

## **CARES Act Benefits Explained: Key Provisions for Businesses and Nonprofit Organizations**

The newly enacted Coronavirus Aid, Relief, and Economic Security Act (commonly known as the "CARES Act") offers a wide range of benefits and incentives to help businesses weather the economic downturn caused by COVID-19. This alert covers five of the key programs offered to businesses and nonprofit organizations: the Paycheck Protection Program, the U.S. Treasury's Direct Lending Program, Economic Injury Disaster Loans, tax relief, and enhanced deductibility benefits for charitable giving.

Late on April 2, 2020, the Small Business Administration (the "SBA") issued an interim final rule (the "Interim Final Rule") that provides additional guidance for implementation of the Paycheck Protection Program and requirements for loan forgiveness, some of which will require further consideration as additional guidance is released. The Interim Final Rule becomes effective on the date it is published in the Federal Register.

We caution that the Government has issued contradictory and/or imprecise guidance concerning the CARES Act, and new guidance may continue to be issued. Furthermore, the CARES Act itself lacks clarity and precision in some respects. It will be important for all persons attempting to avail themselves of benefits under the CARES Act to remain abreast of new developments and interpretations of these complex rules and to obtain professional advice with regard to the specific facts of each situation, based on the rules as they may evolve. This alert is dated April 3, 2020, its release date, and should be referenced with this caveat in mind.

### **Paycheck Protection Program Aims to Preserve Jobs**

The centerpiece of the recently-enacted CARES Act is the creation of a new \$349 billion business loan guarantee program that will be administered by the SBA known as the Paycheck Protection Program (the "PPP"). The purpose of the PPP is to infuse short-term liquidity into a targeted segment of the U.S. economy - small businesses and certain small and medium-sized nonprofit entities - in an effort to preserve the jobs of their employees over the next few months. Pursuant to the PPP, banks and other financial institutions will be authorized to make loans to eligible borrowers. The loans will be 100% guaranteed by the SBA and eligible for forgiveness to the extent certain requirements are met.

For a borrower, the PPP loans are offered on generous terms - no interest or principal payments will be required for the first six months of the term of the PPP loan and, most importantly, if the PPP loan is applied by the borrower to the payment of payroll costs, rent, mortgage interest or utility payments during the 8-week period following origination of the PPP loan, the borrower's obligation to repay the principal and interest on the PPP loan is eligible for 100% forgiveness, subject to reduction in the amount forgiven if the borrower reduces its full-time equivalent workforce or lowers by more than 25% the wages of any employee making \$100,000 or less per annum - effectively converting these PPP loans into grants. Here is a summary of the key provisions of the PPP.

**Enhanced Eligibility for PPP Loans.** Traditionally, SBA loan guarantee programs have been limited to businesses that fit within the definition of a "small business concern." A business concern is defined by the SBA as a business entity (sole proprietorship, partnership, limited liability company, corporation, certain joint ventures, association, trust or cooperative) organized for profit, with a place of business located in the United States and which operates principally within the United States or which makes a significant contribution to the economy of the United States

through payment of taxes or use of American products, materials or labor. A “small business concern” is a business concern that fits within certain size criteria established by the SBA based on total revenues or total number of employees (depending on the industry).

The PPP dramatically expands the universe of potentially eligible borrowers beyond just “small business concerns” to also include:

- (a) any business concern, nonprofit organization (described in Section 501(c)(3) of the Internal Revenue Code and exempt from taxation under Section 501(a) of the Internal Revenue Code), veterans’ organization or tribal business concern that was in existence on February 15, 2020 and employs not more than the greater of (i) 500 employees and (ii) if applicable, the larger employee size criteria established by the SBA for the entity’s industry;
- (b) sole proprietors, independent contractors and eligible self-employed individuals that were in business on February 15, 2020; and
- (c) business concerns that were in existence on February 15, 2020 in the accommodation and food service industry (NAICS 72) that employed not more than 500 employees per physical location (i.e., businesses in this particularly hard-hit industry will be eligible for a PPP loan even if they have more than 500 total employees as long as they don’t exceed the 500 employees per location limitation).

