I. PURPOSE
This guide provides information on the financial supports, in the form of tax credits, loans, and loan guarantees, for eligible businesses included in the CARES Act, which the House passed on March 27, and President Trump signed into law the same day (Public Law 116-136. The measure is the largest stimulus package in history. The guide provides details on what businesses qualify for the provisions, how the provision’s mechanisms function, and how much funding is available.

II. LEGISLATION BACKGROUND
In the face of the economic and social disruption caused by COVID-19, Congress has already passed two significant response packages to address health sector needs and to support American families. On March 19, Senate Majority Leader Mitch McConnell (R-KY) released the Senate Republican draft of the Phase 3 stimulus package, known as the Coronavirus Aid, Relief, and Economic Security (CARES) Act. With a $2.3 trillion-dollar price tag, this third package is the largest and most significant stimulus packages in American history.

On March 25, after a few delays, the Senate voted unanimously (96-0) to advance “Phase Three” of a congressional response to the COVID-19 emergency. The passage of the CARES Act followed intense negotiations over the prior week. Its $2.3 trillion price tag includes: extraordinary public health spending to confront coronavirus; immediate cash relief for individual citizens; a broad lending program for small business; and targeted relief for hard-hit industries.

On Friday, March 27, the House passed the CARES Act, giving Congress’ final approval to the package. The House approved the measure by voice vote, after leaders in both parties successfully blocked Rep. Thomas Massie, a Kentucky Republican with a penchant for using procedural maneuvers to try to block legislation, to force a recorded vote.

This guide provides details of the tax credits, loans, and loan guarantees addressed in the landmark legislation.
III. CARES ACT BUSINESS TAX PROVISIONS

Coming on the heels of an extended tax filing deadline and the Coronavirus Relief Act, the CARES Act is the third step of what promises to be many taken by Congress to help the country recover. The bill includes multiple tax provisions that aim to support businesses during the pandemic by improving a firm’s ability to remain liquid and survive through the crisis.

Employee Retention Credit (Sec. 2301):
The CARES Act provides eligible employers – including tax-exempt organizations but not governmental entities – a refundable credit against payroll tax (Social Security and Railroad Retirement) liability equal to 50 percent of the first $10,000 in wages per employee (including value of health plan benefits).

Who Qualifies?
Eligible employers must have carried on a trade or business during 2020 and satisfy one of two tests:

- Have business operations fully or partially suspended due to orders from a governmental entity limiting commerce, travel, or group meetings; or
- Experience a year-over-year (comparing calendar quarters) reduction in gross receipts of at least 50 percent – until gross receipts exceed 80 percent year-over-year.

Details of the Credit:
For each eligible quarter, the business will receive a credit against its 6.2 percent share of Social Security payroll taxes equal to 50 percent of the "qualified wages" paid to EACH employee for that quarter, ending on December 31, 2020.

The business’s qualified wages depend on its size; if there were more than 100 employees during 2019, the qualified wages are limited ONLY to those wages that were paid by the employer during the quarter for the period the business was shut down. If there were less than 100 employees for 2019, however, qualified wages include not only those paid to employees during a shut-down, but also wages paid for each quarter that the business has suffered a sharp decline in year-over-year receipts.

In both cases, qualified wages include any “qualified health plan expenses” allocable to the wages, such as amounts paid to maintain a group health plan. In either case, however, the amount of qualified wages for EACH employee for ALL quarters may not exceed $10,000.

As one might expect, any wages considered in determining the new payroll tax credit for family medical leave or sick leave as part of the Coronavirus Relief Act may not be considered in determining qualified wages for the employee retention credit. The credit is refundable if it exceeds the business’s liability for payroll taxes, a likely outcome given the two new payroll tax credits that were created as part of the Coronavirus Relief Act.

Finally, if an employer takes out a payroll protection loan (PPP) under Section 7(a) of the Small Business Act, no employee retention credit will be available.

Delay of Payment of Employer Payroll Taxes (Sec. 2302):
The CARES Act postpones the due date for depositing employer payroll taxes and 50 percent of self-employment taxes related to Social Security and Railroad Retirement and attributable to wages paid during 2020. The deferred amounts would be payable over the next two years – half due December 31, 2021, and half due December 31, 2022. The Social Security Trust Fund will be backfilled by general revenue in the interim period.

