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CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY (CARES) ACT
(enacted March 27, 2020)

PAYCHECK PROTECTION PROGRAM AND HEALTH CARE ENHANCEMENT (PPPHCE) ACT
(enacted April 24, 2020)

PAYCHECK PROTECTION PROGRAM FLEXIBILITY (PPPF) ACT OF 2020
(enacted June 5, 2020)

Note: We are periodically updating all of our public coronavirus materials as new information becomes available. For updated versions and memos on new topics, please visit https://tristerross.com/update/.

On March 27 the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was enacted to provide economic relief and stimulus provisions for individuals and employers in response to the COVID-19 pandemic. The loan and grant programs ran out of money by April 16 after a frenzy of applications, and the Small Business Administration stopped accepting new ones.

On April 24 the Paycheck Protection Program and Health Care Enhancement Act (PPPHCE Act) was enacted in part to replenish federal funding for the various small business loan and grant programs of the CARES Act. This new law made no substantive changes in the programs described in this memo. As a result, they continue to be administered on a "first-come, first-served" applicant basis, and loans are being made with little regard for relative needs or differing geographic, workforce or economic sector impacts of the pandemic.

On June 5 the Paycheck Protection Program Flexibility Act of 2020 (PPPF Act) was enacted mainly to

expand access to Paycheck Protection Program loan forgiveness.

Importantly, all this massive legislation was rushed through, and numerous issues have come to light, such as the significant underfunding of the small business loan programs, which Congress attempted to address with the PPPHCE Act. Other provisions of the legislation whose meaning and application lack clarity will be fleshed out over time, as reflected in various federal interim rules and guidances that have been issued to date (with more likely coming soon).

This memo addresses programs that these laws create or broaden for which tax-exempt organizations are variously eligible; for-profit businesses of comparable size are likewise eligible. We first provide a table that summarizes eligibility and key provisions of each program, and then a detailed Q&A. We will continue to monitor developments and provide information about the meaning and implementation of these new laws.

PROGRAM	ELIGIBLE TAX-EXEMPTS	BASIC PROVISIONS
Paycheck Protection Program (PPP)	501(c)(3) organizations with up to 500 employees for which the loan is "necessary to support…ongoing operations" due to "current economic uncertainty"	Forgivable SBA-backed private loans up to $10 million to cover payroll costs, rent, mortgage interest, utilities
Economic Injury Disaster Loans (EIDL)	All 501(c) organizations, *except* those engaged primarily in political or lobbying activities, that experience "substantial economic injury" due to the pandemic	Direct SBA loans up to $2 million to cover operating expenses or alleviate economic injury; plus emergency grants of up to $10,000
"Employee Retention" Payroll Tax Credit	All 501(c) and 527 employers whose operations are fully or partially suspended due to COVID-19-related government restrictions or whose receipts declined by more than 50% compared to the same quarter in 2019	A refundable payroll tax credit against the employer's share of Social Security payroll taxes
Payroll Tax Deferral	All 501(c) and 527 employers	Deferral of employer's share of 2020 Social Security payroll taxes until 2021 and 2022

SBA "PAYCHECK PROTECTION" LOAN AND LOAN FORGIVENESS PROGRAM

The CARES Act modifies and expands the Small Business Administration (SBA) loan guaranty program (as the "Paycheck Protection Program" ("PPP")) to provide $349 billion for small businesses through federally-backed loans. The PPPHCE Act subsequently increased this amount to $659 billion, and earmarked $60 billion for loans by smaller, community and credit union lenders. The basic provisions of the program are specifically applicable to certain Internal Revenue Code (IRC) 501(c)(3) (charitable) and 501(c)(19) (veteran) organizations, but *this program does not apply* to 501(c)(4) (social welfare), 501(c)(5)

(labor), 501(c)(6) (business league) or 527 (political) organizations.

The SBA has released a series of interim regulations and a rolling FAQ document beginning on April 8 and most recently updated on May 13 that may be relied upon as "SBA's interpretation of the CARES Act and of the Paycheck Protection Program Interim Final Rules." Further guidance from the SBA on loan forgiveness is supposed to be forthcoming. The Department of the Treasury posts links to all Paycheck Protection Program regulations and guidance on a single website.

