) compensation in excess of $100,000 and (b) compensation paid to employees residing outside the United States.

Example

> Dan's Hockey Emporium located on the West Side of New York City applies for a paycheck protection loan, and in light of the popularity of hockey, it had $5,000,000 in payroll costs for the 1-year period for a monthly average of $416,666.67. Dan's Hockey Emporium is entitled to loan equal to the lesser of (a) $1,041,666.67 ($416,666.67 in average payroll costs * 2.5), or (b) $10 million.

Loan proceeds may be used for:

- payroll costs;
- interest payments on mortgages entered into before February 15, 2020 (but not prepayment or payment of principal) and interest on any other debt incurred before February 15, 2020;
- rent for a lease entered into before February 15, 2020; and
- utilities, including electricity, gas, water, transportation, telephone, or internet.

Loan Forgiveness

As stated earlier, the PPP provisions contained in the CARES Act cover loans that are made between February 15, 2020 and June 30, 2020. The borrower does not have to provide a personal guarantee or provide collateral in order to receive a PPP loan. The CARES Act contains a loan forgiveness program for loans received under the PPP. Any canceled indebtedness will not be included in the borrower's taxable income.

A borrower is eligible for loan forgiveness in an amount equal to the costs incurred and payments made *during the eight week period following loan origination* for the following:

- Payroll costs;
- Any payment of interest on any covered mortgage (which does not include any prepayment of or payment of principal on a mortgage obligation);
- Any payment on any covered rent obligation; and
- Any covered utility payment.

The loan forgiveness amount will be reduced based on employee and salary reductions, but the PPP makes exemptions for such reduction if a borrower rehires its employees, or eliminates the salary reductions, by June 30, 2020.

There are restrictions on the amount of eligible loan forgiveness:

- the forgiven amount cannot exceed the loan principal; and
- the amount forgiven will be reduced proportionally by any reduction in employees compared to the prior year and reduced by the reduction in pay of any employee beyond 25 percent of their compensation in the prior year, as discussed at length in the CARES

Act. There is an exception to the reduction of loan forgiveness if the organization rehires employees and/or eliminates the reduction in salaries by June 30, 2020.

Loan recipients must apply to their lenders for loan forgiveness by submitting required documentation, and they will receive a decision within 60 days. If a balance remains after the loan recipient receives loan forgiveness, the outstanding loan will have a maximum maturity date of 10 years after the application for loan forgiveness.

By participating in the PPP, however, otherwise eligible entities may become ineligible for other assistance provided in the CARES Act. For example, an employer who receives a PPP loan is ineligible for the Employee Retention Payroll Tax Credits.

Employee Retention Payroll Tax Credits

The CARES Act provides a refundable payroll tax credit for 50 percent of qualified wages paid by employers to employees during the coronavirus crisis for each employee on the payroll. The payroll tax credit is designed to encourage businesses to keep employees on their payrolls.

The credit is available to employers whose (1) operations were fully or partially suspended because of a coronavirus related shutdown order, **or** (2) gross receipts declined by more than 50 percent when compared to the same quarter in the prior year; once the employer's gross receipts go above 80% of a comparable quarter in 2019, they no longer qualify after the end of that quarter. These measures are calculated each calendar quarter.

- For employers with more than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services because of coronavirus related circumstances described above.
- For employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order.

The credit is provided for the first $10,000 of compensation, including health benefits, paid to an eligible employee.

- The CARES Act provides, in part, that there shall be allowed as a credit against applicable employment taxes for each calendar quarter an amount equal to 50 percent of the qualified wages with respect to each employee of such employer for such calendar quarter. The amount of qualified wages with respect to any employee which may be taken into account by the eligible employer for all calendar quarters shall not exceed $10,000. In short, the credit is capped at $5,000 (50% of $10,000 qualified wages) per employee for all calendar quarters.

The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.

Broad Availability for Nonprofits

All non-profits organized under IRC Section 501(c) including, among others, IRC Section 501(c)(4) social welfare organizations, IRC Section 501(c)(6) trade and professional associations and IRC Section 501(c)(7) social clubs, are eligible for the refundable employee retention credit authorized by the CARES Act provided that such organizations met the above-discussed requirements.

Please note that IRC Section 501(c)(3) and 501(c)(19) organizations receiving PPP loans are not eligible for these payroll tax credits.

Employers Credit Reimbursement

Employers can be immediately reimbursed for the credit by reducing their required deposits of payroll taxes that have been withheld from employees' wages by the amount of the credit. Eligible employers will report their total qualified wages and the related health insurance costs for each quarter on their quarterly employment tax returns or Form 941 beginning with the second quarter. If the employer's employment tax deposits are not sufficient to cover the credit, the employer may receive an advance payment from the IRS by submitting Form 7200, Advance Payment of Employer Credit Due to COVID-19.

