Wolters Kluwer

When you have to be right

Special Report

January 14, 2021

Highlights

- Direct stimulus payments authorized
- Employer credit for paid sick and family leave extended
- FSAs may allow rollover of full unused balance
- Additional $300 per week in UI benefits
- Paycheck Protection Program (PPP) extended

Inside

By Wolters Kluwer Editorial Staff and Authors

Appropriations and Pandemic Relief Package Addresses More than Funding, Stimulus

The Consolidated Appropriations Act, 2021, P.L. 116-260 (CAA, 2021), a massive $2.3 trillion spending package of over 5,000 pages, which President Trump signed on December 27, 2020, includes not only the authorization for government funding for the 2021 fiscal year and COVID-19 economic relief, but also a number of other matters outside the Appropriations Committee's jurisdiction that affect, among others, employers, the health care industry, and taxpayers.

Leaders in Congress had announced that they had reached an agreement on a new round of relief for the ongoing COVID-19 pandemic and economic stimulus on December 20, 2020. Passage of that bill, as well as the negotiations, were closely tied to passage of an omnibus appropriations bill for the federal government for the 2021 fiscal year. The bill was approved in the House on December 21 by a vote of 327 to 85 and later passed in the Senate by a vote of 92-6. Congress then also passed another short-term appropriations bill, extending the deadline to avoid a shutdown to December 28.

The White House indicated that the President was expected to sign the CAA, 2021. However, Trump voiced his displeasure with the Act the following day. A presidential statement accompanying the eventual bill signing said that "As President, I have told Congress that I want far less wasteful spending and more money going to the American people in the form of $2,000 checks per adult and $600 per child." It also indicated that the President was "demanding many rescissions" under the Impoundment Control Act of 1974 and would "send back to Congress a redlined version, item by item, accompanied by the formal rescission request to Congress insisting that those funds be removed from the bill." The *Washington Post,* among other major media outlets, noted, however, that "lawmakers have signaled they have no plans to act."

The CAA, 2021, includes several extensions of popular provisions of earlier COVID relief and stimulus acts passed in 2020. This includes additional loans under the Paycheck Protection Program (PPP) (including the allowance of a second round of loans for certain small businesses), relief for the hard-hit transportation industry, additional funding for programs related to vaccines and virus testing, and further expansion of federal unemployment assistance (providing $300 a week in unemployment payments, half of the amount received under the acts passed in the spring). In addition, changes were made to provisions of the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security (CARES) Act. The CAA, 2021, also includes tax extenders and disaster tax relief.

This special report, written by Wolters Kluwer editorial staff and authors, provides a summary of the law across a range of key practice areas.

Tax

By WK Editorial Staff

There are numerous tax provisions in the Consolidated Appropriations Act, 2021, generally contained within one of four named acts contained within the massive legislation: the COVID-19-Related Tax Relief Act, the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, the No Surprises Act, and the Taxpayer Certainty and Disaster Tax Relief Act of 2020.

From a tax standpoint, there are not many provisions providing new forms of stimulus and relief. However, several small changes are made to provisions of the FFCRA and CARES Act, while also extending them beyond their initial expiration date. It also includes another round of direct payments to taxpayers, extensions of the charitable contribution provisions and employee retention tax credit, relief for lower income taxpayers on tax credits, and a clarification of the treatment of business expenses for small businesses with forgiven PPP loans. Additionally, the legislation includes an extension of popular individual and business tax breaks scheduled to expire at the end of 2020.

Recovery rebates/direct stimulus payments

Just as with the CARES Act in March, the CAA, 2021, includes a direct payment to taxpayers in an effort to stimulate a flagging economy. Unlike the Economic Impact Payments, also known as Recovery Rebate Credits, provided in the CARES Act, these payments are only $600 per individual, where the earlier round in the spring provided a $1,200 payment per individual. However, families can claim the full $600 amount for child dependents, where the credit was limited to $500 for children in the previous round of payments.

Otherwise, the direct payments are generally structured as they were in the spring. The payment is actually a credit against 2020 taxes and begins to phase out for individuals with adjusted gross income in 2019 in excess of $75,000 ($150,000 for joint filers). The amounts do phase out faster than the earlier payment, so fewer taxpayers will receive direct payments this time around.

The new direct payment has an impact on joint filers where one of the married persons is a nonresident alien as those taxpayers were left out from receiving the direct payment under the CARES Act. The provision makes such taxpayers eligible for the direct payments under this act and also makes them retroactively eligible for payments under the CARES Act.

Deferred payroll taxes

Pursuant to a memorandum issued by President Trump on August 8, employers were allowed to defer their employee's share of payroll taxes from the period beginning September 1, 2020 through December 31, 2020, paying them ratably after the deferral period through April 2021. The CAA, 2021, extends the "payback period" to December 31, 2021. Penalties and interest will begin to accrue on the deferred taxes on January 1, 2022.

Teacher expenses

The CAA, 2021, requires that the Treasury Department issue regulations providing that personal protective equipment and other supplies used to prevent the spread of COVID-19 qualify for the above-the-line educator expense deduction.

PPP and business expenses tax treatment

The CAA, 2021, includes a clarification of the treatment of business expenses by businesses that received PPP loans that were subsequently forgiven. In Notice 2020-32, the IRS determined that any business expenses paid with the proceeds of a forgiven PPP loan cannot be deducted because, under the Internal Revenue Code and Regulations, the deduction of business expenses allocable to tax-exempt income are prohibited and a forgiven PPP loan is excluded from income. However, the act expressly provides that the intent of the original legislation was that such expenses can give rise to a deduction.

Exclusions of grants and loan forgiveness

The CAA, 2021, clarifies that certain financial aid received by college students under the CARES Act as well forgiveness of Economic Injury Disaster Loans (EIDL) granted to small businesses under the CARES Act are excluded from income.

Tax credits

The CAA, 2021, extends the employee retention tax credit to apply to compensation paid to a covered employee through June 30, 2021. The credit, originally part of the CARES Act, was set to expire with respect to compensation paid after Dec. 31, 2020.

The CAA, 2021, also makes a temporary change in the calculation of the earned income tax credit and the child tax credit. Under the provision, lower-income taxpayers can instead calculate the credits for the 2020 tax year using income information for the 2019 tax year. The calculation of both credits can result in a lower credit amount in a year where there is a reduction in income. The provision allows lower-income taxpayers who may have seen a reduction in wages in 2020 due to the pandemic to use 2019 income amounts (if higher) to calculate the amount of the credits for 2020.

