

WEBSTER, CHAMBERLAIN & BEAN, LLP | NONPROFIT ALERT

COVID-19 RESPONSE LEGISLATION APPLICABLE TO NON-PROFIT ORGANIZATIONS

PHASE 3 – Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act, a \$2.2 trillion package, contains a mixture of different relief measures for businesses, including non-profit organizations, state and local governments, and individuals. The CARES Act is the third phase of the federal government's response to the COVID-19 pandemic.

This Alert is intended to summarize several provisions applicable to non-profit organizations in the almost 900-page law. Other provisions in the CARES Act may be of interest to specific non-profit organizations based on their mission and focus; appropriations were made to numerous government programs including Veterans Administration Homelessness Assistance grants, election assistance for states, aging and disability services, nutrition programs, child care development, and many others. Greater clarity will be provided by the upcoming guidance and/or regulations, most of which are due to come out within fifteen (15) days of the enactment of the Act. Additionally, forms and guidance need to be developed. In the interim, non-profits should carefully review the applicable provisions and gather relevant information so that they are ready to take advantage of relief when it becomes available.

Section 501(c)(3) and Section 501(c)(19) Organizations With Fewer Than 500 Employees

The CARES Act, Sections 1102 and 1106, creates the Emergency Small Business Loan program within the Small Business Administration's 7(a) Loan Program (also known as the **Paycheck Protection Program (PPP)**)¹. This \$349 billion authorization extends through December 31, 2020 and allows loans up to \$10 million to § 501(c)(3) and § 501(c)(19) nonprofits, for-profit small businesses (including sole proprietors, self-employed, and independent contractors) with fewer than 500 employees if they were in existence on February 15, 2020.² The covered loan period begins on February 15, 2020 and ends on June 30, 2020.

The Act provides for delegated authority, which permits all current 7(a) lenders to make determinations on borrower eligibility and creditworthiness without going through all of the Small Business Administration's ("SBA") channels, and provides authority to lenders who join the PPP and make these loans.³ Instead of determining repayment ability, lenders are required to determine whether a non-profit was operational on February 15, 2020, and had employees for whom it paid salaries and payroll taxes, or a paid independent contractor.

The loan may be used for payroll support, such as employee salaries, paid sick or medical leave, health and other insurance premiums and retirement benefits, severance payments, state and local employment taxes, and mortgage, rent, and utility payments during the 8-week period following loan origination. The maximum loan amount is \$10 million through December 31, 2020 and there is a formula by which the loan amount is tied to payroll costs to determine the size of the loan (generally 2.5 times the

¹ The Act does *not* disqualify § 501(c)(3) and § 501(c)(19) organizations that are eligible for Medicaid payments.

² The SBA affiliation rules for non-profits apply; employees of affiliated non-profits may be counted toward the 500 employee cap, depending on the degree of control.

³ Additional lenders may get approved through a new avenue through the U.S. Department of Treasury, but these new lenders are only permitted to make PPP loans, and not regular 7(a) loans.

average total monthly payroll costs from the prior year). Expedited loans of up to \$1 million are available.

Eligible borrowers must make a good faith certification that the loan is necessary due to the uncertainty of current economic conditions caused by COVID-19, and that they will use the funds to retain employees and maintain payroll, lease, and utility payments, and are not receiving duplicative funds for the same uses from another SBA program. The Act waives both borrower and lender fees, collateral and personal guarantee requirements, and waives the credit elsewhere test for the funds provided under the PPP. The maximum interest rate is four percent (4%) and borrowers cannot be charged any prepayment fees. The first six months of payments (principal and interest) are automatically deferred. The loan can have a maximum term of ten years. The SBA has no recourse against any individual, member, partner, or shareholder for non-payment unless the individual uses the loan proceeds for unauthorized purposes.

Section 1106 provides eligibility for loan forgiveness for borrowers, including § 501(c)(3) and § 501(c)(19) organizations. This provision provides that a borrower is eligible for loan forgiveness equal to the amount spent by the borrower during an 8-week period after the origination date of the loan on payroll costs, interest payment on any mortgage incurred prior to February 15, 2020, payment of rent on any lease in force prior to February 15, 2020, and payment on any utility for which service began before February 15, 2020. Amounts forgiven may not exceed the principal amount of the loan and the eligible payroll costs which may be forgiven do not include compensation of individual employees, independent contractors, or sole proprietors in excess of \$100,000 in annual salary, compensation of employees with a principal place of resident outside the United States, or leave wages already covered by the Families First Coronavirus Response Act (see previous WC&B Client Alert).

