Tiber Creek Group | *September 2022*

SUMMER RECAP

For the updated Tiber Creek Group Midterm 2022 Midterm Outlook, please click here.

Despite narrow majorities in the House and the Senate, and many observers predicting gridlock and limited legislative action, the summer proved to be one of the more productive legislative sessions in recent memory. However, Congress has a significant amount of work left to do, including must-do items like funding the government, health and tax extenders, and the annual defense bill, and possibly other high priority bills like antitrust legislation and Electoral Count Act reform (read our Fall Outlook memo here).

RECONCILIATION

On November 18, 2021, the House passed its version of the Build Back Better Act (BBBA) under the budget reconciliation process, but just a month later, on December 19, Senator Joe Manchin (D-WV) announced he would not support the bill, citing concerns about various provisions as well as the bill's potential impact on inflation. This announcement set off months of quiet negotiations between Senators Manchin and Majority Leader Chuck Schumer (D-NY) over what Senator Manchin could support. By early summer, it appeared Senate Democrats would proceed with a much smaller bill addressing prescription drug pricing reform and deficit reduction. However, Senator Manchin and Leader Schumer continued to negotiate, and on July 27, Senator Manchin announced his support for a broader bill addressing prescription drug pricing reform, tax policy changes, an extension of Affordable Care Act (ACA) subsidies, support for clean energy and climate change provisions, and deficit reduction. The resulting legislation, renamed the Inflation Reduction Act (IRA), includes $300 billion in deficit reduction, $369 billion in energy and climate spending, and ACA subsidy extensions, in addition to being paid for through a combination of savings from prescription drug pricing provisions and tax reforms totaling $737 billion. The Senate passed the bill on August 7, with all Democrats voting for the bill and all Republicans opposing it; Vice President Kamala Harris broke the tie. The House took up the Senate-passed legislation on August 12 by a vote of 220 to 207, also along party lines. President Biden signed the bill into law on August 16, with a public signing celebration scheduled at the White House on September 13. Below, we review enactment dates and various major provisions of the IRA.

TIMELINE OF IRA PROVISIONS

POLICY	EFFECTIVE DATE	DETAILS
Health		
ACA tax credits	1/1/2021	Enhanced ACA subsidies remain available through 2025
Prescription drug inflation rebates	1/1/2023	Rebates meant to control price increases in Medicare
Free vaccines in Medicare	1/1/2023	Free vaccines in Medicare
$35 Insulin cap for Medicare	1/1/2023	Insulin co-pays in Medicare capped at $35/month
Medicare Part D redesign	1/1/2024	Seniors' drug costs in Medicare are capped at $2,000 starting in 2025, with more limited cost reductions in 2024
Prescription drug negotiations	1/1/2026	Process begins in 2023, but not fully implemented until 2026
Clean Energy		
Clean electricity credits	Enactment	Credits for companies to invest in clean tech
Residential efficiency/electrification	Enactment	Consumers can get credits/rebates for solar panels and home efficiency improvements
Electric vehicle credits	Enactment	Consumers purchasing qualifying EVs may receive credits
Clean energy manufacturing credits	1/1/2023	Credits for companies to manufacture clean energy products
Clean energy accelerator and R&D	Within 6 months	Programs for deployment, R&D, and supply chains to begin this year, with first grants within 6 months after enactment
Tax		
Corporate minimum tax	1/1/2023	Interim guidance expected shortly
Stock buyback tax	1/1/2023	Buybacks discouraged relative to investments/dividends
IRS enforcement	Enactment	Funding to initiate improvements to customer service

Energy and Climate

The IRA makes the largest climate and energy investments – $369 billion – in history and sets the United States on the path for 40 percent greenhouse gas reductions by 2030, close to President Biden's goal of 50 percent by 2030.

The focus of the IRA for these provisions is to achieve the following: 1) increase domestic production and deployment of clean energy and clean energy jobs; 2) lower energy prices for Americans; 3) lower carbon emissions; 4) focus on the energy transition from fossil fuels to clean energy with investments in disadvantaged communities and displaced workforces; 5) create resilient rural communities; 6) enhance energy security; and 7) advance U.S. clean energy export markets.

