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Client Alert

Congress Passes Combined COVID-19 Relief and Omnibus Spending Bill

The U.S. Congress passed a combined COVID-Relief and Omnibus Spending Bill on Monday, December 21, 2020. The Consolidated Appropriations Act of 2021—both funded the U.S. government for FY 2021 and included a variety of COVID-19-related relief measures. The COVID-19 bill includes about $900 billion in new federal spending. It also repurposes $429 billion in unused CARES Act funding for the Federal Reserve Main Street Lending Program. The combined appropriations-COVID-19 stimulus relief package is the second largest in the nation's history behind the CARES Act passed earlier this year.

President Trump is threatening a veto of the bill which may prompt further Congressional action to override his veto or to draft and pass new legislation which would increase the amount of stimulus checks from $600 to $2,000 per qualified American. It could also prompt Congress to pass a new Continuing Resolution (CR) to fund the U.S. government from the current CR termination date of December 28, 2020 into next year without overriding the President's veto and with the COVID-19 Relief and Omnibus Spending Bill passed by Congress not becoming law. However, regardless of the Congressional response to the President, the main provisions of the bill summarized below are not expected to change, but rather, are expected to be in the final passed legislation if Congress overrides the veto or the President decides to sign the bill in the coming days.

The bill most notably currently includes:

- Stimulus checks - $600 in direct payments to certain qualified Americans
- Unemployment compensation – up to $300 a week in enhanced benefits
- Payroll Protection Program (PPP) - $284 billion in new funding for businesses
- COVID-19 Response Funding - direct new funding including:
  - $20 billion for additional COVID-19 testing capacity
  - $20 billion for additional COVID-19 vaccine purchases
  - $8 billion for COVID-19 vaccine distribution

The combined package had broad bipartisan support in Congress with a vote in favor of the legislation of 359-53 in the House and 92-6 in the Senate. To find consensus, Democrats and Republicans alike were forced to abandon key tenets of earlier proposals. Democrats agreed to drop a provision that would have delivered funding to state and local governments and in return Republicans dropped a provision that would have granted businesses broad liability protections in the return to work effort.

It is likely that any stimulus negotiations early in the Biden Administration will begin with those partisan priorities in mind. Congressional Democrats and the President-Elect have indicated that another round of stimulus measures will be the first order of business following inauguration. Republicans have yet to voice support for future relief spending, although Senate Majority Leader Mitch McConnell (R-KY), who is undoubtedly closely watching the Georgia Senate run-offs that will decide the majority of the Senate in 2021, says he and the Republican caucus will consider a potential future Biden stimulus package.

This Alert provides a more detailed look at the specific provisions included in the COVID-19 relief legislation.

Healthcare Provisions

There are many different healthcare provisions in the bill, a number of which have been under Congressional consideration for several years.

Surprise Billing

The “No Surprises Act” (Act) will prevent “balance billing” of patients for surprise medical bills and would limit patients’ cost-sharing to in-network amounts. The Act applies to out-of-network emergency claims and to non-emergency services provided at in-network facilities by out-of-network providers. The Act also covers air ambulance services. The Act applies to all individual and group health plans (both fully- and self-insured) in the group and individual markets, but does not apply to federal programs such as Medicaid or the Federal Employees Health Benefits Program (FEHBP). The Act also extends to grandfathered health plans.

The Act permits providers to balance bill patients who knowingly consent to receive an out-of-network procedure in certain circumstances. If the patient signs and dates the notice not less than 72 hours prior to the services being received, then the provider may balance bill the patient. This does not apply to ancillary services provided by out-of-network providers at an in-network facility—in such instances, the out-of-network provider is prohibited from balance billing the patient. Ancillary services include items and services that are: (i) related to emergency medicine, anesthesiology, pathology, radiology, and neonatology – whether or not provided by a physician or non-physician practitioner; (ii) provided by assistant surgeons, hospitalists, intensivists, and other specialty practitioners that Department of Health and Human Services (HHS) may specify; and (iii) diagnostic services, including radiology and laboratory services.

