SQUIRE PATTON BOGGS

COVID-19 Public Policy Group Report

US and EU – May 1, 2020

Congressional leaders are laying down markers for what will eventually be a negotiation over the next major COVID-19 response bill. Democrats are dialing up their demands for new funds for state, territorial and local governments. Republicans state that they will not provide the votes for such relief unless it is accompanied by liability measures to shield individuals and enterprises from pandemic-related lawsuits as the economy reopens.

Senate Majority Leader Mitch McConnell (R-KY) and House Minority Leader Kevin McCarthy (R-CA) said in a joint statement this morning that congressional Republicans "are united in our demand that healthcare workers, small businesses, and other Americans on the front lines of this fight must receive strong protections from frivolous lawsuits." The Republican leaders added that such protections "will be absolutely essential to future discussions surrounding recovery legislation."

House Speaker Nancy Pelosi (D-CA), who is expected to soon unveil a Democrat-authored "CARES 2" initiative in response to the coronavirus, said Thursday that states, territories and local governments could need almost US$1 trillion in additional relief money from the federal government. The Speaker stopped short of pledging the forthcoming package will include quite that much aid, noting congressional Democrats "do have other issues we want to deal with."

One such issue, evidently, is workforce investment. House Education and Labor Committee Chairman Bobby Scott (D-VA) on Thursday became the latest Pelosi lieutenant to preview his panel's contributions to the upcoming CARES 2 proposal, announcing legislation to provide US$15 billion to dramatically strengthen skills development programs for unemployed workers. Democrats "will push [Scott's bill] as part of the next round of relief legislation," according to Bloomberg.

Another key House Democrat, Rep. Ed Perlmutter (D-CO), indicated Thursday that Pelosi may add language to the CARES 2 package that would enable US cannabis companies to have access to the banking system and potentially to Small Business Administration (SBA) loans.

As cities across the United States begin to reopen, businesses are turning their attention to how they will safely do so. Our labor and employment team has prepared an "Employer's Guide to Return-to-Work Issues: COVID-19 Public Health Emergency" to help navigate these questions. This guide identifies health and safety, wage and hour, leaves of absence, payroll, compliance and other issues to consider before partially resuming, or fully resuming, operations.

We have been monitoring and reporting on the shifting state, territorial and local government policies and guidance since the onset of the COVID-19 outbreak in the US. As many states have taken first steps to enter into the "reopening" phase, we are making available to the public this daily report where we provide updates on pandemic-related state and local executive actions. Our latest report is available here.

In the coming weeks, we will unveil a blog dedicated to global public policy focused contents. Follow us on Twitter @SPB_CapThinking for the launch announcement.

Tax and Economic Development Updates

After much anticipation, the Federal Reserve yesterday released additional information about its Main Street Lending Program (MSLP). Specifically, the central bank announced various changes related to the scope of and eligibility for the program, including by:

- Creating a third loan option, with increased risk sharing by lenders for borrowers with greater leverage;
- Lowering the minimum loan size for certain loans from US$1 million to US$500,000; and
- Expanding the pool of businesses eligible to borrow:
  - Businesses with up to 15,000 employees or up to US$5 billion in annual revenue are now eligible, which is up from 10,000 employees and US$2.5 billion in revenue under the original terms.
  - In its announcement, "[t]he Board recognizes the critical role that nonprofit organizations play throughout the economy and [indicates that it] is evaluating a separate approach to meet their unique needs."

By way of reminder, the Federal Reserve announced this 13(3) facility on April 9 and accepted comments on its proposed term sheets through April 16. In total, more than 2,200 comments were submitted, ultimately resulting in a new, third loan option (Priority Loans). The central bank also released a set of Frequently Asked Questions, which addresses a number of key issues, including loan eligibility, the application process and various other terms and conditions. In its announcement, the

Federal Reserve indicated that it soon plans to announce a date when the MSLP will officially be operational. The Treasury Department will support the MSLP with US$75 billion in funding authorized by the CARES Act.

According to certain reports, the changes made by the Federal Reserve to the MSLP are being described by some as intended to benefit oil and gas companies. In fact, Mr. Bharat Ramamurti, who was recently appointed to the Congressional Oversight Commission, yesterday made clear that "[t]he Fed and the Treasury should be transparent about why they made these changes…and rejected others that were focused on trying to keep workers employed or get them back on payroll." For its part, though, the Federal Reserve has indicated that the changes were not for the benefit of any single industry, but instead intended to expand the reach of the program to benefit more businesses.

