COVID-19 Public Policy Group Report

US and EU – May 6, 2020

Legislative battle lines between Democrats and Republicans over the next coronavirus relief package are sharpening as the broad contours of the "CARES 2.0" measure soon to be unveiled by House Speaker Nancy Pelosi (D-CA) have begun to emerge. At the same time, congressional committee leaders on both sides of the political fence are pushing for more changes to the original CARES Act and the way it is being implemented by the Trump Administration.

Reports from the House Democratic Caucus indicate the centerpiece of Speaker Pelosi's CARES 2.0 will be approximately US$1 trillion in aid to states, territories and local governments, with US$500 billion in direct aid provided through the original CARES Act's Coronavirus Relief Fund, and billions more injected into the US economy through an array of safety net and workforce investment programs. A memo to House Democrats from one of Pelosi's deputies, House Committee on Appropriations Chairman Nita Lowey (D-NY), reportedly specifies that the aid to local governments will be distributed in equal amounts among counties and municipalities. Chairman Lowey told colleagues on a conference call Monday evening that the package will also provide billions for Community Development Block Grants (CDBGs), elementary and secondary education and other forms of assistance for localities.

Other potential details of the anticipated CARES 2.0 proposal, based on reports that have emerged from the House Democratic Caucus: an expansion of federal Occupational Safety & Health Act (OSHA) protections for American workers who may be exposed to risk as the economy reopens; hazard pay and childcare assistance for workers on the front lines of the nation's coronavirus response, such as health care and grocery store employees; student debt payment relief; additional "stimulus" cash payments to households; an increase in the Federal Medical Assistance Percentages (FMAP), the rates used to determine federal payments to states for Medicaid, children's health insurance, welfare and other safety net programs; and investments in broadband infrastructure.

President Donald Trump on Tuesday unleashed his sharpest rhetoric yet about House Democrats' forthcoming bill, declaring in a tweet: "Well run States should not be bailing out poorly run States, using CoronaVirus as the excuse! The elimination of Sanctuary Cities, Payroll Taxes, and perhaps Capital Gains Taxes, must be put on the table. Also lawsuit indemnification & business deductions for restaurants & [the entertainment sector]."

House Committee on Financial Services Chairman Maxine Waters (D-CA) and House Committee on Small Business Chairman Nydia Velasquez (D-NY) have both told colleagues to expect CARES 2.0 to include reforms to the CARES Act's Paycheck Protection Program (PPP). Sources indicate the changes are likely to include adjustments to the manner in which banks are paid for distributing PPP loans, and may be accompanied by added money for micro lenders and the Community Development Financial Institutions (CDFI) fund. *POLITICO* reports that a bipartisan group of legislators in the US Senate is examining changes to the PPP as well.

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 content. Follow us on Twitter @SPB_CapThinking for the launch announcement.

Tax and Economic Development Updates

As various stakeholders continue to raise issues with implementation of the Paycheck Protection Program (PPP), lawmakers are taking notice. For example, in response to recent Internal Revenue (IRS) guidance prohibiting businesses from deducting expenses that are paid for with PPP loan proceeds, a bipartisan group of lawmakers sent a letter to Treasury Secretary Steven Mnuchin urging that the Department reverse course. Specifically, House Committee on Ways and Means Chairman Richard Neal (D-MA) and Senate Committee on Finance Chairman Chuck Grassley (R-IA) and Ranking Member Ron Wyden (D-OR) posit that "[p]roviding assistance to small businesses, only to disallow their business deductions as provided in Notice 2020-32, reverses the benefit that Congress specifically granted by exempting PPP loan forgiveness from income."

Beyond this, reports suggest that lawmakers plan to "push for major overhaul" of the PPP. In fact, according to *POLITICO*, potential changes to the small business lending program that are under discussion include expanding the timeframe during which businesses are required to use their funding, as well as allowing larger businesses to access the program. Such changes could come if and when Congress provides additional funding for the program, which is likely to run out of funding (for the second time) soon. As Senator Michael Bennet (D-CO) has suggested, "[i]t really is important that we simply don't go through the motions of reauthorizing a few hundred billion dollars for PPP without making changes that are essential for the businesses that have gotten hurt the most."

