**A Summary of the CARES Act for Delaware Nonprofits**
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Nonprofits in Delaware (and around the country) are facing a literal pandemic threat that has shifted them into crisis planning mode. Events have been cancelled or postponed. Economic uncertainty has threatened ordinary cash flow. Doors have been shuttered, employees have been laid off, and Zoom conferences and webinars to keep everyone connected remotely have become the new normal. For many nonprofits and their boards, the reality is that they need to be giving critical consideration to how and whether they will be able to carry out their mission over the short and long term. Recognizing the importance of the nonprofit sector to our economy and the unprecedented threats COVID-19 has imposed on the world, our federal, state, and local governments are reacting at a fever pitch, and many individuals as well as the private sector are responding in positive, constructive, and innovative ways.

At the federal level, the government has put its thumb on the print button and recently enacted several laws beneficial to businesses, including nonprofits. Many others have summarized these acts and explained how they pertain to nonprofits in far more detail than here.[1] All would agree that the best advice any nonprofit can get right now is from their boards and professional advisors, such as their accountants and local SBA reps, as well as resources such as the Delaware Alliance for Nonprofit Advancement (DANA), and determine what options make sense under this legislation. Separate from the federal landscape, many local resources and leaders are combining efforts to help the nonprofit sector, such as the COVID-19 Strategic Response Fund at Delaware Community Foundation (DCF) and the COVID-19 Rapid Response Fund at the United Way of Delaware.[2] Other state and local funding is expected to be released soon to help support these funds and our nonprofits.

Signed into law on March 27, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) contains 880 pages of potential relief for the nonprofit sector. While the CARES Act impacts a broad swath of businesses and individuals across the country, Delaware nonprofits are affected as well. The relevant provisions as to Delaware nonprofits are summarized in short form as well as explained in further detail below.

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[1] *See, e.g.*, National Council of Nonprofits, *Nonprofits and Coronavirus, COVID-19*, *available at* www.councilofnonprofits.org/nonprofits-and-coronavirus-covid-19; Delaware Alliance for Nonprofit Advancement, *Coronavirus Information for Nonprofits*, *available at* delawarenonprofit.org/covid-19; George Constantine, *et al.*, *CARES Act Provides Financial relief for Nonprofit Organizations* (Venable LLP, Mar. 27, 2020), *available at* www.venable.com/insights/publications/2020/03/cares-act-provides-financial-relief-for-nonprofit); James Joseph, *et al.*, *Analysis of CARES Act for Non-Profit Organizations* (Arnold & Porter, Mar. 27, 2020), *available at* www.arnoldporter.com/en/perspectives/publications/2020/03/analysis-of-cares-act-for-nonprofit; James Abel, *et al.*, *President Trump Signs CARES Act Into Law* (Steptoe, Mar. 27, 2020), *available at* www.steptoe.com/en/news-publications/president-trump-signs-cares-act-into-law.html; Harry Friedman, *et al.*, *The Impact of the CARES Act on Nonprofits* (Greenberg Taurig, Mar. 31, 2020), *available at* www.gtlaw.com/en/insights/2020/3/the-impact-of-the-cares-act-on-nonprofits.

[2] To learn more about these funds and how you can apply, visit www.delcf.org/coronavirus. The Delaware COVID-19 Emergency Response Initiative, including the management of these funds, is being jointly coordinated between DCF, United Way of Delaware, Philanthropy Delaware, and DANA.

## Summary of the CARES Act Provisions Relevant to Delaware Nonprofits

### Paycheck Protection Program (PPP) (Section 1102)

- Nonprofits organized under 501(c)(3) and veterans organizations under 501(c)(19) are eligible for the PPP. All other nonprofits are not eligible.
- In general, eligible nonprofits can borrow the lesser of $10 million or 2.5 times their average monthly payroll costs for the past twelve months (including salaries) (plus any EIDL debt, should they take out an EIDL). PPP loans are first come first serve.
- In general, eligible nonprofits can apply for forgiveness of most, if not all of the borrowed amount, namely 8 weeks of payroll costs (including salaries, state and local taxes, and other benefits), rent, transportation costs, and utilities (telephone, internet).
- The loan is payable in two years and the interest rate is 1%. You can get one PPP loan.
- Entities cannot take both a PPP loan and the Employee Retention Credit (Section 2301).
- Borrowers must complete the SBA Form 2483 (Paycheck Protection Program Application Form) and provide payroll documentation.

