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Alert

CARES Act Provides Loans, Expands Employment Benefits and Revises Tax Provisions for Small Businesses

March 30, 2020

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), a $2-trillion stimulus bill, with the most significant impact for small businesses resulting from the allocation of $349 billion for small-business loans. Under the "Paycheck Protection Program" created by the CARES Act, eligible small businesses will have access to government-backed forgivable loans ("Loan(s)") through an expansion of Section 7(a) of the Small Business Act, which is administered by the Small Business Administration ("SBA"). The Loans are available until June 30, 2020.

This *Alert* addresses the Loans and changes to other government-supported loans available to small businesses through the SBA, as well as certain employment issues and tax law changes that affect such small businesses. The SBA is expected to issue regulations to govern the implementation of the Paycheck Protection Program. The Secretary of the Treasury will be releasing additional guidance and additional *Alerts* will be published as regulations or additional guidance is released.

Paycheck Protection Program

As stated above, the most significant aspect of the CARES Act to small businesses is the $349 billion available through the Loans. This section describes the eligibility requirements as well as information on how to access a Loan, the general terms of a Loan and the requirements to have a Loan forgiven.

Eligibility Requirements

As a general rule, companies with 500 employees or less have access to the Loans. The CARES Act significantly expands those eligible to receive Loans from just "small business concerns" to (i) any business concern[1]; (ii) nonprofit organizations; (iii) veterans organizations; and (iv) tribal business concerns, so long as such recipient employs not more than the greater of (a) 500 employees or (b) if applicable, the SBA-prescribed number of employees for the industry in which it operates. For purposes of determining the number of employees employed by a company, an "employee" includes those individuals hired full-time, part-time or on any other basis.

The SBA's affiliation rules typically aggregate the total number of employees across businesses under common ownership, thus causing many companies, that might otherwise qualify on a standalone basis, to be ineligible for the Loans. However, the CARES Act exempts certain businesses from being aggregated with other commonly controlled entities, namely those businesses (i) in the

[1] A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49% participation by foreign business entities in the joint venture.

"accommodation and food services" sector;[2] (ii) operating as a franchise; or (iii) receiving financial assistance from a small business investment company.[3]

Certain sole proprietorships, independent contractors and self-employed individuals are also eligible to receive the Loans. The SBA will determine eligibility based on, in part, payroll tax filings (IRS Forms 1099-MISC) and, with respect to sole proprietorships, an analysis of income and expenses.

Loan Access

The CARES Act greatly expands the SBA's authority to issue loans under Section 7(a). As a significant expansion of the Section 7(a) loan program, potential borrowers will not be required to demonstrate that they are unable to obtain credit elsewhere.[4] Borrowers will also not be required to provide collateral security for the Loans or cause owners or affiliates to guarantee the Loans. In order to obtain a Loan, a potential borrower must be willing to certify that (i) due to current economic uncertainty, the Loan request is "necessary" to support continued operations;[5] (ii) Loan proceeds will be used to maintain a workforce and payroll or to make mortgage, lease or utility payments; and (iii) it does not have another application pending and has not received funds for the same purpose. The legislation also does not prohibit a business that is in bankruptcy from obtaining the Loans.[6]

The SBA is empowered to delegate authority to lenders to make and approve the Loans. In addition to lenders that are already approved to make Section 7(a) loans, the SBA and Secretary of the Treasury are authorized to extend authority to other lenders so long as such lenders have the necessary qualifications to process, close, disburse and service the Loans. The SBA will reimburse lenders the following processing fees (i) 5% of the principal balance for Loans of not more than $350,000; (ii) 3% of the principal balance for Loans of greater than $350,000 but less than $2 million; and (iii) 1% of the principal balance for Loans of greater than $2 million.

The CARES Act provides limited restrictions for lenders to determine eligibility for borrowers. Specifically, lenders should consider if the borrower (i) had been in operation as of Feb. 15, 2020 and (ii) had employees for whom the borrower paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099–MISC.

[2] As determined under the North American Industry Classification System.

[3] A small business investment company is any licensed under section 301 of the Small Business Investment Act of 1958 for purposes of providing "private equity capital and long-term loan funds" to small businesses for small-business-related concerns.

[4] The CARES Act specifies that the processing and disbursement of the Loans should be prioritized to small business concerns and entities in undeserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals, women and businesses in operation for less than two years.