For this purpose, an employee is any person employed on a full-time, part-time or other basis. Under current SBA regulations, the SBA will consider the totality of the circumstances, including criteria used by the Internal Revenue Service for federal income tax purposes, in determining whether individuals are employees. Also, under current SBA regulations where the size criterion is the number of employees, the number of employees is equal to the average number of employees of the concern (including the employees of domestic and foreign affiliates) for each of the pay periods for the preceding completed 12 calendar months.

Generally, applicants for an SBA loan are required to aggregate their employee count with the employees of all commonly-controlled entities or other “affiliates.” The affiliation rules of the SBA are complex, but generally require that entities under common control be aggregated. However, for PPP loans these affiliation rules are waived in the case of (i) any business concern borrower with not more than 500 employees that is in the accommodation and food service industry, (ii) any business concern borrower that is assigned a franchise identifier code by the SBA and (iii) any business concern borrower that receives financial assistance from a Small Business Investment Company. In its Interim Final Rule, the SBA clarified it intends to issue additional guidance regarding the applicability of its affiliation rules to PPP loans.

**Maximum Amount That Can Be Borrowed as a PPP Loan.** The amount that can be borrowed as a PPP loan is capped at the lower of (i) the sum of (a) 2.5x the borrower’s average total monthly payroll costs during the 1-year period before the date on which the PPP loan is made plus (b) the outstanding amount of any SBA Economic Injury Disaster Loan (or “EIDL,” discussed in detail below) made to the borrower during the period from January 31, 2020 through April 3, 2020 and (ii) \$10 million. In the case of an otherwise eligible borrower that was not in business during the period from February 15, 2019 through June 30, 2019, the average total monthly payroll costs may be calculated based upon the average total monthly payroll costs during the period from January 1, 2020 through February 29, 2020. There is also a special rule for seasonal businesses. The SBA has provided conflicting interpretations concerning whether the 1-year period before the date the PPP loan is made refers to the immediately preceding 12 months or to calendar year 2019.

Payroll costs consist of:

- (a) the sum of payments of any compensation with respect to employees that is a (i) salary, wage, commission or similar compensation, (ii) payment of cash tip or equivalent, (iii) payment for vacation, parental, family, medical or sick leave, (iv) allowance for dismissal or separation, (v) payment required for the provision of group health care benefits, including insurance premiums, (vi) payment of any retirement benefit or (vii) payment of state or local tax assessed on the compensation of employees; and
- (b) in the case of a sole proprietor or independent contractor, the sum of payments of any compensation to or income of such sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment or similar compensation and that is in an amount of not more than \$100,000 in 1 year, as prorated for the period February 15, 2020 through June 30, 2020 (collectively, "Payroll Costs").

The Interim Final Rule construes this provision to mean that an employer may not treat its payments to an independent contractor as part of the employer's Payroll Costs. Hence, the provision for compensation to or income of a sole proprietor or independent contractor appears to be applicable only when the sole proprietor or independent contractor is itself applying for a PPP loan.

Payroll Costs do not include:

- (a) the compensation of an individual employee in excess of an annual salary of \$100,000, as prorated for the period February 15, 2020 through June 30, 2020;
- (b) federal payroll taxes that are required to be withheld from employee wages, including FICA (Social Security and Medicare) and income taxes;
- (c) compensation paid to employees whose principal place of residence is outside the United States;
- (d) qualified sick leave and qualified family leave wages for which a credit is allowed pursuant to the Families First Coronavirus Response Act; and
- (e) for borrowers that are not sole proprietors or independent contractors, any compensation payments made to sole proprietors or independent contractors.