### Emergency Economic Injury Disaster Loans (EIDL) (Section 1110)

- All private, non-governmental nonprofits as well as nonprofits exempt under Section 501(c), 501(d), and 501(e) are eligible for an EIDL.
- In general, eligible nonprofits will be able to borrow up to $2 million at an interest rate capped at 2.75% for a maximum of 30 years.
- Nonprofits that apply will receive a $10,000 emergency grant, which will not need to be repaid, even if the nonprofit ultimately is denied the loan.
- Nonprofits can apply for both an EIDL and the PPP. EIDL funds cannot be used for the same expenses as the PPP loan.
- Should you take both and seek loan forgiveness under the PPP, the $10,000 EIDL grant will be subtracted from the amount forgivable under the PPP.

### Other Tax Provisions Affecting Nonprofits (Sections 2204, 2205)

- For at least 2020, all taxpayers get an above-the-line deduction of up to $300 for charitable cash donations. For at least 2020, those taxpayers who itemize no longer have a cap on charitable deductions.
- For at least 2020, corporation limits on charitable deductions have been raised from 10% to 25%, with provisions to carry over excess contributions in subsequent tax years.

**<u>Part I. Paycheck Protection Program (PPP)</u>.** The PPP is designed to help those qualifying businesses, nonprofits, and certain sole proprietors, contractors, and self-employed individuals with 500 or less employees.[3] Because the SBA interim final rule confirms that the program is expected to be oversubscribed and likely underfunded, nonprofits that are going to apply should do so as soon as possible.[4]

<u>Which nonprofits qualify for the PPP?</u> Section 1102 of the CARES Act expands the Emergency SBA 7(a) loan program to encompass a new Paycheck Protection Program. The PPP expands the universe of SBA eligible organizations to include nonprofit organizations under Section 501(c)(3) and veterans organizations under Section 501(c)(19).[5] All other nonprofit organizations, such as those exempt under 501(c)(4) or trade associations exempt under 501(c)(6), are ineligible to participate. If your nonprofit is not eligible, the rest of the analysis of the PPP is irrelevant, and you can skip to Part II below.

<u>How much can be borrowed?</u> Through the PPP, eligible nonprofits and other entities can borrow up to $10 million dollars, although the maximum loan an individual nonprofit can take out will vary. The SBA has issued guidance that the terms of a PPP loan are 24 months (2 years), with a fixed interest rate of 1%.[6] Payments are deferred for the first six months, which means interest will accrue during this time. Loans will be processed by any existing SBA 7(a) lender or through most banks and credit unions. Organizations should consult with their local bank to see whether it is participating in the program. Lenders will start processing loan applications as

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[3] Other provisions of the CARES Act or other legislation (or future legislation) may apply to businesses with more than 500 employees and have not been analyzed here. According to data from the Census, firms with 500 or few workers accounted for 99.7 percent of employer firms in the US in 2016. *See* Small Business & Entrepreneurship Council, Facts & Data on Small Business and Entrepreneurship: American Business is Small Business, *available at* sbecouncil.org/about-us/facts-and-data; *see also* U.S. Small Business Administration Office of Advocacy, Small Business Profile (2016), *available at* www.sba.gov/sites/default/files/advocacy/United_States.pdf. The public sector (federal, state, local government jobs) account for between 15-17% of the workforce. *See* Michael Sauter, *Public Sector Jobs: States Where the Most People Work for Government* (USA Today, June 1, 2018), *available at* www.usatoday.com/story/money/economy/2018/06/01/states-where-the-most-people-work-for-government/35302753.

[4] *See* SBA, Business Loan Program Temporary Changes; Paycheck Protection Program (13 CFR Part 120, Docket No. SBA-2020-0015) (Published April 2, 2020) at 2 ("This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted") and *id.* at 13 (providing that PPP loans are first come, first serve), *available at* https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf.

