



TIBER CREEK GROUP

OUTLOOK FOR THE LAME DUCK SESSION OF THE 117th CONGRESS

October 25, 2022

MEMORANDUM FOR OUR CLIENTS

FROM: Tiber Creek Group

DATE: October 25, 2022

SUBJECT: Outlook for the Lame Duck Session

Congress will return for the Lame Duck session with an ambitious to-do list, which no doubt will be influenced by the outcome of the upcoming midterm elections. Both the House and Senate are scheduled to reconvene on November 14th and immediately will turn their attention to addressing two “must-pass” items: appropriations and the National Defense Authorization Act (NDAA).

Upon reconvening in November, appropriators will need to reach agreement on a topline FY 2023 spending number so they can complete work on FY 23 appropriations bills before the current Continuing Resolution (CR) expires on December 16th. In the event Republicans flip one or both chambers in the midterm elections, House Republicans likely will call for another CR through the beginning of the 118th Congress when they would have the ability to better shape the contours of a government funding package. However, currently, only Republican Leader Kevin McCarthy (R-CA) and the House Freedom Caucus are arguing for that approach. Senate Republican Leader Mitch McConnell (R-KY) prefers to “clear the decks” and negotiate an omnibus spending bill that would fund the government through September 30, 2023. A year-end spending package could serve as a vehicle for additional items, such as an extension of the National Flood Insurance Program (NFIP), disaster assistance, Ukraine funding, healthcare extenders, tax extenders, and COVID/Monkeypox emergency appropriations, among other items.

It remains to be seen whether permitting reform will move in the Lame Duck after Senator Joe Manchin (D-WV) and Democratic leaders failed to secure the 60 votes necessary to include it in the September CR. The current permitting proposal would reform the National Environmental Policy Act (NEPA) and the Clean Water Act, as well as clarify Federal Energy Regulatory Commission (FERC) jurisdiction, among other items. At this time, it is unclear whether a compromise bill could be successfully negotiated and whether such a compromise would move as part of a year-end spending package.

Retirement legislation also may be included as part of year-end negotiations given the bipartisan, bicameral support for moving a retirement package in the Lame Duck. The House passed its version of SECURE 2.0 – the Securing a Strong Retirement Act of 2022 (H.R. 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 American Retirement Now (EARN) Act) in late June. Negotiators from the House Ways and Means and Education and Labor Committees as well as Senate HELP and Finance Committees are now working with

House and Senate leadership to combine the bills into one final product with the intention of moving it in the *Lame Duck*.

There remains a chance some tax provisions which expired and/or are expiring also could be included in year-end negotiations, specifically: the amortization of certain research and development (R&D) expenses under Section 174; the phaseout of bonus depreciation included in the Tax Cuts and Jobs Act (TCJA); and provisions to address the limit on net interest expense of 30 percent of earnings before interest, taxes, depreciation, and amortization (EBITDA) to earnings before interest and taxes (EBIT). If Republicans take control of one or both chambers, tax extenders are another issue that could be impacted, as there may be little appetite to negotiate with Democrats if Republicans believe they could secure a better deal in the 118th Congress.

Multiple deadlines affecting the Medicare and Medicaid programs also may try to hitch a ride on a year-end spending deal. Congress will focus on a Medicare cut triggered by the statutory “paygo” requirements, physician payment cuts, alternative payment model bonuses, and other Medicare payment issues. The increased federal medical assistance percentage (FMAP) for U.S. territories will expire in December along with first-dollar coverage of telehealth services in commercial plans and Medicare payment adjustments affecting low-volume hospitals, Medicare-dependent hospitals, ground ambulances, and the Home Health Prospective Payment System. Additionally, Congress may consider legislation related to prior authorization in Medicare Advantage plans, coverage of dialysis services, mental health, and telehealth. There is also bipartisan interest in revisiting the Food and Drug Administration (FDA) reforms left out of the recently passed CR. However, it is important to note – particularly with the Medicare and Medicaid policy changes – it could be difficult to find offsets to pay for this ambitious agenda, which could lead to shorter term extensions and/or punting issues into the 118th Congress.

