Congress returns to pre-election session

Government funding is the must-pass item, though FDA User Fee bill and nominations also on the agenda

7 September 2022

Washington Council Ernst & Young
www.ey.com/wcey

Congress is back for a pre-election session with one must-pass item: an extension of government funding beyond September 30, likely through a continuing resolution into December. The Senate is also expected to consider energy permitting reform, possibly in conjunction with the government funding bill, and an FDA User Fee bill. With the Inflation Reduction Act tax-climate-health bill just enacted, any additional tax legislation is expected to wait until a post-election lame-duck session toward the end of the year, when a bill addressing tax cliffs and expired/expiring provisions could be taken up, possibly in combination with a retirement security package. The midterm elections are increasingly a focus and will loom large in any action taken by Congress during this work period and, potentially, in the willingness of each party to consider legislation at the end of the year.

The House is in a Committee Work Week and isn't back in session until September 13. Both chambers are then expected to be in until a one-week recess the week of October 3. Following that recess, the Senate is scheduled to then come back for two weeks, though that could change. The House is scheduled to remain out of session until after the elections. A lame-duck session will be held in November and into December.

Government funding – Roll Call reported September 1, "House Democratic leaders are working on a tentative plan to take up a temporary spending bill the week of Sept. 12 that would extend current government funding levels through Dec. 16," which is when the House intends to adjourn for the year. That would set up an additional extension of government funding, either through a continuing resolution (CR) or omnibus appropriations bill, at the end of the year that could be a vehicle for a tax and retirement package.

The article said plans for the September CR "could still shift in talks with Senate leaders, who are currently planning to be in session a few extra

days, through Dec. 21," but the plan "signals a seriousness about getting an omnibus appropriations package for the upcoming fiscal year done before the new Congress is seated, when control of one or both chambers could shift." It said the December 16 date allows time for a potential December 6 runoff for the Warnock-Walker Georgia Senate race, which could determine Senate control. Punchbowl reported that December 9 is also a possibility for a CR cutoff and that Democrats may seek to add a same-sex marriage provision to the package, in addition to an energy permitting reform measure (see below).
https://rollcall.com/2022/09/01/house-prepping-stopgap-funding-bill-through-mid-december/

The White House September 2 also requested $47 billion in emergency funding, nearly half of which is related to the pandemic. "As part of the CR, we are also calling on Congress to provide funding to meet four critical needs: support for Ukraine, COVID-19, monkeypox, and natural disaster recovery," said an OMB blog post.
https://www.whitehouse.gov/omb/briefing-room/2022/09/02/meeting-critical-needs-for-the-american-people-in-the-new-fiscal-year/

Nominations – During this pre-election work period, Senate Democrats are planning a focus on nominations. The Senate is considering the nomination of John Z. Lee to be United States Circuit Judge for the Seventh Circuit. Cloture has also been filed on Andre B. Mathis to be a U.S. Circuit Judge for the Sixth Circuit. "Now more than ever the Senate must make judicial confirmations a top priority," Majority Leader Chuck Schumer (D-NY) said in opening the Senate September 6.

A September 4 Wall Street Journal (WSJ) article said, "Eighteen more nominees await a vote in the Senate, and Democratic senators feel pressure to get as many confirmed as they can before the end of the year. Should Republicans gain control of the chamber, the pace of confirmations would likely slow significantly, as was the case when President Barack Obama tried to confirm judges in a GOP-controlled Senate." https://www.wsj.com/articles/lawmakers-plan-to-confirm-more-judges-in-first-actions-after-summer-break-11662240700?mod=hp_lead_pos6

Permitting – Senate Majority Leader Chuck Schumer (D-NY) made a deal with Senator Joe Manchin (D-WV) to pursue an energy permitting reform bill prior to September 30 as a condition of Senator Manchin's support for the Inflation Reduction Act, and Senator Schumer is expected to try to attach the measure to a government funding continuing resolution.

