COVID-19: US Developments – Implementation and Oversight of CARES Act – June 4, 2020

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As public protests against police brutality and racial disparity continued to dominate the national policy debate, pushing coronavirus-related news from the front pages, the US Senate has given its approval to legislation passed last week by the US House of Representatives making changes to the Paycheck Protection Program (PPP) created by the March 27 Coronavirus Aid, Relief, and Economic Security (CARES) Act. The legislation now proceeds to the White House, where President Donald Trump will sign it into law.

Topics covered in today's report include: tax and economic development, health, trade, government oversight and state updates.

The PPP measure, the Paycheck Protection Program Flexibility Act (H.R. 7010), passed the Senate by unanimous consent Wednesday, but not without some drama. Senator Ron Johnson (R-WI) initially resisted the effort to approve the House-passed bill without changes, but ultimately yielded. Three more Republican senators – Susan Collins (R-ME), Mike Lee (R-UT) and Marco Rubio (R-FL) – expressed concern that drafting glitches in the legislation would result in unintended consequences, but cooperated with the Senate leadership's request for unanimous passage.

Congressional passage of the PPP flexibility measure was hailed by the National Restaurant Association, which had lobbied energetically for additional flexibility in the PPP program to ensure enterprises in the nation's restaurant industry can benefit from the forgivable loans it makes available.

Members of Congress continue to publicly grapple with how the next federal coronavirus measure should deal with the approaching expiration of the enhanced unemployment benefits provided by Congress months ago as the nation's economy was shut down. Central to the debate is the concern that the enhanced benefits provide an inadvertent disincentive for some workers to return to their jobs, and that extending the program may have the unwelcome effect of slowing the recovery. The availability of enhanced unemployment benefits is currently slated to expire at the end of July, creating an action-forcing "cliff" that will help to compel Republicans and Democrats in Congress to begin negotiations in the coming weeks over the next significant federal COVID-19 response package.

The surface transportation bill unveiled by House Democrats this week, which features an array of measures aimed at promoting renewable energy and combating climate change, is being panned by congressional Republicans as well as some significant stakeholder organizations. The US Chamber of Commerce criticized House committee leaders for crafting a "partisan" approach to infrastructure at a moment where the potential for bipartisan consensus appears to be at its peak. The executive director of the American Association of State Highway and Transportation Officials (AASHTO), Jim Tymon, lodged similar complaints about the bill, expressing regret that House Committee on Transportation and Infrastructure Chairman Peter DeFazio (D-OR) did not take the bipartisan approach taken by the Senate Committee on Environment and Public Works, which under Chairman John Barrasso (R-WY) last year passed a surface transportation measure with unanimous bipartisan support.

House Democratic leaders plan to move Chairman DeFazio's bill through committee in the first test of the chamber's new remote committee voting procedures, then bring it to the House floor in July, in hopes the measure or some of its elements may become candidates for inclusion in the next major coronavirus response package.

Tax and Economic Development Updates

The Senate yesterday passed by unanimous consent H.R. 7010, the Paycheck Protection Program Flexibility Act of 2020, which would, among other things: (1) increase the maturity date from two years to five years for PPP loans with a remaining balance; (2) extend the PPP covered period through December 31, 2020; (3) extend from eight weeks to 24 weeks – or through December 31, 2020, if earlier – the length of time that loan recipients have to use their PPP funds; and (4) lower from 75% to 60% the threshold amount of loan proceeds that must be spent on payroll expenses. The legislation has been sent to the president for signature and, once signed into law, is expected to reignite interest in the program for those businesses that may have been holding off on applying for a PPP loan due to concerns about the program's various requirements, especially those related to loan forgiveness. As of the end of May, the Small Business Administration had approved 4.4 million loan applications valued at a total of US$510 billion.

