

Memorandum

COVID-19 Relief Package Enacted Into Law

December 30, 2020

On Sunday, December 27, the \$900 billion bipartisan COVID-19 economic relief package became law. The Consolidated Appropriations Act, 2021 (the “CAA”) provides economic impact payments of \$600 to individuals making up to \$75,000 per year and \$1,200 for couples making up to \$150,000 per year, plus \$600 for each child dependent.

The coronavirus response and relief package appears primarily in Divisions M and N of the CAA, which also includes \$1.4 trillion to fund the federal government for the rest of fiscal year 2021. The CAA provides funding for the unemployed, renters, families, small businesses, COVID-19 vaccines and therapeutics, health care providers, transportation providers, schools, child care providers and broadband access. The law is the fourth major COVID-19 aid package passed by Congress since March. The CAA builds on programs and provisions contained in the three economic relief laws enacted earlier in the pandemic: the Paycheck Protection Program and Health Care Enhancement Act (“PPPHCE Act”), the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) and the Families First Coronavirus Response Act (“FFCRA”).

Here are some of the key provisions of the legislation, including those that pertain to small businesses, the Treasury and Federal Reserve, unemployment insurance benefits and unemployment payments, employee benefits, tax relief and tax credits, and the healthcare industry:

- **Small Businesses**

- The CAA provides more than \$284 billion to the Small Business Association (“SBA”) to extend the Paycheck Protection Program (“PPP”) until March 31, 2021, including certain earmarked amounts for first-time borrowers, borrowers with 10 or fewer employees and borrowers in low-income areas.
- In addition to extending the program and allocating new funding, Title III of Division N of the CAA enhances the flexibility of the PPP program. While it retains much of the structure of the 2020 PPP loan program, the CAA allows borrowers to choose the termination date of their “covered period” for purposes of the forgiveness calculation between 8 to 24 weeks after loan disbursement, expands eligibility for certain types of businesses (such as farmers, ranchers, news organizations, not-for-profits and religious institutions), and requires the SBA to publish a simplified, single-page PPP loan forgiveness application available to PPP recipients of loans of \$150,000 or less. Subject to future SBA rulemaking, certain borrowers that returned all or part of their PPP loans or whose loan limit

calculations have increased due to changes in SBA regulations may be permitted to reapply for their current maximum allowable loan amount.

- Title III of Division N of the CAA also expands the scope of business expenses for which PPP funds are permitted to be used and forgiven to include certain operations expenditures (including payment for software, cloud computing, and other human resources and accounting needs), property damage costs (including those related to uninsured property damage caused by public disturbances that occurred during 2020), supplier costs under contracts in effect prior to the PPP loan being taken out and worker protection expenditures (including those related to personal protective equipment and purchases to help loan recipients comply with health and safety guidelines). Any PPP borrower that has not already received loan forgiveness would be eligible to use the expanded scope of forgivable expenses, regardless of whether the borrower received PPP funds before or after the CAA's enactment.
- The CAA expressly allows PPP lenders to rely on any certification or documentation submitted by a borrower for a PPP loan, and precludes any enforcement action being taken against the lender, so long as the lender has acted in good faith relating to loan origination or forgiveness and otherwise complies with applicable law.
- Notably, Title III of Division N of the CAA allows certain borrowers that received a PPP loan under the CARES Act and have used or will use the full amount of that PPP loan to access a “second draw” PPP loan of 2.5 times (or 3.5 times for businesses in the accommodation or food service industries) average monthly payroll costs (up to a maximum of \$2 million). To be eligible for a second draw PPP loan, borrowers must employ not more than 300 employees and must demonstrate at least a 25% reduction in gross revenue during any quarter of 2020 relative to the same 2019 quarter.¹ Eligibility rules for second draw loans are generally consistent with those established for the first draw PPP loans, but the CAA adds certain second draw eligibility restrictions for businesses affiliated with entities or persons in the People's Republic of China, registrants under the Foreign Agents Registration Act and entities engaged in lobbying or political strategy.

