

## Covid-19 coronavirus: An overview of the U.S. CARES Act

March 27, 2020

### *Introduction*

This note summarizes the important legal changes for U.S. businesses coming out of the historic Covid-19 coronavirus stimulus package passed by Congress on March 27, 2020.

### *Background*

On March 27, 2020 the U.S. House of Representatives passed the "Coronavirus Aid, Relief, and Economic Security Act," H.R. 748 (the "CARES Act"). The CARES Act provides an unprecedented \$2 trillion stimulus package addressing the economic fallout from Covid-19. It passed the Senate on March 25 by a vote of 96-0 and is expected to be signed by the President soon.

The CARES Act is the last and most significant piece of a three-phase set of legislation addressing economic, public health, regulatory, and funding concerns in light of Covid-19. Allen & Overy has previously provided summaries of the Phase 1 and Phase 2 legislation.

This note provides a guide to the two sections of the CARES Act that will be most immediately relevant to most U.S. business:

1. Tax relief provision for business, and
2. The economic stabilization act.

A full list of topics addressed in the CARES Act is included as Appendix A. The topics from the Phase 1 and Phase 2 laws are included in Appendix B for reference.

Allen & Overy continues to monitor all developments with the Covid-19 laws. We will update this note as the laws develop. We encourage you to contact us with any questions on any aspect of these laws.

### *Tax measures*

Title II of the CARES Act provides tax relief for individuals and businesses, as well as expansions to government unemployment benefits. The most important parts for U.S. business will be a series of temporary changes to the tax code, which are summarized below.

#### **Sec. 2301. Employer Retention Credit for Employers Subject to Closure Due to COVID-19.**

Section 2301 allows "eligible employers" to take up to 50% of their employees' "qualified wages" as a tax credit each quarter against the employment taxes levied under Section 3111(a) of the Internal Revenue Code. The credit may not exceed \$10,000 per employee per quarter.

Employers are eligible for this credit if they carried on a trade or business during the year 2020 that was fully or partially suspended due to orders from a government authority limiting commerce, travel, or group meetings due to Covid-19. They will also be eligible if they experienced a "significant" (more than 50%) decline in gross receipts for any quarter of 2020 as compared the same calendar quarter of 2019. This latter eligibility will cease at such time as their gross receipts are greater than 80% of gross receipts from the same calendar quarter in 2019.

The qualifying wages that may be credited are those that employers paid despite the employees not providing services due to the Covid-19 closures. (There are slightly different rules for employers with greater than or less than 100 employees.) Qualifying wages include the costs of group health plans if those costs allocated as wages under the Internal Revenue Code.

This section only applies to wages paid from March 13, 2020 to December 31, 2020.

**Sec. 2302. Delay of Payment of Employer Payroll Taxes.**

Section 2302 delays the payment date for certain payroll taxes. Under this provision, 50% of payroll taxes for employers and self-employment income will not be due until December 31, 2021. The remaining amount will be due on December 31, 2022.

**Sec. 2303. Modifications for Net Operating Losses.**

Section 2303 includes many technical amendments to the Internal Revenue Code on how to calculate and carry back losses from years the years 2018, 2019, and 2020.

**Sec. 2304. Modification of Limitation on Losses for Taxpayers Other than Corporations.**

Section 2304 similarly provides rules for calculating carryover losses for taxable years beginning with 2018 for taxpayers that are not corporations, such as partnerships. It includes calculation for capital gains taxes.

**Sec. 2305. Modification of Credit for Prior Year Minimum Tax Liability of Corporations.**

Section 2305 concerns payment of an alternate minimum tax. It allows corporations to apply for a tax credit based on minimum taxes for the prior year. It further lifts limitations on access to this credit for taxable years 2020 and 2021.

**Sec. 2306. Modifications of Limitation on Business Interest.**

Section 2306 adjusts the amount of business interest that can be deducted under the Internal Revenue Code. It allows a taxpayer to deduct up to 50% of adjusted taxable income (rather than the 30% previously allowed) as part of the calculation to

determine the business interest deduction for taxable years 2019 and 2020.

For partnerships, the change only applies to taxable year 2020. Taxpayers (including partnerships) may also substitute adjustable taxable income from 2019 for any taxable year beginning in 2020.

**Sec. 2307. Technical Amendments Regarding Qualified Improvement Property.**

Section 2307 makes a few minor amendments to the classification scheme of 15-year tangible property for depreciation purposes.

