SQUIRE PATTON BOGGS

COVID-19 Public Policy Group Report

US – May 22, 2020

Speaking at a pre-Memorial Day event hosted by *The Hill*, US Treasury Secretary Steven Mnuchin said it will be "a few weeks" before the Trump Administration moves to negotiate with Congress on another large-scale coronavirus response bill, while conceding there is "a strong likelihood" such legislation will eventually be needed to support the struggling American economy. Members of Congress continue to put forth targeted proposals, many of them bipartisan, to address aspects of the public health and economic crisis, presenting Senate Majority Leader Mitch McConnell (R-KY) with a growing array of options as he and Republican colleagues in the Senate contemplate an eventual GOP response to the gargantuan Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act passed by House Democrats under Speaker Nancy Pelosi (D-CA). Congress appears poised to pass at least one such measure, making changes to the March 27 CARES Act's Paycheck Protection Program (PPP), as a stand-alone bill after the holiday weekend.

The PPP changes, intended to give more flexibility and options to smaller enterprises seeking to access loans, are being championed in the Senate by Senate Committee on Small Business Chairman Marco Rubio (R-FL) and Ranking Member Ben Cardin (D-MD), along with Senators Susan Collins (R-ME) and Jeanne Shaheen (D-NH). Speaker Pelosi has scheduled a vote in the House next week on a bill by Representatives Dean Phillips (D-MN) and Chip Roy (R-TX) that would make comparable changes to the program. If a bipartisan "micro-deal" on PPP reforms is passed and signed into law by President Donald Trump in the coming days, it is conceivable that other focused measures reflecting pockets of bipartisan policy consensus relative to the COVID-19 response could advance in a similar manner while party leaders remain at odds about the timing and content of another grand package.

Targeted pandemic response proposals are being unveiled in Congress at a steady clip. Senator Mark Warner (R-VA) is leading a group of colleagues in backing an expansion of the employee retention tax credit established under CARES, a program that enjoys bipartisan support in Congress. Senator Shaheen announced earlier this week that two Senate Republican colleagues have signed onto a bill she introduced last year, before the pandemic, to require the US Department of Homeland Security to increase the amount of personal protective equipment (PPE) it purchases from manufacturers on American soil. Senators Joni Ernst (R-IA) and Chris Murphy (D-CT) have teamed up to urge that federal safety net programs be modified to ensure low-income parents and workers on the front lines of the pandemic response receive assistance with the cost of diapers.

By resisting calls to immediately launch leadership-level negotiations with the House over the next large-scale coronavirus package and allowing ideas for the next phase of relief to emerge organically in his chamber, Leader McConnell has taken a much different approach than the one taken by Speaker Pelosi that culminated in House passage of HEROES. The proliferation of bipartisan proposals in the Senate may eventually present McConnell and his leadership team with a menu of options from which they can draw in mapping out a negotiating strategy when talks begin, possibly in mid-to-late June, over the next major COVID-19 response legislation.

Tax and Economic Development Updates

As Congress continues to debate additional stimulus measures to address the ongoing economic turmoil, Treasury Secretary Mnuchin yesterday indicated that "[t]here is a strong likelihood we will need another bill." Notably, while the Treasury Department had previously suggested it was examining a "technical fix" to address certain PPP issues, Secretary Mnuchin yesterday also indicated that Congress would need to take action to extend the period of time provided for businesses to use their PPP loan proceeds for purposes of loan forgiveness. To that end, the Senate appears poised to vote today on legislation spearheaded by Senate Committee on Small Business Chairman Rubio that would extend that period from eight to 16 weeks. Additionally, the legislation, which is titled the Paycheck Protection Program Extension Act, would also: (1) extend the deadline to apply for a PPP from June 30, 2020, to December 31, 2020; (2) allow borrowers to use loan funds to purchase personal protective equipment for employees and to pay for adaptive investments needed to reopen safely; (3) clarify that borrowers who have maintained payroll for eight weeks will not lose loan forgiveness due to the extension of the program to 16 weeks; (4) clarify that lenders are not liable for the borrower certification and documentation they provide when applying for a PPP and subsequent forgiveness; and (5) clarify that lenders who followed PPP guidance released by the Small Business Administration (SBA) are not held liable if that guidance changed. Importantly, we have also learned that – despite taking over temporarily as the chairman of the Senate Select Committee on Intelligence – Senator Rubio is expected to continue as chairman of the Senate Committee on Small Business and continue to play a leading role in negotiating on PPP changes and other small business stimulus measures for the remainder of the year.