Note, too, we continue to await critical guidance from the Small Business Administration (SBA) related to PPP loan forgiveness – guidance that may well also prompt additional concerns from Congress and those entities taking out loans through the program. That said, late last night, SBA did update its Frequently Asked Questions and in Question 43 indicated that it is extending the safe harbor repayment date from May 7 until May 14, 2020. The agency also released an updated Summary of Round 2 Data with information current as of 5:00pm yesterday, May 5, 2020.

Aside from the problems plaguing the PPP, it is notable that St. Louis Fed President James Bullard this week acknowledged that it is "very much an experiment we are trying to work our way through here" with regard to economic recovery in the face of COVID-19. That said, he also suggested "we have a better chance of a swift recovery with this shock than with others in the past," though he also offered that the economy is unlikely to "transition" to a more positive outlook until the third quarter. As part of the Federal Reserve's efforts "[t]o support the flow of credit to households and businesses," federal banking regulators yesterday announced an interim final rule that modifies the agencies' Liquidity Coverage Ratio (LCR) rule – a rule designed to ensure banks are able to meet their short-term liquidity needs – to facilitate financial institutions' participation in the central bank's Money Market Mutual Fund Liquidity Facility and the Paycheck Protection Program Liquidity Facility.

While on the subject of banking regulators, note that the Senate Committee on Banking last night announced an oversight hearing set for May 12 that will feature testimony from:

- The Honorable Randal K. Quarles, Vice Chairman For Supervision, Board of Governors of the Federal Reserve System;
- The Honorable Joseph Otting, Comptroller, Office of the Comptroller of the Currency;
- The Honorable Jelena McWilliams, Chairman, Federal Deposit Insurance Corporation; and
- The Honorable Rodney E. Hood, Chairman, National Credit Union Administration

This announcement comes on the same day that House Committee on Financial Services Chairman Waters exercised her oversight authority by sending letters to a number of mortgage servicers – including Bank of America, JPMorgan, Wells Fargo, US Bancorp and Quicken Loans, among others – seeking information about recent customer communications. According to Chairman Waters, "[t]t is critical that [these mortgage servicers] communicate consistent and accurate information regarding the options available to borrowers who are unable to make their mortgage payments due to financial hardship that is directly or indirectly related to the pandemic."

Health Updates

Senate Democrats wrote a letter to President Trump, stating they are "deeply troubled" by the administration's testing blueprint and rejecting "the notion that the federal government bears this little responsibility in increasing testing capacity." In late April, the White House released a new testing overview and testing blueprint, which provide a three-stage, eight-part plan for the federal government, state governments and private sector to scale up the testing regime during the pandemic. 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." As we previously reported, Senate Committee on Health, Education, Labor and Pensions (HELP) Ranking Member Patty Murray (D-WA) released a white paper in early April outlining Democratic testing proposals. Ranking Member Murray previously stated the White House's 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 obvious federal responsibilities by assigning them solely to states instead." In this new letter, the Senate Democrats urged the President to: (1) "use the full authority of the Executive Branch, including the Defense Production Act and the money allocated in the *Paycheck Protection Program and Health Care Enhancement Act*, to ensure sufficient production of testing kits and materials, such as swabs, reagents, and personal protective equipment, to meet demand"; (2) "in coordination with the states and Tribes, increase laboratory capacity to meet demand"; and (3) "in coordination with the states and Tribes, increase public health capacity and personnel, including building up a massive contact tracing workforce, to identify and isolate or quarantine COVID-19 cases and contain the disease's spread." The senators also encouraged the administration to draft a plan "within 30 days – as required by the *Paycheck Protection Program and Health Care Enhancement Act*" that: (1) "create[s] a pipeline for the development and manufacturing of tests and testing supplies"; (2) "work[s] to efficiently and comprehensively administer tests across the United States"; (3) "prioritize[s] the health and safety of the entire population in using testing to inform policy decisions"; and (4) "use[s] testing data to protect the public health." The Paycheck Protection Program and Health Care Enhancement Act provided US$25 billion for testing, US$5 billion shy of the original Democratic ask.

