Steven Roy Management
Cambyses Financial Advisors, LLC

Financial and Tax Topics, 2020

Tax and Finance in the Time of Coronavirus

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The New Realities of Small Business Tax and Finance, 2020

When I prepared for this presentation in January 2020 I identified several Tax and Finance Issues we expected to face in 2020 and beyond:

- The battle over employee vs. independent contractor classification,[1]
- State agencies' and federal efforts to extend their tax base,[2]
- Wayfair's influence on state income tax nexus,[3] and
- Strategic and tactical options to optimize Small Business' response to some of the more bizarre consequences of the Tax Cuts and Jobs Act (TCJA).[4]
- Environmental regulation, business' responses, and how we finance that response.

Most of those issues are still out there and still salient. But, in the chaos of the ensuing months, they take a back seat. The pandemic, and the government response to it, inflicted more pain on Small Businesses than most of us can ever recall over such a short time. Faced with both unpalatable social alternatives (Social distance, isolation, masks, and Queensbury Rules[5]) and a collapsing economy, the Administration opted to support system liquidity – often to the exclusion of social measures.

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[1] CA AB5 – Adopted 09/18/2019; effective 01/01/2020 codifies the result in Dynamex Operations West, Inc. vs. The Superior Court of Los Angeles County. Dynamex holds that 1) most workers are employees; 2) should be classified as such; and that 3) the burden of proof for classifying individuals as independent contractors belongs to the hiring entity. Dynamex and AB5 adopt the (extraordinarily inflexible and unforgiving) 'ABC test,' which was first established by the Commonwealth of Massachusetts Legislature on July 19, 2004. IRS and numerous states have since followed this line of reasoning – intensifying their war on the "Gig Economy."

[2] Someone once observed that legislatures are limited in the objects of taxation only by legislators' imagination. As Thomas Payne notes: "Imagination may range at pleasure till it gets bewildered amidst the labyrinths of power. It is only in the latter light that it can be admitted to have any pretensions to fairness." The states' search for additional revenues make almost anything a potential object for taxation, at least in legislators' minds.

[3] In June 2018 the Supreme Court ruled in South Dakota v. Wayfair, allowing states to impose sales tax on purchases made by buyers in the state's jurisdiction by out-of-state sellers, even if the seller has no physical presence in the taxing state. Their decision overturned longstanding practice {c.f. in Quill Corp. v. North Dakota (1992)}, which barred states from imposing sales tax or collection obligations on companies that had no physical presence (employees, assets, or sales) in the state {and tidied up elements of National Bellas Hess v. Illinois (1967)}. Wayfair rejects Quill's "physical presence" test as "unsound and incorrect."

When Wayfair was decided, we (and a whole lot of other analysts) sensed a broader multi-state tax policy dilemma - If the Court could overturn Quill, why should states continue to abide by Public Law 86-272? The reasoning behind 86-272 mirrors Quills reasoning, but 86-272 applies to state income tax. Wayfair applies to sales tax.

Pennsylvania fired the first shot in the Wayfair Income Tax War on January 1, 2020

[4] Specifically, TCJA's introduction of the Qualified Business Income Deduction (IRC 199A), the Business Interest Limitation (IRC 163(j), and its glitch marred realignment of "immediate asset expensing" (IRC 168 &179). As we note below, the CARES Act eliminated most, if not all, of the IRC 168 &179 glitch – leaving only the other two Gordian Knots to untangle.

[5] Often incorrectly attributed to the Marquis of Queensbury, boxing's primary admonitions "Maintain a consistent offense, and protect yourself at all times," are stated in the Nevada Gaming Commission's rules.

- In short order, the Fed distributed over $3 Trillion dollars of economic support aimed at propping up a collapsing economy and made plans to distribute $1 – 2 Trillion more,
- Congress enacted more than a half dozen major programmatic and tax measures to support personal and business and liquidity,
- Agencies (primarily SBA, IRS, and Treasury) churned out nearly 5,000 pages of interpretations, regulations, and procedures to implement the new rules,
- Accountants, financial planners, and outright crooks burned the midnight oil to accommodate (or exploit) the new rules, working through an extended tax filing season, assuming much of the burden of explanation and response for their clients, and being held accountable, by those same clients, for the chaotic and sometimes dysfunctional implementation they had little or no input to or responsibility for.[6]

From our current "several months later" perspective, the collective fiscal, legislative, and administrative fabric of these pronouncements appears coherent.

That was not necessarily the case at the time they were issued. Legislation was rushed through the approval process, contained glaring errors and omissions, and sometimes lacked even internal consistency. As with most complex legislation, Congress delegated the "nitty gritty details" to the agencies.

Facing the deluge with decimated staff, the agency responses were released on a "first done, first released" basis. (It is hard to imagine how it could have been done any other way.) This often left the omissions unresolved, and the "nitty gritty" unstated – awaiting further clarification in pronouncements that followed. In short, rapid response trumped coherence or completeness.

Small Business owners and their advisors were often left to guess what was intended. It is axiomatic that business decisions (and advice regarding them) always take place (is given) in an "atmosphere of uncertainty." In 2020 that uncertainty concerned not only how the future economy would play out, but what the current choices even meant, and whether the business could survive long enough that the consequences of those choices would matter. Business operators and their advisors frequently had to choose an option and formulate responses while blind to the nature of other options, the consequences of their choice and the responsibilities their choice might entail.

Perhaps with the benefit of hindsight, and the passage of months, we can unravel some of the skein-of-confusion and resolve (or minimize the impact) of sub-optimal decisions made while information was scarce.

It is to that purpose that we dedicate this presentation.

CAUTION: Before you act on ANY of the information we present – research it to make sure it is still true and accurate. Many of the provisions we talk about are in a state of flux. (For Example; We had to rewrite one section of this presentation three times in the space of three weeks.)

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[6] Prime example: The IRS's extraordinarily botched "Where's My Stimulus" web-portal. Return preparers with large practices report getting hundreds of "The website says they don't recognize me. Did you really file my returns? Don't you have a backdoor into the Service so you can fix this?" calls. The clients were further miffed when the preparers replied; "I don't know why the IRS can't design software that works, I didn't write it – and no one has backdoor access, much less me."

Things That Affect Mostly Individuals and Families

Personal Tax Rebates and Stimulus Checks:

The most publicly visible part of the government's coronavirus fiscal response – Stimulus Checks are probably the least complex provisions of the CARES act. The concept is simple – but implementation was sometimes less so.

The program has two components:

1. Rebates: $1,200 ($2,400 if you file jointly) distributions to all Qualified Recipients.[i] Technically the distribution is an advance against a credit that you claim when you file your 2020 income tax return. In theory this is an in-and-out transaction and has little or no impact on your 2020 income tax obligation, balance, or refund… but the Service does love its tax forms and provisions had to be made for corrective adjustments – such as those for people who never got their rebate or got rebates they were not entitled to.

   If you did not get a rebate you were entitled to, you'll get another shot at it when you file your 2020 income tax return. It is still a bit vague what the Service will do about distributions that were too high or made to those who were not entitled to them. Many at the IRS and Treasury are inclined to ignore the overpayments – and let you keep it. We will see!

2. Rebates for Dependents: $500 distributions for each dependent claimed on your income tax return. This rebate is a bit more complex. The CARES Act uses the Child Tax Credit's (CTC) eligibility standards.[ii] Qualifying children who are 1) under age 17, 2) who do not provide more than half of their own expenses, and 3) lived with you for more than six months are eligible. Adult dependents, such as college students aged 17 and over, and elderly dependents do not qualify for the $500 rebate. Adult dependents do not qualify for their own rebate either.

Eligible individuals with adjusted gross income up to $75,000 for single filers, $112,500 for head of household filers and $150,000 for married filing jointly are eligible for the full $1,200 for individuals and $2,400 married filing jointly. In addition, they are eligible for an additional $500 per qualifying child.

For filers with income above those amounts, the payment amount is reduced by 5% of the amount that your adjusted gross income exceeds the $75,000/$112,500/$150,000 thresholds. Single filers with income exceeding $99,000, $136,500 for head of household filers and $198,000 for joint filers with no children are not eligible and will not receive payments.

Treasury, the IRS, and the Social Security Administration shouldered most of the burden for determining who was eligible for the Stimulus Payments and the procedural steps required to make the payments. Those who drew the short straw and were omitted from the first round of the process can base your recovery response on the Service's Economic Impact Payment Information Center Q&A. Rebates, whether for you or your dependents, should work their way through the system and should be resolved when you file your 2020 return.

One request – Please don't ask me or any other tax professional why the IRS's incredibly lame stimulus locator webpage doesn't work. We don't know either.

Wrinkles:

- You will not receive immediate payments for Newborns born after you file your 2019 return. You will be eligible for their $500 credit on your 2020 return,
- If you divorce, only one parent will receive the credit for dependents – the custodial parent who claims the child as a dependent. Presumably, you can always fight it out through counsel in the asset settlement.
- Wage and Income Loss: If you were above the income threshold to receive the credit in 2018-2019 but lost a job or folded a business and would be eligible based on 2020 income, you'll get the credit when you file 2020. As a counterpoint, if you qualify for the credit based on your 2018-2019 income, but you exceed the income limit in 2020, you do not have to give back any part of the rebate.
- Nonresident aliens, individuals who can be claimed as a dependent by another taxpayer, estates or trusts are ineligible for the credit.

Update: As we approach publication, the Senate is considering a second round of stimulus and relief measures. The Senate's first attempt at "CARES 2" was burdened with almost as many special interest and partisan appropriations as it contained relief. The disparity was so glaring that Senate leaders could not even muster enough votes within their own party to get the bill on the floor. Cares 2 (Its real name was the HEALS Act) died a well-deserved death before House Democrats even got a chance to savage it and its authors.

The Senate will regroup for another go at it next week (Early August 2020). If all goes well, we will have more to report by mid-August.

Expanded Unemployment Insurance (UI) for workers

Under the CARES Act states may extend unemployment benefits by up to 13 weeks under the new Pandemic Emergency Unemployment Compensation (PEUC) program.

PEUC benefits are available for weeks of unemployment beginning after your state implements the new program and ending with weeks of unemployment ending on or before December 31, 2020. The program covers most individuals who have exhausted all rights to regular unemployment compensation under state or federal law and who are able to work, available for work, and actively seeking work as defined by state law. The CARES Act gives states flexibility in determining whether you are "actively seeking work" if you are unable to search for work because of COVID-19, including because of illness, quarantine, or movement restrictions.

If you have exhausted the 13 weeks of additional benefits available under the PEUC program, you may be eligible to continue receiving benefits under the PUA program. PUA benefits are available for a period of unemployment of up to 39 weeks, meaning that if you have exhausted regular UC and PEUC benefits in fewer than 39 weeks, you may be eligible to receive assistance under PUA for the remaining weeks within PUA's 39 week period.

PEUC includes a $600 per week increase in benefits for up to four months and federal funding of UI benefits provided to those not usually eligible for UI, such as the self-employed, independent contractors, and those with limited work history. The federal government is incentivizing states to repeal

"waiting week" provisions that prevent unemployed workers from getting benefits as soon as they are laid off by fully funding the first week of UI for states that suspend such waiting periods. Additionally, the federal government will fund an additional 13 weeks of unemployment benefits through December 31, 2020 after workers have run out of state unemployment benefits.

OK – So that is how it is supposed to work! Most states rapidly adopted the program – starting the 13-week timer. As of late July, that timer is about to expire in the early-adopter states. And:

> ***The PEUC program has become a political football and rallying point. (Surprise, Surprise, and bowl me over with a feather.) Extension and continued funding for the program are anything but certain,***

As a consequence, we have decided not to do extensive coverage of the program – unless its continuation is assured. If you want to see details - or dream of what might have been – refer to the Department of Labor's Unemployment Insurance Relief During COVID-19 Outbreak

Update: The HEALS Act, which failed to clear the Senate on July 30th, contained minimal provisions to extend the CARES Act unemployment benefit.

As we approach publication, the Senate is considering a second round of stimulus and relief measures. The Senate's first attempt at "CARES 2" was burdened with almost as many special interest and partisan appropriations as it contained relief. The disparity was so glaring that Senate leaders could not even muster enough votes within their own party to get the bill on the floor. Cares 2 (Its real name was the HEALS Act) died a well-deserved death before House Democrats even got a chance to savage it and its authors.

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Required Minimum Distributions (RMDs) are Not Required in 2020

In any "normal year" once you have reached a threshold age (70 ½ or 72, depending on when you were born)[7] you must distribute "Required Minimum Distributions" (RMDs) from most of your retirement accounts.

The CARES Act suspends the RMD requirement for 2020.

RMD Relief applies to all of the plans that usually require RMDs:

- traditional IRAs

[7] If your 70th birthday falls before July 1, 2019, you must begin making RMD distributions when you reach 70 1/2. The Setting Every Community Up for Retirement Enhancement (SECURE) Act (part of the Further Consolidated Appropriations Act, 2020,P.L. 116-94,) alters the requirement: if your 70th birthday is July 1, 2019 or later, you do not have to take withdrawals until you reach age 72. Both the old and the new provisions allow you to defer the first RMD until April 1 of the calendar year after you reach the age threshold (IRAs including SEPs and SIMPLE IRAs) or the later of April 1 of the calendar year after you reach the age threshold or the year you retire (401(k), profit-sharing, 403(b), or other defined contribution plan). If you own more than 5% of the business that sponsors the plan, then you must begin receiving distributions by April 1 of the year after the calendar year in which you reach age 70½ (age 72 if born after June 30, 1949), even if you have not retired.

