COVID-19 Public Policy Group Report

US – April 28, 2020

The congressional drive toward the next coronavirus disease 2019 (COVID-19) relief legislative package gained momentum Monday, and the Federal Reserve Board announced an expansion of a key initiative to help states and municipalities struggling with cash flow challenges as a result of the COVID-19 pandemic.

While both houses of the US Congress originally planned to return to Washington DC next Monday, May 4, House Majority Leader Steny Hoyer (D-MD) reversed course Tuesday, citing advice from the Capitol physician of continuing COVID-19 case increases in the Washington region and ongoing conversations surrounding the next coronavirus aid bill. Next week's session will mark the first time since the enactment of the US$2.2 trillion CARES Act in late March that the US Senate has formally convened.

Senate Majority Leader Mitch McConnell (R-KY), in an interview with *POLITICO*, indicated Republicans will insist that additional aid to states, territories and local governments in the next round of COVID-19 relief be accompanied by measures limiting legal liability for businesses and individuals as the US economy slowly reopens. A plan to support the reopening of the economy through expanded COVID-19 testing was unveiled Monday by President Donald Trump.

The Federal Reserve Board on Monday announced an expansion of the Municipal Liquidity Facility (MLF), broadening eligibility criteria to include many more counties and cities for financial assistance. The expanded MLF facility "will offer up to US$500 billion in lending to states and municipalities to help manage cash flow stresses caused by the coronavirus pandemic."

House Democratic leaders have publicly set a May 4 deadline for the unveiling of the "CARES 2" pandemic response bill promised by Speaker Nancy Pelosi (D-CA), which is certain to provide a robust infusion of additional aid to states and local governments. However, Democratic sources on Capitol Hill say a preliminary version of the Speaker's bill could potentially be released at the end of this week, in advance of the May 4 deadline.

Speaker Pelosi and House Majority Leader Steny Hoyer (D-MD) also revealed plans on Monday to push forward with a vote in the House on a rules change that will temporarily allow for proxy voting in the chamber for Members of Congress unwilling or unable to be physically present due to COVID-19. Plans to hold a vote on such a measure last week were scrapped by the Democratic leadership after Republicans objected. Speaker Pelosi and her leadership team may seek to push the change without Republican buy-in, utilizing Democrats' majority power in the House, when that chamber convenes again.

Tax and Economic Development Updates

With the Small Business Administration (SBA) yesterday again beginning to accept Paycheck Protection Program (PPP) loan applications, it is clear that there remains significant interest in financial assistance through the program. In fact, reports suggest that the SBA's system went down within the first five minutes it came online. That said, we are also learning more about the details of the loans requested during the initial hours of the new funding having been made available. Notably, Senate Committee on Small Business Chairman Marco Rubio (R-FL) tweeted that the average size of loans "is less than 1/2 of what it was in [the] first round," which is "an encouraging sign that it's reaching smaller companies." This news comes as Senate Committee on Small Business Ranking Member Ben Cardin (D-MD) and Senate Committee on Finance Ranking Member Ron Wyden (D-OR) introduced legislation that would, among other things: (1) provide qualifying small businesses with US$1 million or less in gross receipts, and 50 or fewer employees, with financial assistance equal to 30% of the gross receipts reported in the previous year, up to US$75,000; (2) offer a 50% employee retention payroll tax credit for wages paid to employees during the COVID-19 emergency, which would be available for the first US$7,500 in wages paid per employee over the next four months; and (3) defer all calendar year 2020 estimated payments for small business owners until September 2020 and reduce the required estimated payments from 100% of the previous year's liability to 75%.

There are also efforts underway to help secure PPP loans for certain entities that are not currently eligible for financial assistance through the program. For example, Senators Bill Cassidy (R-LA) and Joe Manchin (D-WV), along with a bipartisan group of 17 other Senators, sent a letter to Senate leadership and the Chairman and Ranking Member of the Senate Committee on Small Business, requesting that local trade and professional associations be made eligible for assistance through the PPP. According to the group of Senators, these associations "are providing critical guidance on resources to help small business weather the current economic downturn … [and] [i]f these organizations are unable to survive, the path to recovery for our hard-hit Main Street economy will be even more difficult." Interestingly, several trade groups are separately lobbying for changes to the PPP, advocating that the SBA's affiliation rules should permit publishing and broadcasting companies with more than 500 employees to apply for financial assistance, provided that each publication or broadcasting station that is part of a larger group does not exceed the employee threshold. Relatedly, a bipartisan group of lawmakers comprising Senators Maria Cantwell (D-WA), John Kennedy (R-LA), Amy Klobuchar (D-MN) and John Boozman (R-AR) have sent a letter to Senate leadership urging them "to ensure any future legislation make thousands of local newspapers, TV, and radio stations around the country eligible for small business assistance."