[5] The CARES Act provides no guidance as to what set of circumstances would render a Loan "necessary." However, it should be noted the CARES Act waives the normal SBA requirement that a business show that it cannot obtain credit elsewhere. Thus, it seems clear that a Loan could still be "necessary" for purposes of the aforementioned certification, even if the borrower has access to alternative sources of credit. Without further guidance, it is also uncertain how the existence of a control party with potentially available funds to contribute would affect the analysis.

[6] Moreover, the CARES Act amends the Bankruptcy Code (which amend expires one year after the passage of the Act) to permit a company with up to $7.5 million of debt (excluding intercompany debt), up from approximately $2.5 million, to file for bankruptcy as a "small business debtor" — which is a more favorable process for debtors.

Loan Terms

In general, small businesses may receive Loans up the lesser of (a) $10 million or (b) 2.5 times the borrower's average monthly payroll costs during the one-year period before the date on which the Loan is made, plus the outstanding amount of any refinanced SBA disaster loan obtained after Jan. 31, 2020.[7]

> Loan Amount = Lesser of (i) $10 million and (ii) (2.5 x Avg. Monthly Payment for Payroll Costs incurred during the one-year period before the date the Loan is made) + the outstanding amount of any refinanced SBA disaster loan obtained after January 31, 2020

Although the definition of "payroll costs"[8] is generally expansive, it does not include, among other things, compensation of an individual employee in excess of an annual salary of $100,000 or whose principal place of residence is outside the United States.

The favorable terms provided to borrowers of the Loans include (i) a maximum interest rate of 4%; (ii) no prepayment penalty; (iii) no personal guarantee or collateral requirement; and (iv) "complete payment deferral relief" provided by lenders for a period of not less than six months and not more than one year.[9] Further, each Loan will be 100% guaranteed by the SBA, and the SBA will have no recourse against any borrower so long as the Loan is used for a proper purpose.

In addition to the allowable purposes under Section 7(a),[10] the Loans may be used for (i) payroll costs; (ii) costs related to the continuation of group health care benefits during the periods of paid sick, medical or family leave, and insurance premiums; (iii) employee salaries, commissions or similar compensation; (iv) mortgage interest, rent and utility payments; and (v) interest payments on any other debt obligations that were incurred before Feb. 15, 2020.

In addition to the terms described above, the most notable provision available to certain borrowers is the CARES Act's loan forgiveness terms.

Loan Forgiveness

Under the CARES Act, borrowers are eligible for 100% loan forgiveness of the principal amount of the Loan in the amount equal to the sum of costs incurred and payments made during the 8-week period beginning on the date of the origination of the Loan ("8-Week Period"). Included in the calculation of costs incurred and payments made are (i) payroll costs;[11] (ii) any payment of interest on any indebtedness or debt instrument incurred in the ordinary course of business that is (a) a liability of the

[7] Note that the calculation is adjusted for seasonal employers and those businesses that were not in business from Feb. 15, 2019 to June 30, 2019.

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

[9] Such relief covers payment of principal, interest and fees. The SBA is required to provide additional guidance as to this deferment relief not later than 30 days after the Act's enactment.

[10] *See* 15 U.S.C. § 636(a) ("The [SBA] is empowered to the extent and in such amounts as provided in advance in appropriation Acts to make loans for plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital, and to make loans to any qualified small business concern, including those owned by qualified Indian tribes, for purposes of this chapter.").

[11] *See* footnote 8. Borrowers with tipped employees may receive forgiveness for additional wages paged to those employees.

borrower, (b) a mortgage on real or personal property and (c) was incurred before Feb. 15, 2020;[12] (iii) any payment on rent under a leasing agreement in force before Feb. 15, 2020; and (iv) any payment for electricity, gas, water, transportation, telephone or internet access services for which service began before Feb. 15, 2020.