[5] CARES Act, Section 1102(a)(2)(36)(A)(vii) and 1102(a)(2)(36)(A)(ix). While the CARES Act imposes an additional restriction that the 501(c)(3) or 501(c)(19) needs to be exempt under Section 501(a), this does not appear to be a limitation under the published SBA guidance. *Compare id.* with SBA, *Business Loan Program Temporary Changes; Paycheck Protection Program* (13 CFR Part 120, Docket No. SBA-2020-0015) (Published April 2, 2020) at 4-5, Part III.2.a.i.B (providing eligible organizations include "A tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business"), *available at* https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf.

[6] *See* SBA, Business Loan Program Temporary Changes; Paycheck Protection Program (13 CFR Part 120, Docket No. SBA-2020-0015) (Published April 2, 2020) at 11 (providing that the interest rate on a PPP loan will be 100 basis points or 1%), *available at* https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf.

soon as April 3, 2020.[7] Due to high demand, and the fact that the SBA interim final rule was only published late evening on April 2, nonprofits (and other applicable businesses that can apply on or after April 3) should expect delays in the application process. Nonprofits planning to apply should be reviewing SBA Form 2483 (Paycheck Protection Program Application Form) and gathering the required payroll and other documentation.[8]

In general, the maximum loan amount that an entity can take under the PPP is calculated by multiplying its average total monthly payroll costs (e.g., salary) by 2.5, beginning with the last payroll date and going backwards 12 months.[9] There are modifications to the calculation based on seasonal employees and other exceptions based on highly compensated employees, so it is critically important to work with a professional advisor or SBA lender to determine the correct amount.[10] There is no requirement to take a loan for the full amount, and organizations should weigh how much they should borrow against any amounts that may be ultimately forgiven. Unlike traditional SBA 7(a) loans, nonprofit applicants do not need to provide a personal guarantee or provide collateral, nor do they need to demonstrate that they are unable to obtain credit elsewhere. Payments and interest on the PPP loan will not be required the first six months.

The PPP is designed to streamline and expedite the application and approval process so that lenders make these loans and get cash into the hands of these organizations as quickly as possible. The SBA guidance, as recently published in its application form, suggests a fairly straightforward calculation:

> For purposes of calculating "Average Monthly Payroll", most Applicants will use the average monthly payroll for 2019, excluding costs over $100,000 on an annualized basis for each employee. For seasonal businesses, the Applicant may elect to instead use average monthly payroll for the time period between February 15, 2019 and June 30, 2019, excluding costs over $100,000 on an annualized basis for each employee. For new businesses, average monthly payroll may be calculated using the time period from January 1, 2020 to February 29, 2020, excluding costs over $100,000 on an annualized basis for each employee.[11]

In its interim final rule, the SBA has also published additional guidance as to the step by step calculation:

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[7] *See* U.S. Small Business Administration, Paycheck Protection Program (PPP), *available at* www.sba.gov/funding-programs/loans/paycheck-protection-program-ppp (updated Apr. 1, 2020).

[8] *See* SBA Form 2483 (Sample), *available at* https://www.sba.gov/sites/default/files/2020-03/Borrower%20Paycheck%20Protection%20Program%20Application_0.pdf.

[9] CARES Act, Section 1102(a)(2)(36)(E).

[10] In this analysis, we have set forth the simplest way to calculate the maximum loan amount, but this analysis should by no means be taken as legal or accounting advice for an organization's specific circumstances. To be clear, organizations should consult with their professional advisors and experts to make sure they understand the criteria required for this calculation and other considerations related to the PPP.

[11] *See* SBA Form 2483, Paycheck Protection Program Application Form (page 3), *available at* www.sba.gov/document/sba-form--paycheck-protection-program-ppp-sample-application-form.