As mentioned in yesterday's report, this week, we expect to learn additional details about the Federal Reserve's various 13(3) liquidity facilities. In fact, following our report, the central bank yesterday announced an "expansion in the size and the scope" of its MLF. By way of reminder, the MLF will provide up to US$500 billion in lending to states and municipalities. Pursuant to the Federal Reserve's announcement, the MLF is now accessible to US counties with a population of at least 500,000 residents, and US cities with a population of at least 250,000 residents. These new population thresholds will "allow substantially more entities to borrow directly from the MLF." Moreover, to be eligible for the facility, notes now must mature "no later than 36 months from the date of issuance – an increase from the previously announced 24-month maximum term." It also appears that the Federal Reserve is considering whether to expand the MLF to allow a limited number of governmental entities that issue bonds backed by their own revenue to participate directly as eligible issuers. That said, despite these changes, it appears that US territories remain excluded from the MLF. As indicated in its announcement, the Federal Reserve will continue to "closely monitor conditions in primary and secondary markets for municipal securities and will evaluate whether additional measures are needed to support the flow of credit and liquidity to state and local governments."

Tax policy changes also continue to be at the forefront of the federal government's response to the COVID-19 pandemic. As you will recall, the CARES Act made a technical correction to the 2017 tax reform law, which enables businesses to immediately deduct costs associated with qualified improvement property (QIP). Notably, yesterday, Ms. Kathleen Reed, Branch 7 Chief, Office of Associate Chief Counsel (Income Tax and Accounting), Internal Revenue Service (IRS), indicated that the retroactive change effectively makes QIP 15-year property back to the effective date of the Tax Cuts and Jobs Act. Another issue at the forefront of tax policy is electronic vehicle tax incentives. Specifically, the Transportation Electrification Partnership is urging lawmakers to provide US$150 billion in funding for the industry, including by providing an extension of the electric vehicle tax credit. Such an effort comes as advocates for the renewable and fossil fuel industries are seeking a number of tax incentives and other stimulus measures as part of the government's ongoing COVID-19 response.

Health Updates

On Monday, the White House released a new testing overview and testing blueprint. The overview provides a three-stage, eight-part plan for the federal government, state governments and the private sector to scale up the testing regime during the pandemic. The first seven parts, which the White House represents as being completed through graphical check marks, involved (1) building the foundation for diagnostic testing, (2) mobilizing the private sector to develop tests, (3) issuing emergency use authorizations (EUAs) for tests, (4) galvanizing commercial and research laboratories and professional associations to ramp up testing capacity, (5) facilitating state efforts to access and utilize all available testing capacity, (6) identifying and expanding public and private sector testing infrastructure, and (7) strengthening the testing supply chain.

The eighth step, coordinating with governors to support testing plans and rapid response programs, puts the onus of testing implementation on state governments. The overview and blueprint note, "The Federal Government will continue to support State efforts to accelerate testing plans and programs that help enable America to Open Up Again." During Monday's White House Coronavirus Task Force Press Briefing, President Trump explained that testing capacity will not be a problem moving forward, calling testing "one of the great assets that we have." Leaders from several retail and drugstore chains – including CVS Health, Walgreens, Walmart, Rite Aid and Kroger – joined the President at the White House for the testing announcement and stated plans to increase COVID-19 testing capacity at some of their locations.

In a statement, Senate Committee on Health, Education, Labor and Pensions (HELP) Ranking Member Patty Murray (D-WA) said the testing blueprint "does nothing new and will accomplish nothing new. It doesn't set specific, numeric goals, offer a timeframe, identify ways to fix our broken supply chain, or offer any details whatsoever on expanding lab capacity or activating needed manufacturing capacity. Perhaps most pathetically, it attempts to shirk obviously federal responsibilities by assigning them solely to states instead." As we previously reported, Senator Murray released a white paper earlier this month outlining Democratic testing proposals. Additionally, the Paycheck Protection Program and Health Care Enhancement Act provides US$25 billion to the Department of Health and Human Services' Public Health and Social Services Emergency Fund, US$5 billion shy of the original Democratic ask. The funds are to be used to research, develop, validate, manufacture, purchase, administer and expand capacity for COVID-19 tests, including tests for both active infection and prior exposure. The law provides US$11 billion specifically to states, localities, territories and tribes for necessary expenses to develop, purchase, administer, process and analyze COVID-19 tests; increase laboratory capacity; trace contacts; and support employer testing.

Trade Updates

US businesses are pressing the Trump Administration to expand its action deferring duty payments on certain entries of goods entered into the US in March and April. In a letter signed by more than 450 businesses and industry groups, proponents of the expansion are advocating for a delay on all duty payments covering May and June, an act that they point out "would immediately free up billions of dollars of working capital for American companies … to pay suppliers, employees, service providers and other critical stakeholders." Stakeholders argue that the current duty deferral program does not go far enough to increase liquidity for businesses struggling to respond to COVID-19 impacts on supply chains and consumer demand, especially since it does not include deferral of tariffs paid on Section 232 (on certain steel/aluminum products) and Section 301 (on select goods from China and from the European Union) that run as high as 25%.