Loan Forgiveness Amount = Total costs incurred and payments made as described above during the 8-Week Period

In order to incentivize businesses to retain employees, the amount of loan forgiveness delivered to a borrower will be reduced by:

1. Any reduction in the average number of monthly full-time equivalent ("FTE") employees during the 8-Week Period as compared to the average number of monthly FTE employees during, at the borrower's election, either (i) the period between Feb. 15, 2019 and June 30, 2019 or (ii) the period between Jan. 1, 2020 and Feb. 29, 2020;[13] and

$$\text{Reduction in Loan Forgiveness} = \text{Loan Forgiveness Amount} \times \frac{\text{(Avg. Number of FTE employees during 8-Week Period)}}{\text{(Avg. Number of FTE employees during elected period)}}$$

2. The amount of any reduction in total salary or wages of any employee during the 8-Week Period that exceeds 25% of that employee's total salary or wages during their most recent full quarter of employment.[14]

As an example, to the extent a borrower's average number of FTE employees during the 8-Week Period is 75% of such average number during the elected comparison period, then only 75% of the anticipated loan forgiveness amount would qualify for forgiveness. Further, the loan forgiveness amount will be reduced dollar-for-dollar by the amount of any reduction in total salary/wages paid by the borrower to any employee during the 8-Week Period that exceeds 25% of the total salary or wages of the employee during the most recent full quarter of employment.

To encourage borrowers to rehire FTE employees and reverse any reductions in employee salaries/wages, the loan forgiveness reductions mentioned above, with regard to any layoffs or salary/wage reductions made during the period beginning on Feb. 15, 2020 and ending on the date that is 30 days after the enactment of the CARES Act, will not be enforced if the borrower increases its number of FTE employee and employee salaries/wages by June 30, 2020 to the levels in effect as of Feb. 15, 2020.

Any small business that takes out a Loan under these new CARES Act provisions should keep diligent records with respect to employees, salaries, hiring/firing dates, etc. In addition to any other documentation that the SBA determines to be necessary, a borrower seeking forgiveness of its Loan must submit to the lender that is servicing the Loan an application, which shall include the following (i) documentation verifying the number of FTE employees on payroll and pay rates for the applicable periods, including payroll tax filings reported to the IRS and state income, payroll and unemployment

[12] This indebtedness does not include any prepayment of or payment of principal on such indebtedness.

[13] Special rules for seasonal employers.

[14] An employee in this section is considered an employee that did not receive, during a single pay period in 2019, wages or salary at an annualized rate of pay of more than $100,000.

insurance filings; (ii) documentation, including cancelled checks, payment receipts, transcripts of accounts or other documents verifying payments on the applicable indebtedness, rent and utilities; and (iii) a certification that the documentation is true and correct and the amount for which forgiveness is requested was used to retain employees, make interest payments on the applicable indebtedness, rent and utilities.

The lender servicing the Loan must issue a decision on the loan forgiveness application no later than 60 days after receiving the application.

Forgiveness of the Loans to small businesses pursuant to the CARES Act will not result in cancellation of indebtedness income for U.S. federal income tax purposes.

Additional Information regarding the Loans available under the Paycheck Protection Program can be found on the SBA's website here.

Other Small Business Loans

The CARES Act affects certain other loans that are available to small businesses in addition to the Loans described above.

First, the SBA's Express Loan program increases the maximum permitted loan amount to $1 million, up from the prior $350,000 cap.

Second, those eligible to receive emergency Economic Injury Disaster Loan ("EIDL") grants has been expanded to include (i) a business, cooperative, Employee Stock Ownership Plan (ESOP) or tribal small business concern with not more than 500 employees; or (ii) any individual who operates under a sole proprietorship or as an independent contractor.[15] EIDL applicants no longer have to prove that they were unable to obtain credit elsewhere. The SBA will also waive (i) any rules related to the personal guarantee on advances and loans of not more than $200,000 and (ii) the requirement that the applicant be in business for at least one year prior to the disaster so long as such applicant was in business as of January 31, 2020. An applicant of an EIDL grant may request the SBA advance it up to $10,000 within three days of submitting its application.[16] The advance may be used for any allowable purpose, which includes (i) paid sick leave to employees unable to work due to the direct effect of COVID-19; (ii) maintaining payroll to retain employees; (iii) meeting increased costs to obtain materials unavailable from the applicant's original source due to interrupted supply chains; (iv) making rent or mortgage payments; and (v) repaying obligations that cannot be met due to revenue losses. Even if the applicant is subsequently denied an EIDL grant, such applicant will not be required to repay the advance received. To determine eligibility, the SBA (i) may rely solely on (a) the applicant's credit score and not require such applicant to file a tax return or tax return transcript or (b) an alternative appropriate method to determine the applicant's ability to repay; and (ii) shall verify eligibility by accepting a self-certification from the applicant under penalty of perjury. The application for EIDL grants can be found here.

[15] The CARES Act allocated $10 billion to this EIDL grant program.