**Generous PPP Loan Terms for the Borrower.** In addition to the forgiveness provisions described in more detail below, the terms of the PPP loans are decidedly generous in favor of the borrower. In particular, there is a waiver of the normal requirement for an SBA loan that the borrower was unable to obtain credit elsewhere. In addition, personal guarantees or pledged collateral will not be required in connection with a PPP loan, and all SBA application and other fees are waived in the case of a PPP loan. While the CARES Act provides the maximum interest rate that can be charged with respect to a PPP loan (which is not otherwise forgiven as described below) is 4% and the portion of a PPP loan which is not forgiven will have a maximum maturity of 10 years from the date that the borrower applies for the loan to be forgiven (with no prepayment penalty), the SBA announced in its Interim Final Rule that the interest rate will be 1.0% per annum for PPP loans, with a term of 2 years.

The borrower of a PPP loan must certify among other things that (i) during the period from February 15, 2020 through December 31, 2020, it has not and will not receive another loan under the PPP, (ii) the uncertainty of current economic conditions makes the loan request necessary to support the borrower's ongoing operations and (iii) the borrowed

funds will be used to retain employees and maintain payroll or to make mortgage payments, lease payments and utility payments.

**Permitted Uses of the Proceeds of a PPP Loan.** A borrower is permitted to use the proceeds of a PPP loan for any of the following purposes: (i) Payroll Costs, (ii) costs related to the continuation of group health care benefits during periods of paid sick, medical or family leave, and insurance premiums, (iii) employee salaries, commissions or similar compensation, (iv) payment of interest on any mortgage obligation (not including any principal payment or prepayment), (v) rent, (vi) utilities, (vii) interest on any other debt obligations that were incurred before February 15, 2020, and (viii) refinancing an EIDL made to the borrower during the period from January 31, 2020 through April 3, 2020. Note that if a borrower's EIDL was used for Payroll Costs, its PPP loan must be used to refinance such EIDL.

**Potential Forgiveness of a PPP Loan.** The borrower of a PPP loan is entitled to apply to have all or a portion of the loan forgiven. The amount eligible for forgiveness is equal to the sum of the following payments made by the borrower during the 8-week period following origination of the PPP loan: (i) Payroll Costs, (ii) any payment of interest on any mortgage obligation that was incurred before February 15, 2020 (not including any principal payment or prepayment), (iii) any payment of rent under a lease agreement in force before February 15, 2020 and (iv) any payment for a service for the distribution of electricity, gas, water, transportation, telephone or internet access for which service began before February 15, 2020. NOTE: Although the CARES Act provides that all of these uses will qualify for forgiveness, the PPP Application Form states that "it is anticipated that not more than 25% of the forgiven amount may be for non-payroll costs." The Interim Final Rule clarifies that at least 75% of the PPP loan proceeds must be attributable to Payroll Costs, which includes the refinancing of EIDL loans that are used for Payroll Costs. By the same token, not more than 25% may be attributable to non-Payroll Costs. The Rule goes on to explain that the SBA has determined that this limitation will "effectuate the core purpose of the statute and ensure finite program resources are devoted primarily to payroll." Forgiven amounts are excluded from the borrower's gross income for purposes of federal income taxes.

The amount of a PPP loan that can be forgiven is subject to reduction based upon certain layoffs effected by the borrower. The amount of the PPP loan that would otherwise be forgiven will be reduced by multiplying such amount by the quotient obtained by dividing (i) the average number of full-time equivalent employees per month employed by the borrower during the 8-week period following origination of the PPP loan by (ii) at the election of the borrower, either (a) the average number of full-time equivalent employees per month during the period February 15, 2019 through June 30, 2019 or (b) the average number of full-time equivalent employees per month during the period from January 1, 2020 through February 29, 2020. For this purpose, the average number of full-time equivalent employees will be determined by calculating the average number of full-time equivalent employees for each pay period falling within a month.

The amount of a PPP loan that can be forgiven is also subject to reduction based upon certain salary reductions effected by a borrower. The amount of a PPP loan that would otherwise be forgiven will be reduced by an amount equal to the total amount of reductions in the salary or wages during the 8-week period following origination of the PPP loan of each employee who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000, to the extent that such reductions exceed 25% of the total salary and wages of such employee during the most recent full quarter during which the employee was employed before the 8-week period following origination of the PPP loan. These reductions can be avoided to the extent that employees who are laid off or have their salaries reduced during the period from February 15, 2020 through April 27, 2020 are rehired and/or their salaries are returned to prior levels by June 30, 2020.

