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September 2020

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As the November elections rapidly approach, Congress faces a number of key legislative deadlines, including the need to fund federal agencies and extend expiring federal programs at the conclusion of the current fiscal year on September 30. Negotiations on an additional ("Phase 4") COVID-19 relief package are at an impasse after the White House and Democratic leaders in Congress failed to reach agreement on a pathway forward after several rounds of closed-door discussions in August. The core disagreement is on the level of funding. The House Democrats have aligned behind the $3 trillion House-passed Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act while the Senate GOP Leadership originally staked out its position in the $1 trillion Health, Economic Assistance, Liability Protection and Schools (HEALS) Act introduced in the Senate back in late summer.

In light of the lack of bipartisan consensus on a Phase 4 package, Treasury Secretary Steven Mnuchin has suggested lawmakers pursue a "piece by piece" approach and pass COVID-19 relief measures that have bipartisan agreement, such as those related to stimulus payments, additional unemployment benefits and assistance for schools. Senate Majority Leader Mitch McConnell (R-KY), in an attempt to unify Republicans in the Senate and restart negotiations, recently pushed for a procedural vote on a pared down version of Phase 4 legislation, which costs roughly $500 billion that would fund, among other provisions, additional unemployment assistance, the Paycheck Protection Program, education stabilization and the development of vaccines and therapeutics. The Senate GOP targeted version went down on a party line vote of 52-47, falling short of the 60 votes needed to move forward.

Meanwhile, lawmakers will need to resume negotiations to keep the government funded beyond the current fiscal year (FY), which ends on September 30. While the House passed 10 of its 12 appropriations bills before adjourning for the August recess, the Senate Appropriations Committee has yet to move any FY 2021 spending bills out of committee, thus ensuring that Congress will need to pass a continuing resolution (CR) prior to the end of September to keep the government open and operating. As in past years, a CR will either keep the government open until December, allowing lawmakers more time either to pass pending appropriations legislation in the "lame-duck" session, or extend until early 2021 after the new session of Congress begins. Speaker Pelosi and Treasury Secretary Mnuchin have publicly stated that a government shutdown before the election is not on the table and have reached a tentative agreement to keep the CR "clean"—meaning they will oppose including nonappropriations items in the package.

The House and Senate each passed versions of the FY 2021 National Defense Authorization Act (NDAA) in July, with funding under the FY20 NDAA set to expire at the end of the month. Congress appears likely to complete negotiations of a final NDAA during the lame-duck session, as conferees have yet to be named to reconcile the differences between the two bills. Other measures set to expire at the end of September include surface transportation authorization (the "FAST Act"), the National Flood Insurance Program, the National Institutes of Health authorization, the $25 billion in the Coronavirus Aid, Relief and Economic Security (CARES) Act aid to commercial passenger airlines and the Workforce Innovation and Opportunity Act. Looking forward, health extenders and Temporary Assistance for Needy Families (TANF) will expire at the end of November. A full list of expiring programs and their expiration dates is available here.

IN THIS ISSUE

DRUG PRICING EXECUTIVE ORDER

Drug Pricing Executive Order

On September 13, President Trump signed an Executive Order on "Lowering Drug Prices by Putting America First." The order directs the Secretary of Health and Human Services (HHS) to move forward with rulemaking for a payment model to implement a "most-favored-nation" price for certain high-cost drugs and biologics in Medicare Part B. The benchmark would be based on the volume-adjusted lowest drug price available in any Organization for Economic Cooperation and Development (OECD) member country with per-capita gross domestic product similar to the U.S. Expanding on the Administration's previous International Pricing Index (IPI) proposal, the executive order also calls for HHS to develop and implement through rulemaking a second model that would extend a most-favored-nation pricing policy to certain Medicare Part D prescription drugs and biologics with "insufficient competition."

Back to top

HEALTH CARE EXTENDERS

Health Care Extenders

There are a number of expiring health care programs and policies that will be on Congress's agenda during the post-election lame-duck period. The CARES Act extended a number of public health programs through November 30, 2020, providing funding for community health centers, the National Health Service Corps, the Teaching Health Center Graduate Medical Education Program and the Special Diabetes Program. In addition, the Certified Community Behavioral Health Centers' (CCBHC) demonstration was reauthorized and two new states were added to the demonstration. Other Medicare extenders include the Work Geographic Practice Cost Index (GPCI) Floor and the National Quality Forum. The CARES Act also extended several expiring Medicaid programs and delayed scheduled Medicaid disproportionate share hospital (DSH) payment reductions until December 1, 2020.

If Democrats win the White House or control of the Senate, they will be inclined to advance another CR into 2021, which would likely include only a short-term extension of the expiring health care provisions. If the lame-duck session includes more robust legislative activity, a longer-term extension of the expiring provisions could carry additional health care policies such as surprise billing or drug pricing as some congressional leaders intended.

Back to top

TRADE POLICY UDATE

Trade Policy Update

In the run up to the November elections, the Trump administration continues to pursue an extremely active trade policy while the Biden campaign continues to hone its messaging to appeal to voters. Among the areas where significant activity is expected in the coming months include U.S.-China trade tensions, USMCA implementation, and the relationship between the U.S. and EU.