The following methodology, which is one of the methodologies contained in the Act, will be most useful for many applicants.

i. Step 1: Aggregate payroll costs (defined in detail below in f.) from the last twelve months for employees whose principal place of residence is the United States.
ii. Step 2: Subtract any compensation paid to an employee in excess of an annual salary of $100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of $100,000 per year.
iii. Step 3: Calculate average monthly payroll costs (divide the amount from Step 2 by 12).
iv. Step 4: Multiply the average monthly payroll costs from Step 3 by 2.5.
v. Step 5: Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the 9 amount of any "advance" under an EIDL COVID-19 loan (because it does not have to be repaid).[12]

Using the above guidance, here are two scenarios showing how a small, hypothetical organization may calculate the maximum loan amount for their entity for purposes of the PPP:

- *Example 1*: Organization A has four W-2 employees, each making $56,250 per year including benefits and those salaries have not changed over the past twelve months. In this situation, the total payroll would be $225,000, and the average monthly payroll costs would be $18,750 ($225,000 / 12). The maximum loan that this organization could take out is $46,875 ($18,750 * 2.5).

- *Example 2*: Organization B has four W-2 employees, with one making $135,000/year and the other three making an average of $30,000 each including benefits. For the highly compensated employee, the amount over $100,000 is excluded from the calculation. In this situation, the total payroll would be $190,000 ($100,000 + $90,000), and the average monthly payroll costs are $15,833.33 ($190,000 / 12). The maximum loan that this organization could take out would be $39,583 ($15833.33 * 2.5).[13]

In addition to the amount that an organization can borrow based on the applicable payroll calculation discussed above, entities can also borrow an additional amount equal to the outstanding amount of a loan made under the SBA's Disaster Loan Program between January

[12] *See* SBA, Business Loan Program Temporary Changes; Paycheck Protection Program (13 CFR Part 120, Docket No. SBA-2020-0015) (Published April 2, 2020) at 8-9, *available at* https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf.

[13] As noted above, there are additional calculations to consider related to seasonal employees and also for businesses that began on or after January 1, 2020, as well as the inclusion of other benefits as described above, or if the organization took an EIDL as discussed below. A tax professional or SBA lender can assist in making these calculations. The SBA guidance provides additional examples. See SBA, *Business Loan Program Temporary Changes; Paycheck Protection Program* (13 CFR Part 120, Docket No. SBA-2020-0015) (Published April 2, 2020) at 8-9, *available at* https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf

31, 2020 and the date on which such loan may be refinanced under the PPP loan program (e.g., loans taken out under the Expanded Economic Injury Disaster Loan (EIDL) & Emergency Grants (SBA 7(b) Loans), discussed in Part II below).[14] Essentially, the PPP allows organizations to choose to refinance an EIDL loan (if they have received or previously applied for one). The total loan amount for any organization is subject to a $10 million cap. [15]

What can the borrowed funds be used for? The PPP loans are specifically supposed to be used for payroll costs and other short term operating expenses—effectively Congress wants nonprofits to keep employees on payroll and continue paying for certain fixed operating costs in the short term.[16] "Payroll costs" are broadly defined to include employee salaries, wages, commissions, cash tips, state and local payroll taxes, and certain other benefits costs.[17] Besides salary and payroll costs, the PPP loans can be used for certain operating costs, namely: group health care benefits (during periods of paid sick, medical, or family leave, and insurance premiums), interest payments on mortgage obligations, rent/lease payments, utilities payments, and interest on any other debt obligations incurred before the covered period (where the covered period is defined as the 8 week period beginning on the origination date of the PPP loan).[18] Expenses related to 1099 contractors are excluded except in narrow circumstances.[19]

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[14] CARES Act, Section 1102(a)(2)(36)(F)(iv).

[15] SBA guidance has also suggested that the loan maximum can be calculated by adding two months of your average monthly payroll costs from the last year plus an additional 25% of that amount, subject to the $10 million cap, with different applicable time periods for seasonal or new businesses, and payroll costs are capped at $100,000 annualized for each employee. *See* SBA, *Paycheck Protection Program (PPP) information Sheet: Borrowers* (page 2), *available at* home.treasury.gov/system/files/136/PPP%20Borrower%20Information%20Fact%20Sheet.pdf.

