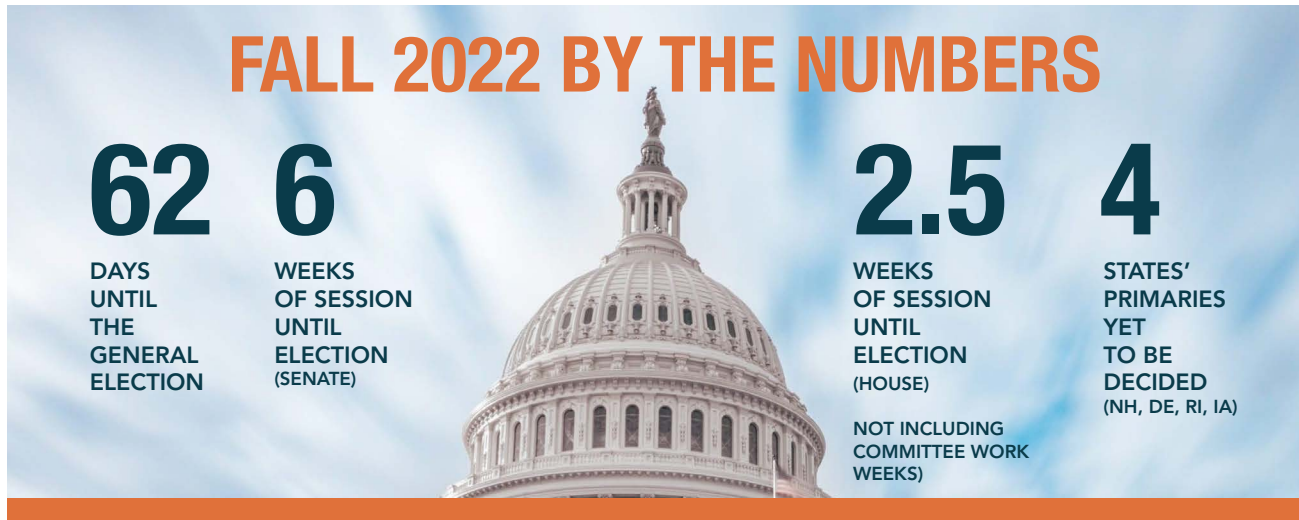


FALL OUTLOOK

For the updated Tiber Creek Group Midterm 2022 Midterm Outlook, please click [here](#).



As Congress returns from the August work period ([read our Summer Recap memo here](#)), a must-do agenda awaits, and it includes familiar items, as follows: annual appropriations, the National Defense Authorization Act (NDAA), and health and tax-related extenders. While several legislative proposals appear poised for action in the limited window before the election and the post-election Lamé Duck period, the outcome of the midterm elections will have an impact on the scope of the Lamé Duck session.

NDAA

In mid-July, after filtering through hundreds of amendments and hours of debate, the House passed H.R. 7900, the NDAA for Fiscal Year 2023 (FY23), by a vote of 329 to 101. The Senate Armed Services Committee (SASC) passed its version in June. However, given the busy Senate agenda, it is far from certain the Senate will vote on its version of the NDAA this upcoming work period. In fact, there is a high probability that the SASC version will not be considered on the Floor given other competing legislative priorities, particularly the continuing resolution (CR).

It is more likely that Committee leaders will follow the same process they used last year, by introducing a draft compromise bill outside of the formal conference process. The House and Senate would then vote on the compromise legislation sometime in December before the end of the 117th Congress.

APPROPRIATIONS

After the House passed six appropriations bills, the majority seems to have hit a wall with five out of the six remaining bills stalled over seemingly unresolvable issues.

Meanwhile, the Senate posted all 12 of its appropriations bills on July 28, however, Senate Appropriations Committee Chairman Patrick Leahy (D-VT) made clear the Committee would not proceed to mark up any of the bills. Notably, the Senate bills are more bipartisan than the House bills, and the defense allocation in the Senate bills better reflects the authorized levels in the House and Senate NDAA legislation mentioned earlier. Addressing the defense allocation sooner rather than later should allow for a smoother process for budget negotiators.