We are also continuing to see changes being made to the Federal Reserve's financial assistance programs as the central bank prepares to bring various of its 13(3) liquidity facilities online. Yesterday, the Federal Reserve announced that it is expanding the number and type of entities eligible to directly use its Municipal Liquidity Facility (MLF), which will offer up to US$500 billion in lending to states and municipalities to help manage cash flow stresses caused by COVID-19. Pursuant to the updated term sheets, all US states will be able to have at least two cities or counties eligible to directly issue notes to the MLF regardless of population. Additionally, governors of each state will now also be able to designate two issuers in their jurisdictions whose revenues are generally derived from operating government activities (such as public transit, airports, toll facilities and utilities) to be eligible to directly use the facility. From our understanding, these modifications to the MLF stem from negotiations between Federal Reserve Chairman Jerome Powell and Treasury Secretary Steven Mnuchin with Senate Minority Leader Chuck Schumer (D-NY), who stated that "[t]he Federal Reserve's expansion of the lending program to include the [Metro Transit Authority] was not just a New York necessity, but it will be an economic life-saver, and I am glad we got it done." These changes come as many continue to wait for another 13(3) liquidity facility – the Main Street Lending Program – to launch this week and begin issuing loans.

Finally, a number of different federal agencies are taking steps using their existing regulatory authority to comply with President Trump's May 19 Executive Order directing them to "remove barriers" to the "innovation, initiative, and drive of the American people." For example, the US Department of Labor yesterday in an information letter provided that "a plan fiduciary would not, in the view of the Department, violate the fiduciary's duties" for including private equity investments as part of an investment strategy for defined contribution plans – though the letter also makes clear that private equity investments may only be a "*part* of a prudent investment *mix* and a way to *enhance* retirement savings and investment security for American workers." US Securities and Exchange Commission Chairman Jay Clayton – whose agency also has oversight of investment advisors and the fiduciary duties with which they must comply – suggested that this clarification "will provide our long-term Main Street investors with a choice of professionally managed funds that more closely match the diversified public and private market asset allocation strategies pursued by many well-managed pension funds as well as the benefit of selection and monitoring by ERISA fiduciaries." Separately, the Consumer Financial Protection Bureau (CFPB) yesterday announced that it is providing "temporary and targeted flexibility" for the duration of the COVID-19 public health emergency to credit card issuers regarding electronic provision of certain disclosures required to be in writing. Specifically, the Bureau has indicated that it does not intend to cite a violation in an examination or bring an enforcement action against an issuer that during a phone call does not obtain a consumer's E-Sign consent to electronic provision of the written disclosures required by Regulation Z, so long as the issuer during the phone call obtains both the consumer's oral consent to electronic delivery of the written disclosures and oral affirmation of his or her ability to access and review the electronic written disclosures. According to the CFPB, this supervisory and enforcement flexibility will facilitate credit card issuers' ability to quickly assist consumers during the pandemic.

Health Updates

Leaders of the House and Senate committees of jurisdiction over the Medicaid program wrote to Department of Health and Human Services (HHS) Secretary Alex Azar yesterday, addressing HHS's delays in disbursing Provider Relief Fund aid to Medicaid-dependent providers. House Committee on Energy and Commerce Chairman Frank Pallone, Jr. (D-NJ) and Ranking Member Greg Walden (R-OR) and Senate Committee on Finance Chairman Charles Grassley (R-IA) and Ranking Member Ron Wyden (D-OR) explained their concerns that withholding aid from these providers could result in long-term financial hardship for those caring for the most vulnerable populations. They requested a specific allocation from the Provider Relief Fund for Medicaid-dependent providers, and they asked Secretary Azar for HHS's timeline and parameters for distributing the funds. This letter follows a *POLITICO* article published earlier this week that reported on the delay many healthcare providers are experiencing in obtaining emergency funding from HHS. The CARES Act provided US$100 billion to the Provider Relief Fund, with the interim relief bill adding US$75 billion to the Fund; HHS has only distributed about US$77 billion of total aid from the Fund. HHS has not released an estimate of when it will distribute the next round of funds. House Democrats' HEROES Act removed HHS discretion in the allocations through codifying the Fund, but it remains to be seen how Senate Republicans will or will not agree to address the Fund in the next relief package.

