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Legal Update

$900 Billion Stimulus Package Signed Into Law: Key Provisions

Yesterday, December 27, 2020, President Trump signed into law the $900 billion economic stimulus package, which Congress passed last week. This legislation (H.R. 133) aims to support the US economy by reauthorizing and providing additional funding for the fiscal support programs established by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), which was signed into law in March 2020. (See our previous Legal Update on the CARES Act.) In particular, the legislation targets assistance to small businesses, unemployed individuals, health care providers, and schools. It also includes a much-debated limitation on the Federal Reserve's Section 13(3) emergency lending authority. To reach a deal on the legislation, congressional negotiators decided to omit direct aid to state and local governments and COVID-liability shield legislation from the final bill due to lack of bipartisan support for those provisions.

The legislation is attached to a year-end omnibus appropriations spending package to fund the government through the end of fiscal year 2021. This spending package also includes a variety of other important pieces of legislation, including several extensions of tax provisions, a reauthorization of the Pipeline and Hazardous Materials Safety Administration, energy legislation, and legislation to address "surprise medical billing."

This Legal Update provides an overview of the bill's economic assistance, financial services, and tax provisions. For questions about other provisions in the legislation, please contact one of the authors listed at the end.

Economic Assistance

The legislative package allocates more than $900 billion across a range of programs, including:

- $325 billion for small business relief.
  - $284 billion for loans through the Paycheck Protection Program ("PPP"), which exhausted its prior funding in August. The legislation also makes several important changes to PPP, including:
    - Simplifying the PPP applications, expanding the expenses that PPP funds can be used for and still be forgiven, and expanding loan amounts for businesses in the accommodations and food services industries.

    - Permitting certain small businesses that have experienced a 25 percent reduction in quarterly gross receipts to receive a second forgivable PPP loan.
    - Through a "hold harmless" provision, allowing lenders to rely on certifications and documentations submitted by a borrower for a PPP loan and ensuring that lenders not be subject to enforcement actions or penalties arising from PPP loan origination or forgiveness if the lender acts in good faith and all other statutory and regulatory requirements are satisfied.
    - Clarifying that debtors in bankruptcy may obtain PPP loans and that such loans will be treated as debt if the loans are not forgiven.
  - $15 billion in funding for live arts and music venues, independent movie theaters, and cultural institutions.
- Additional federal unemployment benefits of $300 per week, for 11 weeks ending March 14, 2021.
- Direct Economic Impact Payments of $600 for individuals making up to $75,000 per year and $1,200 for couples making up to $150,000 per year, as well as $600 for each child dependent.
- $25 billion in emergency rental assistance for up to 12 months of assistance to eligible households who have experienced a financial hardship related to COVID-19.
- $9 billion for the US Treasury Department ("Treasury") to create an Emergency Capital Investment Program for investments in low- and moderate-income ("LMI") financial institutions for lending and investment in LMI and minority communities.
- $3 billion for the Community Development Financial Institutions ("CDFI") fund for use in supporting CDFI's response to the economic impact of COVID-19.
- $45 billion in transportation funding, including $15 billion for airline payroll support and $1 billion for airline contractor payrolls, $2 billion for airports and airport concessionaires, $14 billion in transit funding to address transit agency shortfalls, $10 billion in state highway funding, and $1 billion in Amtrak funding.
- $82 billion in school funding, including funding through the Governors Emergency Education Relief Fund, Elementary and Secondary School Emergency Relief Fund, and Higher Education Emergency Relief Fund created in the CARES Act.
- $69 billion for vaccine procurement and distribution, including $22 billion for states' testing, tracing, and mitigation programs.

Financial Services

The bill also contains several provisions focused on financial services regulation.

- The legislation modestly restricts the Federal Reserve's Section 13(3) emergency lending authority to require congressional approval for the establishment of certain lending facilities to states and municipalities and private businesses. The provision, which was sponsored by Senator Pat Toomey (R-PA), arose out of congressional debate over Treasury Secretary Steven Mnuchin's recent termination of the lending facilities established by the Federal Reserve that utilized CARES Act funding on the grounds that Congress intended in the CARES Act for the facilities to terminate at the end of the year.[1] Senator Toomey sought to ensure the termination of these facilities and prevent their re-establishment without congressional approval by including language to that effect in the legislation.

The final language clarifies that the Federal Reserve lending facilities created using funds authorized by the CARES Act terminate at the end of 2020 (with a short extension for loans in the pipeline for the Main Street Lending Program until January 8, 2021). The remaining unobligated balance of $429 billion of CARES Act funding for emergency lending facilities is rescinded.

The legislation also provides that the Treasury's Exchange Stabilization Fund ("ESF") may not be used to establish a facility under the Federal Reserve's Section 13(3) authority that is "the same" as any of the Section 13(3) facilities that utilized CARES Act funding, with the exception of the Term-Asset Backed Securities Lending Facility ("TALF") (namely, the Primary Market Corporate Credit Facility, Secondary Market Corporate Credit Facility, Municipal Liquidity Facility, and Main Street Lending Program, which supported corporate bonds; states and municipalities; and small- and medium-sized businesses). The ESF was used during the COVID-19 economic shock and during the 2008 financial crisis to provide funds for 13(3) facilities because the Federal Reserve is required by statute to fully collateralize 13(3) lending to prevent it from incurring losses. The ESF funds effectively functioned as the loss absorbing capital for 13(3) facilities that take credit risk.