We expect leaders to reach a topline budget agreement sometime after the election. The early posting of the Senate bills also affords staff more time to compile conference notes and begin preliminary conversations with their House counterparts when there is an agreement on a topline allocation.

Additionally, congressional and committee leadership clearly stated that, absent a topline budget agreement, Congress must pass a continuing resolution at the end of September. Currently, the House plans to take up a CR the week of September 12 with funding extended until perhaps as late as December 16. We expect the CR to be relatively clean but it could include some emergency funding for Ukraine and/or disasters.

Moreover, on September 2, the Biden Administration sent a request to the Hill to pass a \$47 billion supplemental which would provide \$22.4 billion in funding for next generation COVID vaccines and treatments, \$4.5 billion to respond to the monkeypox virus, \$13.7 billion for Ukraine and \$6.5 billion for natural disasters including the recent floods in Kentucky. This follows a \$1.1 billion request from the Administration regarding arms sales to Taiwan. It remains to be seen how much of the Administration's funding request will be enacted and it's important to note, that following reconciliation, adding additional items onto the CR will be more difficult than in years past.

Finally, a \$21 billion emergency COVID supplemental was included in the release of the 12 appropriations bills, reflecting the Administration's initial request, but it ultimately failed in the spring due to offset disputes. We expect COVID funding could be included in an omnibus at the end of the year.

PERMITTING LEGISLATION

As part of the negotiations over the Inflation Reduction Act, Leader Schumer agreed to allow for consideration of a permitting reform package being put together by Senator Manchin. While the final legislation has not been released to date, components of the bill likely will contain reforms to the National Environmental Policy Act (NEPA) and the Clean Water Act, as well as clarifications on Federal Energy Regulatory Commission (FERC) jurisdiction and numerous other items. Many of the provisions traditionally have been supported by moderate Democrats and Republicans. However, in the wake of the use of reconciliation to pass the IRA, some Republicans have made it clear they will not support the permitting package either as a stand-alone bill or attached to a must-pass bill like the continuing resolution. Additionally, numerous progressive Democrats in the House and the Senate may object.

ELECTION REFORM

The Senate is making steady progress on reforms to the Electoral Count Act (ECA), another item which may make it to the President's desk by year-end. A bipartisan group of 18 senators, led by Senators Susan Collins (R-ME) and Joe Manchin (D-WV), introduced the Electoral Count Reform and Presidential Transition Improvement Act (ECRA) in July. Both Leader Schumer and Minority Leader Mitch McConnell (R-KY) have signaled support for ECA reform. The ECRA would modernize the Electoral Count Act of 1887 to ensure that electoral votes are tallied accurately.

Specifically, the ECRA would clarify the state government official who is authorized to submit the

state's electors to Congress; provide limited expedited judicial review of a state's certificate of electors; clarify the role of the Vice President in relation to the Electoral College; raise the threshold to one-fifth of Members of Congress and Senators for objecting to electors; and clarify that a state may move Election Day only in the case of "extraordinary and catastrophic" events. The Senate Rules Committee is expected to mark up the ECRA in September.

The House is considering introduction of similar legislation as well as other approaches to ECA reform. Ultimately, we believe the House and Senate will coalesce around the Senate's bipartisan approach, giving this particular bill the best chance of being signed into law this year. The ECRA is limited to ECA reform and does not address broader election reforms Democrats have been pushing for in H.R. 1, the For the People Act. This approach is necessary to build consensus between the parties on a highly contentious issue.

FOOD AND DRUG ADMINISTRATION (FDA) USER FEES

Congress is currently negotiating an agreement to reauthorize the Prescription Drug User Fee Act (PDUFA), the Generic Drug User Fee Act (GDUFA), the Biosimilar User Fee Act (BsUFA), and Medical Device User Fee Act (MDUFA) before their expiration on September 30. Earlier this year the House successfully passed (H.R. 7667), the Food and Drug Amendments of 2022, with a 392 to 28 vote. The Senate Committee on Health, Education, Labor, and Pensions (HELP) successfully marked up its version of the User Fee legislations (S.4348), the FDA Safety and Landmark Advancements (FDASLA) Act, in June.