- SEP IRAs
- SIMPLE IRAs
- 401(k) plans
- 403(b) plans
- 457(b) plans
- profit sharing plans
- other defined contribution plans

RMD Relief applies to both those retirement accounts you (or your employer) funded, and those you inherited.

When CARES was enacted, the stock market was wallowing in a deep trough (having dropped nearly 35% in 31 days). RMD Relief allowed plan beneficiaries to avoid liquidating positions that were deep in the red – thus reducing depletion of the retirement account and allowing time for the market to recover. (The market has since, rallied impressively – returning to about 90% of its pre-coronavirus high water mark.)

Deferring your RMD also saves a small amount of (discounted) income tax and allows the deferred funds to grow tax free. Given the present low interest rate environment, that deferral is not worth much – about $99 for a $10,000 Required Distribution[8]… but in retirement accounts, every penny counts.[9]

CARES adds another wrinkle to this provision – but its utility has waned for now. If you took a Required Minimum Distribution before CARES was passed in March or in the period before April 1, you had until July 15 to rollover the distribution into another exempt account – effectively erasing the transaction (Notice 2020-51). As it is now July 26th, the rule has evolved: If you take an RMD and later decide you don't need it – you can roll it over into another exempt account any time within 60 days after the distribution. This may be beneficial if you encounter a short-term cash shortage you believe will be remedied within 60 days.

Tax Deferral is a lovely thing – Deferral comes at the price of impaired liquidity in your non-exempt accounts.

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[8] The value of tax deferral is calculated (to a first approximation) as the {[(Required Distribution X The Beneficiary's Marginal Tax Rate) divided by (1- the Risk Free Discount Rate)] minus the Required Distribution}. In our example (and our extremely low interest rate environment), a taxpayer in the 25% Federal tax and 7% State tax brackets would calculate the value of deferral as {[(10,000 X 0.32) / (1 ~ .03)] – 10,000} = ~99.

[9] If you are not an "Eligible Designated Beneficiary" of an inherited IRA (and thus required to use either the 5-year or 10-year rules), tax deferral may have more significance (Because your usual RMD may be proportionately much larger).

Eligible designated beneficiaries include a surviving spouse, a minor child of the deceased owner, disabled or chronically ill individual or any other person who is not more than 10 years younger than the deceased account holder. Eligible designated beneficiaries have the option to take Required Minimum Distributions based on their life expectancy.

A minor child of the deceased owner can use the life expectancy calculation until the child reaches the age of majority (as defined by their state of residence), at which point, assets in the inherited IRA must be fully withdrawn within 10 years of the minor child reaching the age of majority.

- If the RMD is not critically necessary to maintain your standard of living, you do not need the funds, or you can withdraw the necessary funds from another account, like a taxable account, then by-all-means defer your RMD.
- If not taking the RMD means sacrificing necessities such as food, medicine, or shelter – or just making that an uncomfortable pinch. Think twice before you defer the RMD (or revisit the question repeatedly between now and December and feel free to change your mind). Your life and comfort are not worth a 0.99% tax advantage – next year.

Retirement Plan Withdrawals, Distributions, and Loans

CARES allows "Qualified Individuals" to withdraw up to $100,000 from their retirement plan, regardless of their age. without incurring the Sec. 72(t) 10% additional tax for early distributions (or the Sec. 72(t)(6) 25% additional tax for SIMPLE IRAs). If you qualify, you may take the distribution at any time before December 31, 2020.

The Act also increases the permissible plan loan amount under IRC Sec. 72(p) from $50,000 to $100,000 for Qualified Individuals.

Both the distributions and the loans receive favorable tax treatment under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, P.L. 116-136.

As you probably suspect, there are some caveats, conditions, and opportunities:

- The definition of "Qualifying Individual" for both distributions and loans is broad – essentially including anyone who
  - Was diagnosed positive for either SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by an approved test, or
  - Whose spouse or dependent who was diagnosed positive for either SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by an approved test, or
  - Who "experiences financial consequences as a result of one or more "coronavirus catastrophes"[iii]

- Notice (Notice 2020-50) provides guidance on how plans may report coronavirus-related distributions and how individuals and plans report distributions on their individual federal income tax returns.
  - Distributions are includible in income over a three-year period. To the extent the distribution is eligible for tax-free rollover treatment and is contributed to an eligible retirement plan within the three-year period, will not be includible in income. You may also elect to include the entire distribution in income in the year of distribution by making an irrevocable election in your tax return for the year of distribution
  - Loans may be repaid over up to three years. Similar to distributions the loan may be rolled over into an eligible retirement plan and it will not be included in your taxable income. Any unrepaid loan amount will be deemed income and subject to the usual tax exposures. (The literal language of the act implies it "will be taxed over three years," but it is as yet unclear how that tax would be determined. If you have an existing plan loan, payments on that loan may be suspended for up to one year.

It is tempting to take tax deferred and penalty free distributions and loans on the Edmund Hillary principle: "Because they are there." However, doing so may impair your wealth building strategy both now and ultimately in retirement.

This leads to a simple decision rule:

- If you don't need the money, don't do the distribution or loan.
- If you really need the money (not want, need) – can you get it somewhere else?

That simple rule has been the foundation of retirement planning for decades. It remains true even in the midst of a plague.

Working from Home – TCJA, the Gig Economy, and the Law of Unintended Consequences

As COVID spread a Work from Home (WFH) movement was born. Both employers and employees relocated to their kitchen tables, extra bedrooms, and den pool tables (Or in the case of one of our clients, a purpose built, secure bunker in a basement corner).

They soon discovered that technologies like Email, Facetime, Google Hangouts, Skype, Slack, Texting, and Zoom, when mated to authentication apps, and nestled in the cloud make full-time office work unnecessary.

Employees shed their onerous commutes, abandoned their oppressive cubicles, and worked in their bunny slippers with the dog resting peacefully at their feet.

Employers with work-from-anywhere policies boosted employee productivity and morale, reduced turnover, and reduced organizational costs,[10] Along the way, they discovered that even very complex jobs can performed as well or better in WFH than in the office, provided they don't require collaboration or social support.[11]

As a side benefit, both employers and employees realized that WFH made them a smaller target. In a natural or manmade disaster, a distributed workforce is better positioned to keep operations running, even if some of the group goes offline.

Seemingly overnight, long lists of "Work-From-Home-Friendly Firms" and "Top Work-From-Home Jobs" populated the internet.

It all sounded ever so win-win… like a Soviet Stakhanovite documentary – happily singing golden people harvesting endless fields of golden grain with nary a hint of sunburn or muscle ache.

Ah, but into every utopia some dystopia creeps – in this case the Tax Cuts and Jobs Act administered some Reality Therapy.

Under pre-TCJA rules employees who worked from home at the behest (or insistence) of their employer were entitled to either:

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[10] See studies by Harvard Business School. "How Companies Benefit When Employees Work Remotely." And Harvard Business School Faculty & Research. "Work-from-anywhere: The Productivity Effects of Geographic Flexibility."

[11] Journal of Business and Psychology. "Unpacking the Role of a Telecommuter's Job in Their Performance: Examining Job Complexity, Problem Solving, Interdependence, and Social Support."

- Reimbursement of those expenses from their employer, or (to the extent the employer did not reimburse)
- An itemized deduction for Employee Business Expense (EBE)

The itemized deduction was one of a short list of "Miscellaneous Itemized Deductions" that were collectively subject to a deductibility floor: 2% of Adjusted Gross Income. Miscellaneous Itemized deductions included[12]

- Union Dues,
- Educator Expenses[13]
- Employee Business Expense (EBE)
- Investment Expenses (Account Maintenance Fees and Trade Commissions)[14]
- Payments for Tax Preparation
- Safe Deposit Rental Fees, and
- Several seldom seen but potentially large "other expenses"[15]

In the initial euphoria surrounding Work from Home, an awful lot of people[16] missed an important point: The Tax Cuts and Jobs Act repealed every one of those Miscellaneous Itemized Deductions for Federal reporting purposes.[17] Thus, the only way for employees to recoup some or all of the employee expenses they incurred working from home was for the employer to reimburse them. Needless to say, most employers were not enthusiastic about this – though many employers did step up to the plate.

Just to make matters a bit more complicated. Many states (California among them) did not fully conform to TCJA – The most frequent departure was to preserve their own Miscellaneous Itemized Deduction provisions.[18] This introduced a state-federal reporting difference that was, for the most part, comprehensible only to tax professionals. Many of those who worked from home and were not reimbursed by their employer were forced to either pay a tax professional or forgo a potential state tax deduction. Our anecdotal impression: the verdict was about 50:50 on that choice.

The Service and the states recently launched yet another campaign designed to eliminate "Misclassified Employees" (i.e. "employees" that the employer treats as "independent contractors"). Like previous campaigns – this one focuses on businesses that are already under examination and that have a

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[12] For additional detail regarding the pre-TCJA rules, see IRS Publication 529 (12/2019), Miscellaneous Deductions – which is obsolete, but still available on the IRS Website. The Repealed Code and Regulations appear at IRC § 67.2-percent floor on miscellaneous itemized deductions and Regs. § 1.67-1T - 2-percent floor on miscellaneous itemized deductions, respectively.

[13] In excess of the $250 Educator Expense deduction for Adjusted Gross Income

[14] In excess of those used to offset investment income.

[15] Including losses incurred on complete liquidation of an IRA or other retirement plan balance (which we may see more of in the future), and several adjustments related to closing of your estate.

[16] Forbes Magazine, for example, didn't connect the dots or comment on this issue until late May or early June, 2020.

[17] There is an exception that permits Non-Grantor Trusts and Estates to claim the deductions. See Notice 2018-61

[18] Non-conforming states for EBE include Alabama , Arkansas , California , Hawaii , Minnesota , New York , and Pennsylvania. Those states still allow a deduction for unreimbursed employee expenses even though the federal government no longer does. Reporting methods differ among the states.

disproportionate ratio of "contractors" vs. "employees." And, like previous campaigns, it involves ever more dire pronouncements about how-awful-it-is to misclassify employees, accompanied by ever more draconian and restrictive definitions of just exactly what "misclassification" entails.[19]

The campaign is, in part, a response to the evolution of the "Gig Economy." The ethos and logistics of the Gig Economy encourage employers and employees alike to impose or seek independent contractor status.

Inadvertently, Congress, TCJA, the IRS, and state agencies also aggravated a compliance problem they have been fighting for as long as anyone in our practice can remember (that's about 45 years in case it matters).

TCJA made the Gig Economy and independent contractor status an even more attractive option for a simple reason: Independent Contractors are unaffected by the repeal of the EBE deduction. Independent Contractor's "ordinary and necessary business expenses" are deductible under an entirely different set of rules, governed by different Internal Revenue Code provisions.[20]

The Gig Economy and the work-from-home movement will aggravate an already raw nerve. As a sea shift in the way America does business, they may force a re-evaluation of our basic notion of what it means to be "employed." Stay tuned as this melodrama unfolds!

[19] See, for example, Dynamex v. Los Angeles and CA Assembly Bill AB5 (linked above). There are examples that involve nearly every US State.

[20] Miscellaneous Itemized Deductions were governed by IRC and Regulations Section 67; Independent Contractor deductions are governed (generally) by IRC and Regulations Section 162.

Things That Affect Mostly Businesses, Large or Small

Small Business Credit for Paid Sick Leave or Medical Leave

The Families First Act requires (with some exceptions)[iv] employers with fewer than 500 employees to provide up to ten days of paid sick leave and/or family or medical leave for their employees who miss work for various coronavirus-related reasons. Businesses with over 500 employees are not entitled to the credit.

Eligible Employers[21] may claim fully refundable 100% credits based on qualifying leave payments made between April 1, 2020, and Dec. 31, 2020. The credit reimburses the employer for 100 percent of up to ten days of the qualified sick leave wages[v] and up to ten weeks of the qualified family leave[vi] wages (and any qualified health plan expenses allocable to those wages[vii]) that an Eligible Employer paid during a calendar quarter, plus the amount of the Eligible Employer's share of Medicare taxes imposed on those wages.

If the employee is otherwise entitled to sick and family leave under the employer's policies, Qualified sick leave and qualified family leave under the FFCRA are supplemental to those preexisting leave entitlements.

To claim the Employee Retention Credit, report your total Qualified Wages and health insurance costs for each quarter on your quarterly employment tax returns (usually Form 941) beginning with the second quarter 2020 return. Technically, the credit offsets your share of social security tax but the excess is refundable under normal procedures.

You may retain the employment taxes that otherwise would have been deposited, including federal income tax withholding, the employees' share of Social Security and Medicare taxes, and the employer's share of Social Security and Medicare taxes for all employees, up to the amount of the credit, without penalty. You don't need to wait until you file your 941. If you have already filed second quarter returns or made payroll tax deposits for the quarter you may recover the credit by reducing upcoming deposits or requesting an advance credit on Form 7200, Advance of Employer Credits Due To COVID-19.

Employers must separately state the total amount of qualified sick leave wages paid because the employee was quarantined or diagnosed with COVID-19, the total amount of qualified sick leave wages paid because the employee was caring for a sick individual or for a child (or for other similar reason), and the total amount of qualified family leave wages paid.

The IRS has provided guidance to employers who incur this expense and claim this credit (See, Sources, Below)

Wrinkles:

- Accounting – Recordkeeping issue – you can not report what you don't keep track of. The breakdown of this expense is not something that most employers track. Some adjustment of record keeping, payroll, and accounting procedures may be necessary.

[21] Defined, rather circularly as businesses and tax-exempt organizations that: (i) have fewer than 500 employees, and (ii) are required under the FFCRA to pay "qualified sick leave wages" and/or "qualified family leave wages."