In the House, we reported yesterday that lawmakers next week will consider H.R. 6886, the Paycheck Protection Flexibility Act, which is its version of legislation to make various changes to the PPP. Notably, the House bill differs from the Senate approach in several key ways. In addition to providing 24 weeks for businesses to use their PPP funds, the bill would also eliminate the requirement that borrowers spend at least 75% of their loan proceeds on payroll expenses. While these differences will of course need to be resolved before the pending PPP fixes can become law, the expediency with which lawmakers are acting suggests that many of these proposals are likely to be enacted sooner rather than later.

Additionally, the Federal Reserve, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation and National Credit Union Administration have issued guidance allowing certain financial institutions to meet consumers' "ongoing needs for credit" during periods of "economic stress, natural disasters, or other extraordinary circumstances such as the public health emergency created by COVID-19" by offering small dollar loans. Importantly, the guidance provides rigorous underwriting standards for the loans to offer consumers protections intended to help them avoid becoming subject to recurring debt obligations.

Another key issue that continues to be up for debate as part of the ongoing federal response to COVID-19 relates to business interruption insurance. Representative Carolyn Maloney (D-NY) is leading legislation – the Pandemic Risk Insurance Act of 2020 – that would create the Pandemic Risk Insurance Program within the Treasury Department. The legislation is intended to create a new market for pandemic risk insurance and would require insurers that offer general business interruption coverage to offer such coverage for pandemic-related interruptions on essentially the same terms; a portion of insurer losses would be repaid by the federal government, up to an annual cap of US$750 billion. In response to this proposal, yesterday, the American Property Casualty Insurance Association, National Association of Mutual Insurance Companies and Independent Insurance Agents and Brokers of America released a proposal – the Business Continuity Protection Program – "designed to bolster the country's economic resilience by providing timely and efficient financial protection and payroll support to the private sector in the event of a future declared public health emergency." Under the proposal, businesses would pay into the new program that, as contemplated, would be run by the Federal Emergency Management Administration. Business would then be eligible for payments to cover up to 80% of their payroll and other expenses for three months in the event of a public health emergency. Given the diverging opinions in Washington on how to properly address the role of business interruption insurance for businesses impacted by pandemics, we expect to see continued negotiations over the coming months that may result in an agreed upon approach to be included in legislation later this year.

Health Updates

As states begin to reopen economies, the bipartisan leadership of the House Committee on Energy and Commerce and its Subcommittee on Oversight and Investigations is urging the administration to establish a national COVID-19 vaccine plan, POLITICO reports this morning. Chairman Frank Pallone, Jr. (D-NJ), Ranking Member Greg Walden (R-OR), Subcommittee Chairman Diana DeGette (D-CO) and Subcommittee Ranking Member Brett Guthrie (R-KY) wrote a letter to Dr. Deborah Birx, explaining that the plan "should provide as much detail as possible on manufacturing capabilities and how they will be brought to necessary scale, recommendations for prioritization and allocation of vaccines to at-risk populations including health care workers and other first responders, guidance on provider training, and public education and outreach efforts, as well as coverage considerations in order to achieve the recommended utilization of a new vaccine in the United States once it is approved." The lawmakers requested a briefing on Operation Warp Speed, a public-private partnership charged with accelerating the development of a COVID-19 vaccine, by next week.

Yesterday, the administration announced the Department of Health and Human Services (HHS) and AstraZeneca are collaborating to make available at least 300 million doses of a vaccine, with a goal of delivering the first doses as early as this October. HHS states the agreement between AstraZeneca and the Biomedical Advanced Research and Development Authority (BARDA) will speed the development and manufacturing of the investigational vaccine to begin Phase 3 clinical studies in the coming months. BARDA may also provide up to US$1.2 billion "to support, in parallel, advanced clinical studies, vaccine manufacturing technology transfer, process development, scaled-up manufacturing, and other development activities." Some stakeholders have questioned the proposed timeline, calling it overly optimistic and unrealistic.

Other lawmakers continue to push for more information on, and planning for, the distribution of COVID-19 treatments. Last week, Senator Dick Durbin (D-IL) led a letter to HHS Secretary Alex Azar, seeking additional transparency on the distribution process for remdesivir, an antiviral treatment. The senators raised concerns about the "opaque process" under which the treatment has been distributed after the Food and Drug Administration issued an emergency use authorization, as well as whether future supply can meet patient needs. As we previously reported, House Democratic lawmakers have also pressed for answers on the availability and affordability of remdesivir (letters here and here).