Farming losses

Under the CARES Act, net operating losses (NOLs) arising in tax years beginning in 2018, 2019, and 2020 have a five-year carryback period and an unlimited carryforward period. The provision limiting an NOL deduction attributable to NOLs arising in tax years beginning after 2017 to 80 percent of taxable income does not apply during these years. A technical correction concerning taxpayers with a 2017/2018 fiscal year clarifies that the elimination of the former two-year carryback period applies to tax years beginning after 2017 and not to tax years ending after 2017.

The CAA, 2021, allows taxpayers to waive the application of these rules to farming losses.

Charitable contribution extensions

The CARES Act included temporary changes to the limitation on charitable contributions in order to encourage taxpayers to support charities, hopefully lessening the impact of the pandemic on those in need. For individuals, the limitation on charitable contributions was increased from 60 percent of the contribution base to 100 percent for 2020. Also, individual taxpayers can claim a $300 above-the-line charitable contribution on 2020 tax returns.

The CARES Act also increased the percentage limitation on charitable contribution deductions for corporations from 10 percent to 25 percent for qualified cash contributions made in 2020. A corporation may carry forward for five years any qualifying contribution that exceeds the 25-percent limit. The deduction limitation for contributions of food inventory from any trade or business is also temporarily increased from 15 percent to 25 percent for donations of food inventories made during 2020. These provisions are extended to 2021 under the new law.

The employee retention tax credit is extended to compensation paid through June 30, 2021.

Tax extenders

The CAA, 2021, also extends many popular tax breaks for individuals and businesses. These provisions, commonly known as “extenders” are generally extended every year or two for one or two years, and most were scheduled to expire at the end of 2020. Unlike previous years, the extensions are not uniform. Some are extended to 2021 only, others to 2025, while others have been made permanent.

Securities & Corporate Governance

By Mark Nelson, J.D.

The Consolidated Appropriations Act, 2021, provides the SEC and CFTC funding raises for FY21 while the SEC also will be directed to conduct studies of smaller issuers and diversified companies. Moreover, the CAA, 2021, contains a policy rider that bars the SEC from using any funds to finalize regulations that would require public companies to disclose their political spending habits.

SEC and CFTC funding

The appropriations portion of the CAA, 2021, funds the SEC for FY21 at $1.895 billion. Of the funds available to the SEC, $16.3 million are earmarked for the agency's inspector general. Two other provisions would account for replacement leases for the SEC's Washington, D.C. and San Francisco Regional offices ($18.7 million and $12.7 million, respectively). The CFTC will receive $304 million in FY21 appropriations, of which $3.6 million is set aside for the agency's inspector general.

The SEC must study emerging growth companies and companies mulling initial public offerings.

Small issuer research

The CAA, 2021, includes a provision requiring the SEC to study the availability of research on small issuers. The provision tracks the Improving Investment Research for Small and Emerging Issuers Act (H.R. 2919), sponsored by Rep. Bill Huizenga (R-Mich), which passed the House by voice vote in July 2019. The study would include emerging growth companies (EGCs) and companies mulling initial public offerings.

Specifically, the provision requires the SEC to examine: (1) demand for research; (2) availability of research; (3) conflicts of interest; (4) costs of research; (5) payment mechanisms; (6) the unique concerns of minority-, women-, and veteran-owned small issuers; and (7) a variety of other factors, including the concentration/consolidation of investment advisers, SEC rules, and overseas regulations such as the MiFID II.

Diversified company threshold

The CAA, 2021, also contains a provision requiring the SEC to study the effects of the 10 percent threshold for diversified companies under Investment Company Act Section 5(b)(1). The provision tracks the Expanding Investment in Small Businesses Act of 2019 (H.R. 3050), sponsored by Rep. Bryan Steil (R-Wis), which passed the House 417-2 in July 2019.

The provision mandates an SEC study in which the agency must consider: (1) the size and number of diversified companies now subject to the threshold; (2) how investment preferences have changed over time; (3) the impact of a changed threshold on EGCs and small companies; and (4) liquidity risk.

No political donation rules

As has been Congressional practice for several years, the CAA, 2021, includes the now familiar ban on the SEC finalizing rules that would require public companies to make disclosures about their political spending habits. House Democrats had previously sought to strip out such provisions in an earlier version the FY21 Financial Services and General Government appropriations bill included in the CAA, 2021. Many other bills introduced by Democrats in the 116th Congress would mandate such corporate disclosures. For example, the Transparency in Corporate Political Spending Act (H.R. 1176), sponsored by Rep. Andy Levin (D-Mich), would repeal the policy rider contained in recent appropriations legislation banning the SEC from adopting regulations addressing corporate political donations (See Public Law No. 115-245, Division C, Section 101(4), incorporating by reference Public Law No. 115-141, Section 631). The SEC had previously received thousands of public comments on a rulemaking petition asking the agency to adopt rules on political spending disclosures.

Labor & Employment

By Joy Waltemath, J.D.

The employer credit for paid sick and family leave, originally part of the Families First Coronavirus Response Act (FFCRA), has been extended by the Consolidated Appropriations Act, 2021. The credit for *mandated* leave was originally set to expire at the end of 2020, but the covered period is extended to March 31, 2021, for employers that continue to *voluntarily* offer paid sick and family leave to their employees, but the leave itself is no longer mandated.

On December 31, the Wage and Hour Division (WHD) of the Department of Labor updated its guidance on protections and relief offered by the FFCRA's paid sick leave and expanded family and medical leave requirements, which expired on December 31, 2020.

Voluntary leave. Although the CAA, 2021, extended *employer tax credits* for paid sick leave and expanded family and medical leave *voluntarily provided* to employees until March 31, 2021, the Act did not extend an eligible employee's entitlement to FFCRA leave beyond December 31, 2020. However, employers have no legal *obligation* to provide FFCRA leave beyond December 31, 2020.

New FAQs. The added guidance—two frequently asked questions and answers—address whether workers who did not use their FFCRA leave entitlement in 2020 may use such leave after December 31, 2020, and how the WHD will maintain its enforcement authority over employers' leave responsibilities while the FFCRA's paid leave requirements were in effect—even after these leave entitlements have expired.

Unused FFCRA leave. According to new FAQ 104, where an employee was eligible for leave under the FFCRA in 2020 but did not use any leave, the employer is *not* required to provide paid sick or expanded family and medical leave *after* December 31, 2020, but it may *voluntarily* decide to provide such leave. The obligation to provide FFCRA leave applies from the FFCRA's effective date of April 1, 2020, through December 31, 2020. Any change to extend the requirement to provide leave under the FFCRA would require Congressional action.