[16] CARES Act, Section 1102(a)(2)(36).

[17] CARES Act, Section 1102(a)(2)(36)(A)(viii). Payroll costs is broadly defined to also include payments for vacation, parental, family, medial, or sick leave, allowance for dismissal or separation, payment required for the provisions of group health care benefits, including insurance premiums, payment of any retirement benefit, payment of State or local tax assessed on the compensation of employees, and the sum of payments of 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 less than $100,000/year. Payroll costs exclude any compensation of an individual employee in excess of an annual salary above $100,000 and any federal taxes such as the employer's portion of Social Security and Medicare. It also excludes payroll expenses related to employees who live outside of the US, and certain other qualified sick leave wages that are allowed under coronavirus legislation (i.e., qualified sick or family leave under Section 7001 and 7003 of the Families First Coronavirus Response Act (Public Law 116-127),

[18] CARES Act, Section 1102(a)(2)(36)(E). For rent, the leasing agreement had to be in force before February 15, 2020. *Id.* at Section 1106(a)(4). For utilities, that includes electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020. *Id.* at Section 1106(a)(5). What is included as transportation costs is not explicitly defined under the legislation.

[19] CARES Act, Section 1102(a)(2)(36)(A)(viii)(I)(bb). Most nonprofits will not have 1099 employees that qualify under this provision, in part because the typical individuals or contractors that are issued 1099s by nonprofits are separately eligible to apply under different provisions of the CARES Act (such as the EIDL). *See also* SBA, *Business Loan Program Temporary Changes; Paycheck Protection Program* (13 CFR Part 120, Docket No. SBA-2020-0015) (Published April 2, 2020) at 11 ("[I]ndependent contractors have the ability to apply for a PPP loan on their own so

In its interim final rule, the SBA has published additional specific guidance as to what qualifies as payroll costs:

> Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.[20]

As discussed below, the 8-week covered period is a critical component of the PPP program, particularly when it comes how it works with the loan forgiveness provisions.

<u>How much of the PPP loan can be forgiven?</u> Section 1106 of the PPP creates a loan forgiveness mechanism that effectively allows a large portion of the nonprofit's PPP loan to be converted into a tax free grant.[21] The portion of the grant that can be forgiven is specifically for those payroll costs as defined above, as well as most mortgage interest, rent, and utility costs over the 8 week period after the loan is made, provided that employee and compensation levels are maintained.[22] The SBA guidance states unequivocally that applicants should not expect to have more than 25% of non-payroll costs forgiven.[23]

Put in practical terms, an entity can take out a loan for essentially up to 10 weeks of payroll costs, and get forgiven 8 weeks of payroll costs plus any rent, utilities, other contractor payments during this same time period. The amount that may be forgiven may be reduced by certain circumstances, such as if employees have been laid off or salaries were reduced.[24]

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they do not count for purposes of a borrower's PPP loan calculation"), *available at* https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf.

[20] SBA, *Business Loan Program Temporary Changes; Paycheck Protection Program* (13 CFR Part 120, Docket No. SBA-2020-0015) (Published April 2, 2020) at 10, *available at* https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf.

[21] The CARES Act also explicitly excludes any forgiven amount from being included as gross taxable income. *Id.* at Section 1106(i). Presumably, for nonprofits, any forgiven amount would not count as unrelated business income either.

[22] CARES Act, Section 1106(b); *see also* SBA Form 2483, *Paycheck Protection Program Application Form* (page 2), *available at* www.sba.gov/document/sba-form--paycheck-protection-program-ppp-sample-application-form.

[23] SBA Form 2483, *Paycheck Protection Program Application Form* (page 2), *available at* www.sba.gov/document/sba-form--paycheck-protection-program-ppp-sample-application-form; see also SBA, *Business Loan Program Temporary Changes; Paycheck Protection Program* (13 CFR Part 120, Docket No. SBA-2020-0015) (Published April 2, 2020) at 14 and at 16), *available at* https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf.