Treatment of Net Operating Losses (NOL) (Sec. 2303 and 2304):
Certain changes to the loss provisions made by the Tax Cuts and Jobs Act (TCJA) are suspended to allow companies to utilize greater losses as well as to claim refunds for certain losses. Specifically, the CARES Act:

- Suspends the TCJA’s 80% of taxable income limit on net operating loss (NOL) carryovers for three years, so that the limit would not apply to tax years beginning in 2018, 2019, and 2020;
- Allows NOLs arising in 2018, 2019, and 2020 to be carried back five years; and
• Suspends the limitations on excess farm losses and on the use of a pass-through business’ losses against non-business income for three years, so that the limits would not apply to tax years beginning in 2018, 2019, and 2020.

**Corporate Alternative Minimum Tax (AMT) Credits (Sec. 2305):**
The corporate AMT was repealed as part of the TCJA, but corporate AMT credits are allowed as refundable credits until 2021. The CARES Act accelerates the ability for companies to recover those AMT credits.

**Limitation on Business Interest Expense (Sec. 2306):**
The CARES Act would temporarily increase the limitation on interest deductions imposed by the TCJA. Specifically, the Act would increase the 30% of adjusted taxable income (ATI) threshold to 50 percent of ATI, for tax years beginning in 2019 and 2020. (Special tax year 2019 rules would apply to partnerships.) It would also allow a taxpayer to elect to use tax year 2019 ATI in lieu of tax year 2020 ATI for the purpose of calculating its tax year 2020 limitation. This will help businesses increase liquidity if they have debt or must take on more debt during the crisis.

**Technical Fix Regarding Qualified Improvement Property (QIP) (Sec. 2307):**
Businesses, particularly those in the hospitality industry, can immediately write off costs associated with improving facilities, instead of having to depreciate those improvements over the 39-year life of the building. This is a fix to the TCJA’s “retail glitch,” which inadvertently prevented brick-and-mortar companies, like restaurants and retailers, from immediately writing off the cost of interior improvements, essentially making store renovations more expensive. This technical correction will help increase companies’ access to cash flow by allowing them to amend a prior year’s return, while also encouraging companies to continue facility improvements.

**Excise Tax Exemption for Hand Sanitizer (Sec. 2308):**
The CARES Act exempts from excise taxes any distilled spirits removed during 2020 for use in hand sanitizer.

**How to Access Tax Credits**
Like other Department of Treasury/IRS provisions, to claim the new tax credits in the CARES Act, businesses must complete the relevant form from the IRS. The Office of Information and Regulatory Affairs (OIRA) within the White House Office of Management and Budget (OMB) must approve all new forms. Due to the emergency nature of the Act and the tax credits, we anticipate that this normally lengthy process will be expedited. Clark Hill’s Government and Regulatory Affairs group will send updates of the status of the new forms required to claim the tax credits.

**IV. ASSISTANCE TO DISTRESSED SECTORS OF THE U.S. ECONOMY**
Title IV – Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy authorizes the Treasury to make loans directly to businesses impacted by the coronavirus. Funding is in the form of $500 billion to the Treasury’s Exchange Stabilization Fund for loans, loan guarantees, and investments in the Federal Reserve’s lending facilities to support states, municipalities, and “eligible businesses,” which include air carriers and U.S. businesses that have not received “adequate economic relief” in the form of other loans or loan guarantees (Sec. 4003). There is a separate $32 billion made available for employees of passenger air carriers, cargo air carriers, and service contractors to maintain their salaries, wages, and benefits (Sec. 4112).

Some key features of the loans entail transactions being publicly reported on the Treasury Department’s website within 72 hours and new oversight mechanisms for the allocation of funds (Sec. 4026).
Details of the Funding (Sec. 4003)
• $25 billion in loans and loan guarantees for air carriers;
• $4 billion in loans and loan guarantees for cargo air carriers;
• $17 billion in loans and loan guarantees for businesses critical to maintaining national security; and
• $454 billion for loans, loan guarantees, and investments in support of facilities established by the Federal Reserve to support lending to eligible businesses, states, and municipalities. The Treasury secretary legally must sign off on the Fed’s emergency lending programs.

The CARES Act requires the Treasury Secretary to publish application procedures and minimum requirements for loans, loan guarantees, and other investments within 10 days of enactment (Sec. 4003).

Who Qualifies?
Recipients of the funds must not have other reasonably available credit, the intended obligation must be “prudently incurred,” and the loan must be sufficiently secured (Sec. 4003). Additionally, the principal of any these loans or other obligations cannot be reduced by debt forgiveness. It is also a requirement that recipients of a loan must have been created and have a predominant presence in the United States.