Enforcement after FFCRA expiration. FAQ 105 explains that where an employee has used, with employer approval, six weeks of FFCRA leave between April 1, 2020, and December 31, 2020, because their childcare provider was unavailable due to COVID-19, but the employer had not yet *paid* for the last two weeks of FFCRA leave, the employer is still required to pay for the leave, even though the FFCRA entitlement has expired.

The WHD will enforce the FFCRA for leave taken or requested *during the effective period* of April 1, 2020, through December 31, 2020, for complaints made *within the statute of limitations*. The statute of limitations for both the paid sick leave and expanded family and medical leave provisions of the FFCRA is *two years* from the date of the alleged violation—or *three years* in cases involving alleged *willful violations*. There may also be a private right of action for alleged violations.

No Surprises Act

The CAA, 2021, also includes the No Surprises Act, the highlight of which is a prohibition on surprise medical bills, where a patient receives a separate, and sizable, medical bill from an out-of-network health provider while receiving treatment at an in-network facility. Due to the peculiarities of health care-related legislation, largely due to the Affordable Care Act, many changes are made to the Internal Revenue Code, but the actual tax impact is narrow, and in most cases nonexistent.

Other employment-related provisions

In addition, the Society for Human Resources Management has provided a summary of workplace provisions in the bill, some of which are noted below:

- **Health and dependent care flexible spending arrangements.** The CAA, 2021 allows taxpayers to rollover unused amounts in their health and dependent care flexible spending arrangements from 2020 to 2021 and from 2021 to 2022. This provision also permits employers to allow employees to make a 2021 mid-year prospective change in contribution amounts.
- **Work Opportunity Tax Credit (WOTC):** The CAA, 2021, extends WOTC through December 31, 2025. WOTC is a federal tax credit available to employers that hire and retain individuals from certain groups that have consistently faced significant barriers to employment.
- **Employer-provided student loan repayment,** The CARES Act temporarily allowed employers to provide student loan repayment as a benefit to employees through December 31, 2020, which now has been extended through December 31, 2025. Under the provision, an employer may contribute up to $5,250 annually toward an employee's student loans (as well as other educational assistance), and such payment would be excluded from the employee's income.
- **Employer credit for paid family and medical leave.** The Tax Cuts and Jobs Act of 2017 provided for a federal tax credit for employers that provide paid family and medical leave to their employees. The CAA, 2021, extends the employer credit through December 31, 2025, and applies to wages paid in taxable years beginning after December 31, 2020.

Employee Benefits

By Lauren Bikoff, M.L.S., and Tulay Turan, J.D.

The Consolidated Appropriations Act, 2021, makes changes to flexible spending arrangements (FSAs) and adds compliance requirements for group health plans.

The CAA, 2021, contains significant relief for health and dependent care flexible spending arrangement (FSA) participants. Both health and dependent care FSAs may allow participants' full unused balance to be rolled from the 2020 tax year into 2021, and 2021 balances can be rolled into 2022. Companies also can extend the grace period for a plan year ending in 2020 or 2021 to 12 months after the end of the plan year, with respect to unused benefits or contributions remaining in the account.

In addition, the CAA, 2021, provides the following relief for health and dependent care FSAs:

- *Grace period*. Participants whose coverage terminated in 2020 or 2021 are allowed to use health FSA benefits and contributions through the remainder of the plan year in which participation ceased (including the end of any applicable grace period adopted by the plan).
- *Election change relief*. For plan years ending in 2021, health or dependent care FSAs may allow employees to modify prospectively the amount of their contributions to the FSA without experiencing a change in status.
- *Dependent eligibility expanded*. Employees whose children reached age 13 during the last dependent care FSA plan year for which the enrollment period was on or before January 31, 2020, may continue to treat the child as eligible up to age 14 for such plan year. Thus, participants with children who aged out of dependent care FSA coverage in 2020 are allowed to use dependent care FSA funds through the 2021 plan year.
- *Retroactive amendments allowed*. Employers wishing to implement these provisions must amend their Sec. 125 cafeteria plan to incorporate the changes. Amendments may be retroactive, but the changes must be adopted no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective. In addition, the plan must be operated consistently with

the terms of the amendment during the full retroactive period.

Employer-provided student loan repayment

The CARES Act temporarily allowed employers to provide student loan repayment as a benefit to employees through December 31, 2020, which now has been extended through December 31, 2025. Under the provision, an employer may contribute up to $5,250 annually toward an employee's student loans (as well as other educational assistance), and such payment would be excluded from the employee's income.

Employer credit for paid family and medical leave

The Tax Cuts and Jobs Act of 2017 included a federal tax credit for employers that provide paid family and medical leave to their employees. The CAA, 2021, extends the employer credit through December 31, 2025, and applies to wages paid in taxable years beginning after December 31, 2020.

Gag clauses

The CAA, 2021, prohibits group health plans from entering into an agreement with a health care provider, network or association of providers, third party administrator, or other service provider that includes a so-called gag clause. A gag clause restricts or prevents group health plans from disclosing price or quality data to a third party, such as employers, patients, referring providers, or business associates.

Specifically, group health plans cannot enter into an agreement which would restrict access to provider-specific cost or quality of care information or data. In addition, group health plans must be allowed to electronically access deidentified claims, information, or data for each participant or beneficiary in the plan or coverage, as long as the access complies with HIPAA. Providers can place reasonable restrictions on the public disclosure of this information, but group health plans must be allowed to retain access to this information.

Group health plans will be required to attest to the DOL, on an annual basis, that the plan is in compliance with these requirements.

New reporting on pharmacy benefits and costs

The CAA, 2021, adds a new reporting requirement on group health plans regarding pharmacy benefits and costs. Beginning not later than one year after the date of enactment (December 27, 2021), and by June 1 each year thereafter, group health plans are required to provide a report to the HHS, DOL, and IRS with respect to the health plan or coverage in the previous plan year, with the following information:

- the beginning and end dates of the plan year, the number of participants and beneficiaries, and each state in which the plan or coverage is offered;
- the top 50 brand-name prescription drugs most frequently dispensed and the total number of paid claims for each drug;
- the top 50 most expensive prescription drugs by total annual spending, and the annual amount spent by the plan for each drug;
- the top 50 prescription drugs with the greatest increase over the past year, and for each drug, the change in amounts expended by the plan in the plan year;
- total spending on health care services, broken down by type of costs, and spending on prescription drugs by both the plan and participants and beneficiaries;
- the average monthly premium paid by employers and by participants and beneficiaries; and
- the impact, if any, on premiums or out-of-pocket costs by rebates, fees, and any other renumeration paid by drug manufacturers to the plan with respect to prescription drugs.