Forgiveness is equal to the sum of the following payroll costs incurred during the covered 8 week period after loan origination compared to the previous year or time period, proportionate to maintaining employees and wages:

- Payroll costs, plus
- any payment of interest on any covered mortgage obligation (which may not include any prepayment of or payment of principal on a covered mortgage obligation), plus
- any payment on any covered rent obligation, plus
- any covered utility payment

Employers that maintain employment for the 8 weeks after loan origination or rehire employees by June 30 will have their loans forgiven in whole or in part, effectively turning the loan into a grant. The amount forgiven is reduced proportionally by any reduction in employees retained compared to the prior year and reduced by the reduction in pay of any employee beyond 25% of their prior year compensation. Borrowers that re-hire employees previously laid off due to the COVID-19 crisis will not be penalized for having a reduced payroll at the beginning of the period. Borrowers will need to submit documentation to their lenders verifying their payments during the period. Canceled indebtedness under this § 1106 is not included in the borrower's taxable income. Any loan amounts not forgiven at the end of one year is carried forward as an ongoing loan with terms of a maximum of ten years at a maximum of 4% interest. Borrowers must apply for loan forgiveness to their lenders by submitting required documentation and are required to receive a decision within 60 days.

The PPP contains a limitation on a borrower from receiving a PPP loan and an Economic Injury Disaster Loan (see below) through SBA for the same purpose. However, if a nonprofit obtains an Economic Injury Disaster Loan unrelated to COVID-19, it may apply for a PPP loan, and there is an

option to refinance that loan into the PPP loan. The emergency Economic Injury Disaster Loan grant award (see below) of up to \$10,000 would be subtracted from the amount forgiven under the PPP.

The Act contains a sense of the Senate for the SBA Administrator to issue guidance to lenders to ensure that the processing and disbursement of PPP loans prioritizes small business concerns and entities in underserved and rural markets, including veterans and members of the military community, and small business concerns owned and controlled by socially and economically disadvantaged individuals.

The SBA is required to establish regulations no later than 15 days after enactment on March 27, 2020. The loans will be available through SBA- and Treasury-approved banks and credit unions. Additional guidance on how to find a qualified lender is also expected to be provided.

Section 501(c)(3) Organizations – Incentivizing Giving

The CARES Act also creates charitable giving incentives by permitting a charitable deduction up to \$300 for cash only donations. This is a universal or non-itemized deduction that applies to all taxpayers. For those that itemize, current adjusted gross income limits are temporarily suspended for charitable deductions. The annual deductibility limit for corporations is raised from 10% to 25%; food donations are raised to 25%. These incentives apply to donations made in 2020 and are claimed on tax returns next year. Donations to donor advised funds and supporting organizations are not eligible.

Other Nonprofit Organizations

Emergency Economic Injury Disaster Loans (EIDL) and Emergency Grants

The CARES Act appropriates an additional \$10 billion into the EIDL loan program and § 1110 expands eligibility to Economic Injury Disaster Loans (EIDL) and waives some requirements for applicants, which include non-profit organizations with fewer than 500 employees. “Private non-profit organizations,” which include entities exempt under Sections 501(c), (d), and (e) of the Internal Revenue Code, are eligible for both emergency grants and EIDLs. Tribal businesses, cooperatives, and ESOPs with fewer than 500 employees or any individual operating as a sole proprietor or an independent contractor during January 31, 2020 to December 31, 2020 are eligible for EIDLs only. Section 501(c)(3) and Section 501(c)(19) organizations may apply for both PPP loans and EIDL loans as long as they are not used for the same purpose.

The SBA may approve and offer small EIDL loans based solely on an applicant’s credit score or use an alternative appropriate method for determining applicant’s ability to repay. A personal guarantee is not required, the borrower is not required to demonstrate unavailability of credit elsewhere, and the nonprofit must have only been in operation on January 31, 2020. A self-certification under penalty of perjury is required to apply.

EIDL loans carry a 2.75% interest rate for non-profit organizations and up to \$2 million can be borrowed.