A story in the August 22 WSJ said, “The deal aims to expedite new energy projects, in part by streamlining federal permits and limiting court challenges,” and “transmission lines are crucial to President Biden’s goal of eliminating carbon emissions from the power grid by 2035 because they are needed to carry electricity from renewable-energy sources to the cities where most Americans live.” It said, “a permitting bill faces resistance from Senate Republicans, who are skeptical that it will help the fossil-fuel industry and don’t like how it was tied to the tax-and-climate bill passed by Senate Democrats. Some House Democrats oppose such a bill, in part, because of its potential support for pipelines.” https://www.wsj.com/articles/energy-projects-needed-across-the-u-s-face-local-hurdles-11660968040

The legislation has divided environmental groups, with some arguing that it’s too heavily tilted in favor of fossil fuels and building oil and gas pipelines, while others say it would benefit large solar and wind projects and speed the construction of transmission lines needed to move “green power” from renewable energy farms to cities, Politico reported. A summary of the agreement says it would not change requirements under the 1970 National Environmental Policy Act (NEPA), but simply provides “target timelines” for agencies to complete reviews. The federal government would be able to take over the approval process by granting permits for transmission lines the Energy secretary has determined to be in the national interest, regardless of state opposition, according to Politico. The bill would require federal agency leaders to designate 25 energy projects of national importance, the WSJ reported. The proposed agreement is also expected to impose a statute of limitations for court challenges to permits and would require the federal government to work to complete approvals for West Virginia’s Mountain Valley Pipeline.

Tax – The Inflation Reduction Act of 2022’s (Pub. L. No. 117-169) revenue provisions included a 15% corporate alternative minimum tax (CAMT) on adjusted financial statement income for corporations with profits over $1 billion, a stock buyback tax and a 2-year extension of the excess business loss limitation through 2028. Given the bill’s swift passage in Congress and lack of congressional guidance on some provisions, there will be a strong focus on the Treasury regulatory process to provide taxpayers with answers. It’s been widely noted that Treasury will have its hands full in providing guidance, particularly on the CAMT, given the late changes to the language and the bill’s rapid movement through the Senate. There is no committee report or other congressional guidance to work from, so taxpayers will be relying on Treasury for answers and the timeframe is tight because the CAMT goes into effect next year.

The August 23 WSJ said CAMT issues for companies include:
- whether they hit the $1 billion threshold and if adjustments provided for in the law will impact their tax liability;
- how to disclose the potential impacts of the minimum tax in financial statements before they receive guidance on the law from regulators and FASB; and
- for companies with entities in and outside of the U.S., which of those entities to include and how much of their financial-statement income to include when making the calculation.

https://www.wsj.com/articles/companies-face-challenges-determining-impact-of-new-minimum-tax-11661247001

Extenders – Many of the expired or expiring tax provisions related to energy were included in the IRA, but there are still some tax provisions that could compel a year-end tax package that can be combined with a retirement security bill and perhaps other items like appropriations. Top contenders to be addressed include the TCJA cliffs that took hold this year on Section 174 – requiring 5-year R&D amortization rather than expensing – and on the Section 163(j) interest deduction calculation, plus the phasedown of bonus depreciation after this year. The Child Tax Credit with mailed payments that expired at the end of 2021 is a top piece of unfinished business for many Democrats, who say it's hard for them to vote for business tax breaks without it. But it has a big price tag. Republicans, including Senator Mitt Romney (R-UT), have put forward compromise proposals on that issue, but it's unclear if a deal can be struck. There are also non-energy extenders.

A September 3 WSJ article that focused on the near- and longer-term tax policy implications of this fall's midterm elections, with the potential for control of the House and/or Senate to flip to Republicans next year, noted, "There is potential room for compromise, particularly on deficit-increasing tax breaks that include incentives for retirement savings.

Lawmakers could also strike a deal – as soon as this year's post-election session – on extending business tax provisions from the 2017 Republican tax law that have started expiring or will do so soon." https://www.wsj.com/articles/midterm-elections-to-decide-fate-of-bidens-tax-agenda-11662157721

Politico Morning Tax reported September 6 that other items that could be discussed in relation to the package include relief for taxpayers "who for the first time will receive a tax form (the 1099-K) for reporting payments from credit cards or third-party networks like Venmo," and "car dealers struggling with inventory requirements under the 'last in, first out' accounting standards, also known as LIFO." (Note: the third-party network transactions reporting threshold was reduced to $600 under the American Rescue Plan Act.)

Treaties – One outstanding item before the Senate is the U.S.-Chile tax treaty, which the Senate Foreign Relations Committee approved March 29. There has been no indication of when the full Senate will bring the treaty to a vote or how potential objections from senators, including Rand Paul (R-KY), who has historically been reluctant to approve treaties over privacy considerations, could be overcome. Treasury Secretary Yellen on August 22 encouraged Senate leaders of both parties to bring the U.S.-Chile tax treaty up for consideration. She said the treaty is supported by the business community and would help U.S. companies investing in Chile and competing with other nations that already have tax treaties with Chile.