[16] If an applicant receives an advance and transfers it to a Section 7(a) loan, the advance amount will be reduced from the loan forgiveness amount.

Finally, the SBA will pay the principal, interest and any associated fees for pre-existing SBA loans for six months.[17] The CARES Act also requires the SBA to encourage lenders to provide payment deferments, when appropriate, and to extend the maturity of these pre-existing SBA loans to avoid balloon payments or any requirement for increases in debt payments during the COVID-19 crises.

Employment Issues: Tax Relief, Employment Leave and Unemployment Benefits

The CARES Act provides certain employment tax benefits that should be considered prior to obtaining the Loans available through the SBA. In addition, small businesses and their employees should consider the effects of the CARES Act on employment leave and benefits, including changes made to tax-qualified plans.

Payroll and Social Security Tax Relief

Employers who do not take a Loan are eligible to receive a refundable payroll tax credit of 50% of wages paid against the employment taxes for each quarter (not to exceed $10,000 for all quarters in qualified wages with respect to any single employee). To be eligible, the employer must have (i) fully or partially suspended operations as a result of a government authority limiting commerce, travel, or group meetings due to COVID-19; or (ii) experienced a greater than 50% reduction in quarterly gross receipts measured on a year-over-year basis.

Employers with over 100 employees may claim the credit only for wages paid to furloughed employees, or employees who had reduced hours, for services not rendered. Employers with fewer than 100 employees may claim the credit on all wages paid, regardless of whether employees provided services. Wages for this purpose include amounts paid or incurred by the employer to provide and maintain a group health plan. The credit is for wages paid after March 12, 2020 and before Jan. 1, 2021.

In addition to the payroll tax credit, an eligible employer may choose to defer the payment of the employer share of social security taxes for the remainder of calendar year 2020. The deferred taxes must be paid 50% on or before Dec. 31, 2021, and the remaining 50% on or before Dec. 31, 2022. Employers that have had Loans forgiven are not eligible for deferral.

Expansion of Permitted Employee Leave

The federal Families First Coronavirus Response Act ("FFCRA") becomes effective April 1, 2020 and remains in effect until December 31, 2020. The FFCRA made changes to the Family and Medical Leave Act ("FMLA") to require paid childcare leave and paid sick leave. Employers with fewer than 500 employees will be able to obtain an employment tax credit using forms and instructions to be developed by the IRS.

The U.S. Department of Labor ("DOL") released a series of questions and answers (Q&As) and other documents (available here) to provide guidance until formal regulations are issued.

Child Care Leave

The FMLA is being temporarily amended to include a new entitlement to up to 12 weeks of leave to employees if they are unable to work (in person or remotely) due to a need to care for a child because

[17] The CARES Act allocated $17 billion for these payments.

the child's school or child care is unavailable due to a public health emergency. Employees who worked for the employer for at least 30 days prior to the FMLA leave are covered. Eligible employees include rehired employees if they were laid off not earlier than March 1, 2020 and had worked for at least 30 of the last 60 days prior to the layoff.

This amendment applies to employers with fewer than 500 employees. Employers with fewer than 50 employees are exempt if payment of the child care leave would jeopardize the viability of their business. Until regulations are issued, employers who believe the exemption applies should document the reasons. Employers with 25 or more employees are required to restore any employee taking child care leave to the same or substantially same position they held prior to the leave with equivalent pay and benefits. Employers with fewer than 25 employees do not have to restore an employee to the same position if the position no longer exists after the leave due to economic circumstances caused by a public health emergency if the employer made reasonable attempts to return the employee to an equivalent position.

The first 10 days of this emergency FMLA child care leave may be unpaid. The employee can utilize accrued vacation or sick leave during this 10 day period. Employers are required (if requested by the eligible employee) to pay a full-time employee for 80 hours of mandated emergency paid sick leave (as described below) instead of the initial 10 days of unpaid child care leave permitted under the expanded FMLA provision.

Starting on the 11th day of the leave, employers generally must pay full-time employees at two-thirds of the employee's regular rate of pay for the number of hours the employee would otherwise be scheduled to work. Payment is capped at $200 a day (or $10,000 total). Employees who work part-time or irregular schedules would be entitled to payment based on the average number of hours the employee worked for the six months prior to taking the leave.