To advance these goals, the IRA includes the extension and creation of clean energy tax provisions and incentives for consumers and businesses, including the following: investment tax credits (ITC) and production tax credits (PTC) with a 10-year horizon to supercharge existing and new technologies and meet goals such as domestic advanced manufacturing; fuel tax credits, including clean, sustainable aviation, renewable and biodiesel fuels; vehicle incentives for new and previously owned clean vehicles, including electric vehicles (EVs), plug-in hybrids, and hydrogen fuel cell; carbon reduction and carbon management; residential and commercial energy efficiency measures; incentives for innovation in energy intensive industries; methane reduction; funding of national labs; off-shore wind and oil and gas entities; environmental and climate justice block grants; permitting; clean energy financing; and agriculture and forestry to help rural communities.

Many of these provisions include higher percentage incentives for meeting certain requirements such as prevailing wage, domestic content, siting, and other criteria specific to the credit. While a big push was made to include direct pay for all tax provisions, only the following were made eligible: Clean Hydrogen Credit, 45Q Credit, and Advanced Manufacturing Credit. The direct pay option is generally limited to certain tax exempt and governmental entities. The rest of the technologies may be able to utilize a "transferability" mechanism. This includes an option to transfer most credits to another taxpayer.

What's next? The IRA is a large and complex piece of legislation. Companies, consumers, and all eligible recipients alike will be awaiting guidance, including Internal Revenue Service (IRS) regulations. Eligible entities also will have to prepare to transition to the emissions-based, "tech-neutral" approach to tax credits crafted by Finance Committee Chairman Ron Wyden (D-OR). Lastly, the IRA deal was announced alongside an agreement between President Biden, Leader Schumer, Senator Manchin, and Speaker Nancy Pelosi (D-CA) to pass comprehensive permitting reform before the end of the fiscal year. It remains to be seen if permitting legislation actually comes together.

Healthcare

The IRA includes several provisions proponents argue will lower healthcare costs by extending the ACA's enhanced premium tax credits and by changing the way Medicare reimburses for prescription drugs.

According to the Congressional Budget Office (CBO), the IRA will raise nearly $300 billion from drug pricing changes, including nearly $100 billion from allowing the U.S. Department of Health and Human Services (HHS) to negotiate the price of some prescription drugs in Medicare, effective in

2026. While the IRA limits the negotiated price to Medicare, open questions remain about whether this has implications for the commercial and Medicaid markets – also known as 'spillover.'

In addition to Medicare negotiation, the IRA requires drug manufacturers to pay a rebate on drugs if their price increase exceeds inflation. The IRA also makes several changes to the Medicare Part D program. Beginning in 2025, it creates a $2,000 out-of-pocket cap for seniors paid for by increasing manufacturer liability. Additionally, the IRA limits monthly out-of-pocket costs for insulin to $35 for individuals on Medicare beginning in 2023.

The IRA further delayed implementation of the Trump Administration's rebate rule until 2032. The rule would eliminate the anti-kickback 'safe harbor' protections for prescription drug rebates negotiated between drug manufactures and pharmacy benefit managers. According to CBO, delaying implementation of the rebate rule saves $122 billion.

Finally, the IRA also extends by three years the ACA expanded premium tax credits originally passed as part of the American Rescue Plan Act (ARPA). As background, ARPA extended the premium tax credits for two years until December 31, 2022, making them both more generous and expanding them to additional lower-income beneficiaries whose incomes fall beyond the 400 percent federal poverty level ($27,750 for a family of four). Under the IRA, these expanded tax credits will now expire on December 31, 2025.

Now that the IRA has been enacted, HHS must begin the arduous process of issuing regulations to implement the law. Given the impact the law will have on stakeholders across the health sector, we expect them to undertake a significant effort to influence regulatory decisions moving forward.

Tax

The final version of the measure strongly resembles the initial proposal as outlined in the unexpected joint statement released by Senators Schumer and Manchin on July 27.

Much of the $700+ billion revenue raised by the legislation comes from an imposed 15 percent book-minimum tax which takes effect on January 1, 2023. This minimum tax is imposed on corporations reporting an average of $1 billion in adjusted financial statement income over a three-year period (which includes the current tax year). Guidance and rulemaking from the Treasury Department on a variety of open questions related to implementation and compliance is expected to be released within a relatively short timeframe. Importantly, this is distinct from a global minimum tax, which remains on Treasury's international tax agenda at the Organisation for Economic Co-operation and Development (OECD).