Global tax – The IRA didn't include international tax provisions to change global intangible low-taxed income (GILTI) to align with the OECD-led 15% global minimum tax, after Senator Manchin pointedly removed them from the negotiations. The Czech presidency of the EU Council is aiming for agreement on the implementation of the Pillar Two minimum tax portion of the OECD global corporate tax deal, which has been opposed by Hungary, during an October ECOFIN meeting. Amid the EU impasse, Germany announced September 4 that it would begin preparing domestic rules to implement the tax.

In a major personnel development, Pascal Saint-Amans, Director, OECD Centre for Tax Policy and Administration, announced September 5 he will be leaving the post at the end of October. He tweeted: "It is with mixed emotions that I share some personal news: after 15 years at #OECD, I have decided to step down as Director of @OECDtax. This is the outcome of a long reflection and I feel privileged to have served this unique Organisation & its members for so many years."

He said in Politico on September 6 that he thinks the global tax deal will survive because it already has a critical mass behind it, and because the U.S. would lose out on tax income. “It’s so un-American to give up the taxes to the Europeans,” he said.

The OECD August 25 released the public comments it received on the Progress Report on Amount A of BEPS Pillar One. EY submitted extensive comments on the Amount A Pillar One progress report. According to the comment letter submitted by EY, applying the complex mechanics for Pillar One that have been specified to date, it becomes clear that the overall result would be that a relatively small number of mature market jurisdictions would gain additional taxing rights, with the bulk of jurisdictions around the world likely receiving little benefit or seeing a reduction in their taxing rights. This outcome is largely due to the formulaic approach used to determine Amount A.
https://www.oecd.org/tax/beps/public-comments-received-on-the-progress-report-on-amount-a-of-pillar-one.htm

The OECD announced that the public consultation meeting on Amount A of Pillar One will take place on September 12 in hybrid format.
https://www.oecd.org/tax/beps/public-consultation-meeting-on-amount-a-of-pillar-one-september-2022.htm

Data privacy bill – Supporters of the long-stalled push for legislation protecting the privacy of consumers’ data were cheered in July when the House Energy and Commerce Committee approved, by a vote of 53-2, the bipartisan American Data Privacy and Protection Act (HR 8152). The bill, which would require companies to collect the least amount of data possible to provide services, with special protections for children and enforcement by the Federal Trade Commission, is sponsored by three of the four main players on this issue: Energy & Commerce Chairman Frank Pallone (D-NJ), Ranking Member Cathy McMorris Rodgers (R-WA) and Senate Commerce Committee Ranking Member Roger Wicker (R-MS). Supporters are now pressing for a House floor vote in the September work period, but on Thursday, Sept. 2, Speaker Nancy Pelosi (D-CA) released a statement critical of HR 8152 for pre-empting California’s stronger privacy laws and those of other states. Pelosi said the bill “does not guarantee the same essential consumer protections as California’s existing privacy laws… it is imperative that California continues offering and enforcing the nation’s strongest privacy rights. California’s landmark privacy laws… must continue to protect Californians – and states must be allowed to address rapid changes in technology.” She said that in the coming days, “We will continue to work with Chairman Pallone to address California’s concerns.”

Moreover, on the Senate side, Commerce Committee Chairman Maria Cantwell (D-WA) has said the House bill's protections are too weak, telling reporters on July 27 that she has no plans to move the bill through her committee: "I don't even think [Speaker] Nancy Pelosi has plans to bring it up, so pretty sure we are not going to be bringing it up." Chairman Pallone did add a carve-out protecting California's private right of action following data breaches, but any bill that does not pre-empt state laws would likely lose Republican support, and thus any chance of passing the Senate. Privacy supporters may settle for passing a children's privacy bill this year; Cantwell marked up two children's data privacy bills in late July instead of offering a comprehensive alternative to HR 8152. The FTC is also increasingly immersed in this issue, voting on August 11 to seek public comment on the harms of "commercial surveillance" and whether privacy rules are needed.