The legislation, however, also clearly states that the Federal Reserve retains its full authority to establish lending facilities (with the consent of the Treasury Secretary, as required by statute) pursuant to Section 13(3) of the Federal Reserve Act and subject to its statutory terms and conditions. Accordingly, the legislation limits the Federal Reserve's ability to establish 13(3) facilities for corporate bonds, states and municipalities, and small- and medium-sized businesses only if the facilities would utilize ESF funds to absorb losses but preserves the Federal Reserve's ability to establish 13(3) facilities to lend for such purposes on a fully collateralized basis. Because ESF funds are likley the only readily available funds that Treasury could use to fund a 13(3) facility without a congressional appropriation, the practical effect of the provision is to require Congress to approve of any future 13(3) lending to support corporate bonds, states and municipalities, and small- and medium-sized businesses that involves credit risk.

- The eviction moratorium issued by the Centers for Disease Control and Prevention is extended through January 31, 2021.
- The CARES Act's provisions providing relief (1) from the Current Expected Credit Losses ("CECL") accounting standards and (2) from Troubled Debt Restructurings ("TDR") classifications are extended through January 1, 2022.
- The CARES Act's expansion of access to the National Credit Union Administration's Central Liquidity Facility ("CLF") is extended through December 31, 2021.
- The Securities and Exchange Commission ("SEC") is required conduct a study evaluating issues affecting the provision of and reliance on investment research into small issuers. Within 180 days, the SEC must provide a report to Congress with recommendations to increase the demand for, volume of, and quality of investment research into these small issuers.
- The SEC is also required to study the 10 percent threshold limit that applies to the definition of a diversified company under section 5(b)(1) of the Investment Company Act of 1940. The study must determine the impacts of such threshold limits on efficiency, competition, capital formation, and investor protection, and a report must be issued within 180 days containing findings, determinations, and any legislative recommendations.
- Federal banking regulators are required to provide Congress with an annual report detailing the measures they have undertaken to strengthen cybersecurity within the financial services sector and

with respect to the functions of the regulator, including the supervision and regulation of financial institutions and applicable third-party service providers.
- The Director of National Intelligence is required to establish standards for student loan repayment programs for employees of the intelligence community, and the responsible intelligence community leaders must report to Congress when such standards are not met for their divisions.

Tax

Besides the new round of economic impact payments (discussed above), there are also a number of tax-related provisions in the bill, including:

- An extension and expansion of the Employee Retention Tax Credit ("ERTC"), which was enacted in the CARES Act. This language:
  - Extends the ERTC through June 30, 2021.
  - Increases the amount of employee wages that can be included in the credit calculation from a total of $10,000 to $10,000 per calendar quarter.
  - Increases the percentage of the credit from 50% of qualified wages to 70% of qualified wages.
  - Permits a taxpayer to take a deduction on expenses paid using forgiven PPP loans.
- A significant "tax extenders" package that extends and modifies a large number of expiring tax provisions. Just some of these include language to:
  - Make permanent the credit for energy efficient commercial buildings (Sec. 179D) and index the credit to inflation.
  - Make permanent the credit for certain railroad track maintenance.
  - Make permanent reduced excise taxes for certain beer, wine and distilled spirits.
  - Extend through 2025 the look-thru treatment for payments of royalties, interest and dividends between related foreign corporations (the "CFC look-thru rule"). This extension is for several years longer than Congress has typically extended this provision.
  - Extend the New Markets Tax Credit and the Work Opportunity Tax Credit through 2025.
  - Extend the Oil Spill Liability Trust Fund and Section 45Q carbon capture and sequestration credit through 2025.
  - Extend a number of other provisions through the end of 2021.
- Extensions of renewable energy tax credits for wind projects, solar projects and carbon capture and sequestration projects and specific provisions addressing offshore wind farms. (Further detail is provided in a separate Legal Update.)
- A provision to allow the full deduction of business meal expenses provided by a restaurant through January 1, 2023.

The new expiration dates line up with major cliffs and changes in tax provisions enacted as part of the Tax Cuts and Jobs Act ("TCJA"). For example, the extensions through 2025 line up with the expiration of many of the individual tax provisions enacted in TCJA, and the provisions that expire at the end of 2021 line up with the start of the change in the interest calculation from EBITDA to EBIT under Section 163(j).

For more information about the topics raised in this Legal Update, please contact any of the following lawyers.

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Endnote

[1] The terminated facilities were the Primary Market Corporate Credit Facility, Secondary Market Corporate Credit Facility, Municipal Liquidity Facility, Main Street Lending Program, and Term Asset-Backed Securities Loan Facility ("TALF").