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CARES ACT: ECONOMIC IMPACT AND RELIEF FOR NONPROFITS AND TAX- EXEMPT ORGANIZATIONS

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The CARES Act

- **The Coronavirus Aid, Relief and Economic Security (CARES) Act** provides economic relief to organizations facing financial challenges as a result of the COVID-19 pandemic, including nonprofit organizations.
- To claim many of these benefits, however, organizations must navigate a complex web of eligibility requirements and select among mutually exclusive options.

The CARES Act provides \$2 trillion economic stimulus and makes a number of benefits explicitly available to tax-exempt organizations and nonprofits

Specifically, these benefits include:

Paycheck Protection Program

Economic Injury Disaster Loans

Employee Retention Payroll Tax Credit

Payroll Tax Deferral

Paycheck Protection Program (PPP)

- Offers partially or fully forgivable loans of up to \$10 million through the Small Business Administration (SBA) targeted to “small businesses” to help keep their workers employed
- Extends the existing Small Business Act Section 7(a) loan program to section 501(c)(3) organizations and section 501(c)(19) veterans organizations
- Other exempt organizations are not currently eligible for PPP loan funding
- **SBA – Interim Final Rule on PPP:**
 - The Small Business Administration announced Thursday, April 16 that the initial \$349 million loan funding to help small businesses has been depleted, although Congress is in the process of negotiating additional funding.

Paycheck Protection Program (PPP)

- Borrower Eligibility
- Increased limit for certain industries
- Affiliation Rules
- Employee Sharing Arrangements
- Certification
- Loan Terms
- Loan Forgiveness

Paycheck Protection Program (PPP)

Borrower Eligibility:

- Organizations are eligible if they meet either of the following criteria for number of US-based employees (FT, PT, and seasonal), including the employees of their “affiliates”:
 - 500 or fewer employees, or
 - More than 500 employees but fewer than the number of employees under the SBA’s size standards for that organization’s North American Industry Classification System (NAICS) code.

Increased limit for certain industries:

- SBA regulations specify size standards in terms of annual receipts or number of employees (If the SBA regulations have measured the size standard for an organization’s NAICS code using number of employees, the organization can use that number, instead of the baseline of 500 employees, for purposes of determining eligibility)

[view the SBA’s full table of NAICS codes and related size thresholds](#)

Paycheck Protection Program (PPP)

Affiliation Rules:

- SBA takes into account the number of employees of any “affiliate” in determining eligibility under the existing size standard.
- SBA considers two persons or entities to be affiliated when one controls or has the power to control the other, or a third party controls or has the power to control both.
- Thus, affiliation picks up another organization related through common control, and also any organizations controlled by the affiliated organization.
- It does not matter whether control is actually exercised so long as the power to control exists.

Paycheck Protection Program (PPP)

Affiliation Rules:

- SBA issued [FAQs](#) and an [interim rule](#) that provide an exception to the affiliation rules for certain faith-based organizations.
- The exception waives any affiliation between a faith-based organization and any other organization that is “based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion.”
- However, the exception does not apply to a religious organization’s affiliation with another entity for any other reason, such as “administrative convenience.”
- Religious organizations are directed to submit a statement containing the organization’s good faith determination that the exception applies as an attachment to its PPP application.

Paycheck Protection Program (PPP)

Definition of Control:

- One of the most common ways that SBA finds control (and hence, affiliation) is where an individual or another business concern owns more than 50% of the voting equity of the business concern seeking financial assistance. Affiliation also occurs through common management and where two organizations separately are controlled by close family members.
- For nonprofit organizations, SBA would likely evaluate board control, which would be similar to tests for relatedness under the federal tax rules. However, under the current SBA rules even a minority interest has “negative control” where it has the power to block actions related to the daily operations of the business concern (e.g., hiring or firing officers, borrowing money, or paying dividends).

Paycheck Protection Program (PPP)

Employee Sharing Arrangements:

- are common among nonprofit organizations and raise a number of additional considerations.

For example, it is not clear how employees that split their time between affiliated organizations would be counted, and a sharing agreement may provide the kind of “negative control” that would cause a finding of affiliation. Furthermore, when one organization reimburses the other for withholding and making payroll tax payments, there are additional concerns, such as documenting that loan funds were used for payroll costs.

Certification:

In order to secure a loan, eligible organizations must provide a good faith certification that:

- the loan is necessary to support ongoing operations due to the uncertainty of current economic conditions;
- the organization will use the funds to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments; and
- the organization is not applying for or already receiving duplicative funds from another SBA program.