How does the new PPPHEA Act affect previously unprocessed or rejected PPP applicants? There are a number of important but as yet unanswered questions about access to the replenished PPP. For example, we do not yet know whether an organization that applied for a PPP loan before the initial funding ran out but whose application was not processed will need to re-apply, and we do not know whether such an organization will be given priority over new applicants. Nor is it clear whether an organization whose PPP loan application was rejected may apply again now that more money has been provided. We will update this memo with the answers to these questions and others as more information becomes available.

What organizations are eligible for a loan? Businesses and other specified entity types that employ no more than either (1) 500 full- or part-time employees or (2) the (greater) number of employees set by the applicable SBA size standard for the industry, and that have been in operation since February 15, 2020, are eligible. IRC 501(c)(3) and 501(c)(19) organizations – but *not* other 501(c) or 527 organizations – with 500 or fewer employees are eligible. Independent contractors are *not* included in this calculation (though they can apply for their own loans).

If my organization is affiliated with other organizations, how is the number of employees determined? For the purposes of determining loan eligibility, the number of employees is determined by adding the number of employees of all affiliated organizations. If the combined total exceeds 500 employees, none of the affiliated organization are eligible for a Paycheck Protection loan. Organizations are affiliates when one controls or has the power to control the other, or a third party controls or has the power to control both. For example, affiliation exists when the president, executive director or other officers who control management of one organization also control the management of one or more other organizations. Affiliation also exists where a single individual or organization controls the board of directors or management of one or more other organizations. Affiliation may also exist in other circumstances that are unlikely to apply to 501(c)(3) organizations.

How can an organization apply for a loan? Funds will be available through SBA-approved banks and other SBA-approved nonbank lenders, which began accepting applications on April 3. Just one loan is permitted per applicant, and the application deadline is December 31 (though available loan funds may run out long before then). The applicant must provide its number of employees and average monthly payroll during 2019 (counting salaries up to $100,000/yr.), and provide requested documentation. Information from the SBA is available here. The application form is available here. The Treasury Department has released an information sheet for borrowers, available here. A borrower must certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant," and "[t]he funds will be used to retain workers and maintain payroll or make mortgage interest

payments, lease payments, and utility payments." There are 15 other certifications. Numerous traditional SBA loan requirements have been waived, including the personal guarantee requirement and the requirement that collateral be pledged.

How does my organization determine that a loan is "necessary"? What if we conclude after applying that the loan was not "necessary"? Again, an applicant for a PPP loan must certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." The SBA has stated that "[b]orrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business." Additional guidance from the SBA states that "[a]ny borrower that, together with its affiliates, received PPP loans with an original principal amount of less than $2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith."

Borrowers with loans greater than $2 million must still have an adequate basis for making the good-faith certification of necessity, depending on the individual circumstances. All of these loans will be subject to review by SBA, and if SBA finds a borrower lacked an adequate basis for making the certification of necessity, the outstanding balance of the loan must be repaid and the borrower will not be eligible for loan forgiveness. (Any organization that repaid its PPP loan of any amount by May 18 would be deemed by the SBA to have made the certification in good faith as a "safe harbor" to "ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certification standard.")

What may the loan be used for? Loan funds may be used to pay:

- payroll costs, including compensation to U.S.-resident employees, but not including an individual's salary in excess of $100,000 per year, prorated as necessary;
- continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- interest on any mortgage obligation (so, excluding principal on a mortgage obligation);
- rent;
- utilities; and
- interest on any other debt incurred before February 15, 2020.

What happens if we don't use the loan for permitted purposes? The organization will be required to repay misused amounts. If an organization knowingly uses the funds for unauthorized purposes, it will be subject to additional liability, such as fraud charges.

What is the maximum loan amount? 2.5 times the average total monthly payments for payroll costs incurred during *either* the 1-year period before the date on which the loan is made *or* calendar year 2019, up to a maximum of $10 million. The regulations provide a methodology for making this calculation.

What is the interest rate? The interest rate is 1%.