Paid Sick Leave

All employers will be required to provide 80 hours of paid sick-leave benefits if the employee is:

1. Subject to a federal, state or local quarantine or isolation order related to COVID-19;

2. Advised by a health care provider to self-quarantine due to COVID-19 concerns;

3. Experiencing COVID-19 symptoms and seeking medical diagnosis;

4. Caring for an individual (not limited to family members) subject to quarantine or isolation;

5. Caring for the employee's child if the school or child care is unavailable due to a public health emergency; or

6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

If the employee's qualifying reason for the leave is either 4, 5, or 6 (listed above), the employee is to be paid leave at two-thirds of the employee's regular rate. Otherwise, the employee must be paid the 80 hours of paid sick leave at the employee's regular rate.

Paid sick leave wages are limited to $511 per day (or $5,110 total) per employee for their own use and to $200 per day (or $2,000 total) to care for others and for any other substantially similar condition. This leave will not carry over to the following year and is in addition to any other paid leave currently provided by employers. If the employee works part-time or an irregular schedule, the employee will be entitled to payment based on the average number of hours the employee worked for the six months prior to the leave.

Required Poster Released by the DOL

The DOL released a copy of the required notification poster for the new paid leave requirements. Although the Act states that the poster needs to be placed "in conspicuous places on the premises of the employer where notices to employee are customarily posted," the DOL has noted that emailing or direct mailing this notice to employees satisfies this obligation.

This federal program will work in coordination with state or local paid leave laws and benefits. Many states are proposing similar emergency legislation in an effort to navigate this rapidly evolving situation. For example, New York implemented new requirements for employers to provide sick leave and other benefits for employees subject to a mandatory or precautionary quarantine or isolation order by a government agency due to COVID-19, as well as to provide paid sick leave generally.

Expanded Unemployment Benefits for Terminated Employees

The CARES Act sets up a framework for states to agree to expand their unemployment insurance benefits for individuals with total or partial unemployment, including because they are unable or unavailable to work due to COVID-19. The expansion is retroactive to Jan. 27, 2020 and generally covers weeks of unemployment through July 31, 2020. Qualifying COVID-19 reasons for these expanded benefits include:

- Being unable to reach the place of employment due to quarantine orders or the place of employment was shut down due to COVID-19;
- Having been diagnosed with COVID-19 or experiencing symptoms and seeking a medical diagnosis;
- Being a member of a household where someone was diagnosed with COVID-19;
- Being the primary caretaker of a minor who cannot attend school or another facility as a result of COVID-19; and
- Becoming the head of household as a result of the death of the previous head of household due to COVID-19.

The CARES Act expands the eligibility for unemployment insurance benefits to individuals who would not qualify ordinarily for unemployment, such as those who are self-employed or those who have exhausted all rights to unemployment under state law, provided they can certify that they have been impacted by COVID-19. Individuals who have the ability to telework with pay or who are receiving paid sick leave or other paid leave benefits are not entitled to receive the expanded benefits.

The CARES Act provides for lengthening the usual period for receipt of unemployment insurance benefits to a period not exceeding 39 weeks and the waiver of a one week waiting period to receive unemployment insurance. These provisions are applicable through Dec. 31, 2020.

The CARES Act adds "Federal Pandemic Unemployment Compensation" of $600 per week to the amount of unemployment compensation an individual would qualify for under state law or certain amounts for those who would not otherwise qualify under state law (such as independent contractors) and also sets a minimum weekly amount equal to 50% of the average weekly payment of regular compensation in the applicable state for unemployment insurance before the $600 is added. The Federal Pandemic Unemployment Compensation will be disregarded when determining income for the purposes of certain programs such as Medicaid and the Child Health Insurance Program.

The CARES Act encourages states to utilize or adopt programs through which employers can reduce employee hours while still allowing employees to receive unemployment insurance. Such programs permit employees to receive pro rata amounts of unemployment insurance if employers reduce hours, from 10% to up to 60%, in lieu of layoffs. For example, New York State has the Shared Work Program (more information on New York State's Shared Work Program available here). The federal government funds the expanded unemployment benefits to which states have agreed to provide, including by providing funds to reimburse non-profit organizations with special arrangements for paying for unemployment insurance claims.

Expanded Educational Reimbursement

The CARES Act temporarily expands an employer's ability to provide tax-free educational assistance to employees by allowing for the employer, through a Section 127 educational assistance program, to reimburse or pay an employee's student loan payments for the period beginning on March 27, 2020 and ending on Dec. 31, 2020, up to a limit of $5,250 per employee. Employees who benefit are not able to deduct interest with respect to amounts paid or reimbursed by an employer on their 2020 taxes.