EIDL Program

The CARES Act provides additional funds to the SBA's existing EIDL program, expands eligibility for EIDL loans, and waives certain requirements for all applicants, which include private nonprofit organizations (*see Broad Nonprofit Applicability* below) with 500 or fewer employees. The covered period for this section is January 31, 2020 through December 31, 2020.

The CARES Act waives the standard EIDL program requirements that (1) the borrower provide a personal guarantee for loans up to $200,000; (2) that the eligible nonprofit be in operation for one year prior to the disaster (except that the nonprofit must have been in operation on January 31, 2020); and (3) that the borrower be unable to obtain credit elsewhere.

EIDLs

Generally, EIDLs provide up to $2 million for working capital and have a 3.75 percent interest rate for small businesses and a 2.75 percent rate for nonprofits. Under current law, EIDLs are available to small businesses and most private nonprofit organizations, including social clubs, membership organizations, trade associations, advocacy organizations, and unions. The CARES Act expands eligibility for EIDL to include tribal businesses, cooperatives, and ESOPs with fewer than 500 employees. EIDL proceeds may be used to pay fixed debts, payroll, accounts payable and other bills but may not be used to refinance long-term debt.

Until December 31, 2020, the SBA can approve EIDLs based solely on an applicant's credit score or an alternative appropriate method for determining an applicant's ability to repay.

Emergency EIDL Grant

The emergency EIDL grant is an advance of $10,000 to small businesses and nonprofits that apply for SBA's EIDL program. The advance will be provided within three days of applying for the loan, and organizations will not be required to repay the advance even if they are denied for an EIDL. Emergency advance funds can be used for payroll costs, increased material costs, rent or mortgage payments, or repaying obligations that cannot be met because of revenue losses.

Broad Nonprofit Applicability

"Private nonprofit organizations" are eligible for purposes of the EIDL program, including social clubs, trade associations, advocacy organizations, and unions. As discussed above, the PPP program is limited in scope to IRC Section 501(c)(3) and 501(c)(19) non-profit organizations. Nonprofits organized under IRC Sections 501(c)(3) or 501(c)(19) may apply for an EIDL loan in addition to a loan under the PPP provided the loans are not used for the same purpose.

Exchange Stabilization Fund

The CARES Act provides $500 billion for an Exchange Stabilization Fund (the "Fund") that will provide loans, loan guarantees, and other investments to industries affected by the coronavirus. $46 billion of the Fund will be used for air carriers and businesses important for maintaining national security. The remaining $454 billion of the Fund will be available for eligible businesses, states, and municipalities. Eligible business means a) an air carrier or b) a United States business that has incurred losses and has not otherwise applied for or received economic relief in the form of loans or loan guarantees provided under any other provision of law.

The Secretary of the Treasury shall endeavor to seek the implementation of a program or facility that makes direct loans to eligible businesses including, to the extent practicable, nonprofit organizations, with between 500 and 10,000 employees, with such direct loans being subject to an annualized interest rate that is not higher than 2 percent per annum. For the first 6 months after any such direct loan is made, or for such longer period as the Secretary may determine in the Secretary's discretion, no principal or interest shall be due and payable.

Eligible organizations wishing to take of advantage of the Fund must make a good faith certification that: (1) economic uncertainty supports access to the Fund; (2) funds received will be used to retain 90 percent of the workforce at full compensation and benefit levels before September 30, 2020; and (3) an intent to restore not less than 90 percent of the workforce prior to February 1, 2020 while restoring all compensation and benefit levels to workers no later than four months after their termination date.

The CARES Act directs the Department of Treasury to issue additional regulations and guidance with respect to how the Fund will operate.

Broad Availability for Nonprofits

The CARES Act language in this section refers to nonprofit organizations so it seems that these funds will be available to all nonprofits, unlike the PPP that is limited to IRC Sections 501(c)(3) and 501(c)(19) organizations, as well as to businesses that meet the previously discussed requirements.

Closing

The CARES Act requires issuance of regulations within 15 days of enactment, under emergency rulemaking authority. The enactment date is likely March 27, 2020, but a commentator that hosted a discussion of the CARES Act posited that the enactment date may be March 30, 2020. While the Act provides deadlines for the SBA and Treasury Department, delays in issuing regulations and guidance to implement, among others, the PPP and EIDL program may occur.

We are working tirelessly to review the laws being passed that provide assistance to our clients. We are all in this together. Stay safe, stay healthy.