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## CARES Act clears Senate

The Senate voted 96-0 on March 25 to approve the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a substantial tax-and-spending package intended to provide additional economic stimulus to address the impact of the COVID-19 pandemic.

The vote came after days of negotiations between Republicans and Democrats, mostly over a variety of nontax provisions, and less than 24 hours after Senate leaders announced they had resolved their differences, though they did not release final legislative language until much later in the day than originally hoped.
**URL:** https://newsletters.usdbriefs.com/2020/Tax/TNV/200325_1_suppA.pdf

Passage in the Senate came later than expected, after lawmakers defeated an amendment introduced by Senator Ben Sasse, R-Neb., that would have ensured individuals' unemployment benefits could not exceed their earnings prior to unemployment. The bill as passed includes an additional $600 per week payment to each recipient of unemployment insurance or Pandemic Unemployment Assistance for up to four months, but Sasse and several of his Republican colleagues – including Senators Lindsey Graham and Tim Scott of South Carolina and Rick Scott of Florida – argued that the plus-up could mean some lower-paid workers will make more from unemployment than they did from working. On an earlier call with House Democrats, House Speaker Nancy Pelosi told her members, "[t]hat $600 is very substantive and we have to prevail."

The bill now heads to the House for consideration as early as March 26. President Trump has indicated he will sign it into law.

## The 30,000-foot view of key tax provisions

The CARES Act includes several significant business tax provisions that, among other things, would eliminate the taxable income limit for certain net operating losses (NOL) and allow businesses and individuals to carry back NOLs arising in 2018, 2019, and 2020 to the five prior tax years; suspend the excess business loss rules under section 461(l); accelerate refunds of previously generated corporate AMT credits; generally loosen the business interest limitation under section 163(j) from 30 percent to 50 percent (special partnership rules apply); and fix the “retail glitch” for qualified improvement property in the 2017 tax code overhaul known informally as the Tax Cuts and Jobs Act (TCJA, P.L. 115-97). Other technical corrections are also included in these tax provisions. The measure also adds an employee retention credit to encourage employers to maintain headcounts even if employees cannot report to work because of issues related to the coronavirus, as well as a temporary exception from the excise tax for alcohol used to produce hand sanitizer.

Relief to individual taxpayers would come in the form on direct cash payments, penalty-free access to retirement account savings to address virus-related financial hardships, and an expanded deduction for charitable contributions. Also included is a provision that would temporarily expand the scope of the tax exclusion for (but not the amount of) employer-provided educational assistance to include payments of qualified education loans by an employer to either an employee or a lender.

In addition, the measure contains a variety of nontax provisions to assist with coronavirus mitigation and response, including loans to help struggling businesses, aid to state and local governments, funding for health care providers, a substantial expansion of unemployment insurance, and a large supplemental funding package for agencies of the federal government.

By some unofficial estimates, the tax and spending provisions in the legislation would increase the federal deficit by roughly $2 trillion. No official score is currently available from Congressional Budget Office or Joint Committee on Taxation, however, so the actual cost of the proposal could be significantly different.

A summary and cost estimate of the tax provisions is available from Senate Finance Committee staff.
**URL:** https://newsletters.usdbriefs.com/2020/Tax/TNV/200325_1_suppB.pdf

## Business tax provisions

The business tax provisions in Senate-approved version of the CARES Act are broadly similar to those in the proposal that Majority Leader Mitch McConnell, R-Ky., unveiled on March 19. (For prior coverage, see, *Tax News & Views*, Vol. 21, No. 13, Mar. 20, 2020.) But the Senate-approved bill incorporates some revisions to the original language – some of which were added in a second iteration of the proposal that was released on March 22, and others that were incorporated in subsequent negotiations.
**URL:** https://newsletters.usdbriefs.com/2020/Tax/TNV/200319_1.html
**URL:** https://newsletters.usdbriefs.com/2020/Tax/TNV/200322_1_suppA.pdf

Notably, the approved bill does not include three provisions that were in the original – one related to the delay of corporate estimated tax payments and expanded filing deadlines and two others that would have provided technical corrections to certain international tax provisions in TCJA.