Paycheck Protection Program (PPP)

Loan Terms:

- Maximum amount of loan. The maximum amount of the loan will be the lesser of \$10 million or 2.5 times the organization's average monthly payroll for the past 12 months (excluding compensation over \$100,000). Special calculation rules apply for borrowers with a seasonal workforce.
- Interest rate: Interim guidance has provided an interest rate of 1%.
- Optional Deferment: Deferment of principal, interest, and fees for a period of six months is available.
- Use of Loan Proceeds. Organizations may use loan proceeds to cover "payroll costs" (including employee compensation; costs for paid leave; allowance for separation or dismissal; payments for provision of group healthcare coverage and retirement benefits; and state and local compensation taxes), costs related to continuation of group healthcare benefits during periods of paid leave, mortgage interest payments, rent, utilities, and interest on prior debt.

Paycheck Protection Program (PPP)

Loan Terms:

- **Collateral and Fee Waivers:** Collateral requirements, borrower and lender fees, prepayment penalties, personal guarantee requirements, and certain other traditional SBA loan requirements are waived.
- **Optional Deferment:** Deferment of principal, interest, and fees for a period of six months is available.
- **Increased Lender Pool and Flexibility:** The SBA is delegating to lenders the authority to make determinations on borrower eligibility and creditworthiness without going through traditional SBA channels. Furthermore, the SBA administrator and the secretary of the US Department of the Treasury have the authority to add additional lenders to the PPP.
- **Loan Limitations:** Loan proceeds may not be used for employee salaries in excess of \$100,000 or for certain taxes or other employee payments covered under other recent COVID-19 federal legislation. Additionally, borrowers are not eligible to apply for both Economic Injury Disaster Loans and new SBA loans at the same time.

Paycheck Protection Program (PPP)

Loan Forgiveness:

One of the most favorable aspects of PPP is the eligibility for loan forgiveness on all loan proceeds used during the period that is eight weeks following the origination of the loan on:

- (1) payroll costs
 - (2) mortgage interest payments
 - (3) rent payments
 - (4) utility payments
- Organizations must spend a minimum of 75% of loan proceeds on payroll costs during the eight week period in order to qualify for forgiveness.
 - Amounts forgiven will be treated as non-taxable cancelled indebtedness.
 - The amount forgiven cannot exceed the principal amount of the loan, and the amount forgiven will be reduced to partial forgiveness based upon reductions in employees or employee salaries, disregarding employees that were terminated or had their salaries reduced by more than 25% before April 26, 2020 and whose employment or salaries are restored by no later than June 30, 2020.

Economic Injury Disaster Loans

- EIDL loans are available to “private nonprofit organizations” (a more expansive category of organizations than PPP eligibility) that have suffered a substantial economic injury as a result of the COVID-19
 - Due to high demand, these loans are currently capped at \$15,000, not including an advance of up to \$10,000

Eligible Entities:

- Unlike the PPP loans, EIDL loans are available to any private non-profit organization that is a non-governmental agency or entity that currently has:
 1. a determination letter recognizing it as an organization described in sections 501(c), (d) or (e) of the IRC, OR
 2. evidence from a state of organization as, or doing business as, a non-profit organization.

For organizations that are not required to apply for recognition of exemption, such as social welfare organizations or trade associations, or organizations that have not yet received their determination letter, articles of incorporation providing that the organization is organized as a nonprofit corporation under state law should meet these requirements.

Economic Injury Disaster Loans

Advance of Funds:

- Organizations that meet the same size standards and affiliation rules described above for PPP can request an advance of up to \$10,000 that can be used to provide paid sick leave to employees unable to work due to COVID-19, maintain payroll and retain employees, meet increased costs due to interrupted supply chains, make rent or mortgage payments, and repay other obligations.
- Organizations are not required to repay the advance on the loan, even if their loan application is denied.

Employee Retention Payroll Tax Credit

- The CARES Act provides up to \$5,000 in refundable tax credits per employee as relief from the employment tax burden for nonprofit employers
- Eligible employers may claim a refundable credit against the employer share of Old-Age, Survivors, and Disability Insurance (i.e., Social Security) taxes imposed on FICA wages paid to employees as a result of COVID-19-related shutdowns and slowdowns
- Any credit must first be reduced by any credits received for qualified sick or family medical leave paid under the Families First Coronavirus Response Act (FFRCA).

