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COVID-19 Public Policy Group Report

April 25, 2020

President Donald Trump on Friday signed the US$484 billion Paycheck Protection Program and Health Care Enhancement Act into law, triggering a joint announcement by the U.S. Department of the Treasury and Small Business Administration (SBA) that the CARES Act's Paycheck Protection Program (PPP) will resume operations Monday morning at 10:30am EST. Meanwhile, details continued to trickle out about the respective agendas of the White House and Democratic congressional leadership for negotiations over the next federal COVID-19 response measure.

House Speaker Nancy Pelosi (D-CA) and her lieutenants will have the pen in writing the first iteration of the next pandemic response bill, which House Majority Leader Steny Hoyer (D-MD) has indicated will be unveiled by May 4.

Congressional Democrats are reportedly eyeing the inclusion of another round of direct "stimulus" cash payments to individuals and families below a specified income level, as well as creation of a new program that would provide similar direct payments to very small businesses, in an effort to address concerns that some such enterprises are having trouble accessing relief loans from the PPP.

The Democratic measure will include an infrastructure component that could be "more modest" than some have anticipated, according to Hill sources, and will also include significant new funds for states, territories, and local governments, a potential flashpoint for eventual negotiations with the Republican-led Senate.

Senate Minority Leader Chuck Schumer (D-NY), who is reportedly working closely with Speaker Pelosi on crafting the Democratic package, has called for the creation of a "Heroes Fund" that would provide federal hazard payments of up to US$25,000 to workers on the front lines of the COVID-19 response, including grocery workers, health staff, and others operating in businesses deemed essential. Ramped-up social welfare funding for food stamps and related programs and an expansion of unemployment aid are also thought to be candidates for inclusion in the Democrats' massive forthcoming bill.

The White House may formally enter the so-called "Phase 4" fray soon by releasing a formal economic recovery proposal of its own. Treasury Secretary Steven Mnuchin has already publicly outlined some Trump Administration priorities for the next legislation, including payroll tax relief; new initiatives to support the restaurant, sports, and entertainment sectors; and an ambitious national infrastructure initiative, potentially exceeding US$2 trillion. The White House infrastructure push could include new broadband measures, permitting reform and other steps aimed at helping the economy gain traction quickly as it eventually emerges from the pandemic.

Tax and Economic Development Updates

With the interim PPP funding bill now signed into law, the SBA and Treasury Department have indicated that applications will be accepted again beginning at 10:30am on Monday, April 27. In a joint statement, Treasury Secretary Mnuchin and SBA Administrator Jovita Carranza noted: "The PPP has supported more than 1.66 million small businesses and protected over 30 million jobs for hardworking Americans…With the additional funds appropriated by Congress, tens of millions of additional workers will benefit from this critical relief." The two also made clear that the SBA "has properly coded the system to account for changes," including the US$60 billion set aside for smaller financial institutions. Additionally, the SBA yesterday published additional PPP guidance regarding requirements for promissory notes, authorizations, affiliation, and eligibility. Notably, the guidance specifies that "[h]edge funds and private equity firms are primarily engaged in investment or speculation, and such businesses are therefore ineligible to receive a PPP loan." Interestingly, this comes on the same day that a bipartisan group of lawmakers sent a letter to Secretary Mnuchin and Administrator Carranza urging them to make PPP loans available to community lenders and financing providers with fewer than 500 employees – including installment lenders and community development financial institutions.

Outside of the SBA's efforts, the Federal Reserve also continues to take an array of actions to support America's economic recovery. Yesterday, the central bank announced that it had lent over US$85 billion through its emergency lending programs: US$51 billion under the Money Market Mutual Fund Facility; US$34.5 billion under the Primary Dealer Credit Facility; and US$249 million under the Commercial Paper Funding Facility. While the Federal Reserve remains committed to taking necessary action to address troubled areas of the economy, Secretary Mnuchin has made clear that there are currently no plans to create a 13(3) facility to address the liquidity needs of the mortgage servicing industry. According to Secretary Mnuchin, the Federal Housing Finance Agency's (FHFA) announcement that mortgage servicers will only be required to advance four months of missed payments on single-family loans should address any potential liquidity shortfalls that they might experience.

The Federal Reserve did, however, issue an interim final rule yesterday to permit depository institutions to immediately suspend enforcement of the six transfer limit and to allow their customers to make an unlimited number of convenient transfers and withdrawals from their savings accounts "at a time when financial events associated with the coronavirus pandemic have made such access more urgent." That said, though the Federal Reserve is set to hold its Federal Open Markets Committee meeting next week, we expect that the central bank will largely be focused on taking steps to finalize and implement the significant number of new programs it has established in recent weeks. Nevertheless, with the Federal Reserve reported to have received approximately 2,000 comments on its Main Street Lending Program, it is quite possible that we may see further guidance surrounding this and potentially other of the recently-established 13(3) facilities.