Stablecoins Regulation – As the House prepared to exit for the August recess, House Financial Services Committee Chairman Maxine Waters (D-CA) and Ranking Member Patrick McHenry (R-NC) revealed that they had been negotiating a bipartisan bill with the Treasury Department to regulate issuers of stablecoins, a kind of cryptocurrency whose value is pegged to that of a fiat currency like the U.S. dollar. The collapse of the widely used stablecoin TerraUSD in markets earlier this year brought some urgency to the debate. Under the bipartisan draft proposal, banks would be able to issue their own stablecoins, while nonbank stablecoin issuers would have to be licensed by the Federal Reserve and back up their coins with 100 percent reserves in cash or high-quality liquid assets. But as the committee headed toward a markup of the bill, Treasury Secretary Yellen raised concerns over how the bill would deal with digital assets held in "wallets" for consumers.

Treasury reportedly asked for changes requiring providers to segregate such custodial assets from the firm's proprietary assets to protect them in the event of an insolvency. Committee Republicans balked at that idea, seeking to leave the issue up to states, and the bill was pulled from the markup. The Independent Community Bankers of America (ICBA) and the SEC also said it was premature to mark up the bill. House Financial Services seems likely to make another run at a bipartisan agreement on stablecoins during the September work period. But Congress is unlikely to act on broader regulation of digital currencies this year, with no agreement at the top levels and at least three competing approaches offered by Sens. Kirsten Gillibrand (D-NY) and Cynthia Lummis (R-WY); Banking Committee Ranking Member Pat Toomey (R-PA); and Senate Agriculture Committee Chairman Debbie Stabenow (D-MI) and Ranking Member John Boozman (R-AR), among others.

Also, the Financial Stability Oversight Council (FSOC), carrying out part of the President's March 2022 executive order on digital assets, is expected to release a report this fall identifying risks associated with cryptocurrencies and recommending policies to address them.

ESG Disclosure Rules – The Securities and Exchange Commission (SEC) was busy this spring proposing a series of rules related to environmental, social and corporate governance factors, or ESG. The proposals had short comment periods and the SEC, with a full-speed-ahead chairman in Gary Gensler, could finalize them this fall. The Commission's proposed "issuer rule" would require public companies to disclose detailed information about their greenhouse gas emissions and to outline the risks that warming-related events like storms, drought and higher temperatures pose to their operations. Companies would have to disclose emissions for which they are directly responsible, as well as emissions from their supply chains and products.

The SEC separately proposed requiring investment funds labeled "ESG" to invest at least 80% of their assets in a way that addresses environmental, social and governance elements. Another proposal would require ESG-focused funds and firms to disclose more specifics about their ESG strategies in materials like fund prospectuses and annual reports. While the SEC could finalize all of the proposed rules before the end of the year, litigation is considered likely, and critics of the Commission's approach drew encouragement from the Supreme Court's June 30 ruling in West Virginia v. EPA, to limit how the Clean Air Act can be used to reduce CO2 emissions.

Health care – The IRA health care provisions require the Secretary of Health and Human Services (HHS) to negotiate a limited number of prescription drug prices for Medicare; require the payment of inflationary rebates from drug manufacturers to Medicare; and redesign the Part D benefit, including a $2,000 out-of-pocket cap and a $35 monthly cap on out-of-pocket costs for insulin for Medicare beneficiaries. The law also extends the enhanced ACA subsidies established in the American Rescue Plan Act (ARPA) for three years – through 2025. HHS and the Centers for Medicare and Medicaid Services (CMS) are currently assessing the law's requirements and making plans to build out the infrastructure needed to perform these new functions. Additional regulations and guidance are expected in the coming months and years. Implementation of the new provisions and accompanying regulations will roll out over the next seven years, starting with inflationary rebates and publication of the first 10 negotiation-eligible drugs in 2023.

FDA User Fee Agreements – The Food and Drug Administration's (FDA) drug, medical device, and biosimilar user fee programs, which fund a significant portion of the agency's budget, are set to expire at the end of the fiscal year (September 30). FDA Commissioner Robert Califf said the agency will run out of funding in early November and that Congress needs to act quickly so the agency can avoid sending layoff notices.