- Self-employed individuals qualify for the credits; c.f. IRS Website: Specific Provisions Related to Self-Employed Individuals at Question 60 et. seq.

Small Business Credits for Employee Retention:

Employers may claim a 50 percent tax credit for the Qualified Wages paid to employees from March 13 to December 31, 2020. Employers may claim a maximum $5,000 credit per employee (50% of $10,000 of employee wages). (CARES Act)

To qualify, firm activity must be suspended due to government actions related to coronavirus or the firm must experience a 50 percent decline in gross receipts during a calendar quarter when compared to the same quarter in the previous year.[viii]

For firms with fewer than 100 employees, the credit applies to all employees – even those who were able to continue working. For firms with 100 employees or more, the credit applies only to employees not able to do their duties due to a business suspension or a lack of business. In either case, Qualified Wages include wages paid to the employee and certain health care expenses (insurance) incurred by the employer.

Other choices you exercised during the crisis may affect your eligibility for the Employee Retention Credit:

- If you applied for and received a Small Business Interruption Loan under the Paycheck Protection Program you are not eligible for the Employee Retention Credit.
- Wages for this credit do not include wages for which you receive a tax credit for paid sick and family leave under the Families First Coronavirus Response Act.
- Wages counted for this credit cannot be counted for the credit for paid family and medical leave under IRC § 45S of the Internal Revenue Code.
- Employees are not counted for this credit if you are allowed a Work Opportunity Tax Credit under IRC § 51 of the Internal Revenue Code for the employee.

To claim the Employee Retention Credit, report your total Qualified Wages and health insurance costs for each quarter on your quarterly employment tax returns (usually Form 941) beginning with the second quarter return. Technically, the credit offsets your share of social security tax but the excess is refundable under normal procedures.

You may retain the employment taxes that otherwise would have been deposited, including federal income tax withholding, the employees' share of Social Security and Medicare taxes, and the employer's share of Social Security and Medicare taxes for all employees, up to the amount of the credit, without penalty. You do not need to wait until you file your 941. If you have already filed second quarter returns or made payroll tax deposits for the quarter you may recover the credit by reducing upcoming deposits or requesting an advance credit on Form 7200, Advance of Employer Credits Due To COVID-19.

Employer Payroll Tax Payment Deferral

As an employer, you are accustomed to depositing the employer share of Social Security, Medicare, and/or Railroad Retirement Taxes on a semi-monthly or monthly basis.

Provisions in the CARES Act permit you to defer that part of your deposit on payrolls you pay between March 27 and December 31 in 2019. ALL employers (including not-for-profit and household employers) may defer their deposits, regardless of size or entity choice.

You will eventually pay the deferred amounts in two installments: half on December 31, 2021, and the remaining half on December 31, 2022.

By CARES Act standards, this is one of the simpler options to effectuate: To claim the deferral, you simply defer depositing that portion of your payroll tax. You are not required to make or document the election – you "Just Do It." You report the deferred taxes by reporting the deferral on the appropriate line of your employment tax return (e.g. line 13b on Form 941).[22] IRS Notice 2020-22 grants you relief from the failure to deposit penalty under section 6656 of the Internal Revenue Code for not making deposits of employment taxes with respect to the deferred amounts.

CARES initially contained provisions that denied the deferral option to PPP loan recipients. The PPP Flexibility Act amends the CARES Act, striking that restriction. There remains some confusion regarding the pay periods that are affected, so talk to your advisors before you assume this revision applies.

In addition to the pay date confusion, IRS has not yet addressed (at least) two other issues:

- When do you deduct the deferred payroll tax amounts? Under general rules, your deduction for the deferred payroll tax amount would not be allowed in 2020. It would be allowed in the tax year in which it is paid (2021 and 2022). It is not certain that the general rule applies. If it does, you may control the deduction's timing by accelerating payments on the liability. That rather defeats the purpose of deferring the payments, however.
- The Service also has not addressed what happens if you are not able to make the required payment in 2021 or 2022 (e.g. because cash flow from your still operating business is not sufficient or because the business has gone belly up in the interim.) Our conjecture is that the Service (an organization that is not renowned for its compassion or generosity) will apply the usual penalty and interest statutes, effective the payment due date. We speculate that the computation will not be retroactive since that would violate both the spirit of CARES and the letter of Notice 2020-22.

Excess Business Loss Limitation

TCJA added IRC § 461(I) to the Code. IRC § 461(I) limits non-corporate taxpayers' (individuals, trusts, estates) ability to deduct Excess Business Losses. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), amends IRC § 461(l) to apply the limitation on Excess Business Losses of noncorporate taxpayers only to tax years beginning after 2020 and before 2026. The Act repealed the limitation for tax years 2018, 2019, and 2020.

Excess Business Losses are defined as the excess of aggregate business gross deductions over aggregate business gross income.[ix] Deduction of these Excess Business Losses by non-corporate taxpayers was

[22] The Service revised their second through fourth quarter Forms 941 to permit this adjustment. If you filed a first quarter Form 941, you may need to amend it (if you paid payroll between March 27 and March 31).

limited to $250,000 per year ($500,000 married filing jointly). Unused Excess Business Losses are carried forward as NOLs.[23] These limitations continue through the 2026 tax years.

The CARES Act provision delays the application of the Excess Business Loss Limitation until 2021. Non-corporate taxpayers may be able to deduct all Excess Business Losses created through the end of the 2020 tax year. Taxpayers with losses in 2018 and 2019 that were disallowed by the limitation may file amended returns for those years to claim a refund.

Perhaps because Excess Business Losses get incorporated into future years' NOLs, there is a paucity of information regarding either the initial TCJA Excess Loss provisions or their delay under CARES.

Oddly, this relief provision may have a detrimental effect if: An Excess loss was deferred in 2018; You applied it as an NOL in 2019; and you elect to carry back an NOL incurred in 2020. If you did (or plan to do) all these things, talk to your tax representative about your options.

Business Interest Limitation

CARES' Rule Changes

Like the CARES Act's changes to the Excess Loss Provisions, there has been very little official guidance from either the IRS or Treasury regarding the Act's modifications to TCJA's business interest limitation provisions. CARES leaves most of the (already well explained) limitation rule intact. Perhaps the Service believes that the main CARES Act amendment (Change to the percent of interest that is deductible) does not merit much explanation. However, drafting errors (glitches) in CARES introduce several issues that businesses and tax practitioners should consider.

The CARES Act:

- Raises the limit on business interest deductions from TCJA's 30% of your business' Adjusted Taxable Income (ATI) to 50% of ATI for the 2019 and 2020 tax years.
- Permits you to calculate the 50% limit for 2020 based on your business' ATI in 2019 if that yields a more favorable result.
- Is retroactive to 2019 and extends to 2020.

CARES leaves the rest of TCJA's provisions intact. We will get to our review of those TCJA provisions momentarily, but first we will suggest several planning-compliance strategies you may want to consider and we will look at the unintended (so we think) consequences of the CARES amendments.

- Who Benefits?
    - Leveraged Businesses; This is particularly beneficial if you are leveraged (from expansion, equipment purchases, capital structure choices, or because you borrowed to keep the business running) and have gross revenue that exceeds TCJAs threshold for the business interest limitation exemption (see below).
    - Businesses that had a short 2019 tax year. By "grossing up" the deemed ATI based on the entire year, you may be entitled to a more favorable deduction.

[23] At-risk limits and the passive activity limits are applied before calculating the amount of any excess business loss.

- How?
    - If you have not already filed your 2019 return, you claim this advantage by filing returns for 2019 and 2020 based on the expanded deduction limit.
    - If you have already filed, you may file an amended 2019 return to claim the advantage.
- It remains to be seen how software developers, financial staff, and tax professionals will operationalize this "non-change change." (The same can be said for the changes in the Interest Limitations.)

- The Glitch: For Partnerships (including LLCs) CARES' 50%-of-ATI limit applies in 2020, but not in 2019. Partnerships are stuck with the 30% limit for the 2019 tax year. Disallowed Business interest expense is passed to the partners and is also suspended at the partner level under the TCJA rules. 50% of the suspended business interest is deductible at the partner level on a 2020 return unless the partner elects on a 2020 tax return for it not to apply. The remainder from 2019 is suspended until the partnership generates enough taxable income or excess interest income passes to the partner.

Believe it or not, this mess potentiates a planning opportunity: Explore the effect of an election to use 2019 ATI to compute your 2020 business interest limitation. The election may create additional 2020 NOL's which could be carried back to previous tax years under the Net Operating Loss modifications we discuss below.

TCJA Rules that still apply: Exemption

The single most important fact about the business interest limitation: Many Small Businesses are exempt from both the pre- and post-CARES provisions. TCJA excludes businesses that satisfy the "Small Business exemption"[24] – businesses that 1) are not "Tax Shelters." AND have average annual gross receipts of $26 million or less for the previous three years.[25]

As you might expect, there are elaborate "Aggregation Rules" that limit businesses with excessively clever attorneys from skirting the rules using purely structural arrangements. (We do not discuss these rules – other than to note their existence - as they are both complex and seldom applicable to Small Business groups. If you believe they apply to your business, or you are curious, see "FAQs Regarding the Aggregation Rules Under Section 448(c)(2) that Apply to the Section 163(j) Small Business Exemption"

By its own terms, TCJA exempts several trades or businesses from the Business Interest Limitation.[x] Most prominently, TCJA exempts "Certain real property trades or businesses that elect to be excepted" from the limit. Notice 2020-59 creates a safe harbor that allows taxpayers who manage or operate qualified residential living facilities to treat that business as a real property trade or business solely for purposes of qualifying as an electing real property trade or business.

There is, however, a price for the election: If you make the election for a real property business. Then your

- Nonresidential real property,
- Residential rental property, and

[24] IRC § 488(c)

[25] The Code states $25 million, which is indexed to inflation. As of 2019, the indexed value is $26 million.

- Qualified Improvement Property.

must be depreciated using the alternative depreciation system (ADS) and is not eligible for bonus depreciation under IRC § 168(k). Farm businesses face similar restrictions. (See the Endnotes for additional information, including how the election is made.)

If You Do Not Qualify for the Exemption (Computing the Deduction Limit)

If your business is lucrative enough (or unfortunate enough) to fail the exemption test, then TCJA-CARES limits your Annual Net Business Interest deductions to 50% of your businesses Adjusted Taxable Income (ATI) in 2019 and 2020. The rule reverts to the original 30% limit for 2021 and subsequent years.

Definition: Annual Net Business Interest is

- the amount of interest paid or accrued by the business during the year less
- the amount of interest income included in taxable income for the year.

The original TCJA limit allowed you to deduct up to 30% of your Adjusted Taxable Income. The Service later clarified that the limit applies to Adjusted Taxable Income plus 100% of Business Interest Income.

Calculate Adjusted Taxable Income (ATI) by determining taxable income for the taxable year as if section 163(j) does not limit any interest deduction, and then adding and subtracting from it:

Additions: business interest expense; Net Operating Loss deduction; deduction for qualified business income under section 199A; depreciation, amortization, or depletion; capital loss carrybacks or carryovers; and any deduction or loss not properly allocable to a non-excepted trade or business.

Subtractions: business interest income; floor plan financing interest expense; the lesser of (i) gain realized on sale or disposition of property or (ii) deductions for depreciation, amortization or depletion taken for such property during a tax year beginning after 2017 (and similar adjustments for sales or dispositions of property held by a partnership or member of a consolidated group upon the sale or other disposition of the partnership interest or stock of the member); and any income or gain that is not properly allocable to a non-excepted trade or business.

For taxable years beginning after 2021, deductions for depreciation, amortization, or depletion are not considered when calculating ATI. (Presumably, CARES does not change this)

Certain other adjustments apply for some types of taxpayers. See §1.163(j)-1(b)(1) of the proposed regulations.

This calculation becomes so convoluted that most professional tax software did not fully implement it in 2019. That probably indicates that you will need professional help to navigate through it.

If your Business Interest Expense exceeds the applicable threshold, the disallowed Excess Business Interest Expense ("EBIE") is carried forward indefinitely.

Partnership EBIE is passed through to the partners and reduces the adjusted basis of their partnership interest; the partners must carry over their respective share of EBIE to the next tax year, and may

generally only treat EBIE carried over as "paid or accrued" to the extent that the partnership that generated EBIE generates sufficient excess taxable income ("ETI", which is generally going to be the portion of ATI that hasn't been utilized to deduct BIE at the partnership level). The CARES act temporarily modifies these rules for 2019 and 2020.

Corporate AMT

TCJA repealed the Alternative Minimum Tax ("AMT") for corporate taxpayers effective for tax years beginning after December 31, 2017. However, it allowed taxpayers to claim refundable AMT credits over the period 2018-2021. The Cares Act accelerates the allowance of refundable AMT tax credits to tax years 2018-2019 and provides expedited refund procedures that allow corporations to obtain additional cash flow.

The rollback of the NOL Rules will also impact corporate Alternative Minimum Tax calculations. See the NOL section, Below.

Minimum Required Contributions for Single-Employer Plans

IRC § 430 was added to the Code by the Pension Protection Act of 2006 (PPA), P.L. 109-280. The Service issued regulations[26] for IRC § 430 in late 2015, effective for plan years beginning on or after 1/1/2016. IRC § 430 specifies the rules that apply to minimum funding for single-employer defined benefit plans.

Among those rules is a funding deadline: Payment of any required minimum contribution to the plan must be made by 8½ months after the end of the plan year. Funding shortfalls for earlier plan years must be made up by making quarterly payments of 25% of the required annual payment. The regulations provide the due dates for each installment, and they permit the plan sponsor to make a standing election to allow the enrolled actuary to use the funding standard carryover balance and the prefunding balance to satisfy any otherwise unpaid portion. This election may be suspended by written notice to the actuary.