Changes to Tax-Qualified Plans Under the CARES Act

Among the many provisions of the CARES Act are those that cover tax-qualified plans, including 401(k) plans and defined benefit pension plans, as well as group health plans. Specifically, the stimulus legislation provides greater flexibility to participants in defined contribution plans who are impacted by the pandemic to access more of their account balances. It also allows plan sponsors of all tax-qualified retirement plans, including single, multiple and multiemployer defined benefit pension plans, to amend their plans to permit participants who experience certain financial hardships as a result of the COVID-19 pandemic to receive early distributions without an early distribution penalty. The CARES Act also amends the FFCRA to even further expand coverage for certain COVID-19-related testing and treatment and lifts certain restrictions on reimbursements from tax-favored vehicles.

I. Special Rules for Qualified Individuals

A. Qualified Individuals

Under the CARES Act, "Qualified Individuals" are eligible to take special distributions, and increased loans from defined contribution plans. In general, a person is a "Qualified Individual" if:

1. The individual or the individual's spouse or dependent is diagnosed with COVID-19 by a CDC-approved test; or

2. The individual experiences adverse financial consequences due to COVID-19 as a result of:

- Being quarantined, furloughed or laid off;
- A reduction of work hours or the closing of the business owned or operated by the individual;
- Inability to work due to lack of child care; or
- Other factors determined by the U.S. Treasury.

A plan administrator may rely on an employee's certification that the conditions for the employee to receive a special distribution have been met.

B. Distribution Amounts and Tax Treatment

Until December 31, 2020, plan sponsors of tax-qualified retirement plans, including IRAs, defined benefit and defined contribution plans, may amend their plans to permit Qualified Individuals to take distributions of up to $100,000. For federal tax purposes, the amount of a Qualified Individual's distribution may be spread (to the extent taxable) equally over three years, and if made to anyone under the age of 59 and 1/2, a distribution will not be subject to a 10% early distribution tax. Importantly, participants should be aware that the tax treatment of these distributions may differ under state tax laws. While a distribution to a Qualified Individual is not a loan, it may be repaid, at any time during the 3-year period following the withdrawal, to any eligible plan that the individual becomes a participant, or to an IRA.

C. Increased Loan Limits

Plan sponsors of defined contribution plans can amend their plans to enable participants who are Qualified Individuals to take enhanced loans of up to the lesser of 100% of the participant's vested account balance or $100,000 (ordinarily, 50% of the participant's vested account balance or $50,000). These enhanced loans are available only for the next 180 days. Plans may also be amended to allow participants who have existing outstanding loans for the rest of the calendar year to delay repayment of such loans for one year.

D. *Plan Amendments*

The availability of distributions to Qualified Individuals and increased loan limits can be implemented immediately. Timely plan amendments that reflect any implemented measures can be adopted later.

II. Temporary Waiver of Minimum Required Distributions

The CARES Act provides relief to individuals who would otherwise be required to withdraw required minimum distributions (often referred to as "RMDs") in 2020 from defined contributions plans, including 401(k) plans, 403(b) plans and certain 457(b) plan (as well as IRAs). RMDs that would otherwise have been required to be made from those plans to an individual whose required beginning date occurs in 2020 may be delayed until 2021. The delay does not apply to any RMD that should have been made before January 1, 2020 and RMDs under defined benefit pension plans.

III. Single Employer Defined Benefit Pension Plans

A. Minimum Required Contributions by Employers

The CARES Act allows employers to delay until Jan. 1, 2021, minimum contributions to a single employer defined benefit pension plans (including multiple employer plans) that an employer would otherwise be required to make (including quarterly contributions) during the 2020 calendar year (regardless of the applicable plan year). Each delayed contribution will be subject to interest from the original due date through the date the amounts are contributed to the pension plan.

B. Benefit Restrictions

The CARES Act provides relief from certain benefit restrictions that would otherwise have been triggered by a pension plan's lower funding status (its "adjusted funding target attainment percentage" or "AFTAP"). If a pension plan does meet statutorily-established funding thresholds, certain restrictions may be imposed on the plan, such as restricting lump sum distributions. To avoid such restrictions from being imposed on pension plans whose funding levels decline due to the COVID-19 pandemic, the CARES Act permits a plan sponsor to elect to treat the plan's adjusted funding target attainment percentage for the last plan year ending before Jan. 1, 2020, as the adjusted funding target attainment percentage for plan years which include the 2020 calendar year.