Can part or all of the loan be forgiven? Yes. Loan funds spent during the "covered period" are eligible for forgiveness, as discussed below.

What is the "covered period"? The "covered period" means the 24-week period beginning on the loan origination date. If December 31, 2020, is less than 24 weeks after the loan origination date, the covered period ends on December 31. Borrowers who received a loan before June 5 may choose either an 8-week or a 24-week covered period.

How can part or all of the loan be forgiven? A loan recipient *that does not reduce its staff or compensation amounts* is eligible for forgiveness of the loan in an amount equal to the sum of the following costs incurred and payments made during the covered period:

- payroll costs;
- interest on a mortgage obligation incurred before February 15, 2020;
- rent under a lease in force before February 15, 2020; and
- utilities for which service began before February 15, 2020.

To receive loan forgiveness, a borrower must use at least 60% of the loan for payroll costs and no more than 40% for non-payroll costs. The amount of loan forgiveness may not exceed the loan amount.

The CARES Act provides incentives for employers to *retain* employees by *reducing* the amount of loan forgiveness if an employer reduces its number of employees or reduces the amount of salary paid. The forgivable amount is reduced if staffing or compensation levels during the covered period are reduced in comparison to their levels during specified pre-coronavirus reference periods, as described in the loan forgiveness application, so reducing staff and compensation levels immediately before loan origination will provide no benefit when calculating loan forgiveness.

The amount of forgiveness is *not* reduced in the following situations:

- A borrower restores by December 31, 2020 any reductions in the number of full-time equivalent employees and salary levels made between February 15 and April 26.
- A borrower's reduction in full-time employee equivalents results from an inability both to re-hire individuals who were employees on February 15 and to hire similarly qualified employees for unfilled positions on or before December 31.
- A borrower's reduction in full-time employee equivalents results from an inability to return to the same level of business activity as existed before February 15 due to compliance with COVID-19-related safety requirements or federal agency guidance issued between March 1 and December 31.
- A borrower's reduction in full-time employee equivalents results from employees having been fired for cause, voluntarily resigning, or voluntarily requesting and receiving a reduction in hours.

When are loan payments due? All payments will be deferred until the forgiven loan amount is remitted to the lender by the SBA. Interest will accrue during this deferment. A borrower that does not apply for loan forgiveness within 10 months after the close of the covered period must then begin making payments.

Loan maturity for loans made *on or after* June 5 is from 5 to 10 years, as agreed upon by the borrower and the lender, meaning that any amount of the loan that is not forgiven must be paid back within that agreed time period. (The SBA might fix a period between 5 and 10 years for all post-June 5 loans.) Loan maturity for loans made *before* June 5 is two years, though borrowers and lenders may mutually agree instead to a maturity period of between 5 and 10 years.

What is included in "payroll costs"? Payroll costs are compensation-related payments with respect to employees that are for:

- salary, wage, commission, or similar compensation;
- cash tips or equivalent;
- vacation, parental, family, medical, or sick leave;
- allowances for dismissal or separation;
- the provisions of group health care benefits, including insurance premiums;
- any retirement benefit; and
- state or local tax assessed on the compensation of employees.

What is excluded from "payroll costs"? The following are excluded from payroll costs:

- the compensation of an individual employee in excess of an annual salary of $100,000, not including non-cash benefits, prorated as necessary,;
- Federal employment taxes imposed or withheld, including the employee's and employer's share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees;
- any compensation of an employee whose principal place of residence is outside of the United States; and
- qualified sick leave or family leave wages for which a credit is allowed under the Families First Coronavirus Response Act that was enacted on March 18.

Will information about my loan be made public? The SBA is required to make certain information about loans available to the public. Some of this information is available on the SBA website, while other information may be obtained through a Freedom of Information Act request. The following information about loans is generally *disclosed*:

- Names and business addresses of recipients of approved loans.
- Names of officers, directors, stockholders or partners of recipient firms.
- Kinds and amounts of loans, loan terms, interest rates, maturity dates, general purpose, etc.