CARES does not alter any of the technical or calculational aspects of IRC § 430. It extends the 2019 payment-funding date to 2021 from 2020. This is one of a number of CARES provisions that extends funding or payment dates in the interest of preserving business' liquidity.

We give this issue only minimal attention – primarily because there are not very many of these plans out there, and most of them are under professional management and administration. If you need help with this – give us a call or an email.

Technical Amendment Regarding Qualified Improvement Property.

TCJA included a drafting error that required "Qualified Improvement Property" to be depreciated over the same 39 years as the building itself. Under the TCJA, Qualified Improvement Property includes interior improvements to nonresidential property which is placed in service after the building itself is placed in service. Improvements to the structure of the building and elevators and escalators are excluded from the definition of Qualified Improvement Property. TCJA was meant to allow Qualified Improvement Property to be depreciated as personal property, generally over 5-15 years, and to be eligible for bonus depreciation. However, the drafting error

[26] C.f. T.D. 9732

precluded this. Thus, under TCJA as drafted, Qualified Improvement Property had to be depreciated over 39 years and was not eligible for bonus depreciation.

This CARES Act eliminated this drafting error. You are now allowed to claim bonus deprecation for the costs associated with improving facilities instead of depreciating those improvements over the 39-year life of the building. Further, this provision states that taxpayers may treat the change in law as if it was always in the law. Thus, the change applies to 2018 and 2019. Accordingly, you should analyze your depreciation schedules to determine whether to file amended returns to claim additional deductions under the bonus depreciation rules for improvements made to their facilities in those years.

Don't Forget the Work Opportunity Credit

The Work Opportunity Tax Credit (WOTC) is not part of the COVID Response matrix, but it is useful to remember it none-the less.

WOTC fulfils many of the same objectives the Response matrix addresses: sustaining and creating employment, defraying employers' wage and salary expense, and injecting liquidity into your company and the economy.

The WOTC was reinstated and extended as part of the Protecting Americans from Tax Hikes Act of 2015 (the PATH Act). WOTC allows employers to claim a credit for wages and salaries paid to all targeted-group employee categories. The credit applies to wages and salaries paid between December 31, 2014 and before January 1, 2021 (not inclusive). Tax-exempt employers may claim the WOTC for Qualified Veterans who begin work for the employer after December 31, 2014 and before January 1, 2021.

The WOTC Credit is 25-40% of first year wages paid to qualified recipients, and 50% of second year wages paid to long-term family assistance recipients.[27] The credit is limited to the amount of the business income tax liability or social security tax owed.

- Taxable businesses may apply the credit against its business income tax liability. Carry-back and carry-forward rules apply.
- For tax-exempt organizations, the credit is limited to the amount of employer social security tax owed on wages paid to all employees for the period the credit is claimed.

WOTC is allowed for new hires who belong to one or more targeted populations.[xi] WOTC is used most frequently to hire "Qualified Veterans" and/or "Qualified Long-Term Unemployment Recipients but also applies to other targeted groups (disingenuously lumping convicted felons and the long-term unemployed into the same basket)

[27] See IRS Form 5884 (with instructions) or IRS Form 5884-C, Work Opportunity Credit for Qualified Tax-Exempt Organizations Hiring Qualified Veterans.

A "Qualified Veteran" is a veteran who is any of the following:[28]

- A member of a family receiving assistance under the Supplemental Nutrition Assistance Program (SNAP) (food stamps) for at least 3 months during the first 15 months of employment.
- Unemployed for a period totaling at least 4 weeks (whether or not consecutive) but less than 6 months in the 1-year period ending on the hiring date.
- Unemployed for a period totaling at least 6 months (whether or not consecutive) in the 1-year period ending on the hiring date.
- A disabled veteran entitled to compensation for a service-connected disability hired not more than one year after being discharged or released from active duty in the U.S. Armed Forces.
- A disabled veteran entitled to compensation for a service-connected disability who is unemployed for a period totaling at least six months (whether or not consecutive) in the one-year period ending on the hiring date.

A Qualified Long-Term Unemployment Recipient is one who has been unemployed for not less than 27 consecutive weeks at the time of hiring and received unemployment compensation during some or all or the unemployment period.

You must obtain certification that an individual is a member of the targeted group, before you may claim the credit. To obtain certification, file Form 8850, Pre-Screening Notice and Certification Request for the Work Opportunity Credit, with your state workforce agency within 28 days after the eligible worker begins work.[29]

Taxable employers claim the tax credit as a general business credit on Form 3800 against their income tax by filing: Form 5884 (with instructions), and Form 3800 (with instructions) along with your business's related income tax return and instructions (i.e., Forms 1040 or 1040-SR, 1041, 1120, etc.)

Tax-exempt employers[30] claim the credit against the employer social security tax by separately filing Form 5884-C, Work Opportunity Credit for Qualified Tax-Exempt Organizations Hiring Qualified Veterans. File Form 5884-C after filing your employment tax return for the period that the credit is claimed (e.g. your quarterly Form 941). We, and the Service both recommend that you do not reduce your required deposits in anticipation of any credit. The credit does not offset the Social Security tax liability reported on your employment tax return.

[28] See IRS Notice 2012-13 (PDF) for more detailed information. It is also a good idea to review the candidate's DD214. Determine whether their MOS and experience matches your needs and fits with your company culture. The DD214 often reveals abilities and qualifications (e.g. foreign language proficiency) that you might like to have on your team.

[29] State procedures, and to some extent requirements, differ. contact your state workforce agency with your processing questions for Forms 8850.

[30] Qualified tax-exempt organizations described in IRC Section 501(c) and exempt from taxation under IRC Section 501(a)

Things that Affect Both Individuals and Business Entities

Net Operating Losses

In yet another move that rolls back provisions of TCJA, The CARES Act amends IRC § 172(b)(1) to provide for a carryback of Net Operating Losses (NOL) arising in a taxable year that begins after December 31, 2017, and ends before January 1, 2021. The NOL is carried back to each of the five taxable years preceding the taxable year in which the loss arises (the carryback period). For tax years beginning before 2021, TCJA's 80% of income limitation for NOL deductions is temporarily repealed.

For losses incurred in tax years 2018, 2019 and 2020, a five-year carryback is allowed (taxpayers can elect to forgo the carryback). This law also applies to pass-through businesses and sole proprietorships

Note that this, for all intents and purposes, rolls back the changes made by the Tax Cuts and Jobs Act – delaying their application until 2021, and restoring pre-TCJA precedent. As such, it should be familiar territory to your tax planner.

The CARES Act makes three changes to NOLs (each aimed at improving cash flow-liquidity for your businesses: CARES

- Restores the pre-TCJA five-year carryback for losses earned in 2018, 2019, or 2020.
- Suspends TCJA's NOL limit of 80 percent of taxable income.
- Extends this treatment to Pass-Through Businesses owners may use NOLs to offset their non-business income above the previous limit of $250,000 (single) or $500,000 (married filing jointly) for 2018, 2019, and 2020.

Wrinkles

- Because you have already filed your 2018, and possibly your 2019 return as well – you must amend prior returns to take advantage of the new-old NOL provisions. Amended returns seeking refunds for earlier years must be filed by the due date, including extensions, of your return for the first taxable year ending after the enactment of the CARES Act. Thus, calendar year taxpayers have until March 15, 2021 (or September 15, 2021 if the return due date is extended) to file refund claims. There are special provisions for REITs (denying carrybacks for any year the REIT was a REIT) and for companies that recognize foreign income under the "Subpart F" rules of the Code.
- The rollback of the NOL Rules will also impact corporate Alternative Minimum Tax calculations. See the "Corporate AMT" section for details. The IRS has developed guidelines to address this change – but has not adopted formal and binding standards or rules.

High Deductible Health Plans

CARES amends the rules for high-deductible health plans (HDHPs) to allow them to cover telehealth and other remote care services without imposing a deductible. Additional over-the-counter items now qualify.

Telehealth and other remote care services are temporarily classified as "categories of coverage that are disregarded for the purpose of determining whether an individual who has other health plan coverage in addition to an HDHP." Thus, you may contribute to an HSA despite receiving coverage for telehealth and other remote care services before satisfying the HDHP deductible, or despite receiving coverage for

these services outside the HDHP. The temporary rules under the CARES Act, as extended by IRS Notice 2020-29 (PDF), apply to services provided on or after Jan. 1, 2020, with respect to plan years beginning on or before Dec. 31, 2021.

CARES also modifies the rules for tax-advantaged accounts (HSAs, Archer MSAs, Health FSAs, and HRAs) to permit reimbursement of additional "qualified medical expenses" including menstrual care products. The new rules apply to amounts paid after Dec. 31, 2019. Taxpayers should save receipts of their purchases for their records and so that they are able to submit claims for reimbursements.

Apart from Notice 2020-29 (PDF) and some superficial coverage on their website, IRS has provided no significant illumination on this issue.

Charitable Contributions

CARE increases Charitable Contribution limits for 2020 charitable contributions to

- 100% of AGI for individuals (increased from 60%),
- 25% of taxable income for corporations (increased from 10%), and
- 15% to 25% for business contributions of food inventory for the care of the ill, needy or infants.

Wrinkles: CARES

- Does not change the definition of "Qualified Organization"[xii]
- Does not change documentation, substantiation and due diligence standards for Charitable Contributions
- Creates a charitable "above the line" (adjustment to gross income) deduction for up to $300. We are not impressed, but we will take it.

CARES does not suspend any of the procedural requirements that attend large donations, including the quid-pro-quo, Contemporaneous Written Acknowledgement, or Qualified Appraisal rules. It overrides the top-tier personal income tax itemization scheme with a blanket 100% of AGI deductibility limit. However, under the Act: a "*qualified charitable contribution" is a charitable contribution: a) made in cash; b) allowable under IRC §170; c) made to an organization described in IRC §170(b)(1)(A) (i.e. 501(c)(3) and certain other charitable organizations), and not a supporting organization described in IRC §509(a)(3); and d) is not for the establishment of a new, or maintenance of an existing, donor advised fund. In addition, a qualified charitable contribution does not include any amount which is carried over from a prior tax year*.

- Hence, donations to private foundations, donor advised funds, and supporting organizations do not qualify for the extended itemization limit. They are still subject to the Code's multi-tiered (60/30/20) deduction limits. Carryovers are, likewise, not eligible. They retain the character they acquired when they were made.

In our opinion. Individual Donors should, without exception, allocate the first three hundred dollars of charitable deduction to the newly created adjustment to gross income.

More Old News – IRC 139 Qualified Disaster Relief Payments

Like the Work Opportunity Credit, IRC § 139 is not formally part of the COVID Response Matrix. It may, however, represent a tax planning opportunity that provides benefits to you and your employees.

IRC § 139 was enacted in 2002 in response to the 911 attacks. IRC § 139 allows employers to make "Qualified Disaster Relief Payments" to their employees. If you follow the rules in IRC § 139 the payments are tax-free to the employee but deductible to the employer.

IRC § 139 is triggered when an employer makes payments designated as "Qualified Disaster Relief Payments." Qualified Disaster Relief Payments include amounts paid to or for the benefit of an individual to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a "Qualified Disaster" if the expense is not covered by insurance or otherwise reimbursable. IRS Notice 2020-18 appears to indicate that the shelter in place orders and other governmental actions taken in respect of COVID-19 meet the definition of a Qualified Disaster for purposes of IRC § 139.

IRC § 139 treatment does not apply to all payments made by an employer. If a payment is made to replace lost income (such as payments for sick leave or family medical leave) it is not eligible for IRC § 139 treatment. In contrast, payments made by an employer to help an employee pay expenses related to rent, groceries, and other household expenses that are attributed to the COVID-19 pandemic (and are not otherwise covered by insurance) may qualify.

We note that IRC § 139 has never been used for a national pandemic and, historically it has only been used for local disasters, such as hurricanes, floods, and tornadoes. We continue to examine IRC § 139 as an opportunity for employers to make "Qualified Disaster Relief Payments" to their employees in a manner that is tax-free to the employee but deductible to the employer.

Payroll Protection Program (PPP); PPP Loan Forgiveness,

A Brief History of the PPP Program

Congress created the PPP as part of the $2 trillion CARES Act. The legislation authorized Treasury to use the SBA's 7(a) Small Business lending program to fund forgivable loans of up to $10 million per borrower[xiii] that qualifying businesses could spend to cover payroll costs, mortgage interest, rent, and utilities.

The loans were available to Small Businesses with 500 or fewer employees that were in operation on Feb. 15[xiv], Loans were also available to not-for-profits, veterans' organizations, Tribal concerns, self-employed individuals, sole proprietorships, and independent contractors.[xv] [xvi] [xvii] The limits were not rigid: Businesses in some industries who had more than 500 employees could apply for loans.[xviii]

Congress designed the loans to support organizations facing economic hardships caused by the coronavirus pandemic, allowing them to continue paying employee salaries.

A Key Provision: PPP loans will be forgiven in full if the borrowed funds are used for payroll and eligible expenses and other criteria are met.

Small Businesses swamped banks and the SBA with PPP loan requests when the program launched in early April. The initial $349 billion allocated to the program was fully committed in less than two weeks. Congress then allocated an additional $310 billion to the program. Applications for PPP loans from the second tranche dropped dramatically amid concerns about the program's original loan forgiveness terms and backlash against well-capitalized businesses, including several that are publicly traded, that received PPP funds. Several of those businesses returned the funding after public and political outcry, but the well had already gone sour. When the program "ended," something like $100 million of lendable funds were left on the table.