IV. Changes Concerning Health Plans

As discussed in our *SRZ Alert*, the FFCRA mandated group health plans, including self-insured plans, to cover certain expenses, without cost-sharing, related to COVID-19 testing and treatment. The CARES Act expands the types of COVID-19 tests and treatments that group health plans and health insurance issuers must cover without cost-sharing, prior authorization, or other medical management requirements. Now, these plans must cover at 100% tests for which the developer has requested "emergency use authorization" under the Federal Food, Drug, and Cosmetic Act. In addition, the CARES Act also directs the Secretaries of Health and Human Services, Labor, and Treasury to require plans and issuers to cover any COVID-19-related preventive services without cost-sharing (including vaccines) and permits sponsors of high deductible health plans to waive deductibles for all telehealth or remote care services in plan years beginning on or before Dec. 31, 2021 (even if not related to COVID-19).

The CARES Act also eliminates the requirement that individuals obtain a prescription to receive tax-favored reimbursement for over-the-counter drugs from health savings accounts, health reimbursement accounts and health flexible spending arrangements, effective Jan. 1, 2020.

Tax Law Changes

As described below, the CARES Act provides a number of tax benefits that are relevant for small businesses.

2018, 2019 and 2020 NOLs Can Offset 100% of Taxable Income

Net operating losses ("NOLs") generated in 2018, 2019 or 2020 will be permitted to offset up to 100% of income in the taxable year in 2018, 2019, 2020. This relaxes the restrictions introduced under the 2017 Tax Cuts and Jobs Act (the "TCJA"), which both precluded an NOL generated after 2017 taxable years from offsetting more than 80% of the income in any subsequent taxable year and prohibited the carryback of such NOLs.

Five-Year NOL Carryback

Any NOLs generated in 2018, 2019 or 2020 may now be carried back to the five preceding tax years, allowing a refund of taxes paid in any such prior year. This would serve to temporarily lift the TCJA's elimination of the carryback of NOLs generated after 2017 taxable years.

Note, for corporate taxpayers, NOLs carried back to a pre-2018 taxable year when corporate rates were 35% are more valuable than losses used to offset income taxable at the current 21% rate.

A REIT is precluded from carrying back losses under the CARES Act.

The legislation also restricts loss carrybacks from being used to offset any deemed repatriation income (under Section 965 of the Internal Revenue Code) that was includable to a corporation as a result of the TCJA. But in calculating the five-year carryback period, taxpayers are permitted to exclude any taxable years in which foreign earnings were included in gross income under the deemed repatriation rules of the TCJA, which potentially allows some taxpayers to carryback NOLs further than five years.

Loss Limitations on Noncorporate Taxpayers Do Not Apply Until 2021

The TCJA limited the ability of noncorporate taxpayers to use business losses to offset their other nonbusiness income to $250,000 ($500,000 for a married couple filing jointly). Under the CARES Act, this restriction does not apply until 2021.

Section 163(j) Limitation Increased to 50% of Adjusted Taxable Income

Business interest will be permitted to offset up to 50% of adjusted taxable income in 2019 and 2020 (the "163(j) Limitation"), as opposed to the 30% limitation imposed by the TCJA. Currently, adjusted taxable income ("ATI") is calculated in a manner similar to EBITDA, subject to certain modifications.

In addition, the CARES Act allows a taxpayer to elect to use its 2019 ATI for purposes of determining its 163(j) Limitation for 2020, which will potentially benefit taxpayers that will have a lower than projected ATI for 2020 due to the impact of COVID-19.

This favorable 50% limitation is only available to partnerships in 2020. For 2019, however, excess business interest of a partnership is allocated to the partners and is then bifurcated: 50% of such excess business interest becomes fully deductible in the 2020 taxable year and 50% remains subject to the limitations of present law—i.e., such remaining interest will not be deductible until the partnership allocates additional excess taxable income or excess interest income to the partner.

Private equity funds will need to analyze the potential benefits of the CARES Act as it relates to the 163(j) Limitation and ensure that they are maximizing the potential benefit for their funds and their various portfolio companies. In addition, consideration should be given as to whether to put in place short term financing that can benefit from the temporary increased deduction limitations afforded by the CARES Act.

For more information on the CARES Act and emerging legal issues on the COVID-19 crisis, visit our COVID-19 Resource Center here.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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