Another significant component of the bill's revenue comes from increased IRS funding, which – on paper – spends $45+ billion in enforcement (within a total $80 billion in new funding) to bring in an estimated more than $200 billion in revenue over the next 10 years. Republicans will spend a significant amount of time over the coming year claiming this provision violates the President's pledge the bill will not raise taxes on families earning less than $400,000. IRS Commissioner Rettig, however, penned a letter shortly before the bill was signed into law pledging the agency would not increase "audit scrutiny on small businesses or middle-income Americans," specifically on households earning less than $400,000 per year.

In last-minute negotiations, two provisions were added – one by amendment – which may have significant impact on a few sectors. First, to secure the support of Senator Kyrsten Sinema (D-AZ), provisions were added to limit the scope of the book-minimum tax to exclude certain entities which are a part of a controlled group, with the intent of exempting certain portfolio companies held by private equity from the tax. To offset the cost of this exclusion, an amendment was adopted which extends Sec. 461(l) (excess business loss limitation applying to pass-through entities) through 2028. Of note, this provision initially was adopted as a part of the Tax Cuts and Jobs Act (TCJA) through 2025 and extended through 2026 in the ARPA.

While there are a handful of other tax-related provisions contained within the legislation, a new excise tax on stock buybacks has received considerable attention. Initially included in a previous version of the House-passed BBBA, this 1 percent excise tax on the fair market value of shares repurchased by a "covered corporation" applies to tax years beginning in 2023 and is estimated to raise $74 billion. A "covered corporation" is, essentially, any domestic corporation whose shares are traded on an exchange regulated by the Securities and Exchange Commission (SEC).

While most of the focus has been on provisions within the bill itself, it is also important to note several items of interest were NOT included in the measure as enacted.

Specifically,

- **State and Local Taxes:** no change from prior law. The SALT caps enacted under TCJA – limiting deductibility of state and local taxes to $10,000 – remain unchanged (but expire in 2025).
- **TCJA tweaks:** two provisions from TCJA took effect this year, and another is slated to go into effect next year.
    1. Certain research and development (R&D) expenses under Section 174 previously had been deducted in the current year, but beginning January 1, 2022, are now amortized over several years; while there remains bipartisan support for maintaining the "current year" status (and it was included in the House-passed BBBA), the IRA did not include any changes to Section 174.
    2. TCJA created a limit on net interest expense of 30 percent of earnings before interest, taxes, depreciation, and amortization (EBITDA), with an even narrower limitation beginning January 1, 2022, of 30 percent of earnings before interest and taxes (EBIT). The IRA maintained this EBITDA to EBIT transition.
    3. Next tax year initiates TCJA's phaseout of bonus depreciation, beginning with a reduction to 80 percent on January 1, 2023; the IRA kept this phaseout in place.

All of the above provisions, perhaps with the exception of SALT cap changes, remain viable candidates for end-of-year negotiations. That said, considering the possibility of a change in party leadership in either or both chambers, it is important to note any provision within the IRA becomes a potential savings or pay-for in any future revenue negotiation. For instance, a tax credit extended or created for a part or whole of the ten-year budget window under the IRA could be narrowed or eliminated altogether in a future revenue measure (for instance, the 461(l)-provision referenced above), the most immediate of which is likely to come in 2023 during debate over increasing the federal debt ceiling.

CHIPS

After nearly two years, several name changes and multiple drafts, President Biden signed the CHIPS and Science Act into law on August 9. The $280 billion bipartisan package aims to bolster domestic semiconductor manufacturing and R&D to increase U.S. competitiveness and ease supply chain pressures.

The package includes $50 billion for the CHIPS for America Fund grant program, as well as a 25 percent tax credit for investments in semiconductor manufacturing and tool manufacturing. Collectively, these programs, as well as a boost in funding for the National Science Foundation (NSF), seek to incentivize domestic manufacturing, R&D, and workforce development. Among other items, the CHIPS and Science Act authorizes $10 billion for 20 regional technology hubs across the country to enhance regional economic development in technology, innovation, and manufacturing sectors, in addition to providing $1.5 billion to promote and deploy O-RAN technology.