Mental health and substance use disorder benefits

The CAA, 2021, increases the Department of Labor (DOL), Health and Human Services (HHS), and Treasury's authority to regulate and audit health plans to determine Mental Health Parity and Addiction Equity Act compliance. Group health plans that offer mental health or substance use disorder benefits and that impose nonquantitative treatment limitations

(NQTLs) on those benefits must perform and document comparative analyses of the design and application of NQTLs. The analyses would include potential violations of parity requirements between medical and mental health and substance abuse services and would involve potential noncompliance with NQTLs. NQTLs are practices such as prior authorization, medical management standards, step therapy, and prescription drug formulary design.

The CAA, 2021, also requires the Departments to include a summary of the comparative analyses in a report to the Congress each year and to include examples of noncompliance found through those investigations in program guidance that will be issued every two years.

Retirement Plans

By Glenn Sulzer, J.D.

The Consolidated Appropriations Act, 2021, temporarily restricts application of the partial plan termination rules, lowers the threshold age for distributions under a phased retirement program to employees in the building and construction industry, allows in-service coronavirus-related distributions from money purchase pension plans, authorizes limited exceptions from the early withdrawal penalties and loan rules for qualified disaster distributions, and provides relief from the funding requirements applicable to pension plans transferring excess assets to retiree health or life insurance accounts.

Restriction on partial plan termination

The CAA, 2021, would temporarily restrict application of the partial plan termination rules. Specifically, under the temporary relief, a plan will not be treated as experiencing a partial termination under Code Sec. 411(d)(3) during any plan year which includes the period beginning March 13, 2020 and ending March 31, 2021, if the number of active participants covered by the plan on March 31, 2021 is at least 80 percent of the number of active participants covered by the plan on March 13, 2020.

Lower threshold age for employees in building and construction industry

Under CAA, 2021, the threshold age for distributions to employees in a multiemployer plan under ERISA Sec. 4203(b)(1)(b)(i) has been reduced to 55, effective for individuals who were participants in the plan before April 30, 2013. The amendment applies to distributions made before, on, or after the December 27, 2020 date of enactment of the CAA, 2021.

However, in order for the provision to apply: (1) the trust must have been in existence on January 1, 1970; and (2) the plan, before December 31, 2011, at a time when the plan authorized distributions to an employee who has attained age 55 and who is not separated from employment at the time of the distribution, must have received at least one written declaration from the IRS of the plan's qualified status. The CAA, 2021, effectively allows employees who have been receiving such benefits to continue working.

Coronavirus-related distributions extended to money purchase plans

Defined contribution plans and IRAs were authorized, in 2020 under the CARES Act, to make "coronavirus-related distributions" of up to $100,000 to "qualified individuals" affected by COVID-19 or the virus causing it, without being subject to penalty tax under Code Sec. 72(t). A coronavirus-related distribution was defined as any distribution from a defined contribution plan (401(k), 403(b), or 457(b) plan) or IRA made on or after January 1, 2020 and before December 31, 2020 to a qualified individual.

The relief did not extend to distributions from defined benefit plans. The relief also did not expressly cover money purchase pension plans, which are essentially defined contribution plans, although funding rules apply, and contributions are limited to a fixed employer contribution. In addition, unlike DC plans, money purchase plans do not allow for in-service withdrawals, including hardship distributions.

The CAA, 2021, retroactively effective to the March 27, 2020 effective date of the CARES Act, authorizes in-service coronavirus-related distributions from money purchase pension plans. However, note that, under the CARES Act, coronavirus-related distributions needed to be made before December 31, 2020.

Qualified disaster distributions. The CAA, 2021, authorizes relief for qualified disasters declared during the period beginning January 1, 2020 and ending 60 days after the December 27, 2020 date of enactment of the Act. Similar to the relief authorized under the Tax Cuts and Jobs Act of 2017, the Further Consolidated Appropriations Act of 2020, and the CARES Act , the new law allows for penalty-free withdrawals of $100,000 (less the aggregate amount treated as qualified disaster distribution received by the individual for all prior tax years), with respect to each qualified disaster. Further, the CAA, 2021, allows individuals to repay the amount of the distribution to an eligible retirement plan at any time during the 3-year period beginning on the day after the date on which the distribution was received.

Loans

Similar to the relief authorized under the CARES Act, the CAA, 2021, allows plan participants, during the 180-day period beginning on the date of enactment of the Act, to obtain a loan of up to the lesser of:

- $100,000 (reduced by the highest outstanding loan balance during the preceding 12 months, or
- the present value of the employee's nonforfeitable accrued benefit (i.e., 100% of vested account balance).

Delayed date of repayment. In addition, the Act authorizes a one-year delay for the repayment of loans made to qualified individuals that were outstanding on or after the first day of the incident period of a qualified disaster. Pursuant to the relief, the due date for any loan repayment occurring during the period beginning on the first day of the incident period of the qualified disaster and ending on the date which is 180 days after the last day of such incident period, may be delayed for one year (or, if later, until the date which is 180 days after the date of enactment of the Act.)

As with the prior relief, any subsequent repayments with respect to the loan shall be appropriately adjusted to reflect the delayed repayment date and any interest accruing during such delay. However, in determining the maximum 5-year loan repayment period, the delayed payment relief shall be disregarded.

Qualified transfers of excess pension assets to retiree health accounts

Employers are authorized under Code Sec. 420 to transfer excess pension plan assets to a retiree health benefits account or a retiree life insurance account, during a specified 10-year transfer period, beginning with the tax year in which the transfer is made. The CAA, 2021, in an implicit acknowledgement of the effects of the pandemic on the funded status of pension plans, authorizes employers who have made a qualified future transfer to make a one-time election, no later than December 31, 2021, to terminate the existing transfer period, effective for any tax year specified by the employer that begins after the date of such election. The election, however, is conditioned on several requirements.

Coronavirus-related distributions from money purchase pension plans are allowed.

Return of transferred amounts to plan. Any assets transferred to a health benefits account, or an applicable life insurance account, in a qualified future transfer and (any income allocable thereto) which are not used as of the effective date of the election to terminate the transfer period must be transferred back to the transferor (i.e., pension plan) plan within a reasonable period of time. The transfer will be treated as a reversion (but will not be subject to the excise tax under Code Sec. 4980(d)), unless within the 5-year period beginning after the original transfer period, an equivalent amount is transferred back to the health benefits account or the life insurance account.