The path forward on the user fee agreements, however, is uncertain, as the House and Senate still need to agree on a compromise version of their bills. The House passed its bill (H.R. 7667) in June by a 392-28 vote and the Senate Health, Education, Labor and Pensions (HELP) Committee advanced its version (S. 4348) out of committee by a 13-9 vote in July. Senate HELP Ranking Member Sen. Richard Burr (R-NC) threw a wrench in the negotiations on July 14, when he introduced a significantly pared-down version of the committee's bill that only contains base reauthorization language and strips other key bipartisan measures. Burr's push for a "clean" user fee bill stems in part from his concerns over provisions that would allow FDA to share brand drug ingredient information with generic drug makers, codify FDA's interpretation of orphan drug exclusivity, and allow the agency to ban specific uses of medical devices. Following his announcement, HELP Chairman Patty Murray (D-WA) urged Burr to come back to the negotiating table to finish the broadly bipartisan bill, while House Energy and Commerce Leaders Chairman Pallone and Ranking Member McMorris Rodgers maintain the clearest path forward is for the Senate to bring the already-passed House bill to a Senate floor vote.

White House Request for COVID-19/monkeypox funding in CR – The White House requested on September 2 that Congress include additional funding for COVID-19, monkeypox, and other HHS programs in an upcoming bill to keep the government running after September 30.

Their request includes $22.4 billion to combat COVID-19, including for testing, expediting research and development of next-generation vaccines, and preparing for future variants. The White House says without additional funding the federal government won't have the resources it needs to make it through a fall or winter COVID-19 surge. They also said it will help to slow the transition of COVID-19 vaccines and therapeutics to private insurers. In addition to addressing COVID-19, the request also includes $4.5 billion to address monkeypox, calling for $3.9 billion in domestic resources and $600 million in foreign aid. The domestic portion includes $1.6 billion to procure vaccines and therapies. Congress has been in a stalemate over new COVID relief for half a year, with many Republicans reluctant to approve more funding without securing a way to finance the new spending, plus a detailed accounting of what is needed.

Mental health care – In June, the House passed the Restoring Hope for Mental Health and Well-Being Act of 2022 (H.R. 7666), which reauthorizes over 30 federal mental health and substance use programs set to expire at the end of the fiscal year. The bipartisan legislation also includes a focus on bolstering the mental health workforce, funding the 988-suicide prevention lifeline that launched this summer, and bolstering mental health parity. The Senate Finance and HELP Committees, however, are working on their own comprehensive mental health legislation. Given competing priorities and a tight calendar, it seems more likely that passing a comprehensive, bipartisan, bicameral mental health package will turn into a 2023 exercise.

Telehealth/PHE policies – Congress is exploring options for extending certain pandemic telehealth flexibilities, many of which are tied to the public health emergency (PHE). Certain telehealth waivers will be available for 151 days following the termination of the PHE, including those permitting patients to utilize telehealth in their homes and other settings, expanding the types of practitioners eligible for provider services, and modifying in-person requirements for tele-mental health. Other waivers, such as those focused on licensing and the Acute Hospital Care at Home waiver, expire along with the PHE. A bill (H.R. 4040) that would continue Medicare telehealth services, currently set to expire 151 days post-PHE, through December 31, 2024 was approved by the House in July, however the Senate Finance Committee is working on a telehealth bill of its own. While the current PHE expires on October 13, it is expected to continue into 2023, as HHS Secretary Xavier Becerra promised states advance warning. A pandemic flexibility allowing health savings account-eligible plans to provide pre-deductible coverage for telehealth services will also expire at the end of this year barring additional action.

Addressing provider payment cuts – Provider groups are ramping up lobbying to include relief from pending 2023 Medicare payment cuts in a year-end package. CMS's proposed payment rules for 2023 include various pay cuts, which providers groups maintain do not keep up with inflation or other input costs. Lawmakers in both chambers introduced legislation that would push out proposed home health pay cuts to at least 2026, following a CMS proposal to cut payment by 4.2% in 2023 as compared to 2022. It is possible that additional legislation will be introduced to avert other pending cuts and financial pressures.

The 9 lives of Build Back Better
DC Dynamics Podcast

In DC Dynamics episode 10: The 9 lives of Build Back Better, host Ray Beeman, Washington Council EY's managing partner, discusses how the mostly-dead Build Back Better reconciliation bill rose from the ashes like a phoenix and made it over the finish line as the Inflation Reduction Act (IRA).

Listen on Apple Podcasts:
https://podcasts.apple.com/us/podcast/dc-dynamics/id1586698955?i=1000578085249