June 2019

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The summer season has arrived in Washington and things are heating up in the halls of Congress. A number of high priority legislative proposals ranging from health care to appropriations to patent reform to defense authorization continue to drive the policy agenda while a number of investigations focused on President Trump and his administration continue to play out in the political arena. In the House, Democratic investigations have taken priority while the majority's leadership debate the consequences of possibly moving forward with impeachment proceedings against the President. In the Senate, Republican leadership is working expeditiously on a number of judicial and executive nominations while trying to navigate the ever-changing tariff battles between President Trump and Congress.

While the Senate will continue to focus on approving presidential nominations, we also expect floor time this summer on a number of legislative items, including appropriations bills and drug pricing. This is likely to be a welcome change for some senators who have become more vocal with their frustrations over the lack of movement on policy priorities. In the House, Speaker Nancy Pelosi (D-CA) continues to balance the political desires of her voter base and caucus for impeachment proceedings with realistic expectations, knowing the GOP-controlled Senate would not move forward with any effort by the House, and the possibility that impeachment proceedings would energize the President's voter base heading into the 2020 election. However, what was once a strictly partisan issue turned bipartisan as Rep. Justin Amash (R-MI) became the first member of the GOP Conference to join Democratic calls for President Trump's impeachment.

While a deal on budget caps remains elusive, talks continue between congressional leaders and the administration with a relatively optimistic outlook for reaching a deal that would address the Budget Control Act spending caps for FY 2020 and 2021, as well as a further suspension of the debt limit, which expired on March 1, 2019. House Appropriations is plowing through its work, with the first minibus package of several bills expected to reach the House floor this week. The Senate is expected to begin marking up appropriations bills later in June. Another area that has seen progress is the annual defense policy bill, the National Defense Authorization Act (NDAA) for FY 2020, which was marked up in the Senate Armed Services Committee in May and will head to a full committee markup in the House next week. NDAA is expected to be on the Senate floor the week of June 17 and on the House floor later this summer.

A disaster aid package that seemed poised for passage prior to Memorial Day recess was temporarily delayed by a few unsatisfied House Republican members, but was eventually passed on June 3. The bill, which also included a four-month extension of the National Flood Insurance Program, has been signed into law by the President.

On June 7, President Trump announced a deal with Mexico that would "indefinitely suspend" the tariffs he had threatened on all imports from that country just a week earlier, unless it took actions to "alleviate" the "illegal immigration crisis." The President's tariff strategy had been strongly criticized by the business community and members of both parties in Congress, who briefly considered voting to end the President's emergency declaration and its tariffs. The eight day standoff distracted from the push to pass the U.S.-Mexico-Canada Agreement (USMCA), which had seen procedural advances in recent weeks.

IN THIS ISSUE

LAWMAKERS UNVEIL SURPRISE BILLING PROPOSALS

Congress is moving ahead with legislation to address so-called surprise medical billing, an effort that has the support of the administration and committee leaders in both chambers. On May 9, President Trump held a White House event on surprise billing, announcing four broad principles to guide Congress in developing legislation on the issue: i) out-of-network balance billing should be prohibited for emergency care; ii) patients should be given prices and out-of-pocket costs in advance of scheduled, non-emergency care; iii) patients should not receive bills from out-of-network providers that they did not choose themselves; and iv) legislation should protect patients without increasing federal expenditures or reducing patient choice.

Lawmakers have released a number of bills and draft bills, nearly all of which aim to shield patients from out-of-network rates when receiving emergency care or when being treated by an out-of-network provider at an in-network facility. The various proposals take different approaches to the issue of determining reimbursement for providers in these scenarios. However, a bipartisan group of senators led by Sen. Bill Cassidy (R-LA) released its much-awaited legislation, the Stopping The Outrageous Practice (STOP) Surprise Medical Bills Act (S. 1531) or the "Cassidy Bill", under which providers would automatically be paid the difference between the in-network cost-sharing amount and the median in-network rate under the plan. Providers and plans would be able to appeal this amount through a “baseball-style” arbitration process. House Energy and Commerce Committee Chairman Frank Pallone (D-NJ) and Ranking Member Greg Walden (R-OR) released their own draft surprise billing legislation, the No Surprises Act, on May 14. The bill would set a minimum payment amount based on the median contracted in-network rate in the geographic area where the service was delivered.