**Refundable employee retention credit:** A provision added in the most recent round of negotiations calls for a refundable tax credit, computed on a calendar-quarter basis, against taxes imposed under sections 3111(a) and 3221(a) – that is, the 6.2 percent employer-side Social Security payroll tax and corollary Railroad Retirement Tax Act (RRTA) taxes, respectively – applicable to certain employers carrying on a trade or business (which is undefined in the legislation) in 2020 which either fully or partially suspend operations due to a government order or which sustain a significant decline in gross receipts (defined as the first calendar quarter after December 31, 2019, for which gross receipts within the meaning of section 448(c) are less than 50 percent of the amount in the corresponding prior-year quarter and ending with the next quarter in which gross receipts exceed 80 percent of the corresponding prior year quarter). The refundable credit is only applicable for wages paid after March 12, 2020, and before January 1, 2021.

The credit is not available to governmental employers at the federal, state, and local level, but is available to certain tax-exempt organizations. Eligible employers may also elect out of this provision.

The credit is based on 50 percent of the "qualified wages" (up to $10,000 per employee) paid to each employee and must be reduced by any credits claimed under sections 7001 and 7003 of the Families First Coronavirus Response Act (that is, the credits available to certain employers which provide paid sick leave and paid family and medical leave as separately required under that law).

The computation of qualified wages differs slightly depending on whether the employer's average number of full-time employees (within the meaning of section 4980H) during 2019 was more or less than 100 and factors in any tax-excluded health plan expenses allocable to such wages. Any wages taken into account under the aforementioned Families First Coronavirus Response Act credit calculations are excluded from the retention credit calculation. Further, any wages taken into account for purposes of the retention credit cannot be taken into account for the section 45S employer credit for paid family and medical leave.

The legislation includes aggregation rules for eligible employers and provides that any shortfalls in the Social Security and Disability Insurance trust funds on account of the credit will be offset through transfers from the government's general fund.

Broad authority is provided to Treasury to issue any necessary guidance.

**Delay of employer payroll tax payments:** Similar to the original version of the bill, the latest iteration of the CARES Act would allow employers (and self-employed individuals) to defer payment of the 6.2 percent employer-side Social Security payroll tax, effective for wages paid between the date of enactment and December 31, 2020. Payment ultimately would be due in equal parts on December 31, 2021, and December 31, 2022. The measure would grant similar relief to Railroad Retirement Tax Act (RRTA) taxes and would backfill associated shortfalls in the Social Security and Disability Insurance trust funds by way of general fund transfers.

The new bill however, does not include a provision from the original McConnell bill that would have allowed corporations to delay making estimated tax payments and extended certain federal filing deadlines due after enactment of the bill until October 15, 2020. Nonetheless, recently released IRS guidance (Notice 2020-18) postpones until July 15, 2020 the deadline for making estimated tax payments and filing certain tax returns otherwise due on April 15, 2020. (Unlike Notice 2020-17, which Notice 2020-18 supersedes, there is no dollar limit on the amount of estimated tax payments that can be delayed. The IRS has provided additional information on Notice 2020-18 in a "frequently asked questions" document posted on its website.)
**URL:** https://www.irs.gov/pub/irs-drop/n-20-18.pdf
**URL:** https://www.irs.gov/newsroom/filing-and-payment-deadlines-questions-and-answers

**Net operating loss carryback allowed:** The latest proposal retains provisions that would allow taxpayers to carry back net operating losses arising in 2018, 2019, and 2020 to the five prior tax years. NOLs incurred in these years could fully offset prior-year taxable income. This would relax changes made as part of the TCJA, which generally eliminated all carrybacks and provided that the NOLs arising in years beginning after December 31, 2017, are deductible against only 80 percent of taxable income under section 172.