To obtain PPP loan forgiveness, a borrower must submit an application to the lender with documentation verifying the

number of full-time equivalent employees and their pay rates. If eligible for forgiveness, the PPP loan must be forgiven within 60 days of the date that the application for forgiveness is submitted. After a PPP loan is forgiven, the SBA must pay the amount that has been forgiven to the lender (pursuant to the SBA's 100% guaranty of the PPP loan), plus any accrued but unpaid interest on the PPP loan through the date of such payment by the SBA. The SBA will be issuing additional guidance on loan forgiveness.

**Initial Practical Challenges.** In connection with the April 3 launch of the PPP, lenders and news outlets reported that a variety of rollout issues were expected to impact the speed of implementation, the economic feasibility of lenders to participate and which borrowers may actually have access to PPP loans. In addition to operational and technical questions about implementation of the PPP that lenders associate with a lack of sufficient guidelines, a key issue for lenders is the degree to which they will be responsible for verifying borrower qualifications for the loans and the processes they may have to institute to comply. The Interim Final Rule, however, says that the lender "does not need to conduct any verification if the borrower submits documentation supporting its request for loan forgiveness and attests that it has accurately verified the payments for eligible costs." It clarifies that lenders' underwriting requirements are limited to complying with applicable Bank Secrecy Act requirements, reviewing prospective borrower applications, and confirming their Payroll Costs by reviewing submitted documentation. Lenders are entitled to rely on the attestations of prospective borrowers as to their certifications and submitted employee information. While some lenders can be expected to make the PPP available only to existing clients they know well, and some large lenders are suggesting to existing clients that they reach out to smaller lenders for these loans, the increased clarity that comes from relaxing these underwriting requirements in conjunction with forthcoming SBA guidance on loan forgiveness may encourage more lenders to participate. Lenders reacted to the 0.50% fixed interest rate in the initial Treasury guidance from March 31, 2020 as too low a rate for them to participate on an economic basis, which may be the reason that the Interim Final Rule sets the rate at 1%. Given the statutory flexibility to have a rate as high as 4%, it is unclear whether this 1% rate will remain the rate. Lenders have also noted the two-year loan period may be too short for struggling borrowers.

**Next Steps.** The SBA is required to publish regulations relating to the PPP by April 11, 2020 (April 30, 2020 in the case of the forgiveness provisions). These regulations will need to be reviewed carefully, among other reasons, to see if they change any of the existing SBA regulations regarding the determination of who is an "employee," the calculation of the number of employees and the determination of affiliate status. In the meantime, interested small businesses and charitable organizations should contact their advisors to determine if they are eligible for a PPP loan and also should contact their existing bank to determine if the bank is already a participant in the SBA's lending program or will become a participant in the PPP program. A list of participating banks and other financial institutions can be found on the SBA's website ([www.sba.gov](http://www.sba.gov)).

### **U.S. Treasury Direct Lending Program Created for COVID-19 Relief**

The CARES Act contains a \$500 billion appropriation to the U.S. Treasury's Exchange Stabilization Fund to support loans, guarantees and investment in (i) businesses in particularly hard-hit industries (air carriers), (ii) businesses critical to maintaining national security, (iii) states, (iv) municipalities and (v) "eligible businesses" (which is broadly defined to include any U.S. domiciled business with its employees predominantly located in the U.S. that has not otherwise received adequate economic relief in the form of loans or guarantees provided under the CARES Act) (the "Direct Lending Program").

The loans available pursuant to this Direct Lending Program for eligible businesses will be available for a maximum maturity of five years and at an interest rate not less than prevailing market rates prior to the COVID-19 outbreak. Unlike the PPP loans, loans made pursuant to the Direct Lending Program are not forgivable. In addition, the Treasury

generally must also receive a warrant or equity interest in the borrower.