President Trump said yesterday that the United States would not shut down if a second wave of the coronavirus were to impact the country. Decisions on reinstating restrictions would ultimately fall to state governments, but President Trump stated, "We're not going to close the country. We're going to put out the fires." Some lawmakers question whether this approach is feasible. Yesterday, a group of 15 Democratic senators wrote to Vice President Michael Pence, inquiring about the White House Coronavirus Task Force's plans to address the COVID-19 pandemic during the upcoming flu season. Centers for Disease Control and Prevention (CDC) Director Robert Redfield has warned that the spread of COVID-19 could increase later this year, coinciding with seasonal flu outbreaks. Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases and a current member of the Task Force, has cautioned that reopening the country too soon, without the proper capacity to respond to new infections, could lead to serious consequences.

Trade Updates

The rhetoric between the United States and China continues to intensify. In just the past week, President Trump said he is considering all options against China, including "cut[ting] off the whole relationship," and he suggested on Twitter that President Xi is directing a "massive disinformation campaign" related to the pandemic. On Wednesday, Secretary of State Mike Pompeo blamed "the Chinese Communist Party's failures" for the 90,000 American lives and 36 million American jobs lost because of the pandemic.

This follows several weeks of states filing lawsuits against China and lawmakers in Congress introducing anti-China legislation, including bills to sanction Chinese officials for their perceived role in the spread of the pandemic and to strip China of its sovereign immunity protections so the country could be sued in US courts.

The increased rhetoric between the two sides will likely continue through the fall 2020 US elections, but so far, the "war of words" has not triggered a new trade war or, importantly, impacted the viability of the Phase One trade deal signed by the parties in January. Under the deal, China agreed to address some policy issues and committed to increase purchases of US goods by around US$200 billion over two years.

Due to the COVID-19 pandemic, there is growing skepticism that China will be able to meet these purchasing commitments. However, U.S. officials have reacted positively to recent steps taken by the country. On Thursday, US Trade Representative Robert Lighthizer and Secretary of Agriculture Sonny Perdue issued a joint statement outlining the progress made by China in implementing the Phase One deal, including recent actions to allow imports of U.S. blueberries, barley, avocados and other products. Ambassador Lighthizer said in the statement, "Under President Trump's leadership, we fully expect this agreement to be a success."

Despite this, recent reports indicate some Administration officials and some congressional Republicans are pressuring the President to abandon the Phase One deal. However, senior congressional staffers of both parties tell us that this is unlikely. These staffers note that the gains included in the Phase One deal are too important for US agricultural producers and that the Administration is sensitive to the market implications of abandoning the deal.

Congress has no formal role in the Phase One deal, and the decision to stay in or withdraw lies with President Trump. The agreement provides the parties with some flexibility for leniency, but only if both sides agree. We continue to believe that until President Trump and his team publicly criticize China for noncompliance, the Phase One deal is likely safe.

Oversight Updates

Senator Elizabeth Warren (D-MA) and twelve other Democratic Senators sent letters to JetBlue and Delta criticizing their decision to cut employee hours after receiving financial assistance under the CARES Act. Calling the airlines' decision a "blatant and potentially illegal effort to skirt [CARES Act] requirements to keep workers on payroll," the Senators maintained that cutting hours equates to a reduction in pay rates and benefits, which relief funds recipients are prohibited from doing under the law. The lawmakers asked the airlines to reverse their decision. They also asked questions about the airlines' compliance with other provisions of the CARES Act, and whether they are consulting with workers and labor unions about changes in employee hours or benefits. The senators asked for a response to their inquiry by June 3.

A sixth person was charged yesterday with fraud related to the PPP and the Economic Injury Disaster Loan (EIDL) program. Like some others charged with PPP-related fraud earlier this month, this businessman sought PPP loans to pay payroll for hundreds of non-existing employees. According to the US Attorney's Office for the Southern District of New York, the businessman applied to the SBA and at least five banks for loans under the PPP and EIDL. Additionally, the government alleges that he fraudulently told a COVID-19 test kit manufacturer and a medical equipment supplier that his company represented New York State and the Governor in procuring these items.

The Inspector General of the Department of the Interior issued a flash report, highlighting lessons learned from previous work that are applicable to CARES Act oversight. The agency received US$756 million under the CARES Act. According to the report, companies lose about 5% of their revenue each year to fraud; that means an estimated US$37.8 million of the department's CARES Act funds could be vulnerable to fraud. To combat this potential risk, the report detailed steps the department can take to minimize fraud, including: ensuring the use of the appropriate award vehicle; maximizing competition in the source selection process; ensuring that background research on and risk assessments of potential recipients are done; monitoring documentation and the use of funds by recipients; and reviewing recipients' performance and financial reports.

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