[24] The amount forgiven will be reduced proportionally by any reduction in employees compared to the prior year (and also reduced by the reduction in pay of any employee beyond 25% of their compensation the prior year). Borrowers are strongly encouraged to re-hire employees and restore any changes to salary levels. There is an

Similarly, organizations that receive other funding that is for the same expenses over the applicable 8-week period may also risk reducing the total forgivable amount.[25] As with the loan calculation, the nonprofit (and if necessary, its board) should consult tax and other professional advisors, and best practices would suggest keeping the board informed of these particular management decisions regardless.

Using the same examples above, the following scenarios illustrate how much of the loan taken by those hypothetical organizations could be forgiven:

- *Example 1*. Organization A took out $45,000 of the maximum amount they could borrow under the PPP program. Over the 8-weeks from the date of the loan, the organization incurred payroll costs of $34,615.38 ($8653.85 in salary per pay period * 4 pay periods, assuming 2-week pay periods). They paid $4,000 in rent ($2,000/month for 2 months) and $1,000 in utilities and other qualifying expenses (a total of $5,000, or 12.6% of the loan). In this case, they should be able to apply for $39,615.38 in loan forgiveness, and the remaining $5,384.62 would have to be paid off before the end of 24 months at a 1% interest rate, plus any interest accrued over the forgiven portion of the loan before it was forgiven.

- *Example 2*. Organization B borrowed the full $39,583. Over the 8-weeks from the date of the loan, Employee 1 had $15,384.62 in qualifying payroll expenses ($100,000/26 pay periods * 4 pay periods) and the payroll costs for Employees 2, 3, and 4 were $13,846.15 ($90,000/26 pay periods * 4 pay periods), for a total of $29,230.77 in payroll. They paid $8,000 in rent over two months and had $4,000 in other qualifying expenses. Their total expenses were $41,230.77, which in this scenario would allow them to apply for the entire $39,583 to be forgiven. However, the SBA's 25% cap of non-payroll costs in their case would be $10,307.69. Assuming this is how the SBA would handle this scenario, Organization B would be forgiven $39,538.46 of their original PPP loan, leaving them a balance of $44.87 plus interest.

As these examples show, nonprofits can expect that a majority, and in some cases the full amount, of the PPP loan to be forgiven. Once the nonprofit applies for loan forgiveness through its lender, it should expect a decision within 60 days.

<u>PPP loan certification</u>. Borrowers must make several good faith certifications as part of the PPP loan application.[26] These include certifying that the current economic uncertainty makes the loan necessary to support ongoing operations, the funds will be used to retain and workers and maintain payroll or make mortgage, ease, and utility payments, and that you will provide all necessary documents to verify everything (for the loan or for the loan forgiveness

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exception to the reduction if the nonprofit re-hires employees and/or eliminates the reduction in salaries by June 30, 2020.

[25] CARES Act, Section 1102(a)(2)(G)(i)(IV)

[26] CARES Act, Section 1102(a)(2)(G).

application).[27] Organizations must also certify that they do not have any other application pending for a loan for the same purpose, meaning organizations cannot double dip and borrow from two sources for the same expenses.[28]

Other considerations. Like other loans, lenders will require documentation, including copies of at least the two most recently filed 990s and other payroll and tax reports. Unlike typical SBA loans, there is no requirement that an entity must try and obtain some or all of the loan funds from other sources prior to applying for the PPP loan. There is also no personal guarantee requirement or any prepayment penalties. So long as the loan proceeds are used for authorized purposes, nonprofits (and businesses) are supposed to find this to be one of the easiest loan applications they have ever done.[29]

**Part II. SBA Emergency Economic Injury Disaster Loans (EIDL)**. Section 1110 of the CARES Act establishes Emergency EIDL grants and expands SBA 7(b) loans in different ways. Particularly, Section 1110 provides that the first $10,000 of the EIDL is a grant that does not need to be repaid under any circumstance. Delaware nonprofits can seek additional guidance on this issue for free thanks to the Delaware Small Business Development Center.[30]

What nonprofits are eligible for an EIDL? The EIDL is open to many nonprofits, including any private nonprofit that is a non-governmental agency and those nonprofits exempt under Section 501(c), (d) or (e).[31]