The Act does not set a default payment rate for health plans. Rather, the Act empowers arbitrators to decide what health plans must pay if the parties do not reach a voluntary agreement during a 30-day negotiation period. The parties submit their proposed payment rates and supporting information to the arbitrator, who must then choose one of the proposed rates after considering the in-network rate and the information submitted by the parties. Arbitrators are prohibited from considering usual and customary charges or billed charges. Parties may continue negotiating with each other throughout the arbitration process, and any agreement reached before the arbitrator’s final decision will be implemented.

HHS Pandemic-Related Public Health Activities and Provider Relief Funds

Vaccine Development and Distribution, COVID-19 Testing and Contact Tracing

The bill appropriates $73 billion for HHS to support pandemic-related public health activities, including research, development, manufacturing and distribution of vaccines and therapeutics; diagnostic testing and contact tracing; mental health and substance abuse prevention and treatment; and child care support, among other activities. More specifically, it designates $8.75 billion to the Centers for Disease Control and Prevention (CDC), $4.5 billion of which will be awarded as grants to states, localities, and territories for vaccine distribution (including vaccine tracking systems). Additionally, $300 million of the funds established for the CDC are allotted for high-risk and underserved populations. The bill likewise appropriates $20 billion to the Biomedical Advanced Research and Development Authority (BARDA) for manufacturing and procurement of vaccines and therapeutics, and the medical supplies to administer them, and $3.3 billion to fund the Strategic National Stockpile (SNS).

The bulk of the remaining funds designated for HHS support the Public Health and Social Services Emergency Fund. The bill specifies spending of $24.5 billion for testing and contact tracing and to reimburse eligible health care providers for COVID-19 public health emergency related expenses or lost revenues. Within that tranche of funding includes $3 billion in additional grants for hospital and health care providers to be reimbursed for health care related expenses or lost revenue directly attributable to the public health emergency resulting from coronavirus (*see below section for more comprehensive summary of provider access to these funds).* Additionally, $1.25 billion is established for the National Institutes of Health (NIH) to support research and clinical trials on the long-term effects of COVID-19.

Provider Relief Fund

While much less than originally anticipated, the legislation adds another $3 billion to the Provider Relief Fund, which had $175 billion allocated from prior COVID-19 legislation. Of the prior $175 billion allocation to the Provider Relief Fund, there is over $25 billion that remains to be distributed. As reporting of recipients' use of the funds continue to be submitted through the first half of 2021, additional funds will likely be added to the Provider Relief Fund through audit recoupments and returns of unused funds.

The bill's requirements applicable to the usage funds are largely similar to the prior statutes: eligible entities must certify that they will use the funds only for expenses or losses attributable to coronavirus and that such expenses or losses have not been reimbursed—and are not otherwise obligated to be reimbursed—by other sources. Notably, the bill specifically incorporates by reference HHS' June 2020 Frequently Asked Questions guidance as to how eligible providers may calculate lost revenues to justify disbursements from the Provider Relief Fund – whether retrospectively or prospectively. One such method is to calculate the difference between a provider's budgeted and actual revenue, so long as such budget had been established and approved prior to March 27, 2020. This method provides eligible entities an alternative to calculating lost revenue through a 2019 to 2020 calendar year actual revenue comparison.

Medicare Sequestration and Physician Fee Schedule Adjustment

The bill provides for a further extension of the temporary suspension of Medicare sequestration from December 31, 2020 to March 31, 2021, as well a one-time, one-year increase in the Medicare Physician Fee Schedule of 3.75% to support physicians and other providers in adjusting to changes in the Medicare Physician Fee Schedule during 2021.

Expanded Coverage for Immunosuppressive Drugs Post-Kidney Transplant

The bill includes the Comprehensive Immunosuppressive Drug Coverage for Kidney Transplant Patients Act and extends Medicare coverage of immunosuppressive medications from the previous policy of 36-months post kidney transplant to coverage for these drugs for the life of the kidney transplant. More specifically, the legislation stipulates Medicare will cover the cost of immunosuppressive drugs for the life of the kidney transplant if no other coverage is available.

Health Care Extenders

The bill extends funding for a number of expiring public health, Medicare and Medicaid provisions—most for three years—as outlined in the below table.