In order for the Treasury to make a loan or a guarantee pursuant to the Direct Lending Program the Treasury must determine that credit is not reasonably available to the borrower at the time of the borrowing, that the loan obligation is prudently incurred and that the loan is sufficiently secured. An eligible business borrower will also be required to agree to a set of operating constraints which will remain in effect until the expiration of 12 months after the date that the loan is fully paid, including: (i) restrictions on the total compensation of designated highly-compensated employees and officers, (ii) a prohibition on stock buybacks involving publicly-traded securities, (iii) a commitment to maintain employment levels as of March 24, 2020 at full compensation and benefits until September 30, 2020, to the extent practicable, and a prohibition against reducing its workforce by more than 10%, (iv) a prohibition on paying any dividends or other capital distributions on its common stock, (v) a prohibition against terminating existing collective bargaining agreements (until the second anniversary of the date that the loan is fully paid) and (vi) a prohibition against outsourcing jobs (until the second anniversary of the date that the loan is fully paid).

The Treasury is required to publish regulations relating to application procedures and minimum requirements for loans, guarantees and other investments pursuant to the Direct Lending Program by April 6, 2020. It is expected that these regulations will provide more details regarding eligibility to participate in the Direct Lending Program.

### **SBA Economic Injury Disaster Loans Made Available to Address COVID-19**

Section 7(b)(2) of the Small Business Act authorizes the SBA to make or guarantee Economic Injury Disaster Loans ("EIDLs") to small business concerns, nonprofit organizations or small agricultural cooperatives located in an area affected by a disaster that have suffered substantial economic injury resulting from such disaster, in such amounts as may be appropriated in advance from time to time therefor. EIDLs may be made in amounts of up to \$2 million per borrower for terms of up to 30 years. The current EIDL interest rate is 3.75% per annum for businesses and 2.75% per annum for nonprofit organizations.

Now, the CARES Act has made EIDLs available to applicants throughout the United States for COVID-19 related economic injuries. EIDLs are generally only available to applicants in designated disaster areas, determined on a county-by-county basis. On March 6, 2020, the Coronavirus Preparedness and Response Supplemental Appropriations Act deemed COVID-19 to be a disaster for purposes of such requirement, and the SBA subsequently released criteria allowing states to request statewide (rather than county-by-county) disaster area declarations for COVID-19. Subsequently, the CARES Act amended Section 7(b) of the Small Business Act to include within the list of applicable disasters certain presidentially declared emergencies, and to provide that such emergencies are deemed to affect each state and each subdivision (e.g., each county) thereof, and that each state or subdivision is deemed to have sufficient economic damage to qualify for assistance. Because COVID-19 has received an applicable emergency declaration, EIDLs for COVID-19 related economic injuries are available to applicants throughout the United States.

The CARES Act also expands the number of applicants eligible to receive EIDLs from the SBA due to "substantial economic injury" resulting from the COVID-19 pandemic. A substantial economic injury is one that results in the applicant's inability to (i) meet its financial obligations as they mature, (ii) pay its ordinary and necessary operating expenses, and/or (iii) market, produce, or provide its product or service.

Prior to passage of the CARES Act, EIDLs had been available to certain small businesses, certain nonprofit organizations, and small agricultural cooperatives under the Small Businesses Act. From January 31, 2020 to December 31, 2020,

however, the CARES Act (i) authorizes an additional \$10 billion in loans under the program and (ii) expands the list of

eligible entities to include:

1. Any business with 500 or fewer employees;
2. Sole proprietors or independent contractors;
3. Any cooperative with 500 or fewer employees;
4. Any employee stock ownership plan with no more than 500 employees; and
5. Certain tribal businesses with no more than 500 employees.

During the same period, the CARES Act waives, with respect to EIDLs made in response to COVID-19, the EIDL program's previous requirements (i) of a personal guarantee on advances and loans below \$200,000, (ii) that an applicant has been in business for at least a year prior to the disaster, and (iii) that an applicant must show it is unable to obtain credit elsewhere. The CARES Act further permits the SBA to approve an EIDL application in response to COVID-19 during such period based solely on the applicant's credit score, or by using an appropriate alternative method to determine the applicant's ability to repay.