On May 23, the Senate Health, Education, Labor and Pensions (HELP) Committee released its draft legislation, the Lower Health Care Costs Act. In addition to provisions related to drug pricing, health information exchange and transparency, the draft bill includes a section on surprise billing that outlines three possible approaches to payment determinations. Under the first option, in-network facilities would guarantee to patients and plans that every practitioner at the facility would be considered in-network. For emergency care delivered out-of-network, providers and facilities would have 30 days to determine private reimbursement with the health plan. If no agreement is reached, the provider would be paid based on the median contracted in-network rate for services in that geographic area. Under the second option, for bills of $750 or less the health plan would pay the provider based on the median contracted in-network rate for services in that geographic area. For bills greater than $750, the plan or provider can elect to initiate a baseball-style arbitration process. Finally, under the third option, the health plan would simply pay the provider based on the median in-network contracted rate for services in that geographic area. The legislation also requires bills for air ambulance services to be broken out by air

transportation and medical charges.

A preliminary analysis from the Congressional Budget Office (CBO) indicates the network matching option would save $9 billion over 10 years, the arbitration model would save $20 billion, and the option to set a benchmark payment rate would save the most at $25 billion. CBO also estimates that the Cassidy Bill would save $17 billion over 10 years. The HELP Committee closed comments on its draft on June 5. The Committee is expected to hold a hearing on the legislative package on June 18 and a markup on June 25. The chairmen and ranking members of the Senate Finance and HELP committees are aiming to send a health care package that addresses surprise billing and drug pricing to the President in July. The House Energy and Commerce Health Subcommittee will hold a legislative hearing on the issue on June 12.

Back to top

USMCA AND MEXICO TARIFFS: ONE STEP FORWARD, TWO STEPS BACK

On the afternoon of Thursday, May 30, U.S. Trade Representative (USTR) Robert Lighthizer took the next step under the Trade Promotion Authority (TPA) procedures to move the USMCA closer to passage by sending a draft Statement of Administrative Action (SAA) to the congressional leadership. The draft SAA details how the administration plans to implement the agreement if Congress were to pass it. The administration may send Congress the implementing bill no sooner than 30 days after the draft SAA is sent to Congress. Under TPA, once the implementing bill is sent to Congress, a countdown of 90 session days is triggered by which Congress must vote on the agreement without amendment. Since the draft SAA was sent on May 30, the earliest that an implementing bill may be sent to Congress is July 9, which is the first day that both the House and Senate are in session following the 30-day waiting period. This would leave roughly three weeks in July for Congress to consider the USMCA before the August recess.

However, sending the draft SAA to the Democratic-led House was not welcomed by Speaker Nancy Pelosi (D-CA) and Ways and Means Chairman Richard Neal (D-MA). Speaker Pelosi said it was “not a positive step” as she continues to see changes to the agreement’s provisions on enforcement, labor rights, environmental protections and access to medicines.

Prospects for USMCA’s passage were further complicated just hours later when President Trump surprised most stakeholders by releasing a statement proposing new tariffs on all imports from Mexico unless the country took action to “reduce unlawful migration” across the southern border. Specifically, the President proposed imposing a five percent tariff on imports from Mexico beginning June 10 and then increasing the tariff by five percentage points on the 1 of each month until it reaches 25 percent on October 1. The President is drawing on his authority under the International Emergency Economic Powers Act (IEEPA) to take a broad set of actions against any “unusual and extraordinary threat…to the national security, foreign policy, or economy of the United States.” IEEPA has historically been used to impose sanctions on foreign entities and individuals and has never been used to justify incremental tariff hikes. Unlike the authorities previously used by the President to raise tariffs on foreign goods, like Section 232 of the Trade Expansion Act or Section 301 of the Trade Act, the administration does not need to conduct a lengthy investigation before levying these duties. The tariff announcement drew immediate response from both lawmakers and businesses raising the concern that the tariffs would hurt the economy and the chances for passage of the USMCA. Under IEEPA, Congress can terminate an emergency declared by the President by passing a joint resolution of disapproval over his veto.