**Sec. 2308. Temporary Exception from Excise Tax for Alcohol Used to Produce Hand Sanitizer.**

Section 2308 makes distilled spirits used in hand sanitizer free of tax if they are produced and distributed consistent with FDA guidance on fighting Covid-19. These spirits will also not be subject to labeling or bulk sales laws under the Federal Alcohol Administration Act or the Alcoholic Beverage Labeling Act.

*Economic stabilization measures*

Title IV of the CARES Act is called the "Coronavirus Economic Stabilization Act of 2020." It provides sweeping authority for the U.S. Federal Reserve and Treasury Department to provide liquidity to assist U.S. businesses that are severely distressed by Covid-19. The "eligible businesses" entitled to relief are (1) air carriers and (2) other businesses that have not received adequate economic relief elsewhere in the Phase 3 bill, such as, for instance, through expansions to small business loans.

**Sec. 4003. Emergency Relief and Taxpayer Protections.**

Section 4003 authorizes the Secretary of the Treasury to provide up to \$500 billion in liquidity to eligible businesses, states, and municipalities.

Of the total \$500 billion, \$25 billion is designated for air carriers and businesses connected to the air transport industry (such as inspectors, ticket agents, and repair services); \$4 billion is designated for cargo air carriers; \$17 billion is designated for businesses critical to national security; and the remaining \$454 billion is for loans and other investments in programs

or facilities established by the Federal Reserve to provide liquidity to other eligible businesses, states, and municipalities. The Federal Reserve may use the \$454 billion to purchase obligations or other interests directly from those entities, on secondary markets, or through loans.

The Treasury Secretary is directed to publish application procedures and other minimum requirements to receive this relief no later than 10 days after the enactment of this act (expected in early April). Section 4003 describes some criteria that the Secretary must consider in setting these procedures, such as whether the business has access to credit elsewhere, whether the loan is prudently incurred, whether the loan is sufficiently secured given the risk, and so on. Any eligible business must have already incurred or expect to incur losses that jeopardize the business as a going concern. It must also certify in its loan application that it is created or organized in the United States or under the laws of the United States and has significant operations in and a majority of its employees based in the United States.

One condition of any loan will be that for 12 months after the date on which the loan is no longer outstanding, the eligible business may not purchase its own or a parent company's equity security listed on a national securities exchange, except under pre-existing contractual commitments. Nor shall the eligible business pay dividends or make other capital distributions over the same period.

The eligible business will be further required to maintain its employment levels as of March 24, 2020 "to the extent practicable" and in any case may not reduce employment levels by more than 10 percent.

Further, eligible businesses that receive loans may only purchase obligations from or make loans to other businesses that are organized within the United States and that have significant operations and a majority of their employees based the United States.

No loans offered under this Section may be forgiven and all relief transactions will give the Treasury Secretary an equity stake in the eligible business.

Finally, Section 4003 authorizes the Treasury Secretary to implement a program providing liquidity to mid-size businesses and non-profits with between 500 and 10,000 employees. Loans offered under this program

would be made at no more than 2% annual interest, with no principal or interest due for the first 6 months. These loans also require the eligible business to make similar representations as those noted above: namely, that its business is jeopardized by Covid-19; that it will retain 90% of its workforce; that it is based in the US; that it is not a debtor in bankruptcy; that it will not pay dividends or repurchase an equity security from itself or a parent; and that it will not outsource or offshore its jobs or business or terminate a collective bargaining agreement.

#### **Sec. 4004. Limitation on Certain Employee Compensation.**

Section 4004 limits what any eligible business receiving stabilization loans may pay its high income officers and employees for 12 months after the loan is no longer outstanding. Officers and employees making more than \$425,000 per year would be limited to their 2019 compensation. Those making more than \$3 million per year would be limited to \$3 million plus an amount that is 50% of the difference between their actual 2019 compensation and \$3 million. For these purposes, compensation includes salary, bonuses, stock, and other financial benefits. The Section 4004 provisions also apply to severance packages.

#### **Sec. 4005. Continuation of Certain Air Service.**

Until March 1, 2022, the Secretary of Transportation will have the authority to require an air carrier receiving loans under this section to maintain the same air service it provided before to March 1, 2020, taking into account the needs of rural communities and the need to maintain medical and pharmaceutical supply chains.

#### **Sec. 4007. Suspension of Certain Aviation Excise Taxes.**

Section 4007 waives excise taxes on domestic transportation, the transportation of property, and kerosene used in commercial aviation from the date of the enactment of this act through December 31, 2020

#### **Sec. 4008. Debt Guarantee Authority.**

Section 4008 permits the FDIC under the Dodd-Frank Act to establish a program to guarantee debt for solvent insured depository institutions up through December 31, 2020.