Acknowledging business concerns about both loan absorption and repayment terms, Congress passed legislation that eased both burdens. Relief was a bit too late to incentivize prospective borrowers, but a boost to those who had already received PPP funds.

Despite all the sturm-und-drang, the controversy is water under the bridge at this point. Ultimately the SBA approved nearly 4.7 million loans that total $515 billion.

Barring a "CARES 2" (which, at the moment seems a distinct possibility) the PPP's application and funding period is now complete.[31] Hence, we won't spend a lot of time on how the loans were instigated.

PPP Loan Forgiveness or Payback

The next step in the PPP saga is for businesses to request loan forgiveness, pay back unused funds, and report the resulting data on their tax returns.

The initial terms and requirements for PPP loan forgiveness were quite restrictive.

- The period during which loan recipients could spend PPP funds and qualify for loan forgiveness was eight weeks.
- To obtain forgiveness, 75% of PPP funds had to subsidize wages.
- The initial loan repayment term, for funds that were not expended on qualified expenses, was set at two years

In addition, the IRS initially opined (probably correctly under then applicable law)[xix] that expenses paid by or allocated to PPP funds would not be tax deductible. Faced with opposition to that notion (in the form of Senate Bill 3612) the Service has retreated from, but not retracted, their initial posture – but have indicated they will not pursue this issue in future examinations. Meanwhile (as of August 1) SB 3612 remains in the Senate Finance Committee backlog. Bottom Line: There is, as yet no definitive answer to the question: Are expenses incurred using PPP money deductible?

Despite PPP's limitations, businesses queued up to get funded. In many cases, borrowers' remorse followed closely. (As it became clear that a PPP loan closes off other funding or relief avenues.)

[31] Several banks still offer extended PPP loan availability, apparently with Treasury authorization. "Officially" the program has ended.

Recognizing an impending train wreck when they see one, SBA and Treasury eased the restrictions and terms of the PPP program. The easing was, eventually, reflected in legislation as The Paycheck Protection Program Flexibility Act of 2020 (P.L. 116-142). Among other things, the Act:

- Expands the "Covered Expenditure Period" for loan forgiveness to 24 weeks from eight weeks;
- Reduces the portion of proceeds that must be spent on payroll costs to 60% from 75%;
- Extends the PPP loan term for unexpended funds to five years from two;[xx]
- Clarifies safe harbors related to salary and hourly wage reductions and reductions in the number of employees (full-time equivalents) you employ;[xxi]
- Establishes of a safe harbor for businesses that have been unable to return to the level of business activity they had before the COVID-19 pandemic due to compliance with health and safety guidelines that slow the spread of the virus,
- Allows borrowers to choose which terms (the original or the "eased" terms) applies to their loan; and
- Includes anti-abuse provisions that limit the amount and proportion of loan funds that can be used to support owner salaries.

To be sure, there are still some odd inconsistencies in the forgiveness algorithm (For example, S corporation owners' health insurance costs are not included when calculating allowable payroll costs. However, S corporation owners' retirement costs are included.)

Apart from some changes to your payroll accounting system, the Flexibility Act imposes no novel logistic issues. (Something that is not true of, for example, the Small Business Credit for Paid Sick Leave).

Earlier this week, (We are now in the last week of June 2020) SBA and Treasury issued a standard application for loan forgiveness, and a simplified forgiveness application intended for use by sole proprietors Both come with extensive but readable instructions. (Standard Application Instructions) (Simplified Application Instructions) However, lenders are not required to use the "Standardized Forms" for Debt Forgiveness. Lenders may design their own forms. Thus, Lenders may impose greater or smaller compliance burdens than those the SBA contemplates.[xxii]

The Standard Applications provide a framework to determine the appropriate amounts of qualifying expense,[xxiii] and consequently, the amount of PPP debt forgiveness. The worksheets do an adequate job of identifying "exclusions" that do not qualify for forgiveness.[xxiv] However they are not designed to accommodate every case. You, or your accountant, may need to supplement the standard forgiveness application with attached worksheets.

You apply through your lender for forgiveness on your PPP loan. To do that, you

- Document and verify the number of covered employees on your payroll and their pay rates (This can be accomplished by reproducing IRS and State payroll tax filings, unemployment insurance filings, and/or Workers' Compensation reports).
- Document and verify payments for covered mortgage obligations, lease obligations, and utilities.
- Certify that the documents are true and that the amount that is being forgiven was used in accordance with the program's guidelines for use. (A representative who is authorized by the business must certify the reports and documentation. This will usually be an officer or director)

These payroll costs are included in the payroll calculation:[xxv]

- Compensation (salary, wage, commission, or similar compensation, payment of cash tips or equivalent)
- Vacation, parental, family, medical, or sick leave payments
- Allowances for dismissal or separation
- Group health care benefits, including health insurance premiums and Employer HAS funding
- Retirement benefit
- State or local tax assessed against the business on the employee compensation

These costs are excluded from the payroll calculation:

- Employee/owner compensation over $100,000
- Taxes imposed or withheld under chapters 21, 22, and 24 of the IRS code.
- Compensation paid to employees whose principal place of residence is outside of the U.S
- Sick and family leave payments for which a credit is allowed under the Families First Coronavirus Response Act

Other costs may be included in the PPP forgiveness calculation but they may not exceed 40% of includible costs. A summary of includible cost would specify:

- Payroll costs (as noted above)
- Costs to continue group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums
- Employee salaries, commissions, or similar compensations (see exclusions above)
- Interest Payments on business mortgage obligations (not including prepayment of or payment of principal on a mortgage obligation)
- Rent (including rent under a lease agreement)
- Utilities, and
- Interest on any other debt obligations incurred before the covered period

Wrinkles

- There is currently a great deal of debate about how businesses should report PPP loan forgiveness for financial statement purposes. What is clear, is that any method used for statement purposes will introduce a permanent book-tax accounting difference … a situation that will probably drive your accountant (and possibly your bankers) to distraction for years.
- PPP Forgiveness represents a convergence of two issues we identified as critical back in January. You maximize your PPP forgiveness if you classify workers as employees rather than contractors.
- It is unclear how failures to achieve full forgiveness will be handled: both for financial statements and in dealing with SBA-Treasury. The Act treats any PPP funds that are not forgiven as a five year fully amortizing loan.

Economic Injury Disaster Grants and Loans

Who is eligible for an Emergency Economic Injury Grant?
Answer: Those eligible for an EIDL who have been in operation since January 31, 2020, when the public health crisis was announced.

How long are Emergency Economic Injury Grants available?
Answer: January 31, 2020 – December 31, 2020. The grants are backdated to January 31, 2020 to allow those who have already applied for EIDLs to be eligible to receive a grant.

Economic Injury Disaster Loans (EIDL) provide Small Businesses with the capital needed to stay afloat amid the economic fallout from the COVID-19 pandemic. Whereas PPP loans are attractive because they are forgivable. EIDL loans offer features that make them attractive to businesses that cannot qualify (or do not wish to make the attempt) for PPP loans.

- EIDL loans were (are) decidedly less popular than PPP's "free money." Among practitioners, 8% report that they assisted clients to procure EIDL loans – 56% report assistance to PPP applicants. Nevertheless, EIDL loans have a number of features that make them a good fit for many Small Businesses:
    - Low Interest Rate: EIDL rates are fixed at 3.75% APR for most borrowers and 2.75% for not-for-profits.
    - Broad Availability: The EIDL program is available to businesses with 500 or fewer employees. Further – and in contrast to PPP, EIDL Loans are available to Sec. 501(c)(6) organizations (business leagues, chambers of commerce, real estate boards, boards of trade, and professional football leagues), which for reasons known only to avid readers of the Congressional Record were excluded from the CARES act PPP regime.
    - Long Payback Periods and payment deferral:
        - EIDL loans offer one of the longest terms among the emergency loans available for pandemic relief; 30 years.
        - Initial interest and principal payments may be deferred for 12-months.

To obtain an EIDL Loan you must prove economic injury. That bar is not set particularly high: you must prove you (your business) has been unable to meet its operating expenses as a result of a disaster (in this case, the pandemic). At the risk of seeming cavalier – one look at your overdraft notices should be all the proof needed. (It is, of course, more complicated than that.)

The main drawbacks to the EIDL program:

- EIDL funds cannot be used to pay the same expenses that a PPP loan covers ("double dipping" is prohibited – it is defined as fraud in the statute)
- The first $10,000 of EIDL funds you receive reduces your eligibility for PPP loan forgiveness.
- The EIDL loan limit is currently $150,000. Normally, the SBA limit for the program is $2 million. The SBA reduced assistance during the coronavirus crisis, to assist more borrowers.

To apply for an EIDL online, visit https://disasterloan.sba.gov/ela/. Your SBA District Office is an important resource when applying for SBA assistance.

SBA has Other, Ongoing Loan Programs

They're not new, they are not part of the COVID Recovery matrix, and nobody seems to be touting them – but they are still effective,

SBA 7(a) loans are an affordable loan product for loans up to $5 million. They are designed for borrowers who lack credit elsewhere and need access to versatile financing for short- or long-term

working capital; to purchase an existing business; refinance current business debt; or purchase furniture, fixtures and supplies.

Banks share the risk of an SBA 7(a) loan with SBA. There are many different types of 7(a) loans. Visit the SBA site to find the one that is best for you. Formally, you apply for an SBA 7(a) loan with a bank or a mission-based lender. SBA has a free referral service tool called Lender Match to help find a lender near you.

The SBA 504 Loan Program provides loans of up to $5.5 million to approved Small Businesses. SBA 504 loans feature long-term, fixed-rate financing. They can be used to acquire fixed assets for expansion or modernization. The SBA 504 program is a good option if you need to purchase real estate, buildings, and machinery. You apply for an SBA 504 loan through a Certified Development Company, a nonprofit corporation that promotes economic development. SBA has a free referral service tool called Lender Match to help find a lender near you.

The ***SBA Microloan Program*** provides loans up to $50,000 to help Small Businesses and certain not-for-profit childcare centers start up and expand. The average SBA Microloan is about $13,000. These loans are delivered through mission-based lenders who also provide business counseling. SBA has a free referral service tool called Lender Match to help find a microlender near you.

Sources of this chaos: Relief from some of it (maybe)

Families First Coronavirus Response Act, H.R. 6201

- **DOL Website: General Discussion** Families First Coronavirus Response Act: Questions and Answers

- **Small Business Credit for Paid Sick Leave or Medical Leave**
  - IRS Website: New Employer Tax Credits
  - IRS Website: COVID-19-Related Tax Credits for Paid Sick and Paid Family Leave: Overview
  - IRS Website: COVID-19-Related Tax Credits: General Information FAQs
  - IRS Website: Specific Provisions Related to Self-Employed Individuals at Question 60 et. seq.
  - IRS Website: COVID-19-Related Tax Credits: How to Claim the Credits
  - IRS (Form, Instructions, and Narrative) About Form 7200, Advance Payment of Employer Credits Due to COVID-19
  - Journal of Accountancy: Employer tax credits form, employee retention credit guidance posted
  - AICPA: CARES Act and Families First Coronavirus Response Act Summary
  - IRS Website: Treasury, IRS and Labor announce plan to implement Coronavirus-related paid leave for workers and tax credits for small and midsize businesses to swiftly recover the cost of providing Coronavirus-related leave
  - Recapture Regulations
  - Guidance on Reporting Qualified Sick Leave Wages and Qualified Family Leave Wages Paid Pursuant to the Families First Coronavirus Response Act (IRS Notice 2020-54)
  - COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs (IRS FAQ)

CARES Act, H.R. 748, P.L. 116-136. (Personal Provisions)

- **Stimulus Payments (CARES Act)**
  - Treasury Website: The CARES Act Provides Assistance to Workers and their Families
  - IRS Website: "Economic Impact Payment Information Center"
  - SSA Website: Economic Impact Payments Paid by the CARES Act (Why didn't they call this an FAQ?)
  - Legal Council for Health Justice: FAQ: CARES ACT STIMULUS PAYMENTS

- **Stimulus Payments (Health, Economic Assistance, Liability Protection, and Schools Act - HEALS Act)**
  - Senate Record, HEALS Act: SB 1624
  - Wikipedia: HEALS Act
  - Kiplinger: Second Stimulus Check Update: HEALS Act vs. CARES Act

- **Extended Unemployment:**
  - DOL Website "Unemployment Insurance Relief During COVID-19 Outbreak"
  - CA EDD Website: Federal CARES Act Provisions for Unemployment
  - DOL Website "Unemployment Insurance Relief During COVID-19 Outbreak"
  - CBS: Democrats reject White House offer for short-term extension of unemployment benefit (This article's title is inaccurate and possibly misleading. The HEALS Act was neither debated nor voted in the Democrat controlled House. Democrats did, however, declare it DOA if it

managed to pass the Senate.)