Minimum cost requirements continue to apply. The minimum cost requirements of Code Sec. 420(c)(3) continue to apply to the qualified future transfer, irrespective of an election to terminate the transfer period.

Maintain funded status during original transfer period. The employer, following the election, must continue to maintain the funded status of the plan at 100 percent (rather than 120 percent) during the original transfer period.

Maintenance of funded status after original transfer period. In the event a plan has excess assets, as of the valuation date of the plan year in the last year of the original transfer period, the plan must maintain funded status for five years, according to a range of applicable funding percentages, ranging from 104 percent in the first year to 120 percent in the fifth year. The continued maintenance period would no longer apply if the plan, within the first 4 years after the original transfer period, was 120 percent funded.

Unemployment Insurance

By Melanie King, J.D.

Congress passed the "Continued Assistance for Unemployed Workers Act of 2020," which is part of the Consolidated Appropriations Act, 2021. The relief package extends the CARES Act's unemployment insurance provisions, specifically the Pandemic Unemployment Assistance (PUA) and the Pandemic Emergency Unemployment Compensation (PEUC) programs, until March 14, 2021, and makes a larger group of individuals eligible for those benefits under the Mixed Earner Unemployment Compensation (MEUC) program.

Federal Pandemic Unemployment Compensation

The CAA, 2021, also provides an additional $300 per week in unemployment benefits for the next 11 weeks under the Federal Pandemic Unemployment Compensation (FPUC) program and an additional $100 per week for workers with both wages and self-employment income who can document that self-employment income.

Extended number of weeks of benefits

In addition, the new legislation extends the number of weeks of benefits an otherwise eligible individual may receive from 39 weeks to 50 weeks, as well as the funding of the first week of compensable regular unemployment for states with no waiting week.

Short-term compensation program

Short-time compensation under a short-time compensation program, plus financing, has also been extended to March 14, 2021, as has full federal funding of extended unemployment compensation under the Families First Act.

Railroad retirement benefits

Railroad retirement benefits have been extended under the "Continued Assistance to Rail Workers

Act of 2020," as has the waiver of the seven-day waiting period.

Guidance from the DOL

Note that the Department of Labor has issued guidance in the form of program letters that provide implementation information about the UI provisions contained in the Continued Assistance for Unemployed Workers Act of 2020 (UIPL 9-21, UIPL 17-20, Change 2), as well as the mixed employment program (UIPL 15-20, Change 3), and extended benefits (UIPL 24-20, Change 1).

Health Law & Life Sciences

By Sheila Lynch-Afryl, J.D., M.A.

The Consolidated Appropriations Act, 2021—mostly Division CC—includes a broad range of provisions pertaining to Medicare, including an extension of the moratorium on Medicare sequestration through March 31, 2021.

Medicare

Physician fee schedule. To mitigate the effects of a 10 percent reduction in the 2021 conversion factor that CMS implemented in the 2021 final rule, the CAA, 2021, requires the HHS Secretary to increase physician fee schedule amounts by 3.75 percent during 2021 only. It also prohibits CMS from paying for HCPCS code G2211, an add-on for visit complexity, before January 1, 2024. In addition, the CAA, 2021, freezes Alternative Payment Model (APM) incentive thresholds through 2024 and allows physician assistants to receive direct Medicare payments beginning January 1, 2022.

Eligibility and enrollment. Medicare eligibility for beneficiaries with end-stage renal disease generally ends 36 months after an individual receives a kidney transplant. The CAA, 2021, provides that kidney transplant recipients whose Medicare eligibility ends for this reason are eligible for coverage of immunosuppressive drugs when they have no other insurance coverage. Coverage generally begins January 1, 2023. Such beneficiaries will have lower Part B premiums and will not be subject to the late enrollment penalty or the income-related monthly adjustment.

Beginning January 1, 2023, the Act also simplifies Part B beneficiary enrollment, making the effective date of coverage the month after enrollment, and allows CMS to create special enrollment periods for beneficiaries experiencing exceptional circumstances.

Rural emergency hospitals. The CAA, 2021, created a new provider type, the rural emergency hospital, effective January 1, 2023. Facilities that, as of December 27, 2020, were critical access hospitals (CAHs) or general hospitals with fewer than 50 beds can convert to rural emergency hospitals. They must have a staffed emergency department and transfer agreements in place and are generally prohibited from providing inpatient hospital services. Rural emergency hospitals will be paid the hospital outpatient prospective payment system (OPPS) amount plus 5 percent, and a monthly "additional facility payment" using a formula based on 2019 reimbursement to CAHs. They must maintain an agreement with a quality improvement organization (QIO), are subject to EMTALA requirements, and are permitted to be an originating site for telehealth purposes.

The CAA, 2021, created a new provider type, the rural emergency hospital, effective January 1, 2023.

Hospices. Effective December 27, 2020, hospice programs are subject to a standard survey at least once every 36 months. In addition, beginning in fiscal year 2024, the payment reduction for a hospice that fails to meet requirements under the Hospice Quality Reporting Program will increase from 2 to 4 percent.

The Improving Medicare Post-Acute Care Transformation Act of 2014 (IMPACT Act) (P.L. 113-185) required that the hospice aggregate cap amount be updated by the hospice payment update rather than using the Consumer Price Index for all urban consumers (U.S. city average) (CPI-U) for medical care expenditures. This policy was originally set to go through accounting years that end before October 1, 2025, but the Act extended it for accounting years that end before October 1, 2030.

IPPS. The CAA, 2021, includes several provisions on graduate medical education under the hospital inpatient prospective payment system (IPPS). Beginning in FY 2023, the Act added 1,000 residency positions, capped at 200 a year.

Medicaid

The Patient Protection and Affordable Care Act (ACA) (P.L. 111-148) reduced disproportionate share hospital (DSH) allotments to states beginning in 2014. Congress has delayed the enforcement of these cuts a number of times, most recently in the CAA, 2021. The law delayed the cuts three years such that they take effect in FYs 2024 through 2027. The reduction will be $8 million for FYs 2024 through 2027.

States are required to cover routine patient costs for items and services furnished in connection with participation in a qualifying clinical trial beginning January 1, 2022. In addition, the CAA, 2021, provides Medicaid coverage for citizens of Micronesia, the Marshall Islands, and Palau who are lawfully residing in the U.S.

The CAA, 2021, also:

- requires states to submit reports on non-DSH supplemental payments;
- extends the Money Follows the Person Demonstrations and spousal impoverishment protections;
- extends the authority of Medicaid Fraud Control Units to investigate complaints of patient abuse or neglect to all settings, not just board and care facilities; and
- removes more than $3 billion from the Medicaid Improvement Fund.