#### **Sec. 4011. Temporary Lending Limit Waiver.**

The Comptroller of the Currency may exempt any transaction from statutory lending limits upon consideration of the national interest. These lending laws set limits on the amount of credit that a financial institution may issue compared to the market value of the debtor's secured collateral. Nonbank financial institutions are specifically included as entitled to this exemption. The authorization to offer these exemptions will terminate on the earlier of (1) the date on which the President's declaration of national emergency is suspended or (2) December 31, 2020.

**Sec. 4012. Temporary Relief for Community Banks.**

Section 4012 provides relief to qualifying community banks that may not meet the leverage ratio required to be considered well capitalized under the Federal Deposit Insurance Act.

This Section relaxes the current 9% leverage ratio requirement to 8% percent, and extends the two-quarter grace period to a currently undefined "reasonable grace period." Any qualifying community bank during the grace period will continue to be treated as a qualifying community bank and shall be presumed to satisfy its capital and leverage requirements.

This relief is also terminates on the earlier of (1) the date on which the President's declaration of national emergency is suspended or (2) December 31, 2020.

**Sec. 4013. Temporary Relief from Troubled Debt Restructurings.**

Section 4013 permits financial institutions to suspend certain United States generally accepted accounting principles ("GAAP") relating to loan modifications as a result of the effects of Covid-19.

Financial institutions may now suspend the requirement under GAAP for loan modifications related to Covid-19 that would otherwise be characterized as a troubled debt restructuring. They may also suspend any determination of a loan modified as a result of the effects of Covid-19 as being a troubled debt restructuring, including impairment for accounting purposes. Agencies will defer to the determination of the financial institution to make a suspension under this section, and records of the volume of loans involved should continue to be maintained.

Any suspensions under this Section are applicable for the term of the loan modification, but solely with respect to any modification, including forbearance arrangement, an interest rate modification, a repayment plan, and any other similar arrangement that defers or delays the payment of principal or interest, that occurs during the applicable period for a loan that was not more than 30 days past due as of December 31, 2019.

Financial institutions may avail themselves of this relief during the period beginning March 1, 2020 and ending the earlier of (1) 60 days after the date on which the national emergency concerning COVID-19 terminates or, (2) December 31, 2020.

**Sec. 4014. Optional Temporary Relief from Current Expected Credit Losses.**

Section 4014 provides insured depository institutions, bank holding companies, and any of their affiliates temporary relief from Current Expected Credit Loss Standards ("CECL") issued by the Financial Accounting Standards Board. Such entities do not need to comply with existing rules on measurement of credit losses.

This temporary relief is in effect until the earlier of (1) the date on which the President's declaration of national emergency is suspended or (2) December 31, 2020.

**Sec. 4015. Non-Applicability of Restrictions on ESF during National Emergency.**

Section 4015 allows the Treasury Secretary to use the Exchange Stabilization Fund to establish guaranty programs for the United States money market mutual fund industry.

Under the Emergency Economic Stabilization Act of 2008, the Treasury Secretary was permitted to use the Exchange Stabilization Fund to fund the Treasury Money Market Funds Guaranty Program for the United States money market mutual fund industry that the Act established. The 2008 Act also, however, prohibited the Fund from being used to establish any future guarantee programs for the money market mutual fund industry.

Section 4015 temporarily eliminates that 2008 restriction and permits the Treasury Secretary to use the Exchange Stabilization Fund to guaranty money

market mutual funds, provided that (1) the guarantee is limited to the total value of a shareholder's account in a participating fund as of the close of business on the day before the announcement of the guarantee, and (2) the guarantee terminates not later than December 31, 2020.

#### **Sec. 4016. Temporary Credit Union Provisions.**

Section 4016 amends the Federal Credit Union by (1) allowing corporate credit unions to apply for loans, (2) setting aside the restriction that a borrower from the National Credit Union Central Liquidity Facility cannot have the intent to expand its portfolio, and (3) expanding the borrowing limit of the Facility.

Each of these amendments expire on December 31, 2020.

#### **Section 4019. Conflicts of Interest.**

Section 4019 prohibits entities in which the President, Vice President, the head of an Executive Department, or a Member of Congress, and their spouse, child, son-in-law, or daughter-in-law own, control, or hold 20% or more (either directly or indirectly) of the outstanding amount of any type of equity interest in the entity from receiving any type of stabilization funds described in Section 4003 of this Act.