- **Treasury and Federal Reserve**

- Title X of Division N of the CAA rescinds, immediately upon enactment, \$429 billion of unused funding allocated under the CARES Act to support Treasury and Federal Reserve facilities (including those facilities launched by the Federal Reserve under its emergency lending authority of Section 13(3) of the Federal Reserve Act).² In addition, any additional funds made available to Treasury and the Federal Reserve under the CARES Act that remain unused as of January 9, 2021 will be permanently rescinded. The CAA also prohibits the Federal Reserve from making new investments, loans or loan guarantees through Section 13(3) facilities that received CARES Act funding support, or modifying the terms of any

¹ Only borrowers submitting applications on or after January 1, 2021 are eligible to use gross revenues from the fourth quarter of 2020 relative to the fourth quarter of 2019.

² For additional information regarding the funding support provided to Treasury and the Federal Reserve under the CARES Act, please see our client alert available here: https://www.stblaw.com/docs/default-source/memos/firmmemo2_03_26_20.pdf.

such facility, in each case after December 31, 2020, and prohibits the use of the Treasury Exchange Stabilization Fund for any future Section 13(3) facilities that are “the same as” any such program supported by CARES Act funding, other than the Term Asset-Backed Securities Loan Facility.

- **Community Development Financial Institutions and Minority Depository Institutions**

- The CAA provides an aggregate \$12 billion to support two emergency programs: the Emergency Capital Investment Program and the Community Development Financial Institutions (“CDFI”) Fund. The CAA provides \$9 billion to the Emergency Capital Investment Program to fund direct and indirect capital investments in low and moderate income financial institutions, including minority depository institutions, and to support lending and investment activity in low and moderate income and minority communities. The CAA provides the remaining \$3 billion to the CDFI fund to support, prepare for and respond to the economic impact of COVID-19, including the provision of grants to CDFIs.

- **Extended Unemployment Insurance Benefits and Enhanced Unemployment Payments**

- The CAA extends two pandemic unemployment programs which were set to expire on December 31, 2020, and provides \$300 per week in enhanced unemployment benefits in addition to benefits provided under state law.
- Under the CARES Act’s Pandemic Unemployment Assistance and Pandemic Emergency Unemployment Compensation programs, Congress extended unemployment benefits to workers who otherwise would not have been eligible for benefits under state law and extended the duration of unemployment benefits from 26 weeks to 39 weeks for all eligible recipients (including those newly eligible under the CARES Act). These programs were designed to expire on December 31, 2020, but the CAA extends them through March 14, 2021 and increases the maximum duration of benefits to 50 weeks. The CAA also provides a transitional phase-out period ending on April 5, 2021 for anyone who was receiving, but had not yet fully exhausted, Pandemic Unemployment Assistance or Pandemic Emergency Unemployment Compensation as of March 14, 2021.
- The CAA also provides for an additional \$300 weekly payment to workers who are otherwise receiving unemployment benefits. The CAA characterizes this as an “extension” of the Federal Pandemic Unemployment Compensation program established by the CARES Act, which provided an additional \$600 weekly unemployment benefit through July 31, 2020. The CAA reinstates this benefit, at the reduced rate of \$300 per week, for pay periods between December 26, 2020 and March 14, 2021. An additional \$100 per week of “Mixed Earner Compensation” may be available to individuals who received at least \$5,000 of self-employment compensation in the most recent taxable year prior to the year in which they claim regular unemployment compensation.
- The CAA adds requirements for states to establish a method to address circumstances in which an unemployment insurance claimant refuses to return to work or accept an offer of suitable work without good cause, as well as requirements for employment and self-employment documentation (rather than self-certification), identity verification and weekly eligibility re-certification.

- The CAA extends federal funding, from December 31, 2020 through March 14, 2021, of the first week of unemployment benefits for states that do not have an initial week waiting period, but reduces the funding amount from 100% to 50%.

- **Employee Benefits**

- The CAA does not extend mandatory employee paid sick or paid family leave benefits under the FFCRA, which expire on December 31, 2020. However, for employers who voluntarily continue to provide paid sick leave consistent with the FFCRA's leave provisions beyond December 31, 2020, the federal government will continue to provide a tax credit to subsidize the cost of providing those benefits through March 31, 2021.