Progress on an agreement has been delayed as lawmakers negotiate differences in policy riders included in the House and Senate packages. The Senate bill gives the FDA additional authorities to regulate cosmetics, dietary supplements, and laboratory-developed tests. The House passed legislation would strengthen the accelerated approval pathway, address clinical trial diversity, improve generic drug competition, and strengthen supply chains through accountability in FDA inspection programs. HELP Committee Ranking Member Richard Burr (R-NC) has been critical of the FDA throughout user fee negotiation, and in July, offered a "clean" reauthorization without additional riders as an option. Senator Burr's objections have resulted in HELP Committee Chair Patty Murray (D-WA), House Energy and Commerce Committee Chairman Frank Pallone (D-NJ), and Ranking Member Cathy McMorris Rodgers (R-WA) pressing for a compromise agreement.

FDA Commissioner Robert Califf has stated the FDA has enough carryover funds to maintain normal operations and to continue to pay employees through early November. But if Congress is unable to reach an agreement or provide reasonable assurances to the FDA by the September 30 deadline, the agency will likely begin sending layoff notices to user fee-funded staff. The latest understanding is the committees resumed negotiations over the August recess and are currently identifying mutually agreeable policies from the House and Senate versions with the goal of reaching an agreement in time for the legislation to be included as a rider on the government funding extension at the end of September.

UKRAINE

Ukraine's First Lady, Olena Zelenska, addressed Congress before the August recess, detailing the loss of life of Ukrainians and asked Congress for more weapons, specifically air defense systems. Relatedly, Defense Secretary Lloyd Austin has shared the United States' plans to provide four additional rocket launchers to Ukraine. However, a letter from six bipartisan senators to the Biden Administration asks to expedite High Mobility Artillery Rocket System (HIMARS) delivery to Ukraine.

On a related note, the Senate passed S.Res. 623 by unanimous consent on July 27, which calls on

the Secretary of State to designate the Russian Federation as a state sponsor of terrorism. Senators Richard Blumenthal (D-CT) and Lindsey Graham (R-SC) have advocated for passing a bill issuing the designation regardless of whether the Administration supports it.

On August 8, the Biden Administration announced the largest installment yet for a security/weapons package for Ukraine. The package, which totals \$1 billion, brings the commitment from the United States to roughly \$9.8 billion.

One of the top concerns from both sides of the aisle is the lack of oversight of funds and weapons being used for assistance to Ukraine. The Pentagon is being asked by representatives and senators alike for accountability and details of the handling of the \$40 billion package Congress recently approved. Failure of the Pentagon to be transparent could result in a more difficult path forward for the next potential package for Ukraine.

PRIVACY, TECHNOLOGY, AND ANTITRUST

In the upcoming work periods, Congress will continue its work on issues related to the technology sector. This week, the Senate Judiciary Committee is planning to mark up the Journalism Competition and Preservation Act (JCPA), which provides smaller media companies the legal authority to collectively bargain with larger tech platforms; we expect the House Judiciary Committee to mark up its version of the bill the week after. During this work period, the Senate Judiciary Committee is also planning on holding a hearing with testimony from the recent "Twitter whistleblower," as well as an antitrust oversight hearing with the Department of Justice (DOJ) and Federal Trade Commission (FTC) testifying. In addition, both Senator Amy Klobuchar (D-MN) and Rep. David Cicilline (D-RI), among others, will continue to press for Floor consideration of legislation addressing large tech platform self-preferencing behavior and app store misconduct.

On the privacy front, the Energy and Commerce Committee is still working on building consensus on issues raised by Members during its markup of legislation creating a national data privacy standard. On September 2 however, Speaker Pelosi issued a statement iterating that the California privacy standard is the strongest and noted that they will continue to work with the Energy and Commerce Committee to make sure California's data privacy standard is not undermined.

Meanwhile, at the agency level, the FTC is moving forward with a rulemaking on data privacy standards, which likely will take several years to implement. The federal work on privacy is all happening against the backdrop of California implementing its own privacy law on January 1, 2023, which could very likely end up being the default national standard. The comment period for the FTC's privacy rulemaking, the Trade Regulation Rule on Commercial Surveillance and Data Security, closes on October 21, 2022. Additionally, the FTC will hold a public forum on September 8 on the proposed rulemaking to "explore a wide range of concerns that the FTC is seeking comment on through its ANPR."