Life Sciences

The CAA, 2021, allows the FDA to identify certain generic drugs for which labeling updates would provide a public health benefit and, ultimately, order the holder of the drug application to make the identified changes. It also requires the FDA to report on the number of covered drugs and provide a description of the types of drugs selected for labeling changes, as well as the rationale for such recommended changes, and to provide recommendations for modifying the program.

In addition, the FDA is required to publicly post patent information about biological products and revise it every 30 days. The bill also extended the Rare Priority Disease Priority Review Voucher Program.

Provider Relief Fund

The CARES Act created, and allocated $175 billion to, the Provider Relief Fund. The CAA, 2021, allocated an additional $3 billion for providers to use on "health care related expenses or lost revenues that are attributable to coronavirus." Providers may calculate lost revenues using the FAQs released by CMS in June 2020.

COVID-19 Testing and Vaccine

Congress allocated $22.4 billion for COVID-19 testing, contact tracing, surveillance, containment, and mitigation. At least $2.5 billion of this amount must be used to improve testing capabilities and contact tracing for high-risk and underserved populations, and $790 million is allocated to the Indian Health Service.

The CAA, 2021, allocated $8.75 billion to the CDC to "plan, prepare for, promote, distribute, administer, monitor, and track coronavirus vaccines to ensure broad-based distribution, access, and vaccine coverage." Of this amount, $4.5 billion is allocated to states, localities, and territories.

In addition, the Act allocated $1.25 billion to the National Institutes of Health, $1.15 billion of which must be dedicated to research and clinical trials related to long-term studies of COVID-19.

Banking & Financial Services

By Charles A. Menke, J.D.

The Consolidated Appropriations Act, 2021, extended several banking and financial services emergency relief measures while providing an additional $284 million for the Paycheck Protection Program (PPP) and other small business support. Significant banking and financial services provisions are contained in Title V of Division N of the CAA, 2021, while Title III of Division N provides for the continuation of the PPP.

Emergency rental assistance, eviction moratorium

The CAA, 2021, appropriates $25 billion through the Treasury Department to provide to state and local government entities and extends the Centers for Disease Control eviction moratorium to Jan. 31, 2021.

Extensions of temporary relief and emergency authorities

The CAA, 2021, extends and modifies a CARES Act provision allowing banks and credit unions to temporarily delay the adoption of a new credit loss accounting standard, the Current Expected Credit Loss (CECL). These institutions will have until the earlier of: (1) the first day of the fiscal year of the institution that begins after the national emergency termination date; or (2) Jan. 1, 2022. The CAA, 2021, also extends a CARES Act provision that temporarily changes the National Credit Union Administration's Central Liquidity Facility (CLF) for credit unions to meet liquidity needs by expanding the ability to borrow up to a value 16 times the CLF's subscribed capital stock and surplus, up from the statutory limit of 12 times. The termination of CLF's expansion is extended to Dec. 31, 2021.

Troubled debt restructurings

The CAA, 2021, extends a CARES Act provision that allows financial institutions to determine if they will suspend the Generally Accepted Accounting Principles (GAAP) requirements for recognizing any potential COVID-related losses from a troubled debt restructuring (TDR) related to a loan modification. The termination of this CARES Act provision is extended to the earlier of: (1) 60 days after the national emergency termination date; or (2) Jan. 1, 2022. The CAA, 2021, also clarifies that insurance companies are covered by the provision.

Termination of Fed authority

The CAA, 2021, sets Dec. 31, 2020, as the date for termination of the Federal Reserve Board's authority to make new loans, asset purchases, or modifications through the existing CARES Act facilities. However, as funds in the Treasury's Exchange Stabilization Fund that were provided through the CARES Act are rescinded, the Treasury Secretary retains authority to use other ESF funds to backstop future Fed emergency lending programs and facilities under section 13(3) of the Federal Reserve Act. In addition, while those other ESF funds may not be used to establish Fed emergency lending programs and facilities that are the "same as" current Fed programs and facilities that received CARES Act funding support (except the Term Asset-Backed Securities Loan Facility, or TALF), the CAA, 2021, permits substantially similar Fed emergency lending programs and facilities, including those designed to support small businesses and non-profit organizations, as well as state, territory, and local governments, to be established with ESF funds in the future. The Fed also retains the

> *Banks and credit unions may temporarily delay the adoption of the Current Expected Credit Loss (CECL).*

full authority it had prior to the enactment of the CARES Act to establish programs and facilities under section 13(3) of the Federal Reserve Act.

PPP continuation

The CAA, 2021, sets aside an additional $284 billion for the PPP and extends the program to March 31, while also expanding eligible expenses and businesses as well as simplifying both the application and forgiveness process. The expanded PPP eligibility criteria encompasses nonprofits and local newspapers, TV and radio broadcasters, with key modifications to PPP aiming to serve the smallest businesses and struggling non-profits and provide better assistance to independent restaurants. The Act includes $15 billion in dedicated funding for live venues, independent movie theaters, and cultural institutions. The Act also includes $20 billion for targeted Economic Injury Disaster Loan (EIDL) Grants which are critical to many smaller businesses on Main Street.

Community development

The CAA, 2021, provides dedicated PPP set-asides for very small businesses and lending through community-based lenders like Community Development Financial Institutions (CDFIs) and Minority Depository Institutions (MDIs) by authorizing: (1) $9 billion Emergency Capital Investment Program (ECIP) administered by the Treasury Department to provide emergency capital investments in CDFIs and MDIs to support lending in low-income and underserved communities, including persistent poverty counties, that may be disproportionately impacted by the economic effects of the COVID–19 pandemic; and (2) $3 billion in emergency support for CDFIs through the CDFI Fund to respond to the economic impact of the pandemic on underserved low-income and minority communities. The Act further provides for a narrow exemption from the Equal Credit Opportunity Act for the sole purpose and exclusive use of data collection to ensure compliance with the ECIP's plan to enhance lending to minority communities, while ensuring institutions will be subject to ECOA enforcement actions should they discriminate against borrowers.

Consumer Protection

By Jeffrey May, J.D.

The Consolidated Appropriations Act, 2021, provides the Federal Trade Commission with authority to get tough on scammers who exploit the COVID-19 pandemic to commit fraud. The COVID–19 Consumer Protection Act, Title XIV of the CAA, 2021, enables the agency to seek civil penalties for scams and deceptive practices related to the COVID pandemic. The authority lasts for the duration of the COVID-19 public health emergency.