- **Tax Relief and Tax Credits**

- *Employee Retention Tax Credit*: The CARES Act created a quarterly refundable credit against employment taxes for retaining employees despite the negative economic effects of COVID-19. Under the CARES Act, an eligible employer received a refundable credit equal to 50% of “qualified wages” paid between March 12, 2020 and December 31, 2020. Under the CAA, this credit is increased to apply to 70% of qualified wages paid between January 1, 2021 through June 30, 2021 and applies with the following modifications.
 - **Qualified Wages**: Under the CARES Act, wages were “qualified wages” (i) for all employees in the case of a business with 100 or fewer employees and (ii) for employees not providing services due to COVID-19-related restrictions in the case of a business with more than 100 employees. The CAA increases the 100 employee threshold to 500 employees for 2021, thereby increasing the number of employers that can qualify for the broader scope of the credit previously applicable to smaller businesses.
 - **Eligibility**: The CARES Act made the credit available for employers carrying on a trade or business during the 2020 tax year (i) the operation of which was fully or partially suspended during the quarter due to COVID-19-related governmental orders limiting commerce, travel or group meetings or (ii) which experienced gross receipts for the quarter less than 50% of the gross receipts for the same quarter in the prior year. The CAA expands eligibility for the 2021 credit by reducing the required gross receipts decline from 50% to 20%, allowing employers to use prior quarter gross receipts to determine eligibility, and making new employers who were not in existence for all or part of 2019 eligible for the credit.
 - **Limitations**: The CARES Act applied the credit to 50% of qualified wages with a per-employee cap of \$10,000 per year. Under the CAA, the credit applies to an increased 70% of qualified wages with an increased per-employee cap of \$10,000 per calendar quarter. The credit remains limited to the amount of employment taxes on wages paid for the calendar quarter and continues to be reduced by other credits claimed for employer-payroll taxes to prevent double benefits.

- *Paycheck Protection Program:*
 - The CAA clarifies that business expenses paid with forgiven PPP loan proceeds (or other SBA and loan repayment assistance created under the CARES Act) are deductible for income tax purposes. Further, tax basis and other attributes of the borrower's assets will not be reduced as a result of PPP loan forgiveness. Special rules apply to S-corporations and partnerships. This provision is retroactive to March 27, 2020 and provides similar treatment for second draw PPP loans.
 - The CAA provides that employers who receive PPP loans (including other taxpayers that may be treated for this purpose as part of a single aggregated employer group with the entity that received the PPP loan) may still qualify for the Employee Retention Tax Credit with respect to wages that are not paid with PPP loan proceeds.
- *Payroll Tax Deferral:* IRS Notice 2020-65 allowed employers to defer their portion of payroll taxes due between September 1, 2020 through December 31, 2020 and to pay those payroll taxes by April 30, 2021. The CAA extends the repayment period to December 31, 2021. Penalties and interest on deferred unpaid tax liability will not begin to accrue until January 1, 2022, rather than May 1, 2021.

- **Health Care**

- The CAA temporarily extends the CARES Act's suspension of the 2% payment adjustment that would have been applied to Medicare fee-for-service claims as a result of sequestration. The extension of the temporary suspension of sequestration will end on March 31, 2021.
- Title I of Division N of the CAA provides \$3 billion in funding for a one-time increase in the Medicare physician fee schedule (a list of the fees used by Medicare for payment for physicians' services) of 3.75% for calendar year 2021. This one-time increase shall not be taken into account when determining fee schedules that establish physician payment amounts for services furnished after 2021.
- *Surprise Medical Bills:*
 - Congress included the No Surprises Act, which will prevent surprise medical bills for emergency services, in Title I of Division BB. The No Surprises Act requires group health plans and health insurance issuers offering group or individual coverage that cover emergency services to provide coverage for emergency services provided by an out-of-network provider or emergency facility without imposing greater cost-sharing (copay, coinsurance and deductible) requirements than those that would apply if the emergency services were provided by an in-network provider or emergency facility.
 - The No Surprises Act also imposes new prohibitions on balance billing, which occurs when a health care provider bills a patient for the provider's charges or costs that exceed the payment made by the patient's health insurance plan to the provider for a health care service. The No Surprises Act restricts balance billing for non-emergency and air ambulance services by out-of-network health care providers for services provided on or after January 1, 2022. With respect to non-emergency services, out-of-network providers and facilities may still balance bill participants, beneficiaries or