Receipt of an EIDL made after January 31, 2020 but before the date PPP loans are made available under the PPP (i.e., April 3, 2020) shall not disqualify an applicant from receiving a PPP loan so long as the EIDL was not made for a purpose for which a PPP loan may be used, and such an EIDL may be refinanced as part of a PPP loan. According to the SBA's Interim Final Rule implementing the PPP, a PPP loan recipient who has received an EIDL used for Payroll Costs must refinance the EIDL with the PPP loan.

Lastly, the EIDL program offers a \$10,000 advance on COVID-19 related EIDLs for applicants to cover immediate expenses while they wait for approval of their loan applications. The SBA will pay the advance to applicants within three days of applying, and the grant need not be repaid even if the applicant's EIDL application is later denied. These grants can be used to provide paid sick leave to employees, maintain payroll, meet increased costs of materials due to interrupted supply chains, make rent or mortgage payments, and repay other debt obligations that cannot be met due to revenue losses. If the applicant later receives loan forgiveness for a PPP loan, the amount of the EIDL advance will be subtracted from the forgiven amount.

### **Employers May Qualify for Payroll Tax Relief and Businesses Benefit from Expanded NOL Provisions**

The CARES Act provides two other incentives designed to ease the burden of keeping employees on the payroll during the COVID-19 pandemic: a payroll retention tax credit and a payroll tax deferral provision. In addition, it expands taxpayers' ability to use net operating losses ("NOLs"), temporarily reversing certain changes made in connection with tax reform in 2017.

***Payroll Retention Tax Credit.*** This provision offers a payroll tax credit equal to 50% of "qualified wages" paid by eligible employers during certain quarters in 2020, during which the employer's operations have been affected by the pandemic (as described in (1) and (2) below). Qualified wages are capped at \$10,000 per employee on a cumulative basis for all quarters, for a maximum total credit of \$5,000 per employee.

The credit is unavailable to employers who have received loans under the PPP. Furthermore, in order to be eligible for the credit in any given quarter, an employer must either have carried on a trade or business during 2020 or be a tax-exempt organization and, in each case, satisfy one of the following two criteria:

1. The employer's trade or business (or its overall operations in the case of a tax-exempt organization) have been

fully or partially suspended due to a governmental shutdown order; or

2. The employer's "gross receipts" are at least 50% less than they were during the same quarter in 2019. (The meaning of "gross receipts" is not entirely clear for tax-exempt organizations—in other contexts, it has been interpreted as referring only to gross receipts taken into account in calculating unrelated business taxable income, but such an interpretation seems inconsistent with the purposes of this provision.) Once this standard is met for a quarter, the employer is then eligible for the credit during each subsequent 2020 quarter until its receipts for a given quarter reach 80% of what they were in the corresponding quarter in 2019.

Although the CARES Act does not impose an employer size limitation to qualify for the credit, the size of the employer will determine which wages count as "qualified wages." If an employer employed an average of more than 100 full-time employees in 2019, qualified wages include only those paid to an employee who is not working due to a government-imposed shutdown order. But if an employer had 100 or fewer full-time employees, qualified wages include compensation paid to all employees during a qualifying quarter. The term "qualified wages" is subject to other adjustments, including the addition of certain group health plan costs allocable to the employee and certain provisions preventing duplication with other credits under the tax law (including certain credits made available under the Families First Coronavirus Response Act with respect to mandatory paid sick leave and family leave).

There are various ways for an employer to claim the credit. The employer may affirmatively file a request for the credit, either on its quarterly Form 941 or on a new form that the Internal Revenue Service (the "IRS") has published for this purpose, the Form 7200. Alternatively, the employer may reduce deposits of payroll taxes to the extent it anticipates receiving the credit, and (to the extent the credit exceeds the taxes owed) seek a refund for the remainder of the credit on a Form 941 or Form 7200. With respect to this second alternative, although the CARES Act seems to indicate that employers may reduce deposits only of the employer's (6.2%) employer-side Social Security taxes—and not any other payroll taxes—subsequent IRS guidance suggests that the employer may reduce deposits of all payroll taxes, although this point is not entirely clear. If the employer's determination of the anticipated credit is reasonable (as interpreted by the IRS in Notice 2020-22), the IRS will waive failure-to-deposit penalties with respect to amounts not deposited.