The following information is generally *exempt* from disclosure:

- An applicant's or recipient's financial statements, credit reports, business plans, plant lay-outs, marketing strategy, advertising plans, fiscal projections, pricing information, payroll information, private sector experience and contracts, IRS forms, purchase information, banking information, corporate structure, research plans and client lists.
- Portions of loan applications and loan officers' reports.
- Non-statistical information on pending, declined, withdrawn, or canceled applications.
- Non-statistical information on defaults, delinquencies, losses etc.

- Loan status, other than charged-off or paid-in-full.

The PPP is one of several loan programs contained in otherwise longstanding section 7(a) of the Small Business Act. The SBA provides extensive spreadsheets containing information about individual loans made under section 7(a), including the name and address of the borrower, the name and address of the lender, the amount, term and interest rate of the loan, and more. Presumably, information about PPP loans will eventually be included in these spreadsheets. Links to the spreadsheets are here under the "Frequently Requested Records" heading. Note that the spreadsheets are very large – the spreadsheet titled "2010 – Present SBA 7(a) Loan Data" contains entries for over 550,000 loans.

EXPANSION OF SBA ECONOMIC INJURY DISASTER LOAN (EIDL) PROGRAM

The CARES Act also expands the SBA's longstanding Economic Injury Disaster Loan ("EIDL") program and waives certain requirements for obtaining EIDL loans. See the EIDL segment of on the SBA website. The CARES Act provided up to $562 million for disaster loans related to COVID-19, including EIDL loans, and the PPPHCE Act provides an additional $50 *billion* for disaster loans.

How does the new PPPHEA Act affect previously unprocessed or rejected EIDL applicants? As with the PPP, there are a number of important but as yet unanswered questions about access to the replenished EIDL program. For example, we do not yet know whether an organization that applied for an EIDL loan before the initial funding ran out but whose application was not processed will need to re-apply, and we do not know whether such an organization will be given priority over new applicants. Nor is it clear whether an organization whose EIDL loan application was rejected may apply again now that more money has been provided. We will update this memo with the answers to these questions and others as more information becomes available.

Which organizations are eligible for a loan under this program? All "private nonprofit organizations" are eligible for a loan under this program, including any entity that is exempt under IRC section 501(c), including 501(c)(3), (4), (5) and (6) organizations, regardless of the number of employees. However, entities *primarily* engaged in lobbying and political activities – so, especially including *some* 501(c)(4) and *all* 527 organizations – are *not* eligible for EIDL loans.

How can an organization apply for a loan? Funds are available directly from the SBA. Private lenders are not involved. The online application is currently unavailable until the additional funds are made available, but the application will be here once the program re-opens. An applicant must provide its number of employees as of January 31, 2020, and its gross revenue and cost of operations for the year preceding that date, as well as any requested documentation. The "Eligible Entity Verification" on the newly created loan application requires an entity to make numerous certifications, including: "Applicant is a private non-profit organization that is a non-governmental agency or entity that currently has an effective ruling letter from the IRS granting tax exemption under sections 501(c),(d), or (e) of the Internal Revenue Code of 1954, or satisfactory evidence from the State that the non-revenue producing organization or entity is a non-profit one organized or doing business under State law, or a faith-based organization."

What does it mean to "primarily" engage in lobbying activity? This restriction is imposed by an existing SBA regulation, and there is no explicit definition. It may mean an over-50% threshold of spending during a calendar year, and "lobbying" itself is not defined, unlike under other federal laws such as the Internal Revenue Code and the Lobbying Disclosure Act (LDA) (which define "lobbying" inconsistently). The "Eligible Entity Verification" on the newly created loan application requires this certification: "Applicant is not in the business of lobbying."

What about the Lobbying Disclosure Act's prohibition of federal loans and grants to 501(c)(4) groups that lobby? Neither the CARES Act nor the PPPHCE Act refers to this feature of the LDA, whose definition of "lobbying" applies to most substantive contacts with Senators, Representatives and their staffs and with senior-level Executive Branch officials to influence their official conduct. So, it is possible that this provision could block some 501(c)(4)s from qualifying under the EIDL notwithstanding the SBA regulation discussed above that renders ineligible loan applicants that "primarily" engage in (undefined) lobbying.