- enrollees in group health plans or who receive group or individual health insurance coverage from a health insurance issuer. The out-of-network non-emergency services providers and facilities must provide those individuals or their authorized representatives with certain information 72 hours before the individual receives out-of-network services, including written notice of the provider or facility's status (e.g., out-of-network) and a good faith estimate of the potential charges, and obtain consent for treatment from the individual or the individual's authorized representative.
- The law enables out-of-network health care providers and health insurance issuers to address payment disputes for out-of-network claims through either an open negotiation period or an independent dispute resolution process.
 - The No Surprises Act also establishes an advisory committee on ground ambulance and patient billing that will make recommendations to state authorities and the Secretaries of Labor, Health and Human Services ("HHS"), and the Treasury. The recommendations must include options to prevent balance billing and steps that state insurance regulators, legislatures and attorneys general can take to protect consumers from balance billing.
 - The law also contains provisions that require group health plans and health insurance issuers offering group or individual health insurance coverage to offer price comparison guidance or tools, maintain up-to-date provider directories and provide good faith estimates of the amount of cost-sharing in advance of the participant's, beneficiary's or enrollee's receipt of certain items or services.
- The CAA addresses the development, procurement and distribution of COVID-19 vaccines and therapeutics and provides over \$48 billion for the Public Health and Social Services Emergency Fund. Of those funds, the CAA provides \$19.695 billion to the Biomedical Advanced Research and Development Authority for the manufacturing, production and purchase of vaccines, therapeutics and ancillary supplies necessary for the administration of vaccines and therapeutics. The law sets aside \$3.25 billion for the Strategic National Stockpile and \$24.2 billion to states, territories and tribes for contact tracing and COVID-19 testing and mitigation programs.
 - The CAA provides an additional \$3 billion in provider relief to reimburse eligible health care providers for health care-related expenses or lost revenues attributable to COVID-19, but such funds may not be used to reimburse expenses or losses that have been reimbursed from other sources or that other sources are obligated to reimburse.
 - The law also provides \$8.75 billion to the Centers for Disease Control and Prevention ("CDC"), states, territories, tribes and tribal organizations for the promotion, administration and distribution of vaccines. The law sets aside \$300 million in additional funding for vaccine distribution, COVID-19 testing and contact tracing in high risk and underserved areas and provides additional funds for mental health, the Indian Health Service and COVID-19 research by the National Institutes of Health.

- Title III of Division BB contains text that is nearly identical to the Making Objective Drug Evidence Revisions for New (“MODERN”) Labeling Act, which enables the HHS Secretary, acting through the Food and Drug Administration (“FDA”), to require labeling updates for certain generic drugs if updating the approved labeling would benefit the public health. For example, FDA could require labeling updates for certain generic drugs for which new scientific evidence (*e.g.*, safety information) is available, but is not included in current FDA-approved labeling.
- The law includes requirements aimed at curbing the use of electronic nicotine delivery systems (“ENDS”), including e-cigarettes and vape pens, by youth in Title VI of Division FF, the Preventing Online Sales of E-Cigarettes to Children Act. For online sales of ENDS, the CAA imposes requirements such as age verification prior to shipment and at the point of delivery, package weight limits and labeling for packages containing ENDS.
- Title IX of Division N of the CAA provides nearly \$250 million to a Federal Communications Commission COVID-19 Telehealth Program, which was authorized as a pilot program under the CARES Act.
- **Eviction Moratorium and Rental Assistance**
 - Title V of Division N of the CAA extends the CDC’s temporary halt in residential evictions to prevent further spread of COVID-19 until the end of January 2021.
 - Title V also appropriates \$25 billion for fiscal year 2021 for a new federal emergency rental assistance fund, through which states and local governments will distribute rental assistance payments to eligible households for rent, rental arrears, utilities, home energy cost arrears and other expenses related to housing incurred due to the COVID-19 outbreak.
- **Other Provisions**
 - The CAA provides funding relief for transit agencies and state departments of transportation, airlines, airports and other transportation providers.
 - The law includes \$82 billion in education funding for states, public and private K-12 schools, and public, private not-for-profit and for-profit institutions of higher education. The CAA also provides emergency funding for child care and Head Start providers.
 - The CAA provides additional funding to food banks, senior nutrition programs, Puerto Rico and U.S. territories, and farmers and ranchers who suffered losses during the COVID-19 pandemic.
 - The law converts the \$10 billion CARES Act loan to the United States Postal Service into direct funding.
 - The CAA also creates a \$1 billion tribal broadband fund and provides \$3.2 billion in funding for broadband access for low-income families, and additional funds for broadband maps and the replacement of certain equipment.

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