A TCJA-related technical correction that would clarify the effective date of the NOL carryback rules is also included within this section of the bill.

**Relaxation of excess business loss rule:** Pursuant to the TCJA, section 461(l) – the so-called "excess business loss" rule – generally limits certain current losses attributable to trades or businesses for noncorporate taxpayers to $250,000 ($500,000 in the case of joint filers), indexed for inflation annually. Similar to the original proposal, the current bill would generally suspend the limitation under section 461(l) through December 31, 2020. Such noncorporate owners could also benefit from the proposal's temporary NOL carryback allowance under section 172.

**Enhanced refundability of previously generated AMT credits:** The TCJA repealed the corporate alternative minimum tax (AMT) but, through new section 53(e), enabled corporations to recover previously generated AMT credits against regular tax (or, if in excess of regular tax, as refundable credits) after 2017 and before 2022. The CARES Act generally would enable corporations to accelerate any remaining AMT credits they have not yet utilized into 2019. The latest language also provides a mechanism by which a taxpayer can elect to take the entire remaining refundable credit amount in 2018.

**Enhanced interest deductibility:** The TCJA generally limited the deduction for business interest expense to business interest income plus a threshold amount of 30 percent of "adjusted taxable income" (a defined term). Similar to the original proposal, the latest iteration of the CARES Act provides that, for 2019 and 2020, the percentage of adjusted taxable income threshold would be increased from 30 percent to 50 percent. Special rules would apply for partnerships. The provision would also allow businesses to use their adjusted taxable income from 2019 in tax year 2020 (rather than their 2020 adjusted taxable income) for purposes of applying the 50 percent limitation. The bill would allow taxpayers to elect out of the favorable rules, while also providing other special rules applicable to partnerships.

**TCJA technical correction for qualified improvement property still in:** The latest iteration of the CARES Act retains language from the earlier version that would treat qualified improvement property (QIP) as 15-year property under MACRS, and eligible for current law 100 percent bonus depreciation – thus correcting a prominent unintended glitch in the TCJA.

**Other technical fixes to TCJA left behind:** However, the current version of the bill no longer includes other technical corrections related to amending section 965(h) to allow taxpayers to treat claims for refunds or credits separately from the installments of the repatriation tax and clarify the application of downward attribution rules under the subpart F controlled foreign corporation provisions.

**Aviation excise taxes:** The Senate-approved bill would temporarily repeal federal excise taxes collected in relation to commercial aviation. Excise taxes applied to the transportation of persons (the ticket tax), the transportation of property (cargo tax), and aviation fuel would be repealed from the date of enactment through the end of 2020.

**Exception from excise tax for alcohol used in hand sanitizer:** Finally, a change made during recent negotiations between Senate Republicans and Democrats adds a new provision under section 5214 that would waive from excise tax during calendar year 2020 any alcohol used to produce hand sanitizer that is produced and distributed consistent with any guidance issued by the Food and Drug Administration that is related to the coronavirus outbreak.

**Tax relief for individuals**

Like the business provisions, the tax relief proposals for individual taxpayers in the latest version of the CARES Act – with just a few exceptions – are substantially similar to those in the measure released on March 19.

**Direct cash relief:** The Senate-approved measure, like the original, would provide direct cash relief to individuals in the form of "recovery rebate" checks issued through the IRS with base amounts of $1,200 for single taxpayers and $2,400 for joint filers. Those amounts would increase by $500 for every qualifying child.

Significantly, though, the approved bill does not include a provision in the original version that called for capping rebates at reduced levels ($600 for singles and $1,200 for joint filers) for individuals who have little or no federal income tax liability. (That provision was dropped in the March 22 release after lawmakers in both parties criticized it as unfair to those with the greatest financial need.)