Ultimately, President Trump announced a deal with Mexico to avoid the tariffs on Friday, June 7. In a joint statement with its Mexican counterpart, the State Department detailed actions that the Mexican government committed to take, such as deploying its national guard to the southern border of Mexico to prevent Central American migrants from beginning the journey north to the United States. However, the statement also noted that the United States may “take further actions” if “the expected results” do not materialize. The parties pledged to continue the discussions and revisit the issue in 90 days, or on September 5, 2019.

Back to top

CONGRESSIONAL AND ADMINISTRATION TAX UPDATES

Activity on the tax front in May teed up what may be a flurry of activity to come in June, particularly in the Senate. On May 23, the House passed the Setting Every Community Up for Retirement Enhancement (SECURE) Act by a vote of 417-3. Just prior to floor consideration, the House also added a provision to fix an unintended consequence of the 2017 tax reform law for children from Gold Star families (and others) with unearned income.

Given the overwhelmingly bipartisan House vote for this significant retirement reform bill, there was some hope that the Senate would be able to pass the bill quickly by unanimous consent before the Memorial Day recess. However, a number of holds from senators prevented the bill from moving forward. Senate Finance Committee Chairman Chuck Grassley (R-IA) has stated that he continues to work with his colleagues to resolve any outstanding concerns and move the bill forward in the Senate, possibly as soon as this month.

In other Senate Finance news, on May 16, Chairman Grassley and Ranking Member Ron Wyden (D-OR) announced the formation of a bipartisan task force to evaluate temporary tax policies often referred to as “tax extenders,” as well as a task force focused on the issue of tax relief provisions often authorized in the case of natural disasters. The task force issues areas and co-leads are:

- Employment and Community Development - Sens. Rob Portman (R-OH) and Maria Cantwell (D-WA)
- Health - Sens. Pat Toomey (R-PA) and Bob Casey (D-PA)
- Energy - Sens. John Thune (R-SD) and Debbie Stabenow (D-MI)
- Cost Recovery - Sens. Mike Crapo (R-ID) and Ben Cardin (D-MD)
- Individual, Excise and Other Expiring Policies - Sens. Pat Roberts (R-KS) and Bob Menendez (D-NJ)
- Disaster Tax Relief - Sens. Richard Burr (R-NC) and Michael Bennet (D-CO).

The task force members are charged with evaluating the temporary tax provisions in their jurisdiction, including feedback from other Senate offices and stakeholders. The task force must then report back to the Committee by the end of June with a possible solution to provide more certainty, which may include a recommendation to make a provision permanent, to allow it to expire or something in between, such as a phase out or modification.

House Ways and Means Committee Democrats continue to discuss the best path forward on tax extenders in the House, but a final decision has not been made yet as to whether and how the House will act on these temporary tax provisions that expired at the end of 2017 and 2018.

At the Treasury Department, the process of promulgating tax reform regulations continues. Regulations implementing the dividends received deduction, the Global Intangible Low-Taxed Income mechanics, the state and local tax deduction and the small business tax deduction are expected to be released in the next few weeks. Meanwhile, the Treasury continues to review comments on proposed regulations implementing the Base Erosion and Anti-Abuse Tax, Foreign-Derived Intangible Income deduction and 163(j) interest deduction limitation, with final regulations expected later this summer/fall.

Back to top

PRIVACY REMAINS AT A STANDSTILL IN THE SENATE

Senate

Members on the Senate side have begun to express candidly their frustration with the

timeline of the Senate Commerce Committee's privacy working group in developing draft legislation. Sen. Jerry Moran (R-KS) previously discussed releasing a draft bill before the Memorial Day recess, but other members have grown impatient after the timeline was again pushed back. Sen. Chris Coons (D-DE) and Sen. John Thune (R-SD) have particularly emphasized the need to move quickly on federal privacy legislation before the end of the year.

The battle for jurisdiction over the issue has not yet subsided, with Sen. John Kennedy (R-LA) recently urging Senate Judiciary Chairman Lindsey Graham (R-SC) to consider marking up a privacy bill. Chairman Graham has expressed willingness to do this in coordination with the other committees of jurisdiction.