Organizations may file IRS [Form 7200](#) to request an advance payment of the credit.

Eligible Employers: An exempt organization is an “eligible employer” if:

- Its operations fully or partially shut down due to COVID-19-related government orders

OR

- It experienced more than 50% decline in gross receipts as compared to the corresponding calendar quarter in 2019.

Employee Retention Payroll Tax Credit

Qualifying Wages:

- credit applies to 50% of the “qualified wages” up to \$10,000 paid to each employee between March 13, 2020 and December 31, 2020, thus limiting the maximum potential credit to \$5,000 per employee
- The method for calculating “qualified wages” depends on whether the organization, together with any related organization in its section 414 control group, has more or fewer than 100 full-time employees (determined using the Affordable Care Act's measure of 30 hours per week) during 2019.
 - For organizations with 100 or fewer FT employees, all employee wages are qualifying wages for the tax credit.
 - For organizations with more than 100 FT employees, qualifying wages includes only wages paid (including health benefits) to employees who are not providing services due to the shutdown or slowdown circumstances described above, provided that the wage payments during the leave period do not exceed the amount of wages that an employee would have received for an equivalent period of active work, measured by wages received during the 30-day period prior to the shutdown or slowdown.

Payroll Tax Deferral

- Nonprofit employers' Social Security tax payments otherwise due between enactment of the CARES Act on March 27, 2020, and December 31, 2020 may be delayed.
- The deadline for paying the first half of the deferred taxes is December 31, 2021, and the deadline for paying the remaining 50% of taxes is delayed until December 31, 2022.
- These delay relief provisions are available regardless of workforce size, unlike similar relief provided under the FFCRA.

In the event that an IRC 3504 agent or an IRC 3511 certified professional employer organization is directed to defer payment of deferrable Social Security taxes under the CARES Act by a common law employer (a/k/a "customer"), the CARES Act places sole liability for any deferred taxes on the customer. The CARES Act is silent as to tax liability in situations involving an IRC 3401(d)(1) statutory employer arrangement.

Interaction of Benefits

Key aspect of these programs - certain benefits may not be taken in conjunction with each other. Organizations that qualify for loan forgiveness under PPP are not eligible for EIDL, the Employee Retention Payroll Tax Credit, or payroll tax deferral.

Other Provisions

Emergency Unemployment Relief

Above-the-line charitable deduction

Modifications to itemized charitable deduction limits

Modifications for Net Operating Losses

Mid-sized business loan program

Other Provisions

Emergency Unemployment Relief:

- provides federal funding to reimburse section 501(c)(3) organization for one half of the costs of unemployment benefits provided to laid-off employees where the organization elected to reimburse the state for unemployment benefits actually paid rather than pay state unemployment insurance taxes for its entire workforce.

Above-the-line charitable deduction:

- In a course-correction from the Tax Cuts and Jobs Act (TCJA) (P.L. 115-97), which put the charitable contribution deduction out of reach for all but the top 10% of taxpayers, taxpayers who do not itemize their deductions can deduct up to \$300 for cash contributions made in 2020 to certain organizations described in Code Section 170(b)(1)(A).
- The provision excludes gifts to private nonoperating foundations, supporting organizations, and gifts to establish new or maintain existing donor-advised funds.
- The \$300 deduction is not affected by filing status; for example, taxpayers who are married filing jointly have the same above-the-line deduction as individuals and heads of households.

Other Provisions

Modifications to itemized charitable deduction limits:

- Taxpayers may temporarily “zero out” their taxable income in 2020 by making gifts of cash in excess of the amounts otherwise deductible under current law.
- Individuals may deduct “qualified contributions” up to 100% of the difference between an individual’s contribution base (i.e., the individual’s 2020 adjusted gross income computed without regard to any net operating loss carryback to 2020) and all other deductible charitable contributions.
- Corporations may deduct any qualified contributions that in the aggregate do not exceed 25% (up from 10%) of the corporation’s taxable income.
- Individuals and Corporations may carry over any contributions in excess of taxable income to later tax years.
- The provision excludes gifts to private nonoperating foundations, supporting organizations, and gifts to establish new or maintain existing donor-advised funds. We note, however, that gifts to sponsoring organizations to establish a fund that is not classified as a donor-advised fund, such as a field of interest fund, may well be permitted.
- Donors must be sure to follow the special procedures to elect the application of this provision, which is an extra step not usually required for other charitable contributions.