***U.S. Presidential Election*.**

With their political party conventions over and early voting beginning in more than a half-dozen states this month, the Trump and Biden campaigns are working to refine their messages to likely voters. On trade, both candidates continue to advocate similar policies that focus on Buy America, supporting domestic manufacturing, moving supply chains to the United States and targeting unfair trade practices by China. In recent comments, President Trump affirmed his commitment to “reshoring” supply chains and to taking aggressive trade action that would amount to “decoupling” the United States and China. In both his second-term agenda released last month and in public remarks, President Trump has offered policy measures including tax credits for companies that bring manufacturing jobs “back” from China and imposing tariffs on companies that move manufacturing jobs out of the United States. While Vice President Biden has routinely criticized President Trump’s tariff policies, his trade policy plan mirrors several of the foundational tenets of President Trump’s trade policy agenda. In a recently published policy proposal, the Biden campaign outlines measures like taking “aggressive trade enforcement action against China or any other country seeking to undercut American manufacturing” and establishing a “claw-back” provision which would force a company to return public investments and tax benefits when laying off American workers and moving overseas. Though President Trump and Vice President Biden appear aligned on the objectives of their trade policy, Vice President Biden continues to emphasize the importance of working with allies to achieve his goals with respect to China. To date, however, Vice President Biden has not articulated the form that such efforts would take.

***China*.**

Since the coronavirus spread to the United States in March, the Trump administration has significantly increased efforts to push back on China’s unfair trade practices. A primary area of emphasis has been on the technology sector, where the Trump administration has significantly tightened export controls on Huawei and other Chinese companies as well as moved to ban WeChat and TikTok, with many other measures under consideration. These nascent attempts at decoupling have also begun to spread to the financial sector, where the Treasury Department has proposed de-listing Chinese companies from U.S. stock exchanges if they do not provide U.S. regulators with access to their audit papers, and the State Department has warned university endowments about the risk of investing in Chinese companies. There also have been growing efforts to move medical supply chains out of China, as exhibited by the Buy America Executive Order on pharmaceuticals, medical devices and personal protective equipment, and much more significant action to address China’s human rights violations in Xinjiang and efforts to suppress democracy in Hong Kong. In the midst of this increasing tension, however, the U.S.-China Phase One agreement appears stable. Following a Principal-level call on the status of the agreement, the United States released a statement indicating that “both sides see progress and are committed to taking the steps necessary to ensure the success of the agreement.” In particular, the United States indicated that it is largely satisfied with China’s implementation of the structural reforms included in the deal, and that it believes that China’s purchases are beginning to pick up. In export data released by the U.S. Department of Agriculture’s Foreign Agricultural Service, China has continued to make large purchases of U.S. agricultural products but it also remains behind purchasing targets set by the trade deal. At this time, no new talks between the two countries are expected and the relationship is expected to continue to deteriorate.

USMCA.

Since the U.S.-Mexico-Canada Agreement (USMCA) entered into force on July 1, the renewed trade partnership between the three countries has been challenged over discrepancies in the exports of dairy, aluminum and seasonal produce, providing an immediate test of the nascent trade deal. Under provisions set forth in the USMCA, the government of Canada agreed to expand market access to U.S. dairy producers but, according to U.S. dairy industry representatives, Canada’s tariff-rate quotas (TRQs) discourage the import of U.S. dairy commodities. In mid-August, more than 100 U.S. lawmakers wrote to Ambassador Lighthizer and Secretary of Agriculture Sonny Perdue requesting enforcement measures be taken to rectify the discrepancy under the trade agreement. Tensions between the United States and Canada were further exacerbated in August when President Trump re-imposed 10 percent tariffs on Canadian aluminum in light of the U.S. view that there had been an increase in certain aluminum exports from Canada to the United States. Canada responded with “dollar for dollar” retaliatory tariffs on U.S. aluminum goods. Additionally, on September 1, the Office of the United States Trade Representative announced it would ask the U.S. International Trade Commission to open a Section 201 global safeguard investigation on products.

EU.

Following the departure of EU Trade Commissioner Phil Hogan in August, the European Commission appointed Valdis Dombrovskis as his replacement on September 8. Commissioner Dombrovskis is also a Commission Vice President and former Prime Minister of Latvia, which is considered to bring significant clout to the position. From the U.S. perspective, the change in leadership comes at an unfortunate time in light of the recent mini-deal between the United States and the EU on tariffs, which was hoped to build momentum toward addressing the many trade disputes between the economies, such as the Airbus-Boeing dispute and digital services taxes. To date, the United States and EU have also struggled to align on World Trade Organization reform issues.

Back to top

PIPELINE SAFETY REAUTHORIZATION

Pipeline Safety Reauthorization

Congress also may act on long-stalled pipeline safety reauthorization legislation during the lame duck session of the 116th Congress. The previous pipeline safety reauthorization expired on October 1, 2019 and partisan disagreements in the House have prevented the reauthorization from being approved. On August 6, the Senate passed its version of the Pipeline and Hazardous Materials Safety Administration reauthorization by voice vote. The House is now likely to take up the measure, which is currently tabled. House and Senate staff have begun bipartisan negotiations. Notably, the Senate version included a provision on methane leakage that will make the reauthorization more palatable to House Democrats. It remains an open questions what concessions House negotiators will require before sending the bill to the House floor. Despite the role pipelines, such as the Keystone and Dakota Access pipelines, played in previous elections, the issue has not become a focal point in the 2020 elections.

Back to top

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