**Payroll Tax Deferral.** The CARES Act has a separate provision that allows employers to defer payment of employer-side Social Security taxes. Taxes eligible for deferral are those that would have been due from March 27, 2020 to December 31, 2020. 50% of such deferred taxes must be paid on December 31, 2021, and the remaining 50% must be paid on December 31, 2022. Note, however, that employers who receive loan forgiveness under the PPP (as described above) are ineligible for this deferral.

**Net Operating Loss Provisions.** The CARES Act makes various changes to the rules relating to NOLs. The background to these changes is that The Tax Cut and Jobs Act of 2017 generally eliminated taxpayers' ability to use NOL carrybacks, and it limited use of NOL carryforwards to 80% of a taxpayer's taxable income. The CARES Act makes two key changes to these rules. First, it permits a 5-year carryback of NOLs that arise in taxable years beginning after December 31, 2017 and before January 1, 2021 (i.e. 2018, 2019 and 2020 for calendar year taxpayers). Second, it removes the 80% limitation with respect to taxable years beginning before January 1, 2021. There are certain nuances and exceptions to these general rules, including special rules for REITs and insurance companies.

#### **Enhanced Deductibility Benefits Donors of Large Cash Gifts and Non-Itemizers**

The CARES Act also includes provisions designed to encourage charitable contributions of cash, by allowing individual donors to charities to deduct up to 100% of their 2020 adjusted gross income ("AGI"), over and above the usual cap of 60% (or 50% if charitable contributions are made through a combination of cash and other assets). For corporate donors, the deduction cap is raised to 25%, over and above the usual cap of 10%. Unused deductions allowable under

the CARES Act may be carried forward into future tax years, subject to the traditional deductibility limitations, which will be restored in 2021.

These expanded deduction limitations are available **only** to itemizing taxpayers and only for gifts of cash made during 2020. And they are **not available** for gifts to private foundations (other than pass-through foundations and private operating foundations), donor-advised funds (DAFs), or supporting organizations.

*Because of the intricate rules governing the income tax charitable deduction, as well as the allowability of other deductions and the impact of the alternative minimum tax, donors should review carefully with their professional advisors any plans they may have to maximize their charitable giving in 2020.*

The law also includes a benefit for non-itemizing taxpayers: they are allowed a \$300 “above-the-line” deduction for cash gifts to qualifying charities. Although the CARES Act could be clearer, it appears – unless and until the IRS says otherwise – that this benefit for non-itemizers is limited to cash gifts that they make to qualifying charities in 2020.

Even though the CARES Act provides no new benefit for gifts to private foundations (other than pass-through foundations and private operating foundations), DAFs and supporting organizations or for gifts other than cash, the charitable deduction benefits that have traditionally been available for all charitable gifts will continue to apply at the customary levels. Accordingly, an itemizing donor wishing to make gifts to some combination of private non-operating, non-pass-through foundations, DAFs and/or supporting organizations, or charitable gifts of securities, real property, and/or tangible personal property, will still benefit as he or she always did and, in addition, he or she may be able to obtain additional tax benefits by making 2020 cash gifts that qualify for enhanced deductibility under the CARES Act.

### **Useful Resources**

- [Guidance on the Paycheck Protection Program \(PPP\)](#), U.S. Treasury Department
- [PPP Sample Application Form](#), U.S. Small Business Administration
- [FAQS: Employee Retention Credit under the CARES Act](#), Internal Revenue Service
- [COVID-19 Economic Injury Disaster Loan Application](#), U.S. Small Business Administration
- [SBA Interim Final Rule](#), U.S. Department of Treasury/U.S. Small Business Administration

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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