Importantly, Sec. 4003 details that borrowers applying for loans through the Treasury and Fed’s lending facilities would need to make a “good-faith certification” that:
• The funds will be used to retain at least 90 percent of a recipient’s workforce, at full compensation and benefits, until Sept. 30, 2020.
• The recipient intends to restore at least 90 percent of workforce that existed on Feb. 1, 2020 and restore all compensation and benefits to workers within 4 months of the end of Health and Human Services Administration’s public health emergency declared Jan. 31.
• The borrower won’t buy back stocks or pay dividends while the loans are outstanding.
• The borrower won’t outsource jobs until at least two years after the loan is repaid.
• The borrower won’t end collective bargaining agreements for at least two years after the loan is repaid (Sec. 4025).
• The borrower won’t try to block union organizing while the loan is outstanding.

Airline Specifics
Air carriers are receiving $29 billion in loans from the Title IV Subtitle A, Sec. 4003. There is a separate $32 billion made available to aviation workers under Subtitle B, Sec. 4112. The CARES Act requires the Secretary of Transportation to require, to the extent reasonable and practicable, loan or loan guarantee recipient air carriers maintain their scheduled air transportation until March 1, 2022, taking into consideration the air transportation needs of small and remote communities and the need to maintain well-functioning health care and pharmaceutical supply chains (Sec. 4005).

Federal Reserve Facilities Specifics (Sec. 4003)
The Federal Reserve programs include the Money Market Mutual Fund Liquidity Facility, the Commercial Paper Funding Facility, the Primary Market Corporate Credit Facility, the Secondary Market Corporate Credit Facility, and the Term Asset-Backed Securities Loan Facility.
The CARES Act instructs the Treasury Secretary, through the Federal Reserve, to also ensure that nonprofit organizations and businesses between 500 and 10,000 employees have access to a specific loan facility with loans not higher than two percent per year and no payments due for the first six months.

**Employee Compensation Caps (Sec. 4004)**
Any borrower under the Title IV provision must commit, for a two-year period beginning March 1, 2020, that it will cap the pay of any individual employee who earned more than $425,000 in total compensation (including bonuses and equity) in 2019 and would be prohibited from providing departing senior executives with exit payments worth more than twice their annual salary. Individual employees who made more than $3 million in 2019 have their pay capped at $3 million plus 50 percent of excess over $3 million. However, the bill would allow Treasury Secretary Steven Mnuchin to waive those restrictions “upon a determination that such a waiver is necessary to protect the interests of the Federal Government.”

**Regulatory Changes**
The package temporarily lifts several banking regulations for the duration of the COVID-19 national emergency.
- Allows the Office of the Comptroller of the Currency to waive lending limits on unsecured credit to nonbank financial companies. Currently, the OCC can only waive these limits for banks (Sec. 4011).
- Lowers the Community Bank Leverage Ratio to 8 percent from 9 percent (Sec. 4012).
- Allows financial institutions to suspend troubled debt restructuring (Sec. 4013).
- Allows financial institutions to delay implementation of the Financial Accounting Standards Board’s new Current Expected Credit Losses rule (Sec. 4014).
- Suspends restrictions on the Treasury’s Exchange Stabilization Fund that prevent it being used to support money market mutual fund credit facilities. The Fed established such a facility on March 18; this would provide the Fed legal cover for that action. The CARES Act limits the temporary suspension of restrictions by establishing an end date of December 31, 2020 (Sec. 4015).
- Expands the number of credit unions that can go to the National Credit Union Central Liquidity Facility to increase their lending to any credit union approved by the National Credit Union Administration Board. The facility is currently available to credit unions primarily lending to individuals. The legislation also would remove a prerequisite that credit unions seek other sources of liquidity before accessing the liquidity facility (Sec. 4016).
- Allows the Federal Deposit Insurance Corporation to guarantee debt of banks upon a determination of the FDIC’s board (Sec. 4016).

**Oversight Mechanisms**
Title IV designates a Special Inspector General for Pandemic Recovery within Treasury (Sec. 4018). At the appointment of the president, the special inspector general would conduct audits of all loans and other investments issued by Treasury under Title IV. The special inspector general would report to Congress quarterly. Of the $500 billion authorized to Treasury, $25 million is to be made available to the special inspector general for carrying out these duties.
The Act also establishes a Congressional Oversight Committee for the oversight of disbursement of funds by Treasury and the Federal Reserve (Sec. 4020). This commission would have five members, one appointed by each: The House Speaker, the House Majority Leader, the Senate Majority Leader, the Senate Minority Leader, and a fifth jointly by House Speaker and House Majority Leader.