Centers for Medicare & Medicaid Services (CMS) Administrator Seema Verma announced adjustments to the agency's Center for Medicare and Medicaid Innovation (CMMI) models in response to the COVID-19 pandemic. In a post on the *Health Affairs* blog and on the CMS website, Administrator Verma stressed the continuing importance of advancing "payment and service delivery models to help move our health care system from one that pays for volume to one that rewards providers for keeping patients healthy, improving health outcomes, and lowering costs." The new flexibilities – outlined here – include model adjustments related to financial methodologies, quality reporting and timelines. CMS stresses the listed adjustments are not exhaustive, as CMMI "has already implemented several changes and there is the potential for future adjustments."

A group of 25 House Democrats and Republicans wrote to House Speaker Nancy Pelosi (D-CA) and Republican Leader Kevin McCarthy (R-CA), urging them to consider language in the next coronavirus-related legislative package that addresses the shortage of syringes, needles and other materials needed to deploy a vaccine. The lawmakers asked that the next bill focus on "encouraging cooperation with the private sector through joint ventures and facilities and equipment needed to ramp up production of medical supplies; expanding and broadening the medical countermeasure manufacturing base across multiple regions; creating a domestic reserve of critical medical supplies including syringes, needles, and other materials; [and] increasing the emergency stockpile of medical supplies including syringes, needles, and other materials." Yesterday, the *New York Times* reported the administration has selected five companies – Moderna, Oxford University with AstraZeneca, Johnson & Johnson, Merck and Pfizer – as "the most likely candidates to produce a vaccine for the coronavirus." The administration hopes a focus on these specific industry players will speed up the development of an effective vaccine.

Trade Updates

On Wednesday, the Trump Administration announced that it would be banning Chinese passenger airlines from flying scheduled service in the US starting June 16. Officials sought to increase pressure on China to resume flights by US carriers, which were excluded from an earlier plan allowing airlines to operate one commercial passenger flight a week. Early today, Chinese officials announced that it would allow those foreign airlines excluded from the earlier pact to operate one commercial passenger flight to China per week. The number of permitted flights could increase if no passengers test positive for coronavirus for three weeks in a row, but could be suspended temporarily if at least five passengers on board the same flight test positive. Flight restrictions have severely hamstrung international commerce and devastated the aviation industry. Expanding flights between the two superpowers will be critical to restarting the global economy.

The Defense Department recently submitted a report to Congress on its plans to spend funds appropriated as part of the CARES Act to respond to the pandemic, including US$688 million to invest in "regions most severely impacted to sustain essential domestic industrial base capabilities and spur local job creation." As reported by *DefenseNews*, "[t]he plan calls for $171 million for the aircraft propulsion industrial base; $150 million for shipbuilding and submarine launch tubes; $150 million for the space launch industrial base; $80 million for the microelectronics base; $62 million for body armor suppliers; and $40 million for high-temperature materials used in hypersonic weapons." The Defense Department will also continue its efforts to expand production of items necessary for COVID-19 response, including N95 respirator masks, swabs and ventilators, under the Defense Production Act (DPA). So far, the agency has obligated US$167 million of the US$1 billion Congress appropriated under the DPA.

Oversight Updates

Today, the House Committee on Oversight and Reform's Select Subcommittee on the Coronavirus Crisis will hold a video briefing with doctors and public health experts on the impact of the pandemic on existing racial health disparities and the unequal burden of this public health crisis on communities of color.