Oversight Updates

Yesterday, after nearly a month of silence, the Pandemic Response Accountability Committee (PRAC) named an executive director and launched a website that will catalog PRAC's oversight efforts, as well as a Twitter account. Michael E. Horowitz, the chair of the Council of Inspectors General on Integrity and Efficiency (CIGIE) and the US Department of Justice Inspector General (IG), named Robert A. Westbrooks to serve as PRAC's executive director. (The executive director is not to be confused with PRAC's chair, however. PRAC remains without one after President Trump demoted Horowitz's pick for PRAC's chair, Glenn Fine, from his position as the Pentagon's Acting IG, which made Fine ineligible to serve as PRAC's chair.)

In announcing Westbrooks' appointment, PRAC touted his 15 years of experience conducting independent oversight and his credentials as a certified public accountant, certified internal auditor, certified information systems auditor, attorney and former federal criminal investigator. Most recently, Westbrooks served as the IG for the Pension Benefit Guaranty Corporation. He has also held leadership positions in the Offices of Inspector General for the SBA, the Department of Transportation, the Postal Service and the National Archives and Records Administration.

PRAC is one of the three oversight mechanisms established under the CARES Act. At present, it is composed of 20 IGs, including the IGs of the Departments of Defense, Education, Health and Human Services (HHS), Homeland Security (DHS), Justice, Labor, Housing and Urban Development, Transportation and the Treasury; and the SBA and the Internal Revenue Service. Yesterday, Horowitz announced that, "[a] s soon as the PRAC obtains spending information and other reporting data," it will post it to PRAC's new website. Additionally, Horowitz encouraged people to follow PRAC's Twitter account, which had only 543 followers as of this morning, but generated half a dozen tweets over the course of its first day of existence.

Another new oversight mechanism under the CARES Act, the Congressional Oversight Commission, is already riven by a dispute among its members about the fundamental issue of what its mandate is and how aggressive it should be in carrying it out. And, unlike typical disputes in Washington DC nowadays, the disagreement does not fall along partisan lines. Echoing his comments from earlier this month, Representative French Hill (R-AR) contrasted the Commission's role with that of oversight mechanisms established under the Troubled Asset Relief Program (TARP). *POLITICO* reports that Hill noted that "[t]here's no presumption here of wrongdoing" and suggested some "imperfect decision-making in a time of crisis" is inevitable. Notably, Representative Donna Shalala (D-FL) agreed: "When you put this much money out you expect some mischief." She added that she is not as "interested in nitpicking," and that "we should not be rogue in this role." Her implication is that the Commission's first member, her fellow Democratic appointee, Bharat Ramamurti, who has already, among other things, sent a letter to Federal Reserve Chair Jerome Powell requesting "detailed and timely information about each individual transaction" under the CARES Act, is doing just that, "going rogue" by construing the Commission's mandate too broadly and being overly aggressive in exercising its oversight responsibilities. Press interviews of Ramamurti and Senator Pat Toomey (R-PA), a fourth Commission member, indicate that Toomey, too, has a much different view of what the Commission's role should be than that of Ramamurti. While Ramamurti called for restrictions on stock buybacks and executive bonuses for large corporations that receive CARES Act funds, and limits on outsourcing for midsize businesses, Senator Toomey maintained that, "[i]f Congress had wanted those restrictions to be in place, it would've been in the statute." At this point, only the chairman of the Commission, to be selected jointly by Speaker Pelosi and Leader McConnell, remains to be named. Since the chair will be a consensus pick of the two parties, and even Representative Shahala agrees with her Republican counterparts on a narrower view of the commission's mandate, Ramamurti's viewpoint may prove to be a minority of one (assuming Shahala does not yield to pressure from critics to step down from the Commission over her failure to report certain stock sales).

Also yesterday, Senators Elizabeth Warren (D-MA) and Richard Blumenthal (D-CT) sent letters to the six medical supply companies involved in "Project Air Bridge," the program aimed at getting medical supplies to hospitals amid the pandemic. In this letter, the two Senators voiced concerns similar to ones that they and eight other Senators raised in an April 21 letter to the IGs of HHS and DHS, in which they requested a joint investigation into the management and distribution of COVID-19-related medical supplies by HHS and the Federal Emergency Management Agency. Of the medical suppliers, the Senators asked eight questions relating to, among other things, prices, costs and the distribution of personal protective equipment (PPE). The Senators requested the companies' responses by May 8.

Following Treasury's and the SBA's guidance last week encouraging companies with alternative funding sources to return PPP funds under a safe-harbor provision in place until May 7, additional companies have announced they will do so. Yesterday, the LA Lakers said that it would return its US$4.6 million PPP loan. In doing so, the NBA franchise joined several companies that decided to return funds last week, including Potbelly, Ruth's Chris Steakhouse, Shake Shack, Sweetgreen, Kura Sushi, AutoNation and Manning & Napier.

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