What may the loan be used for? The loan may be used to pay fixed debts, payroll, accounts payable and other bills that can't be paid because of the disaster's impact.

What is the maximum loan amount? The actual economic injury to the organization as determined by the SBA, up to $2,000,000.

What is the interest rate? The interest rate is 2.75% for non-profits.

When are loan payments due? Repayment of principal and interest may be deferred for up to four years, depending the terms of the loan. Loan maturity may be up to 30 years.

Are we required to pay back the loan? Yes, except for any amount that is advanced as an emergency grant described below.

Which customary EIDL loan requirements have been waived? The CARES Act waives the standard EIDL requirements that: (a) the borrower provide a personal guarantee for loans up to $200,000; (b) the borrower be unable to otherwise obtain credit; and (c) a nonprofit applicant be in operation for at least a year prior to the disaster. Instead, a nonprofit must have been in operation on January 31, 2020. Additionally, EIDL loans may be approved by the SBA based solely on the applicant's credit score.

Can this loan program be utilized in combination with the CARES Act Paycheck Protection Loan Program? Yes, but *only* so long as the EIDL loan is for a purpose for which a Paycheck Protection loan is *not* being used. An EIDL loan obtained between January 31 and April 3 does not affect an organization's eligibility for a Paycheck Protection loan, so long as the EIDL loan was not used for payroll costs. An organization that used an EIDL loan for payroll costs and subsequently obtains a Paycheck Protection loan must refinance the EIDL loan as part of the Paycheck Protection loan.

Will information about my loan be made public? See the discussion of public disclosure above

regarding PPP loans; the same rules appear to apply to EIDL loans (as well as the EIDL grants discussed next below). The SBA disclosed on April 21 that the online EIDL application system inadvertently exposed the personal information of nearly 8,000 applicants in March. The SBA says it has corrected the problem.

EMERGENCY GRANTS AVAILABLE THROUGH THE EIDL PROGRAM

The CARES Act provided $10 billion for these emergency grants. The PPPHCE Act has increased the amount to $20 billion.

What is an emergency grant? An organization applying for a loan under the EIDL program may request an advance on the loan in the form of an emergency grant of up to $10,000 to be provided within days of applying for the loan.

What may the emergency grant be used for? The emergency grant may be use for the same purposes as the EIDL loan, including:

- paid sick leave to employees unable to work due to the direct effect of the COVID–19;
- maintaining payroll to retain employees during business disruptions or substantial slowdowns;
- rent or mortgage obligations; and
- obligations that cannot be met due to revenue losses.

Are we required to pay back the emergency grant? No, even if your EIDL application is denied.

"EMPLOYEE RETENTION" CREDIT FOR PAYROLL TAXES

The CARES Act also includes an employee retention credit that may help employers meet payroll obligations. All employers are eligible, and there is no approval requirement.

What does the employee retention credit provide? The CARES Act provides eligible employers a refundable payroll tax credit against the employer's share of Social Security payroll taxes. For each eligible quarter, the employer will receive a credit against its overall share of Social Security payroll taxes equal to fifty percent (50%) of the qualified wages (including qualified health plan expenses) paid to each "eligible" employee for that quarter (see below). The amount of qualified wages of a particular employee is capped at the first $10,000 in wages paid to an eligible employee, including qualified health plan expenses, from March 13 to December 31, 2020, so the credit can be as much as $5,000 per employee.

For any calendar quarter the amount of the credit to which the employer is entitled exceeds the employer portion of the Social Security tax on all wages paid to all employees, then the excess is treated as an overpayment and refunded to the employer. Consistent with its treatment as an overpayment, the excess credit will be applied to offset any remaining tax liability on the employer's employment tax return, and the amount of any remaining excess will be reflected as an overpayment on the return.

For example, if the eligible employer pays $10,000 in qualified wages in a quarter, the employee retention

credit available to the employer is $5,000. This amount may be applied against the employer share of Social Security taxes that the employer is liable for with respect to all employee wages paid in that quarter. Any excess over the employer share of Social Security taxes is treated as an overpayment and refunded to the employer after offsetting other tax liabilities on the employment tax return.