Extender/Provision	**Funding Timeframe**
Medicaid Disproportionate Share Hospital (DSH) payment reductions	Eliminated from FY 2021 through FY 2023; cuts added to FY 2026 and 2027
Temporary Assistance for Needy Families (TANF)	Current level funding extended through FY 2021
Child Care Entitlement to States	Current level funding extended through FY 2021
Special Diabetes Programs	Funded at current levels through FY 2023
National Health Service Corps	Funded at current levels through FY 2023
Community Health Centers	Funded at current levels through FY 2023
Teaching Health Center GME Program	Funded at current levels through FY 2023
Medicare Quality Measure Endorsement, Input and Selection	Funded through FY 2023
Medicare Work Geographic Practice Cost Index Floor	Funded through the end of CY 2023
Medicare Patient IVIG Treatment Demonstration	Extended/expanded by 2,500 additional beneficiaries with primary immunodeficiency disease
Independence at Home Demonstration	Extended/expanded by 5,000 additional beneficiaries

Mental Health Parity

Also in the bill Congress elevated Mental Health Parity and Addiction Equity Act sub-regulatory compliance requirements to statutory text. Health insurers and health plans must have written comparative analysis, including specific elements to demonstrate compliance with non-quantitative treatment limitations and must provide it to state and federal regulators upon request. If the federal government determines the plan is not compliant, it must demonstrate compliance within 45 days. If the federal government makes a final determination that the plan is not compliant, then within 7 days of that final determination, it will notify all enrollees that the plan is not in compliance.

Public Health Provisions

The COVID-19 relief legislation also includes a variety of public health related provisions, including the following:

- Providing awards for the development and expansion of technology-enabled collaborative learning and capacity building models, to improve the retention of health care providers and increase access to health care services in rural areas, for medically underserved populations and Native Americans (Section 313)
- Providing funding to expand and modernize public health systems, including assessing current data infrastructure capabilities and gaps, improving secure public health data collection, transmission, exchange, maintenance and analysis, improving the secure exchange of data for public health purposes, and enhancing interoperability of public health data systems with health information technology, and charging the Secretary of HHS to develop data and technology standards for public health systems (Section 314)
- Prescribing terms for the modernization of the labels for certain generic drugs
- Providing for additional FDA regulation of biosimilars, including additional patent transparency

Tax Provisions

The stimulus portion of the legislation provides limited tax relief in the “COVID-related Tax Relief Act of 2020,” for individuals and businesses. This includes a refundable tax credit for 2020 tax year of $600 per eligible family member, phased out starting at $75,000 in income. Advanced payments of this credit are provided for in the Act as well. The Act also clarifies the tax treatment of forgiveness of PPP loans, as discussed in the PPP portion of this alert.
The Omnibus bill also includes far broader tax provisions, called the “Taxpayer Certainty & Disaster Tax Relief Act of 2020”, including extension of tax provisions set to expire, full deduction of business meals through 2022, and changes to deductions for individual charitable contributions. Finally, the Act clarifies and expands the CARES Act Employee Retention Credit. The Act extends the ERC to quarters through July 1, 2021, increases eligibility, and raises the cap for the maximum credit from $10,000 total to $10,000 per quarter.

Paycheck Protection Program

The Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act section of the COVID-19 measure in the bill **authorizes** $806.5 billion for an extended period of the Paycheck Protection Program (“PPP”) with new or “second draw” loans available through March 31, 2021, and a number of enumerated set asides for specific appropriations. The legislation reflects a combination of extension of original CARES Act PPP provisions along with a significant number of changes that permeate multiple areas from loan eligibility to the use of loan proceeds.

Changes to Applicant Pool and Rules Governing the Application for New PPP Loans:

- PPP Loan Eligibility. Section 317 of the bill alters the eligibility criteria for loans, with expanded coverage for FCC license holders and newspapers with more than one physical location, as long as the business has no more than

500 employees per physical location or the applicable Small Business Administration ("SBA") size standard. The bill also alters the eligibility criteria for certain Section 511 public colleges and universities that have a public broadcasting station, certain 501(c)(6) entities and destination marketing organizations, and for borrowers in bankruptcy. The bill eliminates eligibility for any publicly traded companies (except news organizations) and entities with specified affiliation ties with China. Notably, the good faith loan necessity certification (i.e. that the loan is "necessary to support the on-going operations of the applicant") remains and is unchanged for new applicants or "second draw" applicants, as discussed below.