Yesterday, the Pandemic Response Accountability Committee (PRAC) held a YouTube event titled "Stakeholder Perspectives on Oversight of the Federal COVID-19 Spending and Response." Twelve participants spoke on oversight and transparency from the perspectives of (1) state and local governments; (2) business, financial and nonprofit organizations; (3) healthcare; and (4) government spending. Notably:

- The state panel (Melinda Miguel, Chief Inspector General of Florida; Kinney Poynter, Executive Director, National Association of Auditors, Comptrollers, and Treasurers; and Robert Asaro-Angelo, Commissioner, New Jersey Department of Labor & Workforce Development), in addition to their unique issues, spoke about the importance of collaboration between federal and state oversight mechanisms. Poynter gave a list of specific immediate action items to ensure transparency, as well a breakdown of CARES Act relief funds going to state and local governments.
- On the business panel, Anthony "Tony" Wilkinson, President & CEO, National Association of Guaranteed Government Lenders, expressed frustration over the delayed, fragmented and shifting guidance from Treasury on PPP loans, which has negatively affected borrowers and lenders alike. Neil Bradley, Chief Policy Officer, US Chamber of Commerce, urged the PRAC not to engage in "Monday morning quarterbacking" and to take into account the fast pace at which coronavirus legislation and agency guidance were developed, and the resulting compliance challenges. He offered several specific suggestions to the PRAC, including that it: (1) assess compliance as businesses understood it at the time based on existing guidance, not guidance as it was modified at a later time; (2) give deference to good faith certifications businesses made amidst ambiguous government guidance; and (3) stay away from politically motivated oversight and be "guided by the facts" instead. On the latter point, Bradley expressed concern that congressional oversight may be based, in part, on the belief that certain companies or sectors may be simply "unworthy of assistance," regardless of whether they qualified for the relief.

Last week, Senator Tom Udall (D-NM) and several other Senators sent a letter to Treasury Secretary Mnuchin, requesting that the agency clarify the disbursement formula used to allocate payments to Tribal governments from the Coronavirus Relief Fund (CRF) under the CARES Act. The senators echoed concerns of tribal nations that Treasury's reliance on Department of Housing and Urban Development population data – without consultation and meaningful opportunities for tribal nations to provide feedback – may result in an inaccurate or inequitable distribution of funds.

State Updates

Interest in the acute impact of COVID-19 on nursing homes has been justifiably intense over the last month, but specific information in some states has been difficult gather. Earlier this week, **Oklahoma** stopped publicizing information on infection rates and deaths from COVID-19 in nursing homes, claiming that without the governor's emergency authority – which had not been renewed – the health department could no longer release the data because of privacy laws. Attorney General Mike Hunter (R) issued an opinion yesterday indicating the information could be de-personalized and indeed could be released on an ongoing basis. Likewise, a newspaper in **Mississippi** had to go to court to get the authorities to release similar information for the Pine Belt region of the state. Attorney General Lynn Fitch's (R) office agreed with the Court that open records laws required the release of the information that demonstrated 15 facilities in five counties were trying to manage an outbreak.

Florida Governor Ron DeSantis (R) yesterday said the state will enter the next phase of reopening on Friday, allowing businesses including bars, movie theaters and bowling alleys to open in most parts of the state for the first time since the coronavirus pandemic instigated a shutdown. This next phase will not include the state's three most populated counties: Palm Beach, Miami-Dade and Broward, where the pandemic has been most prominent. On May 18, the governor placed the entire state into Phase One of reopening.

New York Governor Andrew Cuomo (D) yesterday touted the lowest daily death toll and hospitalization rate since the coronavirus pandemic began. Earlier this week, the governor had announced the state's implementation of an early warning dashboard that aggregates the state's expansive COVID-19 data collection efforts and is being used to monitor and review containment of the virus during the state's four phases of reopening. Starting today, restaurants can offer outdoor dining in the seven regions included in Phase Two of reopening. Excluded is New York City, which is on track to enter the first phase of reopening on June 8.

For Trump Administration activities, see our US Executive Branch Update for today.

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