Section 1110 establishes an emergency grant to allow an eligible entity who has applied for an EIDL loan due to COVID-19 to request an advance on that loan of not more than \$10,000, which the SBA must distribute within 3 days. In advance of disbursing the advance payment, the SBA must verify that the entity is an eligible applicant for an EIDL loan. This approval shall take the form of a certification under penalty of perjury by the applicant that they are eligible. Applicants are not required to repay advance payments, even if they are subsequently denied for an EIDL loan. The advance payment must be

considered when determining loan forgiveness, if the applicant transfers into a loan made under SBA's Paycheck Protection Program. In other words, the amount of the emergency grant would be counted towards the loan forgiveness amount for a payroll cost under a 7(a) loan (PPP loan). The advance payment may be used for providing paid sick leave to employees, maintaining payroll, meeting increased costs to obtain materials, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses.

Employee Retention Payroll Tax Credits

Section 2301 of the Act creates a refundable payroll tax credit of up to \$5,000 for each employee on the payroll, assuming certain conditions are met. The credit is available to employers who were carrying on a trade or business during calendar year 2020 and whose operation of the trade or business is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19 or there has been a significant drop in revenue of at least 50% in the first quarter compared to the first quarter of 2019. The availability of the credit continues each quarter until the revenue exceeds 80% of the same quarter in 2019. The whole operation of the non-profit must be taken into account when determining full or partial suspension.

The credit is based on qualified wages paid to the employee. For employers with more than 100 full-time employees, qualified wages are wages paid to the employees when they are not providing services due to the COVID-19 circumstances described in the above paragraph. For eligible employers with less than 100 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 for all calendar quarters. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.

A § 501(c)(3) or § 501(c)(19) organization which has a PPP loan forgiven is not eligible for the payroll tax credits.

Other Significant Provisions

Sections 3601 and 3602 create limitations stating that employers are not required to pay more than \$200 per day/\$10,000 in the aggregate for paid leave, and no more than \$511 per day/\$5,110 in the aggregate for sick leave or more than \$200 per day/\$2,000 in the aggregate to care for a quarantined individual or child for each employee under the Families First Coronavirus Response Act. These amounts required to be paid under the Families First Coronavirus Response Act are limited to the amounts covered by the refundable payroll tax credit.

Except for § 501(c)(3) and § 501(c)(19) organizations receiving PPP loans, employers may delay up to 50% of employment taxes for 2020 until December 31, 2021 and the remaining 50% until December 31, 2022.

Nonprofits that self-insure for state unemployment purposes will be reimbursed for half of the costs of benefits provided to their laid-off employees. Sections 2102-2104 provide employees an extra \$600 per week on top of their state benefits for four months. Additionally, a temporary Pandemic Unemployment Assistance program is created through December 31, 2020 to provide payment to those not traditionally eligible for unemployment benefits, including self-employed, independent contractors, those with limited work history, and others. The CARES Act provides for an additional thirteen weeks of unemployment benefits through the end of 2020.

Treasury Industry Stabilization Loan Program – Non-profits With 500 or More Employees

Section 4003 provides up to \$454 billion in financial assistance to businesses, and non-profit organizations are expressly included. These are “eligible businesses”, defined as a “United States business that has not otherwise received economic relief in the form of loans or loan guarantees provided under” the COVID-19 legislation. Loans made under this provision cannot be forgiven and the borrower must certify that it is a U.S.-domiciled business and that its employees are predominantly located in the United States. This loan program is for businesses with between 500 and 10,000 employees.

Local financial institutions will process the loans, which dollar amount is currently unspecified. Borrowers must show that alternative financing is not reasonably available, and the loan must be sufficiently secured. The interest is capped at 2% with no principle or interest paid for the first six months. The duration of the loan shall be as short as possible and shall not exceed five years. A good faith certification of need based on economic conditions is required. Funds must be used to retain and restore employment; loan must be used to retain 90% of workforce at full wages and benefits through September 30, 2020 with an intention to restore 90% of the workforce in place on February 1, 2020 within four months after termination of the COVID-19 public health emergency. The borrower cannot outsource or offshore jobs for the term of the loan plus an additional two years.

Borrowers under this Program cannot increase the compensation of any officer or employee whose total compensation exceeds \$425,000, or offer such employees severance pay or other benefits upon termination of employment which exceeds twice the maximum total annual compensation received by that employee until one year after the loan is no longer outstanding. Officers or employees making over \$3 million in 2019 would also be prohibited from earning more than \$3 million plus 50% of the amount their 2019 compensation exceeded \$3 million.

Section 4003 specifically directs the Department of Treasury to issue additional guidance on this Program’s applicability to non-profit organizations.

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