- Creation of "Second Draw" Loans for Smaller and Harder-Hit Businesses. Section 311 of the bill removes the blanket prohibition on receipt of multiple PPP loans. "Second draw" loans are authorized only for "any business concern, nonprofit organization, housing cooperative, veterans organization, Tribal business concern, eligible self-employed individual, sole proprietor, independent contractor, or small agricultural cooperative" with 300 or fewer employees, which used or will use all of their original PPP loans, and can demonstrate at least 25% reduction in gross receipts for the same quarter from 2019 to 2020. Loans may be for amount up to two-and-a-half times the average monthly payroll costs for the year prior to the loan or the calendar year, but the loan cannot exceed $2,000,000.
- Loan Caps. The bill includes, for this round of funding, reduced caps of $2,000,000 per borrower for new loans as well as "second draw" loans.

Changes for All Existing and New PPP Loans:

- Clarification of Tax Treatment. Section 276 of the bill provides relief to PPP loan recipients by clarifying that business expenses paid with the proceeds of any forgiven PPP loans are tax-deductible, despite earlier IRS guidance providing that such expenses were nondeductible. This section of the bill further provides that PPP loan recipients will not incur a tax attribute reduction or denial of a basis increase as a result of PPP loan forgiveness being excluded from gross income. Similar treatment is provided for "second draw" loans.
- Use of PPP Loan Proceeds. In Section 304, the bill expands the permitted and forgivable uses for PPP loan proceeds, including for certain worker protection expenses, payments for operations expenses including software, cloud computing, and other human resources and accounting needs, and supplier costs for agreements in effect prior to obtaining loan and essential to operations. The bill further provides that other employer-provided group insurance benefits are included in forgivable payroll costs. (Note, loans for which a borrower have already received forgiveness would not be impacted by this change.)

  PPP Forgiveness Coverage Period. The bill includes flexible coverage periods for loan forgiveness at borrower's option with end dates ranging from 8 to 24 weeks after loan origination.
- Simplified Forgiveness Application Process for Loans under $150,000. For any PPP loans under $150,000, although borrow must still comply with all of the applicable PPP loan requirements, Section 307 states that they need only complete a 1-page application for loan forgiveness.

Changes Specific to Existing PPP Loans:

- Amendment to Loan Applications for Increased Amounts. Section 312 of the bill requires the SBA to issue guidance to lenders within 17 days to provide a process for borrowers who returned all or part of their PPP loan to reapply for the maximum allowable amount so long as they have not requested forgiveness. The bill also allows borrowers whose loan calculations have increased due to changes in interim final rules to work with lenders to modify their loan amounts.

Additional Protection Provided for Lenders:

- Lender Hold Harmless Provisions and Tiered Compensation Structure. Section 305 of the bill includes broad but explicit language providing that lenders will not be subject to enforcement actions if they satisfy a limited set of requirements. The bill further identifies a tiered compensation structure for lender fees based on loan amounts.

Enhancements to Oversight of the PPP:

- Oversight of SBA and the Treasury. Section 321 of the bill requires the SBA to comply with GAO requests within 15 days, and requires the SBA to submit justification to Congress if they are unable to comply. The bill further requires the Secretary of the Treasury and SBA Administrator to testify before Congress within 120 days of enactment and not less than twice per year for the next two years.

- Appropriations for Audits/Investigations. The Bill appropriates $50,000,000 specifically for PPP auditing and fraud mitigation purposes.

Section 303 of the bill charges SBA with issuing regulations to carry out these changes no later than 10 days after the date of enactment.

Labor & Employment

The new legislation does not contain extensive employment-related provisions. The two most significant employment-related issues addressed in the new bill involve the extension and modification of the paid sick and family leave provisions of the Families First Coronavirus Relief Act ("FFCRA"), as well as continuation of certain unemployment benefits provided under the Pandemic Unemployment Assistance program that were enacted as part of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act").