Lawmakers are also continuing to examine the need for providing financial assistance to states and municipalities. Yesterday, Speaker Pelosi indicated that she would like to include US$1 trillion in aid to states and municipalities as part of the next COVID-19 package – funding that could cover up to four years of expenses and allow reimbursements for both virus expenses and revenue losses. As you will recall, Senate Majority Leader McConnell earlier this week expressed an openness to such funding, but indicated that it must be paired with liability protections for businesses that reopen during the pandemic. That said, the Majority Leader has since stated: "I'll be clear: Infrastructure is unrelated to the coronavirus pandemic that we're all experiencing and trying to figure out how to go forward…We need to make sure that whatever additional legislation they do is directly related to this pandemic and to get it in the rearview mirror and get the country back up and running again."

With regard to small businesses, the SBA yesterday released yet another Interim Final Rule, which provides guidance related to corporate groups and non-bank and non-insured depository institution lenders. At the same time, the Federal Reserve announced that it is making changes to broaden access to its Paycheck Protection Program Liquidity Facility by allowing non-depository institutions to act as lenders and expanding what collateral may be pledged. The SBA also updated its Frequently Asked Questions, including by providing additional information related to if and how the agency will review individual PPP loan files. This additional guidance comes as Deputy Secretary of the Treasury Justin Muzinich has been tasked with assisting the SBA in administering the PPP. According to one report, this suggests that "the Treasury Department and SBA continue their close coordination on the successful implementation of the Paycheck Protection Program." This same report suggests that larger financial institutions are concerned that smaller financial institutions may now be being prioritized, leaving many of the big banks' applications pending and with little information about their current status.

Health Updates

The Centers for Medicare and Medicaid Services (CMS) released an expansive interim final rule with comment period, intended to provide additional policy and regulatory flexibilities in response to the COVID-19 public health emergency, and additional waivers for healthcare providers. The administration announced this news as a "second round of sweeping changes to support [the] US healthcare system during [the] COVID-19 pandemic." The announced changes include new rules to expand and support diagnostic testing for Medicare and Medicaid beneficiaries, flexibilities to increase hospital capacity through CMS's Hospitals Without Walls initiative, augmentations to healthcare workforce restrictions and further expansions for the use of telehealth services in the Medicare program. CMS also announced it is "making adjustments to the financial methodology to account for COVID-19 costs so that [accountable care organizations] will be treated equitably regardless of the extent to which their patient populations are affected by the pandemic." Further information on CMS's announcement yesterday is available here.

The Medicaid and CHIP Payment and Access Commission (MACPAC) wrote a letter to Department of Health and Human Services (HHS) Secretary Alex Azar, calling for the CARES Act's Provider Relief Fund to provide better financial support to healthcare providers focused on serving Medicaid patients. Earlier this month, MACPAC wrote a letter to CMS Administrator Seema Verma, expressing concern over the decision to distribute the first wave of funding based on a provider's proportionate share of Medicare fee-for-service reimbursements in 2019. MACPAC advocated for "safety-net providers, including hospitals considered deemed disproportionate share hospitals (DSH) for the purposes of Medicaid payment, physician practices, health centers, children's hospitals, and other providers serving Medicaid and other low-income patients [to] have access to federal funds made available through the CARES Act without delay." This new letter references HHS's April 22 modifications to the allocations, but notes the changes did not have a large effect on the likely share of funds being transferred to hospitals serving a high share of Medicaid and low-income patients. MACPAC called for more transparency regarding which providers have received funding and the methodology and amount of funds that will be used to distribute future allocations.

President Trump delivered remarks focusing on America's senior citizen population, explaining that the Federal Emergency Management Agency will send supplemental shipments of personal protective equipment to all Medicare and Medicaid certified nursing homes. He also said CMS is providing states with US$81 million from the CARES Act to increase nursing home inspections, and the agency is finalizing a new rule requiring information about COVID-19 cases in nursing homes to be reported directly to the Centers for Disease Control and Prevention and testing data to be posted online. Lastly, President Trump announced the Coronavirus Commission for Safety and Quality in Nursing Homes, which is to be composed of industry experts, doctors, scientists, resident and patient advocates, family members, infection and prevention control specialists and state and local authorities. The Commission is expected to convene later this month and will issue recommendations on additional steps the government can take to protect seniors.

Democratic leaders on the House Committee on Energy and Commerce – Chairman Frank Pallone, Jr. (D-NJ), Subcommittee on Health Chairman Anna Eshoo (D-CA) and Subcommittee on

Oversight and Investigations Chairman Diana DeGette (D-CO) – wrote to HHS Secretary Azar, advocating for a national coronavirus contact tracing strategy and stressing the need for an increase in contact tracing capacity. In the Senate, 14 Democratic lawmakers wrote to Senate leadership, requesting "at least US$8 billion in new funding for contact tracing to help states and localities recruit, hire and train contact tracers and deploy voluntary digital tools that can integrate data to quickly alert people who have crossed paths with a newly diagnosed COVID-19 patient." The senators explained that any established fund "must include a small state minimum of no less than US$50 million to ensure that every state can bolder and maintain its testing and contact tracing infrastructure."