On August 25, President Biden signed an Executive Order (EO) to start the CHIPS and Science Act implementation process. The EO establishes a 16-member interagency steering council led by Co-Chairs National Economic Council (NEC) Director Brian Deese, National Security Advisor (NSA) Jake Sullivan, and Acting Director of the Office of Science and Technology Policy (OSTP) Alondra Nelson. The EO establishes six primary priorities to guide implementation across the federal government, including protecting taxpayer dollars; meeting economic and national security needs; ensuring long-term leadership in the sector; strengthening and expanding regional manufacturing and innovation clusters; catalyzing private sector investment; and generating benefits for a broad range of stakeholders and communities. We expect additional implementation announcements in the coming weeks from the Department of Commerce and its dedicated website: www.CHIPS.gov.

GUN REFORM

Almost immediately after two tragic mass shootings in May 2022, at a Topps supermarket on May 14 in Buffalo, NY, and ten days later at the Robb Elementary School in Uvalde, TX, the House and Senate commenced committee and floor proceedings to consider and pass gun safety and mental health legislation. Within a month and three days of the Uvalde tragedy, Congress passed and transmitted the most comprehensive piece of bipartisan gun control legislation in more than two decades to the President for his signature. On June 25, 2022, President Biden signed the Bipartisan Safer Communities Act (BSCA) into law.

The BSCA contains hundreds of reforms to current gun safety laws. The new law, among other provisions, clarifies definitions determining what it means to be engaged in the sale of firearms; expands background checks for individuals under 21 purchasing firearms; and further criminalizes arms trafficking and 'straw purchases' of firearms. The BSCA also provides $11 billion for mental health services, particularly within schools and for pediatric mental health services; $750 million in funding incentives to states to enact "red-flag" laws, implement mental health and crisis intervention programs, including extreme risk protection orders extending sufficient due process; another $250 million for community-based violence prevention initiatives; and financial support for mental health courts, drug courts, and veterans courts. The BSCA also partially closes an exception to firearms eligibility purchasing regulations, including the "boyfriend loophole." So-called "red-flag" laws generally would allow states to confiscate guns from those whom a court has determined is a significant danger to themselves or to others.

In addition to raising public awareness about the details and scope of the new law, some gun control supporters are urging states to utilize newly authorized BSCA funds available to implement their own red flag laws. As of 2021, 19 States and the District of Columbia had enacted some form of red-flag laws. These laws differ from each other as to specific details and the degree to which they are utilized.

OCEAN SHIPPING REFORM ACT

On June 16, 2022, President Biden signed into law the Ocean Shipping Reform Act, a bipartisan bill aimed at mitigating supply chain issues resulting from rising shipping fees, denial of American cargo, and port and intermodal congestion due to increased demand for imported goods.

The bill expands the Federal Maritime Commission's authority to self-initiate investigations of ocean carriers and apply enforcement measures where necessary; prohibit carriers from unreasonably denying U.S. exports; and require ocean carriers to report on the volume of empty containers, among other key provisions.

In late July, the Federal Maritime Commission outlined several steps the Commission has already taken to implement the bill and indicated it is on track to issue final regulations by December 2022.

PACT ACT

In March, the House initially passed the Honoring our Promise to Address Comprehensive Toxics Act of 2022, or the PACT Act, 256-174. Named in honor of Sergeant First Class Heath Robison, a decorated combat medic who died from a rare form of lung cancer, the PACT Act aims to deliver benefits to the more than 5 million veterans estimated to be impacted by toxic exposures, such as burn pots, Agent Orange, and other toxic exposures during Vietnam, the Gulf War, and post-9/11 eras. After some back-and-forth between the chambers over the summer, both agreed to an amended version of the legislation, which President Biden signed into law on August 10.

NATO ACCESSION TREATIES

Last month, the Senate ratified NATO accession treaties for Sweden and Finland. The August 3 vote (95-1) showed there is overwhelming bipartisan support for continuing to strengthen NATO and pushing back against Russian aggression.

CONCLUSION

After a productive summer, a long agenda awaits Congress upon return from the August work period, including health and tax extenders, the annual defense authorization bill, as well as legislation to fund the government. For our Fall Outlook memo, please click here.