The type of conduct that generally would be challenged by the FTC in a COVID-19 fraud case would fall within FTC Act, Section 5's prohibition on unfair and deceptive acts or practices. However, Section 5 of the FTC Act does not authorize the Commission to seek civil penalties for first-time violations. As a result, until now, the FTC was not able to seek civil penalties when pursuing marketers that were not already bound by an FTC order or who did not violate one of the agency's rules defining an unfair or deceptive act or practice under the FTC Act.

The COVID–19 Consumer Protection Act permits the agency to seek civil penalties, among other existing remedies, for a first offense if the conduct involves fraudulent marketing related to the COVID-19 pandemic. Specifically, the new law targets conduct "associated with— (1) the treatment, cure, prevention, mitigation, or diagnosis of COVID–19; or (2) a government benefit related to COVID–19." Such a violation would be "treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B))." A rule violator is subject to civil penalties.

The statutory language would likely capture the type of representations related to COVID-19 that have been challenged by the agency since the start of the pandemic. For instance, the FTC's first COVID-19 case alleged that a Rhode Island company misrepresented that it was affiliated with the U.S. Small Business Administration (SBA) and was an approved lender under SBA's Paycheck Protection Program. The company and its president ultimately settled the allegations and agreed to refrain from making the challenged claims.

As for COVID-19 treatment, cure, prevention, mitigation, or diagnosis claims, the FTC challenged advertising that a Vitamin C supplement treated COVID-19. The marketer agreed to resolve the FTC's concerns under a court order and administrative order.

FTC appropriations

The CAA, 2021, also provided increased funding for the FTC for Fiscal Year (FY) 2021. Specifically, it funds the FTC at $351 million. The additional $20 million increase over what the agency received in FY 2020 should assist with COVID-19 enforcement efforts.

Public education efforts regarding COVID-19 scams

Late in 2020, Congress passed a separate measure aimed at educating the public about COVID-19 scams. The "Combating Pandemic Scams Act of 2020" (H.R. 6435), Public Law 116-287; 134 Stat. 4882, signed into law on January 5, 2021, by President Trump, requires the FTC, in consultation with other agencies, to develop and disseminate information to the public about scams related to COVID-19. The measure calls on the agency to include details regarding the most common mail, telemarketing, and Internet fraud scams and illegal robocalls related to COVID-19 and information on where and how consumers can report instances of scams and how to file a complaint with the appropriate law enforcement agency.

Environmental Law

By Mark Nelson, J.D.

The Energy Act of 2020, contained in Division Z of the CAA, 2021, is perhaps the centerpiece of the several environmental provisions included in the appropriations omnibus. The Energy Act updates for the first time in over a decade the laws applicable to the power generation and transmission sector of the U.S. economy, a sector that is a major contributor to greenhouse gas (GHG) emissions. The Energy Act focuses on the development and use of new technologies that may help to reduce GHG emissions.

In the 116th Congress, Senate Energy and Natural Resources Committee Chairwoman Lisa Murkowski (R-Alaska) and Ranking Member Joe Manchin (D-WVa) jointly commented on the inclusion of the Energy Act in the CAA, 2021. "The Energy Act represents the first modernization of our nation's energy policies in well over a decade. This bipartisan package will foster innovation across the board on a range of technologies that are critical to our energy and national security, our long-term economic competitiveness, and the protection of our environment," said Sen. Murkowski.

Senator Manchin also noted the significance of the Energy Act: "The Energy Act of 2020 provides a down payment on the technologies that will be critical to reducing greenhouse gas emissions in the power sector, industry, and buildings and addressing climate change. This focus on research, development, and demonstration will create high quality jobs and ensure the United States continues to lead the world in the clean energy future."

Sen. Manchin, in a separate press release, highlighted several key provisions within the Energy Act, including:

- Modernizing the Department of Energy's (DOE's) program for carbon capture, utilization, and storage.
- Facilitating investment in multiple forms of renewable energy sources, such as wind, solar, hydroelectric power, marine energy, and geothermal power.
- Reauthorizing the Weatherization Assistance Program.

The Energy Act's carbon management title sets a definitional goal for the sequestration of carbon dioxide under the carbon storage demonstration program required to be established by the DOE. Specifically, "large-scale carbon sequestration" means the demonstrated ability to inject into geologic formations at least 50 million metric tons of carbon dioxide within a 10-year period. The DOE also must pursue a phased program regarding high-efficiency turbines that incentivizes the use of first-of-a-kind engineering and detailed gas turbine design for small-scale and utility scale electric power generation.

Regulators must establish an R&D program focused on large scale removal of carbon dioxide from the atmosphere.

With respect to carbon removal, the DOE must coordinate with other regulators, including the Department of Agriculture, to establish a research and development (R&D) and demonstration program focused on large scale removal of carbon dioxide from the atmosphere. The program may address: (1) direct air capture and storage technologies; (2) bioenergy with carbon capture and sequestration; (3) enhanced geological weathering; (4) agricultural practices; (5) forest management and afforestation; and (6) planned or managed natural and artificial carbon sinks.

Significantly, the Energy Act also contains provisions that will allow the DOE to conduct demonstration projects to develop a new type of fuel called high-assay low-enriched uranium (HA-LEU). HA-LEU could be used in next generation nuclear reactors that are expected to be smaller and more efficient than reactors now in use at existing nuclear power plants.

The Energy Act further provides for research by the DOE to foster the development of "a cost competitive fusion power plant and to support the development of a competitive fusion power industry in the United States." Fusion power seeks to create energy by using electric and magnetic fields to control the flow of hot plasma (gas) in a process similar to how stars produce energy in order to generate electric power without carbon emissions. The technology needed to produce fusion power is still at an experimental stage but two programs, DIII-D and ITER, are developing fusion reactors based on the tokamak design (See DOE Office of Science video and the ITER website). Research contemplated by the Energy Act also would emphasize alternative fusion energy concepts, including non-tokamak confinement configurations operating at low magnetic fields.

Moreover, the Energy Act seeks to address the shortage of rare earth minerals in the U.S. As a result, the Energy Act provides for the development and assessment of advanced separation technologies to extract and recover rare earth elements and other critical materials from coal and coal byproducts.

Lastly, the Energy Act contemplates that the DOE will commercialize new technologies by facilitating their transfer to the private sector. To this end, the Energy Act establishes within the DOE the Office of Technology Transitions, whose mission is to: (1) expand the commercial impact of the DOE's research investments; and (2) focus on commercializing technologies that support the DOE's mission, including reducing GHG emissions and other pollutants. The catch-all section in the Energy Act also contains a sense of Congress that directs the Secretary of Energy to prioritize funding of basic R&D via the DOE's Office of Science. This prioritization is needed, the Energy Act states, to meet the goal of "reduc[ing] emissions and meet[ing] 100 percent of the power demand in the United States through clean, renewable, or zero emission energy sources while maintaining United States leadership in science and technology."