Other Provisions

Modifications for Net Operating Losses:

- temporarily repeals the 80% of taxable income limitation on the utilization of net operating loss (NOL) carryovers imposed by TCJA.
- Thus, for a taxable year beginning before January 1, 2021, an exempt organization can fully offset its unrelated business taxable income in that year with NOLs permitted to be carried to that year from other years, subject to the requirement to separately compute its unrelated business income for each separate trade or business under section 512(a)(6).
- NOLs arising after December 31, 2020, will be subject to the 80% of taxable income limitation.
- In addition, taxpayers now may carry back NOLs arising in 2018, 2019, and 2020 to the taxpayer's five preceding taxable years.

However, organizations should consider any potential consequences of reopening closed tax years in order to take additional NOL carrybacks.

Other Provisions

Mid-sized business loan program:

- provides that the Treasury will “endeavor” to implement a program to provide financing to banks and other lenders that make direct loans to mid-size nonprofit organizations, defined as having between 500 and 10,000 employees.
- These loans are subject to certain additional statutory criteria and obligations, and require eligible borrowers to make a “good faith certification” to a number of more onerous conditions, including that “the funds it receives will be used to retain at least 90 percent of the recipient’s workforce, at full compensation and benefits, until September 30, 2020.”

QUESTIONS?

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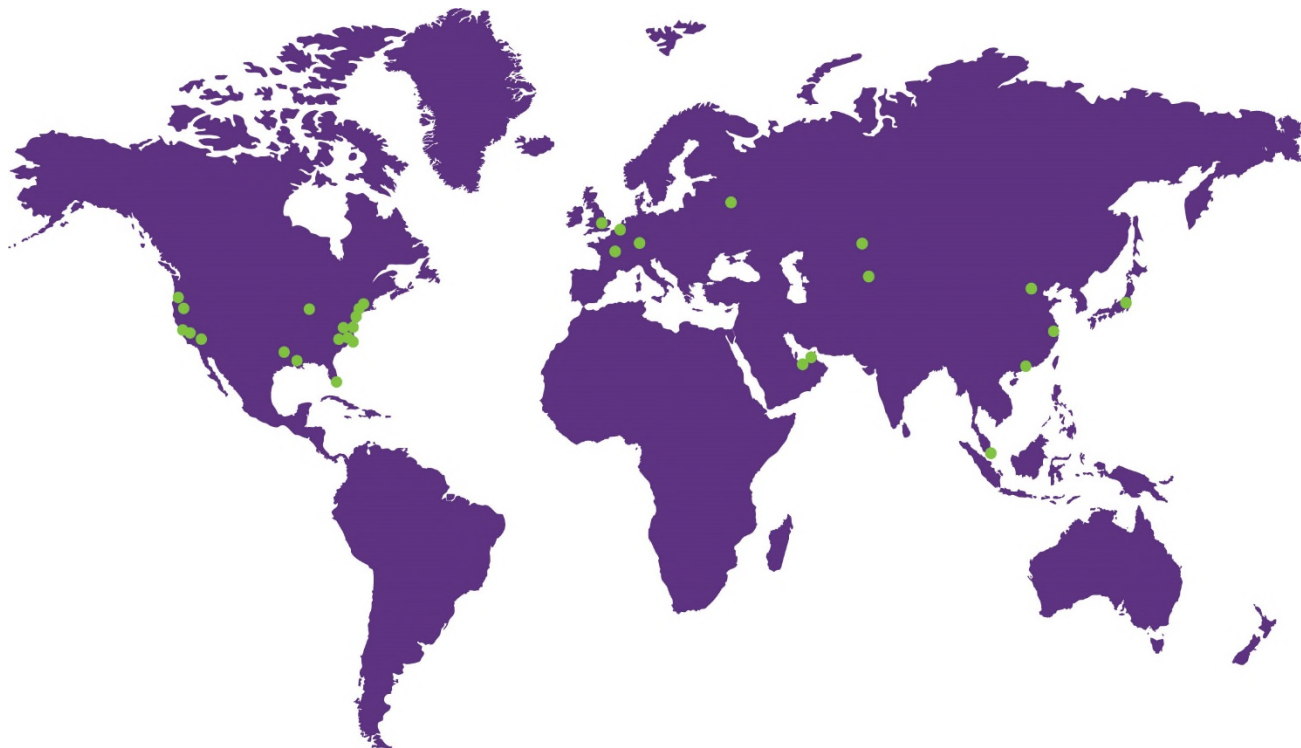
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