As in the original proposal, relief amounts would begin to phase out when adjusted gross income (AGI) exceeds $75,000 for single taxpayers, $112,500 for heads of households, and $150,000 for joint filers. Payments would be reduced by $5 for each $100 by which a taxpayer's AGI exceeds the phase-out threshold, and relief would phase out completely when a taxpayer's AGI exceeds $99,000 (for single filers), $146,500 (for heads of households), or $198,000 (for joint returns).

In a change from the March 19 version, however, the Senate-approved bill provides that AGI for purposes of the phase-out provisions would be based on a taxpayer's 2019 federal income tax return if it has been filed. If a 2019 return has not been filed, AGI would be based on the taxpayer's filed 2018 return. (The original proposal was based solely on AGI shown on a taxpayer's 2018 return. The final language reflects a revision in the March 22 draft.)

**Increased access to retirement funds:** The approved bill carries over – without changes – provisions in the original version that would waive the 10 percent early withdrawal penalty for distributions of up to $100,000 from qualified retirement plans to cover emergency expenses related to the coronavirus. Income tax on the distributions would be payable over three years, and withdrawn amounts could be recontributed within three years without regard to that year's contribution cap. The proposal also would relax the rules for loans from retirement plans for qualified relief.

The CARES Act defines a coronavirus-related distribution as a distribution made to an individual who:

- Is diagnosed with COVID-19;
- Has a spouse or dependent who is diagnosed with COVID-19; or
- Experiences financial hardship as a result of being quarantined, furloughed, or laid off; a reduction in work hours; inability to work due to lack of child care due to COVID-19; the closing or reduction in hours of a business owned or operated by the individual due to COVID-19; or other factors as determined by the Treasury Secretary.

A provision added in the March 22 draft and retained in the final bill language would waive the required minimum distribution rules for certain defined contribution plans and individual retirement accounts in calendar year 2020.

**Expanded rules for charitable deductions:** The CARES Act as approved would temporarily modify the current-law limitations on deductions for charitable contributions by individuals who itemize, as well as corporations: for individuals, the 50 percent of AGI limitation would be suspended for 2020; for corporations, the current 10 percent limitation would be increased to 25 percent of taxable income.

The current limitation on deductions for contributions of food inventory would be increased from 15 percent to 25 percent.

The proposal also would permit a partial above-the-line deduction of up to $300 for nonitemizers who make cash charitable contributions in 2020.

All of these provisions are carried over from the original proposal without modification.

**Expanded exclusion for employer-provided educational assistance:** A provision added in the final round of negotiations among Senate leaders and the administration would permit employers to provide a student loan repayment benefit to employees on a tax-free basis. Under the provision, an employer may contribute up to $5,250 annually toward an employee’s student loans, and the payment would be excluded from the employee’s income. The $5,250 cap applies to both the new student loan repayment benefit as well as other educational assistance (for example, tuition, fees, books) provided by the employer under current law. The provision would apply to any student loan payments made by an employer on behalf of an employee after date of enactment and before January 1, 2021.

**Health care-related tax provisions:** The Senate-approved bill retains two provisions from the original version that would expand the flexibility of various tax-preferred health care savings vehicles that are linked to high-deductible insurance plans by:

- Providing that a high-deductible health plan would not lose its qualified status solely because it does not offer telehealth services; and
- Treating payments for menstrual care products as eligible expenses under the rules governing health savings accounts (HSAs), medical savings accounts, and similar arrangements.

But the latest iteration of the bill drops prior proposals that would have (1) provided that individuals eligible for an HSA would not lose their eligibility solely because they participate in a Direct Primary Care (DPC) arrangement and (2) permitted DPC provider fees to be paid for out of an HSA.

**Next steps**

The measure now moves to the House, where initial responses from Democratic leaders to the Senate’s announcement of a bipartisan deal applauded the days of work by negotiators but fell short of full endorsement.