The American Hospital Association (AHA) released a report on Tuesday, estimating a loss of US$202.6 billion for US hospitals and health systems from March through June 2020 (an average of US$50.7 billion per month). AHA attributed these losses, in part, to the effect of COVID-19 hospitalizations on hospital costs, cancelled and forgone services caused by COVID-19, additional costs associated with purchasing required personal protective equipment and costs of additional support some hospitals are providing to their workers. AHA indicated – under no uncertain terms – that hospitals will advocate for more federal funding in the future, stating "Although the federal government moved quickly to provide relief, more help is needed. Critics have argued that hospitals were well funded prior to the COVID-19 public health emergency, however, the reality is that many hospitals were already facing financial pressures. Experts have raised concerns about low payment rates from government payers, which in part led the Congressional Budget Office to project that between 40% and 50% of hospitals could have negative margins by 2025 prior to the pandemic." The CARES Act and the Paycheck Protection Program and Health Care Enhancement Act provided a total of US$175 billion to a Provider Relief Fund to support care-related expenses and lost revenues attributed to the pandemic. At the direction of President Trump, the Department of Health and Human Services (HHS) is also distributing money from the Fund to cover certain coronavirus-related health services for uninsured Americans.

Ranking Member Murray wrote to HHS Secretary Alex Azar and Department of Labor Secretary Eugene Scalia, inquiring into efforts of both departments "to collaborate and coordinate on potential mechanisms to shift unemployed workers from across the country into an expanded public health workforce focused on containing and managing the spread of COVID-19." She explained that a comprehensive contact tracing effort will require a robust workforce, and she suggested the departments work together to mobilize unemployed workers for these efforts. Ranking Member Murray also requested answers to questions on what efforts have been made to identify mechanisms to shift unemployed and furloughed workers to public health roles; details of communication with state and local entities, as well as non-governmental entities, regarding opportunities to utilize unemployed workers for an expanded public health workforce; and the status of Centers for Disease Control and Prevention (CDC) Director Robert Redfield's stated need for "an 'army' of health care workers to implement a 'very aggressive' containment strategy for COVID-19."

European Policy Updates

The global COVID-19 response efforts of the European Commission, and in the context of the World Health Organization's Access to COVID-19 Tools Accelerator, have raised €7.4 billion (US$8.024 billion) as of Monday. The amount was gathered from donors worldwide via a Coronavirus Global Response Pledging event; the US did not participate. The funding will be deployed in support of universal diagnostics, treatments and vaccines against COVID-19.

The European Commission adopted a package of exceptional measures in support of the agri-food sector on Monday. The package, initially announced on April 22, includes aid for private storage (especially for dairy and meat products), flexibility for market support programs and temporary derogation from EU competition rules to address market imbalances for certain products for a maximum of 6 months.

On May 5, the German Federal Constitutional Court issued judgement in a number of individual constitutional complaints of German citizens against the European Central Bank's (ECB) Public Sector Asset Purchase Programme (PSPP) of 2015. The judgment was based on a provision contained in the German constitution that prohibits the German Parliament and German Federal Council from changing certain provisions of the German Constitution even if there is a 2/3 majority. The German Federal Constitutional Court ordered the German Central Bank (Bundesbank), subject to a grace period of 3 months, to stop participating in purchases under the PSPP and to wind down all purchases made in the past in an orderly way, insofar as the ECB Council has not proven the proportionality of the PSPP. Further details on the judgement can be found in our analysis here. The practical effect of the judgment is that the German Government must now urgently seek a proportionality justification from the ECB. While the judgment makes clear that it does not concern any financial assistance measures taken by the European Union or the ECB in the context of the current coronavirus crisis, it has laid out some important principles that could be expected to apply to the current measures as well.

The ongoing COVID-19 pandemic is placing significant pressure on businesses and national economies. In light of this, the UK competition regulator - the Competition and Markets Authority (CMA) - has issued guidance on its approach to merger assessments during the outbreak. In particular, the guidance addresses timetable delays, information requests, interim measures and the failing firm defiance, each addressed in this recent update.

As some countries in Europe can now see light at the end of the following COVID-19 lockdowns, the Belgian government has released its plans for easing lockdown measures in a 167-page presentation. Our blog post outlines the initial steps that Belgium will take to allow its citizens and businesses to return to normal.