- **Minimum Required Distributions Deferred**
  - Pre-CARES Rules
    - IRS Website: Retirement Plan and IRA Required Minimum Distributions FAQs
    - Regulations: 26 CFR § 1.401(a)(9)-6 - Required minimum distributions for defined benefit plans and annuity contracts
    - FINRA Website: Required Minimum Distributions—Common Questions About IRA Accounts
  - CARES Provisions
    - IRS Rulings: Notice 2020-51 (PDF)
    - IRS Website: IRS announces rollover relief for required minimum distributions from retirement accounts that were waived under the CARES Act

- **Penalty Free (and Expanded) Retirement Plan Distributions and Loans**
  - CARES Provisions
    - Guidance for Coronavirus-Related Distributions and Loans from Retirement Plans Under the CARES Act (IRS Notice 2020-50)
    - IRS Website: Coronavirus-related relief for retirement plans and IRAs questions and answers
    - FINRA Website: CARES Act 2020: Retirement Fund Access and Student Loan Relief

CARES Act, H.R. 748, P.L. 116-136. (Small Business Provisions)

- **General Information, SBA:** The Small Business Owner's Guide to the CARES Act
- **Small Business Credit for Employee Retention**
  - IRS Website: New Employer Tax Credits
  - IRS Website: COVID-19-Related Employee Retention Credits: General Information FAQs
  - IRS Website: Employee Retention Credit
  - Treasury: Employee Retention Tax Credit: What You Need to Know
  - Journal of Accountancy: Employer tax credits form, employee retention credit guidance posted
  - AICPA: CARES Act and Families First Coronavirus Response Act Summary
  - IRS Website: FAQs: Employee Retention Credit under the CARES Act
  - IRS Publication 5419: New COVID 19 Employer Tax Credits – Employee Retention Credit - (Flowchart)
  - IES Website: COVID-19-Related Tax Credits: How to Claim the Credits
  - IRS (Form, Instructions, and Narrative) About Form 7200, Advance Payment of Employer Credits Due to COVID-19

- **Employer Payroll Tax Payment Deferral**
  - IRS Website: Deferral of employment tax deposits and payments through December 31, 2020
  - IRS Notice 2020-22: Relief from Penalty for Failure to Deposit Employment Taxes

- **Excess Business Loss Limitation**
  - TCJA Provisions and restrictions
    - IRS Website: (Yeah, this is really about all there is) Excess Business Losses

        - AICPA: New limitation on Excess Business Losses
    - CARES Act Provisions
        - IRS Website: Limitation on business losses for certain taxpayers repealed for 2018, 2019, and 2020
        - AICPA: AICPA Requests Additional Guidance and Relief for Limitations on Excess Business Losses of Noncorporate Taxpayers

- **Business Interest Limitation**
    - TCJA Provisions and restrictions
        - IRS Website: Basic questions and answers about the limitation on the deduction for business interest expense
        - IRS Website: IRS issues final regulations and other guidance on business interest expense deduction limitation
        - IRS Website: FAQs Regarding the Aggregation Rules Under Section 448(c)(2) that Apply to the Section 163(j) Small Business Exemption
        - Final Regulations, Federal Register: Limitation on Deduction for Business Interest Expense
        - Journal of Accountancy: IRS issues business interest expense limitation guidance
    - CARES Act Provisions
        - CPA Practice Advisor: CARES Act Changes Rules for Business Interest Deductions

- **Corporate AMT**
    - (IRS Website FAQ) Questions and Answers about NOL Carrybacks of C Corporations to Taxable Years in which the Alternative Minimum Tax Applies

CARES Act, H.R. 748, P.L. 116-136. (Mixed, Personal Small Business Provisions)

- **Net Operating Losses**
    - IRS: Rev. Proc. 2020-24 (Carryback of 2018-2020 NOLS)
    - IRS: Temporary Procedure for Electing and Reporting NOL Elections
    - IRS Website: Frequently asked questions about carrybacks of NOLs for taxpayers who have had Section 965 inclusions

- **High Deductible Health Plans**
    - IRS Notice 2020-29: COVID-19 GUIDANCE UNDER § 125 CAFETERIA PLANS AND RELATED TO HIGH DEDUCTIBLE HEALTH PLANS, Yeah, really – all caps!
    - IRS Website: IRS outlines changes to health care spending available under CARES Act

- **Charitable Contributions**
    - (IRS Charitable Contributions Page): Temporary Suspension of Limits on Charitable Contributions

The Paycheck Protection Program (Part of the CARES Act)

- US Treasury Guidelines "PAYCHECK PROTECTION PROGRAM LOANS Frequently Asked Questions (FAQs)"

- The Paycheck Protection Program Flexibility Act of 2020 (P.L. 116-142)

- Business Loan Program Temporary Changes; Paycheck Protection Program – Revisions to Loan Forgiveness Interim Final Rule and SBA Loan Review Procedures Interim Final Rule (SBA and Treasury Joint Release)
- Revised PPP Loan Forgiveness Application and instructions
- EZ PPP Loan Forgiveness Application and instructions

Pension Protection Act, 2006 (PPA), P.L. 109-280

- **Minimum Contribution Provisions**
  - IRC: 26 U.S. Code § 430 - Minimum funding standards for single-employer defined benefit pension plans
  - IRS (Proposed Regulations): TD9732
  - AICPA (Tax Advisor): IRS Final Rules Govern Required Minimum Contributions for Single-Employer Pension Plans
  - IRS Website: Employee Plans News - New Relief for Single-Employer and Multiemployer Defined Benefit Plans

PATH Act - Work Opportunity Tax Credit

- IRS Website: Work Opportunity Tax Credit
- IRS Website: PATH Act Tax Related Provisions
- DOL Website: WOTC Fact Sheet
- IRS Notice: IRS Notice 2012-13 (PDF) [Untitled Notice re: Section 51 - Work Opportunity Tax Credit; Section 52 – Special Rules; Section 3111(e) – Credit for Employment of Qualified Veterans]
- IRS Form: Form 5884 (with instructions) (Work Opportunity Credit)
- IRS Form: Form 5884-C, Work Opportunity Credit for Qualified Tax-Exempt Organizations Hiring Qualified Veterans.
- IRS Form: Form 3800 (with instructions) General Business Credits - Summary)
- IRS Form: Form 8850, Pre-Screening Notice and Certification Request for the Work Opportunity Credit (This form is used to request certification fro your state employment agency)

End Notes

The notes in this presentation are intended to assist tax and financial professionals and ardent do-it-yourselfers. The notes offer a deeper analysis of issues than is commonly appropriate to a seminar presentation designed to familiarize non-professionals with the issues and rules they may confront. Please note that these Endnotes are, for the most part, extracted without editing from relevant source documents. Please do not judge Steven Roy Management's ability to articulate clear thoughts based on this part of our presentation.

Since the PPP loan program has closed, much of the material related to loan qualification, head count, and initial application is predominantly of historical interest. It is included here 1. in case Congress enacts a CARES 2 relief package that employs similar criteria (which seems a likely scenario as of 07/25/2020) and 3. For reference if agencies challenge the bona-fides of the original application, fund grant, and debt forgiveness. At the moment, there seems to be little appetite for the latter examination-audit function, but "times change."

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[i] U.S. citizens and U.S. resident aliens will receive the Economic Impact Payment of $1,200 or $2,400 if they filed married filing jointly and if they are not a dependent of another taxpayer and have a work eligible Social Security number with adjusted gross income up to:

- $150,000 for married couples filing joint returns
- $112,500 for head of household filers and
- $75,000 for all other eligible individuals

Taxpayers will receive a 5% reduction in their payment for the amount their AGI is above these amounts.

Eligible retirees and recipients of Social Security retirement, survivor, or disability benefits (SSDI), Railroad Retirement benefits, Supplemental Security Income (SSI) and VA Compensation and Pension (C&P), who do not file a tax return, will receive a $1,200 payment automatically.

These benefit recipients should refer to the Social Security, Railroad Retirement and Department of Veteran Affairs benefit recipients section of the FAQs for additional information.

For eligible taxpayers who filed tax returns for 2019 or 2018, they receive the payments automatically.

For people who have little or no income and didn't file a tax return or don't receive any of the federal benefits listed above, they are also eligible for an Economic Impact Payment. They need to register with the Non-Filer tool on IRS.gov as soon as possible so they can receive a payment.

Although some filers, such as high-income filers, will not qualify for an Economic Impact Payment, most will.

Taxpayers likely won't qualify for an Economic Impact Payment if any of the following apply:

- You do not have any qualifying children and your adjusted gross income is greater than
  - $198,000 if your filing status was married filing jointly
  - $136,500 for head of household

- $99,000 for all other eligible individuals
- You can be claimed as a dependent on someone else's return. For example, this would include a child, student who can be claimed on a parent's return or a dependent parent who is claimed on their child's return.
- You do not have a Social Security number that is valid for employment.
- You are a nonresident alien.
- You filed Form 1040-NR or Form 1040NR-EZ, Form 1040-PR or Form 1040-SS for 2019.
- An incarcerated individual.
- A deceased individual.
- An estate or trust.

[ii] Qualifying Child for the CTC Extracted and reformatted from material at the linked address.

Child Tax Credit: 26 U.S. Code § 24. Child tax credit. There shall be allowed as a credit against the tax imposed by this chapter for the taxable year with respect to each qualifying child of the taxpayer for which the taxpayer is allowed a deduction under section 151 an amount equal to $1,000.

A child qualifies you for the CTC if the child meets all of the following conditions.

1. The child is your son, daughter, stepchild, eligible foster child, brother, sister, stepbrother, stepsister, half brother, half sister, or a descendant of any of them (for example, your grandchild, niece, or nephew).
2. The child was under age 17 at the end of 2018.
3. The child did not provide over half of his or her own support for 2018.
4. The child lived with you for more than half of 2018 (see *Exceptions to time lived with you* , later).
5. The child is claimed as a dependent on your return. See Pub. 501 for more information about claiming someone as a dependent.
6. The child does not file a joint return for the year (or files it only to claim a refund of withheld income tax or estimated tax paid).
7. The child was a U.S. citizen, U.S. national, or U.S. resident alien. For more information, see Pub. 519, U.S. Tax Guide for Aliens. If the child was adopted, see *Adopted child* , later.
8. If your child is age 17 or older at the end of 2018, see *Credit for Other Dependents (ODC)* , later.

Adopted children.

An adopted child is always treated as your own child. An adopted child includes a child lawfully placed with you for legal adoption.

If you are a U.S. citizen or U.S. national and your adopted child lived with you all year as a member of your household in 2018, that child meets condition (7), earlier, to be a qualifying child for the CTC (or condition (3), later, to be a qualifying person for the ODC).

Exceptions to time lived with you.

A child is considered to have lived with you for more than half of 2018 if the child was born or died in 2018 and your home was this child's home for more than half the time he or she was alive. Temporary absences by you or the child for special circumstances, such as school, vacation, business, medical care, military service, or detention in a juvenile facility, count as time the child lived with you.

There also are exceptions for kidnapped children and children of divorced or separated parents. For details, see your tax return instructions for column (4) of the section on Dependents.

Qualifying child of more than one person.

Special rules apply if a child is the qualifying child of more than one person. For details, see your tax return instructions for column (4) of the section on Dependents and Pub. 501.

SSN Required

In addition to being a qualifying child for the CTC (defined earlier), your child must have the required SSN. The required SSN is one that is valid for employment and is issued by the Social Security Administration before the due date of your 2018 return (including extensions).

If your child was a U.S. citizen when the child received the SSN, the SSN is valid for employment. If "Not Valid for Employment" is printed on your child's social security card and your child's immigration status has changed so that your child is now a U.S. citizen or permanent resident, ask the SSA for a new social security card without the legend. However, if "Valid for Work Only With DHS Authorization" is printed on your child's social security card, your child has the required SSN only as long as the DHS authorization is valid.

If your dependent child was born and died in 2018 and you do not have an SSN for the child, enter "Died" in column (2) of the Dependents section of your tax return and include a copy of the child's birth certificate, death certificate, or hospital records. The document must show the child was born alive.

If your child does not have the required SSN, you cannot use the child to claim the CTC (or ACTC) on either your original or amended 2018 tax return.

Credit for Other Dependents (ODC)

This credit is for individuals with a dependent who meets additional conditions (described later). This credit is in addition to the credit for child and dependent care expenses (on Schedule 3 (Form 1040), line 49, or Form 1040NR, line 47) and the earned income credit (on Form 1040, line 17a).

The maximum amount you can claim for the credit is $500 for each dependent who qualifies for the ODC. But, see *Limits on the CTC and ODC* , later.

For more information about claiming the ODC, see *Claiming the CTC and ODC* , later.

Qualifying Person for the ODC

A person qualifies you for the ODC if the person meets all of the following conditions.

1. The person is claimed as a dependent on your return. See Pub. 501 for more information about claiming someone as a dependent.
2. The person cannot be used by you to claim the CTC or ACTC. See *Child Tax Credit (CTC)* , earlier
3. The person was a U.S. citizen, U.S. national, or U.S. resident alien. For more information, see Pub. 519. If the person is your adopted child, see *Adopted child* , earlier.

Examples
Your 10-year-old nephew lives in Mexico and qualifies as your dependent. He is not a U.S. citizen, U.S. national, or U.S. resident alien. You cannot use him to claim ODC.

Your son turned 17 on December 30, 2018. He is a citizen of the United States and you claimed him as a dependent on your return. You cannot use him to claim the CTC because he was not **under** age 17 at the end of 2018.

[iii] The act initially identified three catastrophes

- The individual's being quarantined, being furloughed or laid off, or having work hours reduced due to COVID-19;
- The individual's being unable to work due to lack of child care due to COVID-19; or
- The closing or reducing hours of a business owned or operated by the individual due to COVID-19.

The service later identified several others: encompassing anyone who suffer adverse financial consequences as a result of:

- Having a reduction in pay (or self-employment income) due to COVID-19 or having a job offer rescinded or the start date for a job delayed due to COVID-19;
- The individual's spouse or a member of the individual's household (as defined below) being quarantined, being furloughed or laid off, or having work hours reduced due to COVID-19, being unable to work due to lack of child care due to COVID-19, having a reduction in pay (or self-employment income) due to COVID-19, or having a job offer rescinded or the start date for a job delayed due to COVID-19; or
- Closing or reducing hours of a business owned or operated by the individual's spouse or a member of the individual's household due to COVID-19.