1. Modifications to Paid Sick and Family Leave

The new bill modifies the paid sick and family leave sections of the FFCRA in several important ways. The FFCRA, which was passed in March 2020, required that smaller employers (i.e., those with fewer than 500 employees) provide mandatory paid sick and family leave to employees, and it also granted tax credits for employers who provided the paid leave, subject to certain income limits and caps. The paid leave provisions of the FFCRA were originally scheduled to expire on December 31, 2020. Pursuant to the new bill, eligible employers may, but are no longer required to, continue to provide paid sick and family leave, and continue to receive the associated tax credits, through March 31,2021. In addition, the FFCRA's paid leave provisions have been expanded to cover self-employed workers, with eligibility to be determined in same manner as if the worker was employed by a third party.

2. Extension of Unemployment Benefits

The new bill also extends until March 14, 2021 the unemployment insurance provisions of the Pandemic Unemployment Assistance program. The bill grants an additional $300 per week in unemployment insurance benefits. Claimants receiving benefits as of March 14, 2021 would continue to receive them through April 5, 2021 if they have not reached the weekly benefits maximum. In addition, the period of unemployment insurance benefits during for eligible claimants would increase from 39 weeks to 50 weeks. Temporary federal financing for Short Term Compensation, or work-sharing, programs, at the rate of 100 percent for those established by state law and 50 percent for non-statutory programs, also would be extended through March 14, 2021. Various specific requirements covering states and claimants for the documentation and verification of eligibility aimed at strengthening the integrity of the Pandemic Unemployment Assistance program are also included in the new bill. States would be required, 30 days after enactment of the new bill, to implement specific procedures to address the refusal of claimants to return to work or accept an offer of suitable work without good cause.

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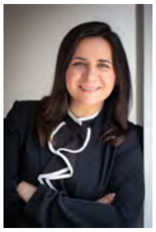
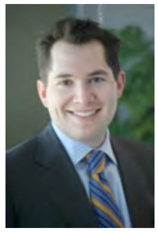
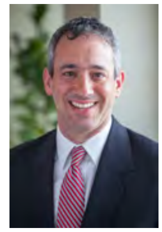
Who to Contact



Jacinta Alves
Partner
Washington, D.C.
+1 202.624.2573
jalves@crowell.com

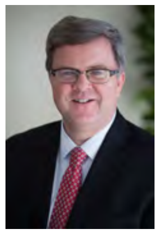


A. Xavier Baker
Partner
Washington, D.C.
+1 202.624.2842
xbaker@crowell.com



Troy A. Barsky
Partner
Washington, D.C.
+1 202.624.2890
tbarsky@crowell.com

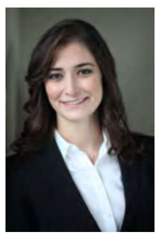
Peter Eyre
Partner
Washington, D.C.
+1 202.508.2807
peyre@crowell.com



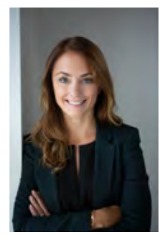
James G. Flood
Partner
Washington, D.C.
+1 212.895.2716
jflood@crowell.com

Glenn D. Grant
Senior Counsel
Washington, D.C.
+1 202.624.2852
ggrant@crowell.com

Stacie Heller
Senior Policy Director
Washington, D.C.
+1 202.508.2844
sheller@crowell.com

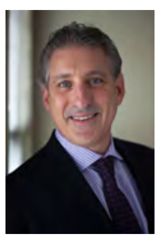


Olivia Lynch
Counsel
Washington, D.C.
+1 202.624.2654
olynch@crowell.com



S. Starling Marshall
Partner
New York
+1 212.895.4263
smarshall@crowell.com

Amy Laderberg O'Sullivan
Partner
Washington, D.C. +1
202.624.2563
aosullivan@crowell.com



Paul J. Pollock
Partner
New York
+1 212.895.4216
ppollock@crowell.com

Michael E. Samuels
Counsel
Washington, D.C.
+1 202.624.2711
msamuels@crowell.com

Tim Shadyac
Director, Government Affairs
Washington, D.C.
+1 202.624.2958
tshadyac@crowell.com