Entities that seek to enter into a transaction under this Act must, before that transaction is approved, certify to the Treasury Secretary and the Federal Reserve Board of Governors that the entity is not prohibited by this Section from engaging in the transaction.

#### **Sec. 4021. Credit Protection during Covid-19.**

Section 4021 amends the Fair Credit Reporting Act to allow agreements between creditors and consumers affected by Covid-19 to defer one or more credit payments, make a partial payment, forbear any delinquent amounts, modify a loan or contact, or provide any other assistance or relief granted to a consumer. Consumers operating under such agreements would be entitled to have their existing obligations reported as current to the relevant credit reporting agency.

This accommodation is in effect for the period beginning January 31, 2020 through the later of (1) 120 days after the enactment of the Act or (2) 120 after the date on which the national emergency concerning Covid-19 is terminated.

#### **Sec. 4022. Foreclosure Moratorium and Consumer Right to Request Forbearance.**

Section 4022 permits borrowers with a federally backed mortgage loan who experience financial hardship due, directly or indirectly, to the Covid-19 emergency to request forbearance on the loan regardless of delinquency status. They may submit this request to the loan servicer. Aside from affirming financial hardship, no further documentation is required.

Any such forbearance shall be granted for up to 180 days, and may be extended for an additional 180 days at the request of the borrower. During a period of forbearance, no fees, penalties, or interest will accrue beyond what would normally accrue if the borrower had made full payments on time under the terms of the loan. The borrower may discontinue the forbearance at any time.

This Section also establishes a moratorium on foreclosing on a federally backed mortgage loan for a 60-day period beginning on March 18, 2020.

#### **Sec. 4023. Forbearance of Residential Mortgage Loan Payments for Multifamily Properties with Federally Backed Loans.**

Section 4023 permits owners of multifamily properties with a federally backed multifamily mortgage loan experiencing financial hardship due directly or indirectly to the Covid-19 emergency to request a forbearance.

This applies to borrowers that were current on their loan payments as of February 1, 2020 and requires an oral or written request for forbearance to the loan servicers and an affirmation of financial hardship.

Any such forbearance shall be granted for up to 30 days, and extended for up to two additional 30-day periods upon request of the borrower, provided the request is made at least 15 days prior to the end of the initial forbearance period. The borrower may discontinue the forbearance at any time.

A multifamily borrower receiving a forbearance may not, for the duration of the forbearance (1) evict or initiate eviction proceedings against a tenant solely for non-payment of rent or other fees or charges, or (2) charge any late fees, penalties, or other charges to a tenant for late payment of rent. The borrower also

may not require a tenant to vacate a unit (for any other reason) without 30-days prior notice and may not issue any such notice to vacate until after the expiration of the forbearance.

These provisions are in effect from the date of enactment of the Act until the earlier of (1) the date on which the President's declaration of national emergency is suspended or (2) December 31, 2020.

**Sec. 4024. Temporary Moratorium on Eviction Filings.**

Section 4024 places a 120-day moratorium on evictions of tenants who reside in properties that have a federally backed mortgage loan (including multifamily loans) or are considered part of (1) a covered housing program under the Violence Against Women Act of 1994, or (2) the rural housing voucher program under the Housing Act of 1949.

Similar provisions as those in Section 4023 (no late fees, penalties, etc.) also apply.

**Sec. 4025. Protection of Collective Bargaining Agreement**

Section 4025 prohibits the federal government from conditioning the issuance of a loan or loan guarantee under this Act on an air carrier's or eligible business's agreement to enter into negotiations with the certified bargaining representative of its craft or class of employees regarding pay or other terms and conditions of employment.

This Section is in effect beginning on the date the air carrier or eligible business is first issued a loan or loan guarantee and ends one year after the loan or loan guarantee is no longer outstanding.

**Sec. 4026. Reports**

Section 4026 provides that within 72 hours of any transaction under the Act, the Treasury Secretary must publish on the Department's website:

- a description of the transaction including the identity of the business;
- the amount of the loan or loan guarantee
- the interest rate, conditions, and any other material or financial terms associated with the transaction, and

- a copy of the relevant and final term sheet and contract or other relevant documentation of the transaction.

Other reporting to Congress is also required under this Section with respect to activities undertaken pursuant to the Act.