A "member of the individual's household" is someone who shares the individual's principal residence.

[iv] The FFCRA permits the Department of Labor to provide rules that a business with fewer than 50 employees may use to claim an exemption from providing paid sick leave and expanded family and medical leave for the purpose of caring for a child whose school or place of care is closed or whose child care provider is unavailable due to COVID-19-related reasons if providing these qualified leave wages would jeopardize the viability of their businesses as a going concern. Any business that claims the exemption is not entitled to tax credits for any qualified leave wages that they are exempt from providing.

Also note that the FFCRA permits employers whose employees are health care providers or emergency responders not to provide qualified sick leave or qualified family leave wages to those employees.

For more information about exemptions from the requirement to provide paid sick leave and expanded family and medical leave under the FFCRA, see the Department of Labor's Families First Coronavirus Response Act: Questions and Answers

[v] Qualified sick leave wages are wages (as defined in section 3121(a) of the Internal Revenue Code for social security and Medicare tax purposes) that Eligible Employers must pay eligible employees for periods of leave during which they are unable to work or telework because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
5. is caring for a child of the employee if the school or place of care of the child has been closed, or the child care provider of the child is unavailable due to COVID-19 precautions; or
6. is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

[vi] Qualified family leave wages are wages (as defined in section 3121(a) of the Internal Revenue Code for social security and Medicare tax purposes) that Eligible Employers must pay eligible employees for periods of leave during which they are unable to work or telework due to a need for leave to care for a child of the employee if the child's school or place of care has been closed, or because the child care provider of the child is unavailable, due to COVID-19 related reasons. The first ten days for which an employee takes leave for this reason may be unpaid. However, during that 10-day period, an employee may be entitled to receive qualified sick leave wages as provided under the ESPLA or may receive other forms of paid leave, such as accrued sick leave, annual leave, or other paid time off under the Eligible Employer's policy. After an employee takes leave for ten days, the Eligible Employer must provide the employee with qualified family leave wages for up to ten weeks.

[vii] An Eligible Employer who sponsors a fully-insured group health plan may use any reasonable method to determine and allocate the plan expenses, including (1) the COBRA applicable premium for the employee typically available from the insurer, (2) one average premium rate for all employees, or (3) a substantially similar method that takes into account the average premium rate determined separately for employees with self-only and other than self-only coverage.

If an Eligible Employer chooses to use one average premium rate for all employees, the allocable amount for each day an employee covered by the insured group health plan is entitled to qualified leave wages could be determined using the following steps:

- The Eligible Employer's overall annual premium for the employees covered by the policy is divided by the number of employees covered by the policy to determine the average annual premium per employee.
- The average annual premium per employee is divided by the average number of work days during the year by all covered employees (treating days of paid leave as a work day and a work day as including any day on which work is performed) to determine the average daily premium per employee. For example, a full-year employee working five days per week may be treated as working 52 weeks x 5 days or 260 days. Calculations for part-time and seasonal employees who participate in the plan should be adjusted as appropriate. Eligible Employers may use any reasonable method for calculating part-time employee work days.
- The resulting amount is the amount allocated to each day of qualified sick or family leave wages.

An Eligible Employer who sponsors a self-insured group health plan may use any reasonable method to determine and allocate the plan expenses, including (1) the COBRA applicable premium for the employee typically available from the administrator, or (2) any reasonable actuarial method to determine the estimated annual expenses of the plan.

If the Eligible Employer uses a reasonable actuarial method to determine the estimated annual expenses of the plan, then rules similar to the rules for insured plans are used to determine the amount of expenses allocated to an employee. That is, the estimated annual expense is divided by the number of employees covered by the plan, and that amount is divided by the average number of work days during the year by the employees (treating days of paid leave as work days and any day on which an employee performs any work as work days). The resulting amount is the amount allocated to each day of qualified sick or family leave wages.

The amount of qualified health plan expenses does not include Eligible Employer contributions to HSAs or Archer MSAs. Eligible Employers who sponsor an HDHP should calculate the amount of qualified expenses in the same manner as an insured group health plan, or a self-insured plan, as applicable.

The amount of qualified health plan expenses may include contributions to an HRA (including an individual coverage HRA), or a health FSA, but does not include contributions to a QSEHRA. To allocate contributions to an HRA or a health FSA, Eligible Employers should use the amount of contributions made on behalf of the particular employee.

[viii] Employers, including tax-exempt organizations, are eligible for the credit if they operate a trade or business during calendar year 2020 and experience either:

- the full or partial suspension of the operation of their trade or business during any calendar quarter because of governmental orders limiting commerce, travel, or group meetings due to COVID-19, or
- a significant decline in gross receipts.

A significant decline in gross receipts begins:

- on the first day of the first calendar quarter of 2020
- for which an employer's gross receipts are less than 50% of its gross receipts
- for the same calendar quarter in 2019.

The significant decline in gross receipts ends:

- on the first day of the first calendar quarter following the calendar quarter
- in which gross receipts are more than of 80% of its gross receipts
- for the same calendar quarter in 2019.

[ix] A "trade or business" can include, but is not limited to, Schedule F and Schedule C activities, the activity of being an employee, an activity reported on Form 4835, and other business activities reported on Schedule E. Business gains and losses reported on Form 4797 and Form 8949 can be included in the

excess business loss calculation. They also include pass-thru income and losses attributable to a trade or business. This includes farming losses from casualty losses or losses by reason of disease or drought. Excess business losses that are disallowed are treated as a net operating loss carryover to the following taxable year. See Form 461 and instructions for details.

[x] The following are excepted trades or businesses:

1. The trade or business of providing services as an employee;
2. Certain real property trades or businesses that elect to be excepted;
3. Certain farming businesses that elect to be excepted; and
4. Certain regulated utility trades or businesses.

An eligible real property trade or business or farming business may elect to be an excepted trade or business by following the procedures outlined in §1.163(j)-9 of the proposed regulations, including the requirement to attach a statement to a timely filed federal income tax return (including any extensions) for the year of election. See also Revenue Procedure 2018-59. An exempt Small Business is not permitted to make an election to be an excepted trade or business because that taxpayer is already not subject to the section 163(j) limitation. Once made, the election is generally irrevocable and binding on the trade or business for all succeeding years. See §1.163(j)-9 of the proposed regulations for certain circumstances where the election may no longer apply. The statement must include the following information:

1. The taxpayer's name, address, and social security number or employer identification number;
2. A description of the electing trade or business, including the principal business activity code; and
3. A statement that the taxpayer is making an election as a real property trade or business (under section 163(j)(7)(B) or as a farming business (under section 163(j)(7)(C)), as applicable.

After 2018, the time and manner for making an election may be updated in forms, publications, or other guidance.

If you make an election to be an excepted real property trade or business, the following assets that you hold in the electing real property trade or business must be depreciated using the alternative depreciation system (ADS), and are not eligible for a bonus depreciation deduction under section 168(k):

- Nonresidential real property;
- Residential rental property; and
- Qualified improvement property.

If you make an election to be an electing farming business, any property with a recovery period of 10 years or more that you hold in the electing farming business must be depreciated using ADS, and the property is not eligible for a bonus depreciation deduction under section 168(k).

[xi] The statute lists: (See IRS Website: Work Opportunity Tax Credit for definitions)

- Qualified IV-A Recipient
- Qualified Veteran (see our recap, above)
- Ex-Felon
- Designated Community Resident (DCR)

- Vocational Rehabilitation Referral
- Summer Youth Employee
- Supplemental Nutrition Assistance Program (SNAP) Recipient
- Supplemental Security Income (SSI) Recipient
- Long-Term Family Assistance Recipient
- Qualified Long-Term Unemployment Recipient

[xii] Qualified Organizations: Charitable contribution made to, or for the use of, any of the following organizations that otherwise are qualified under section 170(c) of the Internal Revenue Code are deductible.

1. A state or United States possession (or political subdivision thereof), or the United States or the District of Columbia, if made exclusively for public purposes;
2. A community chest, corporation, trust, fund, or foundation, organized or created in the United States or its possessions, or under the laws of the United States, any state, the District of Columbia or any possession of the United States, and organized and operated exclusively for charitable, religious, educational, scientific, or literary purposes, or for the prevention of cruelty to children or animals;
3. A church, synagogue, or other religious organization;
4. A war veterans' organization or its post, auxiliary, trust, or foundation organized in the United States or its possessions;
5. A nonprofit volunteer fire company;
6. A civil defense organization created under federal, state, or local law (this includes unreimbursed expenses of civil defense volunteers that are directly connected with and solely attributable to their volunteer services);
7. A domestic fraternal society, operating under the lodge system, but only if the contribution is to be used exclusively for charitable purposes;
8. A nonprofit cemetery company if the funds are irrevocably dedicated to the perpetual care of the cemetery as a whole and not a particular lot or mausoleum crypt.

If in doubt about the bona fides of any organization, use the IRS's Tax Exempt Organization Search function to verify the organization's exempt status. Private databases are available if you wish to review the organization's finances, governance, and compliance history – e.g. Guidestar's Directory of Charities and Nonprofit Organizations and their Charity Search function.

CARES does not suspend any of the procedural requirements that attend large donations, including the quid-pro-quo, Contemporaneous Written Acknowledgement, or Qualified Appraisal rules. It overrides the top-tier personal income tax itemization scheme with a blanket 100% of AGI deductibility limit. However, under the Act: a "*qualified charitable contribution" is a charitable contribution: a) made in cash; b) allowable under IRC §170; c) made to an organization described in IRC §170(b)(1)(A) (i.e. 501(c)(3) and certain other charitable organizations), and not a supporting organization described in IRC §509(a)(3); and d) is not for the establishment of a new, or maintenance of an existing, donor advised fund. In addition, a qualified charitable contribution does not include any amount which is carried over from a prior tax year*.

Hence, donations to private foundations, donor advised funds, and supporting organizations do not qualify for the extended itemization limit. They are still subject to the Code's multi-tiered (60/30/20) deduction limits. Carryovers are, likewise, not eligible. They retain the character they acquired when they were made.

Individual Donors should, without exception, allocate the first three hundred dollars of charitable deduction to the newly created adjustment to gross income.

[xiii] If a franchise brand is listed in the SBA Franchise Directory, each of its franchisees that meets the applicable size standard can apply for a PPP loan. (The franchisor does not apply on behalf of its franchisees.) The $10 million cap on PPP loans is a limit per franchisee entity, and each franchisee is limited to one PPP loan. Franchise brands that have been denied listing on the Directory because of affiliation between franchisor and franchisee may request listing to receive PPP loans. SBA will not apply affiliation rules to a franchise brand requesting listing on the Directory to participate in the PPP, but SBA will confirm that the brand is otherwise eligible for listing on the Directory

Under the CARES Act, any single business entity that is assigned a NAICS code beginning with 72 (including hotels and restaurants) and that employs not more than 500 employees per physical location is eligible to receive a PPP loan. In addition, SBA's affiliation rules (13 CFR 121.103 and 13 CFR 121.301) do not apply to any business entity that is assigned a NAICS code beginning with 72 and that employs not more than a total of 500 employees. As a result, if each hotel or restaurant location owned by a parent business is a separate legal business entity, each hotel or restaurant location that employs not more than 500 employees is permitted to apply for a separate PPP loan provided it uses its unique EIN.

The $10 million maximum loan amount limitation applies to each eligible business entity, because individual business entities cannot apply for more than one loan.

The following examples illustrate how these principles apply.

Example 1. Company X directly owns multiple restaurants and has no affiliates. • Company X may apply for a PPP loan if it employs 500 or fewer employees per location (including at its headquarters), even if the total number of employees employed across all locations is over 500.

Example 2. Company X wholly owns Company Y and Company Z (as a result, Companies X, Y, and Z are all affiliates of one another). Company Y and Company Z each own a single restaurant with 500 or fewer employees. • Company Y and Company Z can each apply for a separate PPP loan, because each has 500 or fewer employees. The affiliation rules do not apply, because As of June 25, 2020 Company Y and Company Z each has 500 or fewer employees and is in the food services business (with a NAICS code beginning with 72).

Example 3. Company X wholly owns Company Y and Company Z (as a result, Companies X, Y, and Z are all affiliates of one another). Company Y owns a restaurant with 400 employees. Company Z is a construction company with 400 employees. • Company Y is eligible for a PPP loan because it has 500 or fewer employees. The affiliation rules do not apply to Company Y, because it has 500 or fewer employees and is in the food services business (with a NAICS code beginning with 72). • The waiver of the affiliation rules does not apply to Company Z, because Company Z is in the construction industry. Under SBA's affiliation rules, 13 CFR 121.301(f)(1) and (3), Company Y and Company Z are affiliates

of one another because they are under the common control of Company X, which wholly owns both companies. This means that the size of Company Z is determined by adding its employees to those of Companies X and Y. Therefore, Company Z is deemed to have more than 500 employees, together with its affiliates. However, Company Z may be eligible to receive a PPP loan as a Small Business concern if it, together with Companies X and Y, meets SBA's other applicable size standards."

For some purposes, SBA substitutes Gross Revenue Dollars for number of employees when determining size. Thresholds are based on NAICS Code. Table of Small Business Size Standards Matched to North American Industry Classification System Codes SBA also provides an on-line calculator, Size Standard Tool, to facilitate size determination.

For purposes of the PPP's 500 or fewer employee size standard, an applicant must count all of its employees and the employees of its U.S and foreign affiliates, absent a waiver of or an exception to the affiliation rules. 13 C.F.R. 121.301(f)(6). Business concerns seeking to qualify as a "Small Business concern" under section 3 of the Small Business Act (15 U.S.C. 632) on the basis of the employee-based size standard must do the same.18 45.