Which organizations are eligible for the employee retention credit? Employers of all sizes – including tax-exempt organizations – may be eligible for the employee retention credit. To be eligible for the credit, the employer must have carried on a trade or business during 2020 and satisfy *either or both* of the following tests:

- Business operations are fully or partially suspended due to orders from a governmental entity limiting commerce, travel, or group meetings due to COVID-19; *or*

- Gross receipts declined by more than 50% when compared to the same quarter in the previous year.

The CARES Act makes clear that "carrying on a trade or business" *includes* 501(c) activity (unlike comparable IRC language for 501(c) organizations).

When is the operation of a trade or business partially suspended? The operation of a trade or business may be partially suspended for the purposes of the employee retention credit if a governmental authority imposes restrictions upon the business operations by limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19, such that the operation can still continue to operate, but not at its normal capacity.

Which employees' wages are eligible for the employee retention credit? For employers with *more than 100* full-time employees, only wages paid to employees who are *not* providing services for the employer due to COVID-19 causes are eligible for the credit. A "full-time employee" is an employee who is employed on average at least 30 hours of service per week.

For employers with *100 or fewer* full-time employees, *all* employee wages qualify for the credit, regardless of whether the employees are providing services.

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

How does an employer claim the refundable tax credit for qualified wages? Eligible employers can be immediately reimbursed for the employee retention credit by reducing their required deposits of federal employment taxes by the amount of the credit it can receive, rather than depositing these amounts with the IRS.

IRS Notice 2020-22 has expanded the set of employment taxes that employers are not required to deposit in anticipating of acquiring the employee retention credit, to include federal income tax withheld and the employer and employee portions of Social Security and Medicare taxes, as long as the total amount of

these employment taxes not deposited on a deposit date is equal to or less than the total refundable tax credit amount that would be attributable to that deposit date.

Eligible employers will report their total qualified wages and the related credits, and will account for the reduction in deposits, for each calendar quarter on IRS Form 941, Employer's Quarterly Federal Tax Return.

Can an employer get an advance of the credit? Yes. Eligible employers can file an IRS Form 7200, Advance Payment of Employer Credits Due to COVID-19, to request an advance payment of employer credits. Employers can file the form for advance credits anticipated for a quarter at any time before the end of the month following the quarter in which they paid the qualified wages.

For example, if an employer is entitled to an employee retention credit of $10,000 and was required to deposit $8,000 in employment taxes, the employer could retain the entire $8,000 of taxes as a portion of the refundable tax credit to which it is entitled, and file a request for an advance payment for the remaining $2,000 using IRS Form 7200.

Can an employer qualify for *both* the employee retention credit *and* a Paycheck Protection loan? No. If an employer takes out a Paycheck Protection Program loan no employee retention credit will be available.

PAYROLL TAX DEFERRAL

Separately from the payroll tax credit above, all employers are eligible for payroll tax deferral as well, and there is no approval requirement.

What payroll tax deferrals are available? The CARES Act allows employers to defer payment of the employer's portion of the Social Security payroll tax (6.2% of wages up to the Social Security wage base, which is $137,700 in 2020) imposed on employee wages paid between March 27, 2020 and December 31, 2020. The deferred Social Security taxes must be paid over the following two years, with half of that amount required to be paid by December 31, 2021 and the other half by December 31, 2022.

Can an employer qualify for *both* payroll tax deferral *and* a Paycheck Protection loan? Yes; the PPPF Act eliminated the previous forced choice between the two programs imposed by the CARES Act.

Can an employer claim the employee retention credit and the payroll tax deferral? Yes, although the IRS has not yet released guidance as to how these benefits interplay. The IRS is expected to release a revised version of Form 941, Employer's Quarterly Federal Tax Return, to allow for tracking the employer's decision to defer Social Security payroll tax deposits. Thus, it is anticipated that employers will use Form 941 to report qualified wages and applicable employee retention credits, as well as its decision to defer Social Security payroll tax deposits, for each applicable quarter.

NOTE: This document does not constitute legal advice. For application of the matters discussed in this document to a particular situation, please consult legal counsel.