Oversight Updates

Brian Miller, a White House lawyer President Trump nominated to serve as Special Inspector General for Pandemic Recovery at Treasury, faced tough questions at his confirmation hearing before the Senate Committee on Banking, Housing and Urban Development. While Republican lawmakers' questions focused on Miller's service as the General Services Administration's Inspector General (IG), Democratic Senators questioned Miller's ability to be an independent and aggressive watchdog, considering his service as a White House lawyer. In his responses, Miller spoke to the vital nature of IGs, but he refused to discuss the President's recent firings and demotions of IGs. Miller noted, however, that IGs could always be fired as long as the reason for the firing is communicated to Congress and said he would resign before compromising his independence. He expressed support for comprehensive information sharing, pledged to investigate all relevant misconduct, even if doing so would upset the Administration, and to follow the facts, even if the President does not like where they lead. Several Democratic lawmakers were not convinced by Miller's pledge of independence, including Senators Robert Menendez (D-NJ), Elizabeth Warren (D-MA) and Doug Jones (D-AL). Senator Warren offered the harshest assessment, saying that Miller's time in the White House Counsel's office during impeachment should disqualify him from serving as IG. Despite such vocal disapproval of Miller's nomination, his confirmation is likely, given Republican control of the Senate. If confirmed, Miller plans to begin working with a team of 75-100 people, although he added he cannot determine at this time how many resources he will require.

Yesterday, the Department of Justice charged two New England businessmen with fraud over their PPP loan applications for US$438,000 and US$100,000, respectively. While the requested loans were for smaller amounts than the ones that have received negative press coverage, such as the US$10 million loan Shake Shack returned, this is just the first criminal action related to the CARES Act funds. Joseph Bonavolonta, the special agent in charge of the Federal Bureau of Investigation's (FBI) Boston field office, said that the "arrests should serve as a warning to others that the FBI and our law enforcement partners will aggressively go after bad actors like them who are utilizing the Covid-19 pandemic as an opportunity to commit fraud." Less than a week ago, Assistant Attorney General Brian Benczkowski, who runs the Department of Justice's (DOJ) criminal division, said attorneys in the DOJ's fraud section's market integrity unit will be overseeing PPP-related investigations, in coordination with US attorneys throughout the country and IGs. The initial review consisted of information the DOJ received from 15 to 20 of the largest loan processors and the SBA. Additional enforcement will likely follow, especially after the safe harbor provision now in place through May 14 expires. Under this provision, companies that return their PPP loans will be deemed to have certified in good faith that "current economic uncertainty" makes the loans "necessary to support the ongoing operations." PPP loan applicants and recipients will not be the only ones facing government scrutiny. Yesterday, Wells Fargo announced that federal and state enforcement authorities are investigating its handling of PPP loan applications.

Several notable Congressional hearings are planned for next week, including a House Committee on Energy and Commerce Health Subcommittee hearing where Dr. Rick Bright, the former director of the Biomedical Advanced Research and Development Authority (BARDA), is expected to testify. Bright was dismissed from his position and reassigned to a narrower job at the National Institutes of Health last month. At the time, Bright announced that he would file a whistleblower complaint with HHS's IG, as he maintains the Administration removed him from his role in part as retaliation for his questioning the use of hydroxychloroquine as a treatment for COVID-19. Yesterday, Bright filed a complaint with the Office of Special Counsel, which investigates retaliation against federal whistleblowers. In an interview, Bright said that he "witnessed government leadership rushing blindly into a potentially dangerous situation by bringing in a non-Food and Drug Administration (FDA) approved chloroquine," which was "alarming" to him and other scientists. Also next week, Dr. Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases; Robert Redfield, director of the CDC; HHS Assistant Secretary Brett Giroir; and FDA Commissioner Stephen Hahn are set to testify before the Senate HELP Committee. Last week, the Administration blocked Dr. Fauci from appearing before a House panel. Yesterday, President Trump said he does not want members of the coronavirus task force appearing before the House because "The House is a setup," and "a bunch of Trump haters."

Also yesterday:

- Representative French Hill (R-AR), a member of the Congressional Oversight Commission established by the CARES Act, reiterated his position that this crisis is different from that of 2008. While at that time, the government was "lending money or injecting money in companies that actually contributed to the reasons for why you were there in the first place," now "we obviously don't have that challenge." Last month, Representative Hill indicated that his vision of the Commission's work is narrower in scope than oversight under the Troubled Asset Relief Program (TARP).
- Bharat Ramamurti, another Commission's member, criticized the Federal Reserve Bank of New York's interpretation of whether a US company that is a subsidiary of a foreign company can qualify for emergency loans. Ramamurti tweeted that "Congress prohibited taxpayer support of foreign business," but the new interpretation "opens the door to providing US taxpayer support to companies that … maintained operations here but reincorporated abroad specifically to avoid paying more US taxes."

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