The Act provides for the commission to hold hearings and take testimony. The commission would report to Congress every 30 days and be disbanded on September 30, 2025. Any sums necessary to this commission would be derived half from the House of Representatives and half from the Senate.

V. IMPLEMENTATION OF THE ACT

There will be significant guidance from the Agencies charged with implementation of the Act – primarily the Internal Revenue Service for tax related provisions and the Department of the Treasury and the Federal Reserve for the lending programs created for distressed industries. While there have been industry specific loan programs in the past (e.g., the Obama era Auto Bailout with the use of TARP funds), we’re largely into uncharted territory (not unlike the creation of a State Stabilization Fund with large appropriations to States) with these new programs. With little legislative history and no Legislative Conference Report on the measure, individual agencies will have broad discretion on how the terms of these programs are defined subject to the major statutory lines of demarcation on things like executive compensation and the like. Because of the exigency of the need for liquidity across many sectors and companies, we expect the guidance to come out quickly but there is no schedule. There will be rolling efforts to modify this guidance so the first blush of rules may not be the last for either Treasury or the Federal Reserve.

For potential loan recipients, what we will need to do will be:
• to help clients evaluate whether they want to proceed with an application to take advantage of these programs;
• assist them with the application process to be compliant with the program’s requirements (including demonstration that they are truly distressed) and not have their petition delayed because of incomplete or inaccurate data; and
• help them expedite consideration of their loan application.

For lenders, it will help them prepare to become a part of the program and make sure the loans they make meet the appropriation underwriting and statutory requirements, and then support the analysis to close the loans approved.

The process will require advocacy within the agencies for the consideration of these various loans and that advocacy will be more needed the larger the loans in question.

VI. HOW THE “BAILOUTS” COMPARE

Many Members of Congress expressed support for increased oversight and eligibility criteria for business loans, and cited previous congressional efforts to financially support industries, like the 2008 bailouts for banks and the auto industry. Democratic Senators and Representatives expressed concerns that the $500 billion provision in Title IV operated essentially like a “slush fund,” making Title IV a key area of negotiations prior to the bill’s passage in the Senate.

In their discussions about the bill, members invoked the 2008 package in broad terms, and maintained that the focus of the legislation should be employees and families. Members repeatedly emphasized that because the pandemic caused the current financial crisis, as opposed to industry, the funding included should not be viewed as a bailout for airlines and other businesses receiving loans.
Throughout discussions of the CARES Act, these historical economic packages for private industry were repeatedly referenced:

- **2001 Airline Bailout:** The law supported $15 billion; Congress approved $5 billion in direct federal aid to the airlines and another $10 billion in loan guarantees for the industry. The bill also included liability protections and insurance assistance for the airlines.

- **2008 Emergency Economic Stabilization Act, also known as TARP:** The law created a $700 billion program authorizing the U.S. Treasury to purchase “troubled assets” from institutional investors. But the Troubled Asset Relief Program ended up disbursing about $440 billion, according to ProPublica’s bailout tracker. In addition to rescuing failing banks, the program also helped the auto industry and individual families facing foreclosure. In the end, the Federal Government made money on this bailout.

- **2009 American Recovery and Reinvestment Act:** The total bill was $831 billion, according to the Congressional Budget Office. The recovery act included three broad elements – temporary tax cuts for families and businesses; an expansion of food assistance and unemployment benefits; and new spending on local infrastructure projects, education programs, and other initiatives.

**VII. UNKNOWNS MOVING FORWARD**

With the ink barely dry on the CARES Act – stage 3 – Congressional leaders are already looking ahead to “phase four” – even as Congressional Republicans play down the need for more assistance. Democrats are pushing for additional funding for state and local governments to address the rapidly spreading virus; expanding the pool of people who qualify for family and medical leave; more federal dollars for food aid; stronger worker protections for first responders; funding to offset coronavirus treatment costs; stabilizing pensions and funding for critical infrastructure projects.

Once the scale of the economic impact of the public health steps taken to contain the virus become more readily transparent, pressure will increase significantly for another round of stimulus. The timing of that package remains uncertain.
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