Privacy negotiations have recently featured a clash over including a private right of action in federal legislation. Senate Democrats, including Sen. Richard Blumenthal (D-CT), have discussed the need to consider the measure, while Senate Republicans have pushed back against including a private right of action. However, according to Sens. Moran and Thune, the issue will not be a significant obstacle to reaching an agreement.

On May 21, the Senate Judiciary Committee held a hearing to assess the impact of privacy and competition policy on digital advertising. During the hearing, Chairman Graham and Sen. Thom Tillis (R-NC) discussed the need for a preemptive federal privacy standard. However, Sen. Patrick Leahy (D-VT) stated that he would not support a preemptive bill if it weakens measures enacted on the state level. Sen. John Cornyn (R-TX) questioned the witnesses about what authorities Congress should give the Federal Trade Commission (FTC), with witnesses pointing to rulemaking authority, fining authority and additional staff.

The Senate Banking Committee has maintained its involvement in the privacy debate, with Chairman Mike Crapo (R-ID) and Ranking Member Sherrod Brown (D-OH) recently sending a letter to Facebook requesting information on what privacy and consumer protections the company will put in place in its payments system. The Committee has also emphasized the need to ensure that information affecting an individual's credit is not used in violation of the Fair Credit Reporting Act (FCRA).

Sen. Josh Hawley (R-MO) recently introduced the Do Not Track Act, which would allow consumers to enroll in a national "do not track" program that would prohibit companies from collecting some of their personal information. The bill would also allow federal regulators to fine companies that collect excess data, prohibit companies from discriminating against users in the program and require firms to disclose user rights.

House

Rep. Jan Schakowsky (D-IL), Chairwoman of the Energy and Commerce Consumer Protection Subcommittee, recently discussed digital privacy and data protections at a panel discussion hosted by Public Citizen. In terms of preemption, she noted that she would potentially support a preemptive standard that does not weaken state protections. Regarding enforcement, she asserted that state attorneys general should be able to enforce the law, and she noted that she has not ruled out a private right of action. However, full committee Ranking Member Greg Walden (R-OR) has echoed concerns in the Senate about the measure.

Rep. Schakowsky also noted that the bill should have a strong section on the right to erase, correct, delete and amend information. In terms of the drafting process, she raised a concern about bipartisan cooperation, noting that many Republicans on the subcommittee have led with the controversial issue of preemption. Rep. Schakowsky stated that she is talking to members on the subcommittee and is beginning talks with Republicans, but she noted that she plans to introduce legislation with or without the minority.

Back to top

THE ARTIFICIAL INTELLIGENCE INITIATIVE ACT (AI-IA)

Sens. Martin Heinrich (D-NM), Rob Portman (R-OH) and Brian Schatz (D-HI) recently introduced the bipartisan Artificial Intelligence Initiative Act (AI-IA) to organize a coordinated national strategy for developing AI. The comprehensive legislation provides

$2.2 billion of federal investment in research and development over five years to prepare an AI workforce, accelerate the responsible delivery of AI applications from government agencies, academia and the private sector over the next 10 years. Furthermore, the AI-IA seeks to ensure that our nation's universities, national laboratories and technology companies are the foundation by which the United States maintains an advantage in AI, regardless of where they are located. Learn more here.

Back to top

CANNABIDIOL INDUSTRY CONTINUES TO GROW

On May 31, the Food and Drug Administration (FDA) held a public hearing to launch a process to change its regulation of products containing cannabidiol (CBD), a compound extracted from cannabis and hemp. In recent years, the market for CBD products has proliferated. Consumers now purchase CBD, and CBD-infused foods and cosmetics, in stores and over the Internet.