How much can be borrowed? Under the SBA's Economic Injury Disaster Loan program, small businesses can typically apply for working capital loans of up to $2 million, with rates capped at

[27] *Id.*

[28] CARES Act, Section 1102(a)(2)(G)(i)(IV). It is unclear whether the lender would consider other grants that an organization may receive during the same period as a penalty that would reduce the forgivable amount, although practically speaking, grants for general operating grants can be used for different periods or expenses outside of the covered period for purposes of any PPP loan. Tax professionals should be consulted in the event an organization receives other loans or grant funding during this time, and organizations should keep careful records —particularly of qualifying expenses—to ensure that everything is properly accounted for, including for the PPP lender and

[29] Taking the PPP loan also renders the organization ineligible for another provision of the CARES Act related to deferral of the payroll tax (Section 2301, Employee Retention Credit). This analysis does not summarize that particular tax provision, but it is worth noting that organizations taking this credit can defer the employer share of the Social Security tax they otherwise are responsible for paying to the government. Those taxes must be paid in two 50% installments, the first by December 31, 2021 and the second by December 31, 2022. However, while deferred payments are effectively tax free loans from the government, these payments would eventually be due in full, where the PPP loan has a sizable portion that can be forgiven, as explained above.

[30] Visit www.delawaresbdc.org or call 302-831-1555.

[31] *See* SBA EIDL application, *Eligible Entity Verification Question*, *available at* covid19relief.sba.gov/#. While Section 1110 of the CARES Act creates some ambiguity by making a distinction about "private" nonprofits, subsequent guidance and the EIDL application itself makes it clear that "private" means "non-governmental" and the EIDL program is open to a far wider scope of tax exempt entities than the PPP, and includes 501(c)(4), (6), and (7) organizations, such as the Delaware State Chamber of Commerce and other trade organizations or membership groups, advocacy organizations, and unions and social clubs. *See, e.g.*, *See* U.S. Senate Committee on Small Business & Entrepreneurship, *The Small Business Owner's Guide to the CARES Act* (page 7), *available at* www.coons.senate.gov/imo/media/doc/Small%20Business%20Guide%20to%20the%20CARES%20Act.pdf.

2.75% for nonprofits for up to 30 years.[32] The CARES Act expands the eligibility of this program to include 501(c) organizations (as explained above), and also waives or modifies some of the standard EIDL program requirements, such as collateral and guarantee requirements.[33] Like the PPP, EIDL loans are expected to be processed and approved relatively quickly.

How does the $10,000 emergency advance work? Section 1110 provides all EIDL applicants with a $10,000 advance, which is supposed to be paid within three days of submitting the SBA application.[34] Practically speaking, however, these advances will not be received in three days.

The $10,000 advance is a grant, and is not required to be repaid even if the loan is denied.[35] Like the PPP, the funds are supposed to be used to cover payroll costs, rent, and other obligations that have been otherwise disrupted due to COVID-19.[36]

How does the EIDL work with the PPP? The two programs are separate and both require careful consideration. While the first $10,000 of the EIDL is a grant, any additional amount borrowed as an EIDL may have different terms than the PPP loan. Notably, an organization using EIDL funds may not "double dip" and use the PPP for the same expenses.[37]

Can a nonprofit get both a PPP loan and an EIDL? Yes. However, it should be noted that for those organizations receiving the $10,000 advance, that amount will be subtracted from the amount forgivable under the PPP.[38] Using the example from Organization A above, had our hypothetical nonprofit also received $10,000 as an EIDL grant, its total amount forgiven would have only been $29,615.38, leaving it with a $15,384.62 balance. Again, consultation with a tax professional will help determine the most appropriate amount to borrow under the PPP should the entity also take advantage of both programs.

**Part III. Other Tax Provisions Affecting Nonprofits**. The CARES Act contains several other provisions that will have an impact on the nonprofit sector. They include:

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32 *See* SBA, *Economic Injury Disaster Loans and Loan Advance*, *available at* www.sba.gov/page/disaster-loan-applications and *SBA Disaster Assistance in Response to the Coronavirus*, *available at* https://www.sba.gov/disaster-assistance/coronavirus-covid-19.