RETIREMENT LEGISLATION

With strong bipartisan bicameral support, the odds of Congress passing retirement-related legislation is higher than most non- "must-pass" pieces of legislation.

The House passed its version of so-called SECURE 2.0 - the Securing a Strong Retirement Act of 2022 (HR 2954) - by a vote of 414 to 5 in late March and the Senate HELP and Finance Committees unanimously reported out a similar series of bills (the Enhancing Retirement Now Act, or EARN Act) in late June. It appears unlikely the Senate's version of SECURE 2.0 will be considered on the Senate

floor; rather, negotiators from the House Ways and Means and Education and Labor Committees and Senate HELP and Finance Committees will work with House and Senate leadership to meld the bills into one final product. While it is possible that new provisions could be added to the final bill, there is strong support to maintain the core provisions in the House and Senate bills and for limiting the bill's cost to \$45 billion over 10 years.

FINANCIAL SERVICES

When the House and Senate return in September, the Financial Services and Banking Committees are expected to hold two major sets of hearings that will likely garner significant press and industry attention. Securities and Exchange Commission (SEC) Chair Gary Gensler is expected to appear before the Senate Banking Committee the week of September 12. Additionally, the Senate Banking Committee will hold an insurance hearing covering a general overview of the industry with government witnesses testifying. The Banking and Financial Services Committees will also hold hearings the week of September 19, featuring CEOs from the nation's largest banks as part of Chairman Sherrod Brown's (D-OH) and Chair Maxine Waters' (D-CA) efforts to annually review trends and developments in the banking industry.

In addition, the House Financial Services Committee's September schedule includes a hearing on accounting and auditing standards in the 21st Century; a hearing on alternative payment systems, including their national security impacts; a hearing to review diversity and inclusion at the largest insurance companies; and a hearing on the impact of wildfire risk on the insurance market. As of now, the Committee does not have any markups scheduled for September.

According to Chairwoman Waters, a markup of stablecoin legislation may be added to the calendar "at a date and time TBD." The stablecoin legislation is currently being negotiated by Chairwoman Waters and Ranking Member Patrick McHenry (R-NC). The bill would be focused on a payment stablecoin rather than an algorithmic stablecoin, making the Federal Reserve the primary regulator versus the Commodity Futures Trading Commission (CFTC) or SEC. Since there is no markup scheduled, Chairwoman Waters and Ranking Member McHenry have a more flexible timeline to continue negotiations on the specifics of the bill.

TAX EXTENDERS

Congress' annual must-do list of tax extenders continues to shrink given the lack of desire to continue many Covid-related provisions as well as enactment of the IRA, which extended several popular energy-related provisions. There remains a chance some provisions which expired and/or are expiring could be included in year-end negotiations, specifically:

- 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.
- 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.
- 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.

HEALTH CARE EXTENDERS

Multiple deadlines will drive the healthcare debate this fall. In addition to FDA user fees, Congress needs to extend the Medicare-dependent Hospital Program and Low-volume Hospital payment adjustment prior to October 1. Hospitals are backing the ARCH Act introduced by Senators Bob Casey (D-PA) and Chuck Grassley (R-IA) and Representatives Carol Miller (R-WV) and Terri Sewell (D-AL), which reauthorizes both programs for five years. These programs were last reauthorized as part of the Bipartisan Budget Act of 2018 at a total cost of approximately \$2.7 billion. It remains to be seen if another long-term reauthorization is possible or if negotiators will settle for something shorter. Regardless of the duration, it seems likely these will end up riding along with a government funding extension at the end of September.

Later in the year, Congress will face a handful of other deadlines. On December 13, Puerto Rico's Medicaid matching rate will drop from 76 percent to 55 percent and the other territories will drop from 83 percent to 55 percent. Most of the focus likely will be on Puerto Rico, given 90 percent of Medicaid beneficiaries in the territories reside on the island. These negotiations will be further complicated by recent controversial guidance from the Biden Administration that guaranteed Puerto Rico and the other territories a permanent Medicaid allotment.