“I salute the strong leadership of Chuck Schumer and Senate Democrats,” said Speaker Nancy Pelosi of California. “I especially thank our House Democratic Committee chairmen, who worked hard to move the Republican proposal from corporations-focused to workers-first and who will now review the legislative text of this agreement with our Caucus.”

“The legislation the Senate is considering is far better than the partisan version introduced in the Senate over the weekend,” said House Democratic Leader Steny Hoyer of Maryland. “Like any compromise, it is not perfect, and I will be carefully reviewing the text of this legislation to make sure that it meets this moment and sufficiently protects workers and families."

House Democrats scheduled a series of issue-specific calls for their members on March 25, to allow various committee chairs to walk through sections of the bill, and House Republicans were set to have two calls with their own members.

House Republican Leader Kevin McCarthy of California gave his stamp of approval to the bill, saying, "Our country is on the edge, but we must be in this fight together. It's time for Washington to start acting that way and send this bill to the president." However, he also asked that House members have at least 24 hours to review a bill sent over by the Senate before voting.

**How will the House vote?:** The House is expected to approve the bill and send it to President Trump for his signature as soon as March 26. An open question at press time, however, was exactly how the House vote will take place. The chamber currently is in recess, and in response to increased calls from House members who do not want to return to Washington to vote in person during the health emergency, House Rules Committee Chairman Jim McGovern, D-Mass., on March 23 released a report examining House voting options that determined remote voting "cannot be implemented overnight, and likely cannot be accomplished in time to address the current crisis."
**URL:** https://rules.house.gov/sites/democrats.rules.house.gov/files/StaffReport_VotingOptions.pdf

Earlier in the day, 70 House Democrats sent a letter to McGovern asking that he "enact a temporary change to House Rules to allow remote voting by Members of the House during national emergencies, especially the current one involving COVID-19." However, the report McGovern released stated that while members' concerns about risking their own health and that of House staff are valid, "implementing remote voting would raise serious security, logistical, and constitutional challenges." The report also noted that if the chamber were to pursue the necessary rule changes, members would still need to return to Washington to vote on those changes in person unless there was full consensus.
**URL:** https://swalwell.house.gov/sites/swalwell.house.gov/files/Remote-Voting-Rules.pdf

"Clearly, the quickest and likely best path forward is for Congress to pass [phase 3 legislation] by unanimous consent or by voice vote," McGovern wrote in a letter to Democratic members accompanying the report, adding that members could submit statements for the *Congressional Record* stating how they would have voted had there been a recorded vote.

If the House is unable to pass the bill by unanimous consent or by voice vote, the report pointed to three other options under the current rules. The first and simplest would have members return to Washington for a recorded vote, with the vote being held open longer than usual to allow for small groups of members to enter the chamber at a time and for cleaning voting machines in the House Chamber in between groups. Alternatively, the House could allow members to utilize a "paired voting" process that would enable an absent member to pair with another absent member voting the opposite way and know that their absences would not change the outcome of the vote. However, this would have to be implemented in conjunction with the third option: a provisional quorum, which would reset the number needed for a quorum if more than 215 members are quarantined or otherwise unable to travel to Washington.

As of press time, McCarthy was urging a voice vote, which would allow members to come to the floor and register their vote if they choose to do so. However, if any one member calls for a recorded vote, the House would have to determine a way to bring members back to Washington, and that would likely lead to additional delays, as the Speaker would have to allow time for members, who are currently scattered across the country, to return to Washington.

Rep. Alexandria Ocasio-Cortez, D-N.Y., told CNN she is not ruling out asking for a recorded vote, saying she had not yet seen the final language but is open to forcing an in-person vote "if necessary."

To date, two members of the House, Reps. Ben McAdams, D-Utah, and Mario Diaz Balart, R-Fla., as well as Sen. Rand Paul, R-Ky., have tested positive for COVID-19 and another dozen or so members are in self-quarantine, heightening the desire of Senators to leave the Capitol and of House Members to avoid having to return for the vote.

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