The CAA, 2021 includes additional significant environmental provisions. Senator Murkowski specifically remarked on the inclusion of the western water package (Division FF), a collection of bills that had been considered by the Senate Energy and Natural Resources Committee, that seeks to provide water managers needed tools to deliver a reliable supply of water. Additional environmental provisions in the CAA, 2021 include:

- Division R—Protecting Our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2020.
- Division S—Innovation for the Environment.
- Division AA—Water Resources Development Act of 2020.
- Division DD—Montana Water Rights Protection Act.

Intellectual Property & Technology

By Thomas Long, J.D.

The Consolidated Appropriations Act, 2021, not only funds the USPTO and the Copyright Office, but it includes several measures that had previously passed the House regarding intellectual property reforms.

IP provisions

Title II of Division Q of the CAA, 2021, addresses a variety of copyright and trademark measures. The most prominent provision establishes a new copyright "small claims" recovery procedure through a Copyright Claims Board at the Copyright Office, for infringement cases with up to $30,000 in damages. It also creates new ex parte expungement and reexamination procedures to address the problem of false or inaccurate statements of use in trademark registrations and applications. Also included is criminal copyright legislation addressing a narrow range of online media streaming activities. Finally, the Act includes provisions requiring the Food and Drug Administration (FDA) to provide more information to the public on the licensing and marketing status of patented biological products.

Felony streaming provision

Division Q, Title II, Section 211 of the CAA, 2021, creates a new Section 2319C of Title 18, providing the Department of Justice with the authority to bring felony charges against digital transmission services offered to the public for financial gain that are designed, provided, or marketed for the purpose of streaming copyrighted works without authorization, and have no other commercially significant purpose or use. According to the Copyright Office, the legislation was the result of a negotiated process among a number of consumer and industry groups and was drafted to exclude criminal prosecution of individual users. This bill originally was revealed by Sen. Thom Tillis (R-N.C.) on December 10 with the short title "The Protecting Lawful Streaming Act."

"The shift toward streaming content online has resulted in criminal streaming services illegally distributing copyrighted material that costs the U.S. economy nearly $30 billion every year, and discourages the production of creative content that Americans enjoy," said Tillis. "This commonsense legislation was drafted with the input of creators, user groups, and technology companies and is narrowly targeted so that only criminal organizations are punished and that no individual streamer has to worry about the fear of prosecution."

CASE Act—copyright small claims

Division Q, Title II, Section 212 of the CAA, 2021, incorporates the Copyright Alternative in Small-Claims Enforcement Act of 2019 (H.R. 2426), known as the CASE Act. This law adds a new Chapter 15 to Title 17 to create a Copyright Claims Board at the Copyright Office to make it easier and less expensive for independent creators, such as photographers, songwriters, and graphic artists, to enforce their copyrights. The bill was introduced on May 1, 2019, by Representatives Hakeem Jeffries (D-N.Y.) and Doug Collins (R-Ga). The bill was marked up by the House Judiciary Committee in September. A companion bill (S. 1273) was approved by the Senate Judiciary Committee on July 18 and passed the House of Representatives on October 22 by a vote of 410-6.

The CASE Act calls for the establishment of the Copyright Claims Board (CCB) at the Copyright Office. The CCB does not replace a district court as a forum for pursuing copyright claims, but provides an optional, alternative forum for rightsholders. A panel of three Copyright Claims Officers—subject matter experts appointed by the Librarian of Congress—will be designated to adjudicate and settle copyright claims of up to $15,000 in statutory damages per work infringed. Damages will be capped at $30,000 per case. Proceedings could take place over the phone and online, without an attorney.

Shira Perlmutter, Register of Copyrights and Director of the U.S. Copyright Office, said, "The Copyright Office has long supported a solution for the challenges posed for asserting small copyright claims, and is pleased that Congress has passed the CASE Act. We are looking forward to implementing the Act and providing access to dispute resolution for the parties involved in such claims."

Trademark Modernization Act

Division Q, Title II, Section 221 incorporates the "Trademark Modernization Act of 2020" (or the TM Act of 2020). This measure (introduced as H.R. 6196 and S. 3449) creates expedited ex parte trademark cancellation procedures and codifies a rebuttable presumption of harm for trademark violations, which will make it easier for trademark owners to obtain injunctions. It amends the Lanham Act to:

- Create new procedures at the USPTO to address false and inaccurate use claims in trademark applications and registrations by providing expedited procedures to cancel ("expunge") trademark registrations for marks that have not been used. The measure allows any person to file an ex parte petition for expungement for marks never used in U.S. commerce, and ex parte reexamination of trademark registrations covering marks for which improper use claims were made during the examination process before registration.
- Codify additional trademark examination procedures to give the USPTO flexibility and additional authority to gather evidence during examination. For example, the law provides a process for third parties to submit relevant evidence during examination, including that the mark has not been used in commerce. Current law provides that a third party can only request cancellation of a trademark registration through an inter partes procedure before the Trademark Trial and Appeal Board or in a lawsuit in district court. The measure also gives the USPTO greater flexibility in setting times for response to office actions issued during examination. Currently, the statute requires that the USPTO allow six months to respond. The new provision would allow the office to set response periods, by regulation, for a time period between 60 days and six months, with the option for an applicant to request extensions to a full six-month period.
- Clarify that a rebuttable presumption of irreparable harm exists for trademark violations, given the consumer protection concerns that would occur otherwise. Following the Supreme Court's ruling in a patent infringement lawsuit holding that irreparable harm could not be presumed in that context, *eBay, Inc. v. MercExchange LLC*, 547 U.S. 388 (2006), a circuit split has developed as to whether irreparable harm can be presumed when a trademark violation has been proven.

Biological product patent transparency

Division BB, Title III, Subtitle B, Section 325 of the CAA, 2021, requires the FDA to provide more information to the public about patented biological products. This information includes a list of each biological product, by nonproprietary name (proper name), for which, a biologics license is in effect; the date of licensure; and the licensure and marketing status. Within 30 days after a biologics product maker gives an applicant seeking approval for biosimilars a list of the patents on the product and their expiration dates, the product maker is directed to provide that to the FDA to be made available to the public in its Database of Licensed Biological Products or "Purple Book."