[xiv] As long as the business was in operation on February 15, 2020, if it meets the other eligibility criteria, the business is eligible to apply for a PPP loan regardless of the change in ownership. In addition, where there is a change in ownership effectuated through a purchase of substantially all assets of a business that was in operation on February 15, the business acquiring the assets will be eligible to apply for a PPP loan even if the change in ownership results in the assignment of a new tax ID number and even if the acquiring business was not in operation until after February 15, 2020. If the acquiring business has maintained the operations of the pre-sale business, the acquiring business may rely on the historic payroll costs and headcount of the pre-sale business for the purposes of its PPP application, except where the pre-sale business had applied for and received a PPP loan. The Administrator, in consultation with the Secretary, has determined that the requirement that a business "was in operation on February 15, 2020" should be applied based on the economic realities of the business's operations.

[xv] PPP loans are also available for qualifying tax-exempt nonprofit organizations described in section 501(c)(3) of the Internal Revenue Code (IRC), tax-exempt veterans organization described in section 501(c)(19) of the IRC, and Tribal business concerns described in section 31(b)(2)(C) of the Small Business Act that have 500 or fewer employees whose principal place of residence is in the United States, or meet the SBA employee-based size standards for the industry in which they operate. Note that organizations exempt under IRC 501(c)(6) are ineligible for the PPP program but are eligible for the EIDL program.

[xvi] Borrowers must apply the affiliation rules set forth in SBA's Interim Final Rule on Affiliation. A borrower must certify on the Borrower Application Form that the borrower is eligible to receive a PPP loan, and that certification means that the borrower is a Small Business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632), meets the applicable SBA employee-based or revenue-based size standard, or meets the tests in SBA's alternative size standard, after applying the affiliation rules, if applicable. SBA's existing affiliation exclusions apply to the PPP, including, for example the exclusions under 13 CFR 121.103(b)(2).

In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP

regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Borrowers 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. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and the company should be prepared to demonstrate to SBA, upon request, the basis for its certification.

If a minority shareholder in a business irrevocably waives or relinquishes any existing rights specified in 13 C.F.R. 121.301(f)(1), the minority shareholder would no longer be an affiliate of the business (assuming no other relationship that triggers the affiliation rules).

[xvii] Section 1102 of the CARES Act defines the term "nonprofit organization" as "an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986. As of June 25, 2020 1986 and that is exempt from taxation under section 501(a) of such Code." The Administrator, in consultation with the Secretary of the Treasury, understands that nonprofit hospitals exempt from taxation under section 115 of the Internal Revenue Code are unique in that many hospitals meet the description set forth in section 501(c)(3) of the Internal Revenue Code to qualify for tax exemption under section 501(a), but have not sought to be recognized by the IRS as such because they are otherwise fully tax-exempt under a different provision of the Internal Revenue Code.

Accordingly, the Administrator will treat a nonprofit hospital exempt from taxation under section 115 of the Internal Revenue Code as meeting the definition of "nonprofit organization" under section 1102 of the CARES Act if the hospital reasonably determines, in a written record maintained by the hospital, that it is an organization described in section 501(c)(3) of the Internal Revenue Code and is therefore within a category of organization that is exempt from taxation under section 501(a).

The hospital's certification of eligibility on the Borrower Application Form cannot be made without this determination. This approach helps accomplish the statutory purpose of ensuring that a broad range of borrowers, including entities that are helping to lead the medical response to the ongoing pandemic, can benefit from the loans provided under the PPP.

This guidance is solely for purposes of qualification as a "nonprofit organization" under section 1102 of the CARES Act and related purposes of the CARES Act and does not have any consequences for federal tax law purposes. Nonprofit hospitals should also review all other applicable eligibility criteria, including the Interim Final Rules on Promissory Notes, Authorizations, Affiliation, and Eligibility (April 28, 2020) regarding an important limitation on ownership by state or local governments. 85 FR 23450, 23451.17 43. Question: FAQ #31 reminded borrowers

[xviii] Small Business concerns can be eligible borrowers even if they have more than 500 employees, as long as they satisfy the existing statutory and regulatory definition of a "Small Business concern" under section 3 of the Small Business Act, 15 U.S.C. 632. A business can qualify if it meets the SBA employee-based or revenue- 1 This document does not carry the force and effect of law independent of

the statute and regulations on which it is based. 2 Question 1 published April 3, 2020. As of June 25, 2020 based size standard corresponding to its primary industry. Go to www.sba.gov/size for the industry size standards.

Businesses may also qualify for the Paycheck Protection Program as a Small Business concern if they meet both tests in SBA's "alternative size standard" as of March 27, 2020: (1) maximum tangible net worth of the business is not more than $15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than $5 million.

In addition to Small Business concerns, a business is eligible for a PPP loan if the business has 500 or fewer employees whose principal place of residence is in the United States, or the business meets the SBA employee-based size standards for the industry in which it operates (if applicable). (Source - US Treasury Guidelines "PAYCHECK PROTECTION PROGRAM LOANS Frequently Asked Questions (FAQs)"

Agricultural producers, farmers, and ranchers are eligible for PPP loans if: (i) the business has 500 or fewer employees, or (ii) the business fits within the revenue-based sized standard, which is average annual receipts of $1 million. Additionally, agricultural producers, farmers, and ranchers can qualify for PPP loans as a Small Business concern if their business meets SBA's "alternative size standard." The "alternative size standard" is currently: (1) maximum net worth of the business is not more than $15 million, and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than $5 million. For all of these criteria, the applicant must include its affiliates in its calculations. For additional information, see: AFFILIATION RULES APPLICABLE TO U.S. SMALL BUSINESS ADMINISTRATION PAYCHECK PROTECTION PROGRAM

As long as other PPP eligibility requirements are met, small agricultural cooperatives and other cooperatives may receive PPP loans

For purposes of loan eligibility, the CARES Act defines the term employee to include "individuals employed on a full-time, part-time, or other basis." A borrower must therefore calculate the total number of employees, including part-time employees, when determining their employee headcount for purposes of the eligibility threshold. For example, if a borrower has 200 full-time employees and 50 part-time employees each working 10 hours per week, the borrower has a total of 250 employees. By contrast, for purposes of loan forgiveness, the CARES Act uses the standard of "fulltime equivalent employees" to determine the extent to which the loan forgiveness amount will be reduced in the event of workforce reductions.

Relevance: Businesses were required to attest that they met one or more of the standards for "Small Business" participation in the PPP program. Since the application period for the program has expired, these definitions are relevant to defense of the business's attestation.

[xix] IRC Sec. 265(a)(1) and the accompanying treasury regulations disallow deductions for an amount otherwise allowable as a deduction to the extent it is allocable to one or more classes of income other than interest (whether or not any amount of income of that class or classes is received or accrued)

wholly exempt from federal income tax. The term "class of exempt income" is defined as any class of income (whether or not any amount of income of such class is received or accrued) that is either wholly excluded from gross income or wholly exempt from federal income taxes. The purpose of IRC Sec. 265 is to prevent a double tax benefit.

Initially the Service asserted, in Notice 2020-32, that IRC Sec. 265(a)(1) applies to tax exempt income "earmarked for a specific purpose and deductions are incurred in carrying out that purpose. In such event, it is proper to conclude that some or all of the deductions are allocable to the tax-exempt income." Looking to case law and prior IRS guidance, the IRS concludes that any portion of a PPP loan that is forgiven under the CARES Act is considered a class of exempt income under IRC Sec. 265. Therefore, expenses reimbursed by the PPP loan for payroll costs or payments of mortgage interest, rents and utilities during the covered period are not deductible by the borrower.

The IRS further supports its conclusion with case law and prior rulings that disallow deductions under IRC Sec. 162 for otherwise deductible payments when a taxpayer receives reimbursement. Under this alternative theory, the IRS again concludes that the expenses reimbursed by PPP loan proceeds are non-deductible.

[xx] If a PPP loan received an SBA loan number on or after June 5, 2020, the loan has a five-year maturity. If a PPP loan received an SBA loan number before June 5, 2020, the loan has a two-year maturity, unless the borrower and lender mutually agree to extend the term of the loan to five years. The promissory note for the PPP loan will state the term of the loan.

[xxi] As an exercise of the Administrator's and the Secretary's authority under Section 1106(d)(6) of the CARES Act to prescribe regulations granting de minimis exemptions from the Act's limits on loan forgiveness, SBA and Treasury intend to issue an interim final rule excluding laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the CARES Act's loan forgiveness reduction calculation. The interim final rule will specify that, to qualify for this exception, the borrower must have made a good faith, written offer of rehire, and the employee's rejection of that offer must be documented by the borrower. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.

[xxii] Lenders may also use their own promissory note or an SBA form of promissory note.

[xxiii] PPP loans covers payroll costs, including costs for employee vacation, parental, family, medical, and sick leave. However, the CARES Act excludes qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Public Law 116–127).

Allowances (somewhat poorly outlined) are made for seasonal employers and "employers" who contract through a third party (e.g. a Professional Employer Organization, PEO) for payroll support.

- a lender may consider whether a seasonal borrower was in operation on February 15, 2020 or for an 8-week period between February 15, 2019 and June 30, 2019.
- SBA recognizes that eligible borrowers that use PEOs or similar payroll providers are required under some state registration laws to report wage and other data on As of June 25, 2020 the

Employer Identification Number (EIN) of the PEO or other payroll provider. In these cases, payroll documentation provided by the payroll provider that indicates the amount of wages and payroll taxes reported to the IRS by the payroll provider for the borrower's employees will be considered acceptable PPP loan payroll documentation. Relevant information from a Schedule R (Form 941), Allocation Schedule for Aggregate Form 941 Filers, attached to the PEO's or other payroll provider's Form 941, Employer's Quarterly Federal Tax Return, should be used if it is available; otherwise, the eligible borrower should obtain a statement from the payroll provider documenting the amount of wages and payroll taxes. In addition, employees of the eligible borrower will not be considered employees of the eligible borrower's payroll provider or PEO.

[xxiv] The CARES Act excludes from the definition of payroll costs any employee compensation in excess of an annual salary of $100,000. Good luck finding either that information or a description of the exclusion anywhere in the application or its instructions. It is, however noted in US Treasury Guidelines "PAYCHECK PROTECTION PROGRAM LOANS Frequently Asked Questions (FAQs, Item 7)

The exclusion of compensation in excess of $100,000 annually applies only to cash compensation, not to non-cash benefits, including:

- employer contributions to defined-benefit or defined-contribution retirement plans;
- payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and
- payment of state and local taxes assessed on compensation of employees.

[xxv] In general, borrowers can calculate their aggregate payroll costs using data either from the previous 12 months or from calendar year 2019. For seasonal businesses, the applicant may use average monthly payroll for the period between February 15, 2019, or March 1, 2019, and June 30, 2019. An applicant that was not in business from February 15, 2019 to June 30, 2019 may use the average monthly payroll costs for the period January 1, 2020 through February 29, 2020. Borrowers may use their average employment over the same time periods to determine their number of employees, for the purposes of applying an employee-based size standard. Alternatively, borrowers may elect to use SBA's usual calculation: the average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if it has not been operational for 12 months).

Any amounts that an eligible borrower has paid to an independent contractor or sole proprietor should be excluded from the eligible business's payroll costs. However, an independent contractor or sole proprietor will itself be eligible for a loan under the PPP, if it satisfies the applicable requirements.

Payroll costs are calculated on a gross basis without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld, such as the employee's and employer's share of Federal Insurance Contributions Act (FICA) and income taxes required to be withheld from employees. As a result, payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer's share of payroll tax. For example, an employee who earned $4,000 per month in gross wages, from which $500 in federal taxes was withheld, would count as $4,000 in payroll costs. The employee would receive $3,500, and $500 would be paid to the federal government. However, the employer-side federal payroll taxes imposed on the $4,000 in wages are excluded from payroll costs under the statute.

The definition of "payroll costs" in the CARES Act, 15 U.S.C. 636(a)(36)(A)(viii), excludes "taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period," defined as February 15, 2020, to June 30, 2020. As described above, the SBA interprets this statutory exclusion to mean that payroll costs are calculated on a gross basis, without subtracting federal taxes that are imposed on the employee or withheld from employee wages. Unlike employer-side payroll taxes, employee-side taxes are ordinarily expressed as a reduction in employee take-home pay; their exclusion from the definition of payroll costs means payroll costs should not be reduced based on taxes imposed on the employee or withheld from employee wages. This interpretation is consistent with the text of the statute and advances the legislative purpose of ensuring workers remain paid and employed. Further, because the reference period for determining a borrower's maximum loan amount will largely or entirely precede the period from February 15, 2020, to June 30, 2020, and the period during which borrowers will be subject to the restrictions on allowable uses of the loans may extend beyond that period, for purposes of the determination of allowable uses of loans and the amount of loan forgiveness, this statutory exclusion will apply with respect to taxes imposed or withheld at any time, not only during the period..

The eight-week or 24-week period starts on the date your lender makes a disbursement of the PPP loan to the borrower. The lender must disburse the loan no later than 10 calendar days from the date of loan approval. The Paycheck Protection Program Flexibility Act of 2020, which became law on June 5, 2020, extended the covered period for loan forgiveness from eight weeks after the date of loan disbursement to 24 weeks after the date of loan disbursement, providing substantially greater flexibility for borrowers to qualify for loan forgiveness. The 24- week period applies to all borrowers, but borrowers that received an SBA loan number before June 5, 2020, have the option to use an eight-week period.

The cost of a housing stipend or allowance provided to an employee as part of compensation counts toward payroll costs