33 CARES Act, Sections 1110(c) and 1110(d).

34 The application can be submitted here: covid19relief.sba.gov/#

35 CARES Act, Section 1110(c)(5).

36 CARES Act, Section 1110(c)(4).

37 CARES Act, Section 1102(a)(2)(G)(i)(IV); *see also* U.S. Senate Committee on Small Business & Entrepreneurship, *The Small Business Owner's Guide to the CARES Act* (page 7), *available at* www.coons.senate.gov/imo/media/doc/Small%20Business%20Guide%20to%20the%20CARES%20Act.pdf ("For example, if you use your EIDL to cover payroll for certain workers in April, you cannot use PPP for payroll for those same workers in April, although you could use it for payroll in March or for different workers in April.")

38 *See* U.S. Senate Committee on Small Business & Entrepreneurship, *The Small Business Owner's Guide to the CARES Act* (page 7), *available at* www.coons.senate.gov/imo/media/doc/Small%20Business%20Guide%20to%20the%20CARES%20Act.pdf.

Universal Charitable Deduction. Section 2204 provides that for the 2020 calendar, all taxpayers who donate up to $300 to qualified nonprofits (such as 501(c)(3) organizations) will be able to include that amount as an above the line deduction on their 2020 tax returns.[39]

Additional Deductions Allowed. For those individual taxpayers who itemize deductions, Section 2205 removes the limits on charitable deductions, allowing those individuals to claim up to 100% of adjusted gross income, subject to certain limitations.[40] Charitable contributions are limited to cash and exclude donations made to those organizations exempt under Section 501(a)(3) (supporting organizations) and for the establishment of a new or maintenance of an existing donor advised fund.[41]

Expansion of Corporate Giving Limits. Section 2205 also raises the cap on the deductibility of annual charitable giving by corporations from 10% to 25% of taxable income.[42] Corporations may also carry over excess contributions in subsequent tax years.[43]

These measures should help to increase charitable giving from both individuals and corporations.

**Part IV. Unemployment Provisions**. The CARES Act creates a temporary Pandemic Unemployment Assistance program, which allows nonprofits to be reimbursed for half of the costs incurred through the end of 2020 to pay unemployment benefits.[44] This program and related unemployment issues are not analyzed here and nonprofits covered by this provision should consult with their professional advisors to learn how they may be impacted.

**Conclusion.** The CARES Act provides quick and, in most cases, critical funding for many Delaware nonprofits to continue operating while we weather these uncertain times. Because a large portion of these loans can effectively be converted to grants, nonprofits and their boards should give these options strong consideration. With many businesses and nonprofits making similar decisions, however, there is a strong likelihood that there will not be enough money allocated toward these programs. Nonprofits should strongly consider applying early in the process and consulting with your tax advisors and other professionals if they haven't already.

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[39] CARES Act, Section 2204(a).

[40] CARES Act, Section 2205(a)(2)(A)(i). Excess contributions may be able to be carried over in subsequent years. *See id.* Section 2205(a)(2)(A)(ii).

[41] CARES Act, Section 2205(a)(3).

[42] CARES Act, Section 2205(a)(2)(B)(i). Food donations from corporations would be available to 25 percent, up from the current 15 percent cap. *Id.* at Section 2205(b).

[43] CARES Act, Section 2205(a)(2)(B)(ii).

[44] *See* National Employment Law Project, *Unemployment Insurance in the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, *available at* www.nelp.org/publication/unemployment-insurance-provisions-coronavirus-aid-relief-economic-security-cares-act; *see also* National Council of Nonprofits, *Nonprofits and Coronavirus, COVID-19*, *available at* www.councilofnonprofits.org/nonprofits-and-coronavirus-covid-19; David Heinen, *Self-Insured Nonprofits and Unemployment Insurance* (National Council of Nonprofits, Mar. 23, 2020), *available at* www.councilofnonprofits.org/thought-leadership/self-insured-nonprofits-and-unemployment-insurance.

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