In addition to negotiations over the scope and contours of a year-end funding package, both chambers are expected to take up the annual NDAA in the *Lame Duck*. While the House passed its version of NDAA in July by a vote of 329 to 101, the Senate proceeded to consideration of its version of the bill on October 11 and is expected to hold a final vote when the Senate reconvenes in November. As part of Senate consideration, hundreds of amendments have been filed – including non-defense amendments – as Senators look for an opportunity to attach their priorities to one of the last moving vehicles of the year. Many of these filed amendments will fall away as part of the negotiation, but some, with the required bipartisan support, will likely be accepted. Looking ahead, House and Senate staff already have begun to preconference their respective versions of NDAA and are expected to introduce a compromise bill in the *Lame Duck*, bypassing the formal conference process.

Another possible *Lame Duck* agenda item is consideration of legislation to modernize the Electoral Count Act (ECA) of 1887. Specifically, ECA reform legislation would: clarify the state government official 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 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 House passed its version of ECA reform, the Presidential Election Reform Act (H.R. 8873), by a largely partisan vote of 229 to 203 on September 21st. The Senate Rules Committee reported out its own, bipartisan version, the Electoral Count Reform and Presidential Transition Improvement Act (ECRA) (S. 4573), on September 27th by a vote of 14 to 1. Notably, both Majority Leader Chuck Schumer (D-NY) and Republican Leader Mitch McConnell voted for the ECRA in committee and have cosponsored the legislation. Although there are differences between the House and Senate versions, the Senate bill is likely to prevail. Given the bipartisan, bicameral support for ECRA, it stands a fairly good chance of making its way to the President’s desk in the *Lame Duck*.

The *Lame Duck* agenda also may include legislation codifying Deferred Action for Childhood Arrivals (DACA), after an October 6th decision by the Fifth Circuit upheld the District Court decision that ruled the DACA program is unlawful. However, the Court stayed its decision and remanded the case to the District Court to reconsider in light of the new DACA rule issued by the Administration. For now, current DACA recipients can renew their status, but the program continues to be closed to new applicants. The District Court and Fifth Circuit, and ultimately the Supreme Court, are widely expected to rule DACA unlawful after consideration of the new DACA rule. Given the uncertainty surrounding the future of the program, Congress may face pressure during the *Lame Duck* to provide DACA recipients with legal protections from deportation and continued work authorization. Such legislation likely would be paired with border security measures and potentially numerous other immigration-related issues, such as the Farm Workforce Modernization Act, green cards for workers in STEM fields, and H-2B reform. However, without the threat of imminent loss of legal protections and given highly contentious border security issues, it will be difficult for the Senate to reach a deal. In the event an immigration deal does come together, it likely would be included as part of a year-end spending package.

Majority Leader Schumer also has committed to bringing the Respect for Marriage Act (H.R. 8404), which would nullify the 1996 Defense of Marriage Act and recognize interracial and same-sex marriages, for a vote in the *Lame Duck*. The House passed the bill by a vote of 267 to 157 in July. Notably, the bill currently lacks the requisite Republican support for passage in the Senate.

The election outcome will prove critical in setting the agenda for the *Lame Duck* session when Congress returns in November. While Congress has established an ambitious legislative wish list for the *Lame Duck*, the size and make-up of the incoming House and Senate majorities will largely determine which items – notwithstanding “must pass” bills such as government funding and NDAA – are considered.

Tiber Creek Group is one of the largest independent government relations firms in Washington. We have years of bipartisan engagement at the highest levels of all branches of government - including presidential transitions - regardless of party. In Congress, we've been in the middle of the most important legislative initiatives – from the Dodd-Frank Act to the Affordable Care Act to the Tax Cuts and Jobs Act to the more recent Inflation Reduction Act, CHIPS and Science Act and Infrastructure Investment and Jobs Act – serving on both sides of the aisle in crucial roles. Our track record proves the difference - we work hard to ensure our clients are engaged early in the process, as long-term collaboration with Washington policymakers is key to success.