The legal status of CBD has evolved considerably in the last year. Prior to the enactment of the 2018 Farm Bill, CBD had been a controlled substance under the Controlled Substance Act (CSA). Distribution of CBD was thus a violation of the CSA, carrying significant possible penalties. The Farm Bill removed industrial hemp and its derivatives from prohibition under the CSA. This change had the effect of eliminating the CSA's ban on some types of industrial hemp-based CBD. Nevertheless, the Farm Bill did not amend the federal Food, Drug and Cosmetic Act (FD&C), the statute governing most FDA regulations. Generally, the FD&C prohibits the sale of a food or dietary supplement that contains a drug that has been the subject of a clinical study or is part of an FDA-approved drug. A form of CBD is the active pharmaceutical ingredient in an approved drug and has been part of clinical trials authorized by Investigational New Drug Applications. Thus, the FDA has stated that food products and dietary supplements containing CBD are unlawful. The FDA has not asserted that CBD-containing cosmetics are unlawful. Despite the FDA's position on the illegality of some CBD products, the agency has limited its enforcement action to issuing warning letters regarding CBD products that claim to cure certain diseases. By and large, it has allowed the CBD food industry to grow. The legality of CBD products under state law varies significantly by state.

The FDA has the authority to issue a regulation and take other action to remove what it views to be the prohibition on CBD-containing foods and dietary supplements. In its May 31 hearing, which gathered information for a possible regulation, the FDA heard from industry, technical experts and other stakeholders about a variety of issues, including CBD safety and quality, possible therapeutic benefits and possible side effects. Many hearing participants spoke about the need for the FDA to establish clear standards for CBD quality and to clarify other issues, such as possible age restrictions. The FDA expressed a desire to obtain more population-level data on issues such as acceptable CBD levels in products. The FDA has opened a public docket to which interested parties can submit comments until July 2.

Were the FDA to proceed with a rulemaking, the process would be quite lengthy—taking perhaps two years or more. It is possible that Congress could legislate in this area, as well. In the meantime, the CBD industry will likely continue to grow.

Back to top

THE RIVER NO LONGER RUNS THROUGH IT: EPA TO CEASE REGULATING RELEASES OF POLLUTANTS TO GROUNDWATER

After decades of insisting otherwise before the U.S. Supreme Court has had a chance to rule on the issue, the U.S. Environmental Protection Agency (EPA) took steps to limit its interpretation of the Clean Water Act's (CWA) jurisdiction over groundwater pollution. Following a February 2018 request for public comments on revisions to the National Pollutant Discharge Elimination System (NPDES) permitting regime, the agency issued an Interpretative Statement in April 2019 determining that the CWA does not require point-source polluters to obtain permits for releases of pollutants to groundwater, regardless of

whether the groundwater remains "hydrologically connected" to surface water. The Interpretive Statement applies to point-source polluters in all federal circuits except the Fourth and Ninth Circuits, where the U.S. Supreme Court has granted petitions for writ certiorari to resolve a split in the federal circuit courts regarding this issue. June 7, 2019, marked the conclusion of the public comment period that the EPA opened with publication of the Interpretive Statement, in which the agency sought input on how it can provide regulatory certainty through a future rulemaking.

According to the EPA, the agency's administrative record and federal court decisions have generated uncertainty regarding the application of the NPDES permit program to releases of pollutants to groundwater that reach waters that the EPA or states otherwise regulate. Indeed, the agency's current interpretation stands in stark contrast to the position the EPA advanced in recent litigation, where the agency argued for a liability rule requiring a "direct hydrological connection" between point sources and navigable waters. In its new guidance, EPA determines that the purpose of the CWA does not extend to regulating groundwater because other federal environmental statutes—such as the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation and Liability Act—already "extensively" regulate groundwater. Thus, the agency now concludes that Congress intended for states, and not the EPA, to regulate discharges to groundwater from point sources.

Notably, the agency's guidance could have significant implications for a range of activities, including aquifer recharge, leaks from sewage collection systems, septic system discharges, treatment systems (e.g., constructed wetlands), spills and accidental releases, manure management and coal ash impoundment seepage. Whether the guidance has long-term practical import, however, is up to the Supreme Court, which, as we have noted, is set to weigh in on the CWA's jurisdiction during its current term.

Interested parties had another chance to provide input regarding further steps that the EPA should take to clarify and provide regulatory certainty with respect to its regulation of groundwater under the Clean Water Act; the public comment period closed on June 7, 2019.