Beyond these lending programs developed in response to the COVID-19 pandemic, there have also been a number of changes to U.S. tax policy designed to assist with America's economic recovery. Yesterday, the Joint Committee on Taxation released a description of the tax changes included in the CARES Act. It is clear, though, that further changes to the tax code are possible. For example, as we reported yesterday, a number of Senators are urging Secretary Mnuchin "to extend the continuity safe harbor, provided under existing Treasury Department guidance, for both the production tax credit (PTC) and energy investment tax credit (ITC), from four years to five years for projects that started construction in 2016 or 2017." Building on such efforts, Senator Kevin Cramer (R-ND), along with four fellow Republicans, sent a letter to Senate Majority Leader Mitch McConnell (R-KY) requesting that, to the extent renewable energy tax credits are included in a forthcoming "recovery" package, they be paired with similar benefits for fossil fuels. Specifically, these lawmakers highlight the need for an extension of the refined coal tax credit, enhanced carbon capture and sequestration credits, and "immediate action to properly compensate" coal and nuclear facilities. According to the five Senators, they have "legislative language ready" for each of these policy priorities.

Finally, as we continue to keep apprised of what might be included in forthcoming COVID-19 legislation, it is notable that House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law Chairman David Cicilline (D-RI) this past week suggested that he would like to include a provision in the forthcoming "recovery" package that would prohibit mergers except in the case of businesses that are "truly failing or in bankruptcy." Chairman Cicilline added: "It is unthinkable that we would allow mega-mergers and private equity takeovers during this crisis." While such a proposal seems unlikely to be enacted, it serves as an example as to why it is critical that businesses stay engaged in the legislative process in order to protect – or advance – their interests as part of the COVID-19 federal response.

Health Updates

The Food and Drug Administration (FDA) issued a Drug Safety Communication cautioning against the use of hydroxychloroquine or chloroquine as a treatment for the coronavirus outside of a hospital setting or clinical trial, as there is a risk of serious and potentially life-threatening heart rhythm problems in patients when the drugs are administered. The FDA states, "Hydroxychloroquine and chloroquine have not been shown to be safe and effective for treating and preventing COVID-19. They are being studied in clinical trials for COVID-19, and we authorized their temporary use during the COVID-19 pandemic for treatment of the virus in hospitalized patients when clinical trials are not available, or participation is not feasible, through an Emergency Use Authorization." As we previously reported, members of President Trump's team have disagreed over the use of hydroxychloroquine as a treatment for the coronavirus. Earlier this month, President Trump repeatedly expressed enthusiasm for hydroxychloroquine during press briefings, and the FDA posted chloroquine phosphate and hydroxychloroquine sulfate tablets to its drug shortages website, attributing the action to a surge in demand. The International Society of Antimicrobial Chemotherapy has now questioned a French study published in a society-run journal that suggested the drug could be beneficial for COVID-19 patients.

President Trump has received criticism for other statements he has made about potential COVID-19 treatments, most recently for remarks he made during Thursday's press briefing. William Bryan, the acting undersecretary of science and technology at the Department of Homeland Security, reported on research regarding the effects of solar light on killing the virus (on both surfaces and in the air). He also explained that recent research, which was not peer-reviewed, found the virus dies at a more rapid pace from exposure to higher temperatures and humidity. He noted the researchers had found "bleach will kill the virus in five minutes; isopropyl alcohol will kill the virus in 30 seconds." President Trump suggested a treatment for the virus could include "hit[ting] the body with a tremendous – whether it's ultraviolet or just very powerful light." He also said, according to the White House transcript, "I see the disinfectant, where it knocks it out in a minute. One minute. And is there a way we can do something like that, by injection inside or almost a cleaning. Because you see it gets in the lungs and it does a tremendous number on the lungs." In response, the makers of Lysol and Dettol, Reckitt Benckiser, issued a statement that "under no circumstance should our disinfectant products be administered in the human body (through injection, ingestion or any other route)." Physicians and health providers also denounced President Trump's statements. The Surgeon General tweeted that individuals should talk to their health provider before administering treatments to themselves or loved ones, and former FDA Commissioner Scott Gottlieb stated, "There's no circumstance under which you should take a disinfectant or inject a disinfectant for the treatment of anything." On Friday, White House Press Secretary Kayleigh McEnany accused the media of taking President Trump's comments out of context, and President Trump told reporters that he was being sarcastic in his remarks.

The SBA clarified that some hospitals that are partially owned by state or local governments may receive a loan from the PPP. Additional guidance was released that explains "a hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization . . . shall not be rendered ineligible for a PPP loan due to ownership by a state or local government if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid." This clarification is expected to aid rural hospitals, many of which are municipal-owned entities.

The Department of Health and Human Services Office of Inspector General (OIG) has started a frequently asked questions (FAQ) website to address regulatory flexibilities during the COVID-19 pandemic. OIG notes it is "accepting inquiries from the health care community regarding the application of OIG's administrative enforcement authorities, including the Federal anti-kickback statute and civil monetary penalty (CMP) provision prohibiting inducements to beneficiaries." Questions regarding how OIG would view arrangements in the scope of the public health emergency that would implicate these authorities can be submitted to OIGComplianceSuggestions@oig.hhs.gov; OIG will update the FAQ site as it responds to questions.