Trade Updates

As we have previously reported, US businesses are struggling to maintain North American supply chains as a result of the COVID-19 pandemic. One major issue remains the application of restrictions on the operations of non-essential businesses In Mexico. Business leaders are urging the Mexican government to provide more detailed guidance on essential operations, and, if possible, align with the recommendations set out by the US Cybersecurity and Infrastructure Security Agency (CISA) on essential operations to minimize disruptions in supply chains to the greatest extent possible. Lawmakers agree; as we reported yesterday, eleven bipartisan senators wrote to Secretary of State Mike Pompeo this week urging he press his Mexican counterparts to increase guidance for businesses operating in key sectors in Mexico.

Mexico is so far resisting pressures to expand what it deems essential. In remarks on Thursday reported by *POLITICO*, Mexican Foreign Minister Marcelo Ebrard said that the government would not expand its definition of "essential business" to increase access for supply chains, emphasizing that Mexico's priority remains public health and safety. When asked to comment on the senators' letter, he called it a US "internal matter."

European Policy Updates

Due to the unprecedented challenges posed by the COVID-19 outbreak, on Wednesday, the European Commission announced relief measures for the transportation sector (aviation, rail, maritime and road sectors). These measures include easing regulatory burdens and reducing costs for transport companies through four legislative proposals: (1) extension of the validity date of certain certificates, licenses and other authorizations relevant to the broader transport sector; (2) relief for ground-handling services through extension of contracts and modifying air carrier licensing rules; (3) flexibility to Member States and port authorities to defer, reduce, or lift port infrastructure charges; and (4) three month extension of the implementation of EU law on rail safety and interoperability. Temporary exemption from EU rules related to driving times and rest periods for drivers moving goods across Europe have been approved for certain Member States. More relief measures could follow in the coming weeks. Further information can be accessed here.

Meanwhile, a virtual meeting of EU Energy Ministers with Energy Commissioner for Energy Kadri Simson concluded with agreement that the European energy system is resilient and that there is currently no risk to supply disruption linked to the COVID-19 outbreak.

In the Medical Devices field, the European Commission proposed on April 3 to delay the entry into effect of the Medical Devices Regulation (EU) 2017/745 by one year, to May 26, 2021, to facilitate both businesses and authorities. The Medical Devices Regulation will introduce a series of new health and safety standards for medical devices manufactured and traded in the EU. Both the Council of the EU and the European Parliament adopted the delay, with the proposed Regulation subsequently published in the Official Journal of the EU on April 24. Our update provides further information on the proposed delay.

In light of the COVID-19 pandemic, the UK Cabinet Office has issued procurement policy guidance for contracting authorities in relation to providing financial and other support to suppliers with a view to ensuring service continuity and the protection of infrastructure, supply chains and jobs (detailed in this update). The guidance was issued further to an emergency financial support scheme devised by the UK government to encourage contracting authorities to assist suppliers during the crisis.

The pandemic is requiring businesses to deal with numerous issues at the same time. Our team in Prague has produced a legal checklist for businesses in the Czech Republic to consider during the crisis, which covers contractual relations, employees, cybersecurity, insurance and ownership of real estate.

Similarly, our Belgian Corporate Practice produced a short description of important points to take into account when considering whether to invoke a *force majeure* event resulting from the COVID-19 crisis in respect of a Belgian law-governed agreement.

Oversight Updates

After the Federal Reserve Board announced that it is expanding the scope and eligibility criteria for the Main Street Lending Program (see above), Bharat Ramamurti, a member of the Congressional Oversight Commission established under the CARES Act, was quick to note on Twitter that these changes "mirror the top requests of the oil and gas industry." In Ramamurti's view, these changes do not "promote the broader public interest," which prompted him to ask the Federal Reserve and Treasury "...why they made these changes...—and rejected others that were focused on trying to keep workers employed or get them back on payroll." Ramamurti's criticism of the changes and calls for transparency came following and despite comments by two other Commission members against "rogue" oversight (Representative Donna Shalala (D-FL) and advocating for restrictions that Congress chose not to put in place (Senator Pat Toomey (R-PA)). This shows that Ramamurti is determined to be an independent and aggressive overseer, regardless of whether his counterparts like it. Four of the five-member Commission's members have been appointed; the chair will be jointly selected by Speaker Pelosi and Senate Majority Leader McConnell.

Bloomberg reports that the Department of Justice has already begun an inquiry into Payment Protection Program loans and found evidence of potential fraud both in approved and rejected applications. Assistant Attorney General Brian Benczkowski, who runs the Department of Justice's (DOJ) criminal division, said that attorneys in the Fraud Section's Market Integrity Unit will be overseeing PPP-related investigations, in coordination with US attorneys throughout the country and Inspectors General. The initial review focused on information the DOJ received from 15 to 20 of the largest loan processors and the SBA.

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