Another area of focus at the end of the year will be on the 4 percent across-the-board Medicare cut set to take effect as a result of the statutory "pay-go" requirements triggered by the enactment of ARPA in 2021. The cuts were delayed in 2022, but they will take effect in 2023 absent congressional action. Additionally, Congress passed a 3 percent increase to the Medicare Physician Fee Schedule for 2022 to offset some changes to newly adopted evaluation and management code values and we expect providers will seek a further extension of that increase before the end of the year. Providers will also be focused on extending the Medicare Access and Chip Reauthorization Act's (MACRA) 5 percent bonus payment for participating in an Advanced Alternative Payment Model (AAPM), which also expires at the end of year. It seems likely all these issues, and possibly others, will seek to ride along with an expected omnibus government funding deal in the post-election lame duck session of Congress. Lastly, now that the 2 percent Medicare sequester is fully back in place, it seems unlikely Congress will revisit that issue at this time.

Since all these issues, and others that will come up, add up to billions of dollars in new spending, it is important to be mindful of offsets Congress might be considering. For example, the \$7 billion in the Medicare Improvement Fund (MIF) is the most likely offset. In addition, Republicans may push for relaxing the COVID Public Health Emergency's (PHE) Medicaid Maintenance of Effort (MOE) and/or repeal of the Medicaid guidance related to Puerto Rico, but it could be difficult to reach a bipartisan deal on either of these issues.

MARRIAGE

Majority Leader Schumer has committed to bringing the Respect for Marriage Act to a vote, though he has not set out a definitive timeline. The bill would nullify the 1996 Defense of Marriage Act and recognizes interracial marriage and same-sex marriage; the House passed the bill by a vote of 267 to 157.

CHINA/TAIWAN

With tensions between China and Taiwan growing, the Senate Foreign Relations Committee is expected to markup the Taiwan Policy Act (S. 4428) introduced by Chairman Bob Menendez (D-NJ) and Senator Graham on September 14. Numerous amendments are expected to be filed and a manager's package will be incorporated. This bill would authorize \$4.5 billion in military support for Taiwan

over the next 4 years, help bolster Taiwan’s standing in international organizations and designate Taiwan as a Major Non-NATO Ally. This bill is expected to garner significant support and could pass stand-alone or as part of a year-end bill unless the Biden Administration voices serious opposition.

KIGALI TREATY

The Senate also may take up the Kigali Treaty by the end of the year. This treaty would make the US a party to an international agreement to reduce the use and production of Hydrofluorocarbons (HFCs). All Senate Democrats are likely to vote for the treaty and there are expected to be at least 17 Republican votes in favor. Still, it remains unclear if Leader Schumer will schedule floor time for this treaty.

NOMINATIONS

Nearly 100 Executive Branch nominees currently are pending on the Senate Executive Calendar. Majority Leader Schumer will attempt to confirm as many of these as possible in the next work period, with the priority being nominees to the Federal bench; there are currently 20 judicial nominees on the calendar, with two slated to be considered this week.

HOUSE SCHEDULE

As a note on the House schedule, there has been some discussion that once an agreement is reached on a CR, the House could recess shortly thereafter. Therefore, should the chambers agree on a CR through December 16 with the House moving the legislation next week as expected, the House may potentially adjourn for the last two weeks of September.

KEY DATES

- September 30 – Government funding deadline
- September 30 – TANF, NFIP, FDA User Fees, Medicare extenders, and the Maternal, Infant, and Early Childhood Home Visiting Program expire
- November 8 – Election Day
- November 14 – New Member Orientation (week of)
- December 6 – Georgia Runoff (if necessary)
- December 10 – Louisiana Runoff (if necessary)
- December 13 – Medicaid Assistance for Territories expires
- December 31 – NDAA deadline
- December 31 – Expiration of key tax provisions under TCJA and other extenders
- December 31 – Multiple Medicare extenders expire
- January 3 – 118th Congress convenes
- Early to mid-2023 – Debt ceiling limit reached

CONCLUSION

With the midterms quickly approaching, Congress will seek to clear several must-pass pieces of legislation against a dynamic political backdrop. The next few weeks paired with the outcome of the elections will prove critical in setting the agenda for the Lame Duck session which inevitably awaits.

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