Back to top

WHITE HOUSE IMMIGRATION PROPOSAL

On May 16, 2019, President Trump outlined a proposal to refocus immigrant visas (often referred to as "green cards") on employment and skills rather than family ties. The plan would award 57 percent of immigrant visas based on employment and skills through a new "Build America Visa" program. There would be three main categories of employment-based visas: (i) extraordinary talent; (ii) professional and specialized vocations; and (iii) exceptional students. The proposal would only award 33 percent of immigrant visas based on family ties. In contrast, the current system awards 12 percent of immigrant visas based on employment and 66 percent based on family ties. The plan would award 10 percent of visas based on humanitarian reasons, and it would grant some visas based on "employment investment or job creation," similar to the existing EB-5 program. The total number of immigrant visas awarded annually would remain the same.

The administration would prioritize Build America Visa applicants using points based on several factors, including age (younger workers preferred), English proficiency and level of education. Current employment-based visa applicants would have to re-apply for the new visa, but they would receive bonus points for re-applying. Furthermore, the proposal would end the practice of employers petitioning for their employees directly. For family-based visas, the proposal would limit eligibility for those visas to the spouse, minor children and parents of U.S. citizens and permanent residents. All applicants for a green card would need to complete background checks and health screenings, demonstrate English proficiency and pass civics exams.

The plan does not address "Dreamers," persons who are undocumented, recipients of Temporary Protected Status or the broader undocumented population. Additionally, it does not modify nonimmigrant visa programs, like the H-1B visa program. Beyond reforming immigrant visas, the proposal calls for enhancing border security and establishing dedicated funding sources for border security.

Neither text, nor a detailed summary of the proposal has been provided by the White House, which was met with tepid response from lawmakers on both sides of the aisle, business groups and other interest groups, and shows little promise for getting any traction in Congress.

Back to top

INFRASTRUCTURE OUTLOOK

After President Trump met with Democratic members of Congress and told them that he wanted to work cooperatively to develop comprehensive infrastructure legislation, he announced at a subsequent, and very brief, meeting that he would not work on an infrastructure bill unless Democrats stopped investigating him. With the President and congressional Democrats at an impasse, House and Senate committee leadership are turning their attention to developing stand-alone infrastructure bills. In particular, Congress must reauthorize the highway and transit programs under the Fixing America's Surface Transportation (FAST) Act before the current law expires on September 30, 2020, and likely will attempt to move a Water Resources Development Act bill next year.

Senate Environment and Public Works (EPW) Chairman John Barrasso (R-WY) is working on the highway title of the transportation bill and has announced plans to mark up the bill this summer. He appears to be working in a bipartisan manner with Ranking Member Tom Carper (D-DE). Neither the Senate Commerce Committee, which is responsible for rail and trucking portions of the bill, nor the Banking Committee, which is responsible for the transit title, have expressed a similar desire to mark up a bill in the short term. House Transportation and Infrastructure (T&I) Committee Chair Peter DeFazio (D-OR) also has indicated he will continue to meet with stakeholders and move slower to develop legislation since the FAST Act does not expire for 15 months.

With 2020 being a presidential election year, it will be difficult for Congress to agree on how to pay for transportation spending and most members will be reluctant to raise taxes or impose new fees. Since existing gas tax revenues are not sufficient to maintain the current authorized levels of spending, Congress either would need to transfer more general funds to the Highway Trust Fund to pass a multiyear bill, or pass a short-term extension of the FAST Act until after Election Day, allowing a new Congress to address the issue of transportation spending.

Gas Tax Legislation

Rep. Earl Blumenauer (D-OR) introduced legislation on May 21 that would increase the gas tax by five cents a year for the next five years. The Rebuild America Act (H.R. 2864) would also index the gas tax to inflation. One cent of each five-cent gas tax increase would be dedicated to the mass transit account of the Highway Trust Fund. After five years, the bill calls for replacing the gas tax with a new revenue mechanism, but does not specify the new, "more sustainable, stable funding source". Rep. Blumenauer left the House T&I Committee several years ago to join the Ways and Means Committee with the intent to work on increasing revenues for transportation and infrastructure. Earlier this year, he unsuccessfully pushed for the creation of an infrastructure subpanel on the Ways and Means Committee to specifically address revenue mechanisms to fund transportation investments. The future of this bill is uncertain, and even if it could pass in the House, it would not likely advance in the Senate.

Back to top

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