Trade Updates

On Friday, the Office of the U.S. Trade Representative confirmed that the Administration had notified Congress and the Governments of Mexico and Canada that the United States had completed its domestic procedures for implementing the U.S. Mexico-Canada Agreement (USMCA). With this act, the USMCA is expected to enter into effect on July 1. Some stakeholders – including the auto industry and certain lawmakers – have urged the Administration to delay entry into force further into the future, to allow companies more time to address the effects of the COVID-19 pandemic. The three countries must still issue uniform regulations to guide implementation of the deal's auto rules of origin procedures before entry into force.

Also on Friday, a New York man became the first to face federal charges for hoarding and price-gouging key medical supplies during the COVID-19 crisis. According to the Department of Justice (DOJ), Amardeep Singh hoarded personal protective equipment (PPE) at a warehouse in Brentwood, New York, and sold them at significantly inflated prices at his sneaker and apparel retail store. DOJ officials emphasized that they will continue to "intervene whenever profiteers and scammers break the law by capitalizing on the public's fear to enrich themselves."

European Policy Updates

The EU27 Heads of State held a videoconference on April 23 to endorse a set of measures and recommendations in the context of the COVID-19 crisis. They endorsed a financial emergency fund of €540 billion (US$591 billion) that was approved at the Eurogroup level on April 9. The package of measures- which includes support for national unemployment schemes, business loans, and financial assistance to Eurozone governments through the European Stability Mechanism- will become effective on June 1, 2020. The EU27 Leaders engaged in another contentious round of talks toward establishing a "Recovery Fund", which would provide an additional financial instrument to help the European economy rebound from the negative economic impacts suffered from the COVID-19 crisis.

EU Commission President Ursula von der Leyen also proposed a revamped version of the EU 7-year budget plan (i.e., the Multiannual Financial Framework, or MFF) as a "Marshall Plan" to further support the EU's economy during the COVID-related economic recession. The 27 Heads of State could not yet agree on all relevant details of this European Marshall Plan (e.g., balance of grants vs. loans). Therefore, they tasked the Commission with analyzing related needs, determining the necessary size of the Marshall Plan / Recovery Fund, and coming up as swiftly as possible with a proposal on how to establish it. This analysis should also clarify the link between the Recovery Fund and the MFF, which Leaders agreed would need to be adjusted to the current situation. Finally, the EU27 Leaders welcomed the proposed "Joint European Roadmap" to lifting national coronavirus containment measures.

A temporary export authorization scheme for PPE entered into effect on April 24 2020. Throughout the COVID-19 outbreak, PPEs such as masks, protective garments, or eyewear have required authorization for export. This measure introduces an exception for other countries in the European region, such as the Western Balkans, where Member States shall grant such authorizations for humanitarian purposes. This measure is in place for 30 days.

In recent weeks, governments across Europe and the Middle East have sought to support businesses in three principal ways – giving them money, lending them money, and relieving them of bills and financial commitments. This updated guide summarizes government financial support available in key European and Middle Eastern countries, covering loan scheme and financing facilities, employee support, insurance, and tax, through to assistance available for the self-employed. The guide outlines the types and level of funding available, eligibility, how to apply, and how to access the support.

Lastly, in order to support the Polish government's mission to provide the national economy with sufficient liquidity, the country's Competition Protection Authority chair recently stressed that the body will pay close attention to payment delays. Under Polish legislation, if a debtor's payment delay in a commercial transaction exceeds 30 days or the payment date provided for in the parties' agreement has been missed, the debtor shall pay the creditor the penalty interest set forth under law. A new client alert from the SPB Warsaw team summarizes potential penalties to be imposed on debtors and the powers of the national competition authority.

Oversight Updates

At the signing ceremony for the Paycheck Protection Program and Health Care Enhancement Act on Friday, Secretary Mnuchin emphasized that the PPP "is really a program that's designed for small business. And we put out some clarification … that some of the bigger businesses that have taken out loans should return the money." This "clarification" is the Interim Final Rule on Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility, which contains a limited safe harbor provision with respect to certification concerning the need for a PPP loan request. In accordance with the CARES Act, PPP applicants must certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Under the interim final rule released yesterday, "any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020 will be deemed by the SBA to have made the required certification in good faith." Mnuchin stressed that "[t]here will be a surveillance around this" if companies that should return the money do not.

Secretary Mnuchin's announcement follows calls by several Democratic legislators for investigations into the US$650-billion small business relief program. In a letter to the SBA's and Treasury Department's Inspectors General on April 23, Senator Elizabeth Warren (D-MA) and Representative Nydia Velázquez (D-NY) requested "a broad investigation into the program's implementation," including the two agencies' "rulemaking and guidance process," "the lending process and the role of banks in providing funds," and "a review of program participants." In a separate letter, Senate Minority Leader Schumer, Senator Sherrod Brown (D-OH), and Senator Ben Cardin (D-MD) asked the SBA's IG to investigate reports that large banks prioritized applications of their larger clients and also to provide recommendations, by May 8, to ensure that small businesses receive the money they need and are treated fairly in the PPP application process.

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