# Appendix A

## Phase 3

### *Coronavirus Aid, Relief, and Economic Security Act, H.R. 748*

DIVISION A—KEEPING WORKERS PAID AND EMPLOYED, HEALTH CARE SYSTEM ENHANCEMENTS, AND ECONOMIC STABILIZATION

TITLE I—KEEPING AMERICAN WORKERS PAID AND EMPLOYED ACT

TITLE II—ASSISTANCE FOR AMERICAN WORKERS, FAMILIES, AND BUSINESSES

Subtitle A—Unemployment Insurance Provisions

Subtitle B—Rebates and Other Individual Provisions

Subtitle C—Business Provisions

TITLE III—SUPPORTING AMERICA’S HEALTH CARE SYSTEM IN THE FIGHT AGAINST THE CORONAVIRUS

Subtitle A—Health Provisions

PART I—ADDRESSING SUPPLY SHORTAGES

SUBPART A—MEDICAL PRODUCT SUPPLIES

SUBPART B—MITIGATING EMERGENCY DRUG SHORTAGES

SUBPART C—PREVENTING MEDICAL DEVICE SHORTAGES

PART II—ACCESS TO HEALTH CARE FOR COVID-19 PATIENTS

SUBPART A—COVERAGE OF TESTING AND PREVENTIVE SERVICES

SUBPART B—SUPPORT FOR HEALTH CARE PROVIDERS

SUBPART C—MISCELLANEOUS PROVISIONS

PART III—INNOVATION

PART IV—HEALTH CARE WORKFORCE

Subtitle B—Education Provisions

Subtitle C—Labor Provisions

Subtitle D—Finance Committee

Subtitle E—Health and Human Services Extenders

PART I—MEDICARE PROVISIONS

PART II—MEDICAID PROVISIONS

PART III—HUMAN SERVICES AND OTHER HEALTH PROGRAMS

PART IV—PUBLIC HEALTH PROVISIONS

PART V—MISCELLANEOUS PROVISIONS

Subtitle F—Over-The-Counter Drugs

PART I—OTC DRUG REVIEW

PART II—USER FEES

TITLE IV—ECONOMIC STABILIZATION AND ASSISTANCE TO SEVERELY DISTRESSED SECTORS OF THE UNITED STATES ECONOMY

Subtitle A—Coronavirus Economic Stabilization Act Of 2020

Subtitle B—Air Carrier Worker Support

TITLE V—CORONAVIRUS RELIEF FUNDS

TITLE VI—MISCELLANEOUS PROVISIONS

DIVISION B—EMERGENCY APPROPRIATIONS FOR CORONAVIRUS HEALTH RESPONSE AND AGENCY OPERATIONS

# Appendix B

## Phase 1

*Coronavirus Preparedness and Response Supplemental Appropriations Act, H.R. 6074, Pub. L. 116-123*

DIVISION A—CORONAVIRUS PREPAREDNESS AND RESPONSE SUPPLEMENTAL APPROPRIATIONS ACT, 2020

DIVISION B—TELEHEALTH SERVICES DURING CERTAIN EMERGENCY PERIODS

## Phase 2

*Families First Coronavirus Response Act, H.R. 6201, Pub. L. 116-127 ("Phase 2")*

DIVISION A—SECOND CORONAVIRUS PREPAREDNESS AND RESPONSE SUPPLEMENTAL APPROPRIATIONS ACT, 2020

DIVISION B—NUTRITION WAIVERS

DIVISION C—EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

DIVISION D—EMERGENCY UNEMPLOYMENT INSURANCE STABILIZATION AND ACCESS ACT OF 2020

DIVISION E—EMERGENCY PAID SICK LEAVE ACT

DIVISION F—HEALTH PROVISIONS

DIVISION G—TAX CREDITS FOR PAID SICK AND PAID FAMILY AND MEDICAL LEAVE

DIVISION H—BUDGETARY EFFECTS

REFERENCES

## CONTACTS

*Allen & Overy is advising clients on a range of coronavirus-related issues. For more information on the schemes discussed above or on the potential impact of coronavirus on your business or transaction, please speak to your usual A&O contact.*

**Please note:** This document will be updated regularly but please check with your A&O contact to ensure you have the most up to date version.

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy (Holdings) Limited is a limited company registered in England and Wales with registered number 07462870. Allen & Overy LLP and Allen & Overy (Holdings) Limited are authorised and regulated by the Solicitors Regulation Authority of England and Wales.

The term partner is used to refer to a member of Allen & Overy LLP or a director of Allen & Overy (Holdings) Limited or, in either case, an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners, and a list of the directors of Allen & Overy (Holdings) Limited, is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2020. This document is for general guidance only and does not constitute definitive advice. | NYO1: 2000063547.1