November 13, 2020

Washington Update

This Week In Congress

Senate – The Senate confirmed several judicial nominees. The Senate Appropriations Committee released draft text of its Fiscal Year (FY) 2021 funding bills.

House – The House was in recess and met in pro forma session

Next Week In Congress

Senate – The Senate and the House are expected to hold negotiations on legislation to fund the government beyond the current December 11, 2020 expiration date. The Senate and House may also go to conference committee on the National Defense Authorization Act and the Water Resources Development Act. The Senate will continue its consideration of judicial nominations and may take up the nomination of Judy Shelton to be a Federal Reserve Board Governor.

House – The House will consider the National Apprenticeship Act of 2020 (H.R. 8294).

TAX

Non-Residential State Taxes on the Rise as the Pandemic Continue

Key Point:

- *As many employees work from home in states different than where they work, and state budget deficits grow, states grapple with the tax consequences.*

Many employees forced into remote work by the COVID-19 pandemic have given up long commutes across state lines, and this issue has grown as a state tax issue. Commutes like those from New York to New Jersey, New Jersey to Pennsylvania, and Virginia to Maryland are prime examples. As work from home continues to evolve so does the situation surrounding state taxation. As employees continue to work from home many have begun to argue they should not be liable for wage income taxes in states where they no longer work or are residents, however many states experiencing significant revenue shortfalls seem intent on taxing employees who typically work in their state. Tax treatment for non-resident workers can vary. In states like New York and Massachusetts the amount of revenue generated from neighboring states' residents is significant. This question that could end up as a state versus state constitutional challenge in the Supreme Court — New Hampshire is hoping that the Court takes on its case against Massachusetts, which has put in place a temporary measure to continue taxing the wages of workers who reside in New Hampshire.

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One recent proposal from Senate Republicans, which is embodied in the Remote and Mobile Worker Relief Act (S.3995), would set a threshold at 30 days of physical presence of the employee in a state to trigger sufficient nexus for an obligation of tax to that state and, for 2020, pushes that threshold out to 90 days. As the pandemic continues and state budget deficits grow, the policy debate will become ever more important, and continue to take on national importance. The language on state nexus was included in a package introduced to the Senate on June 18, 2020, and Senate Republicans continue to push to include the language in a broader COVID relief package.

Democrats and Republicans Await January Runoffs to See Impact on Biden Administration Tax Proposals

Key Points:

- *President-Elect Biden has proposed a number of tax increases during the campaign including raising the corporate tax rate.*
- *With the balance of power up in the air as the Senate seats in Georgia advance to a runoff, many of those aggressive tax proposals are likely to be scaled-back in a 50-50 Senate or rejected by a possible Republican majority in the Senate.*

During the campaign, President-Elect Biden made a number of aggressive tax promises including repealing the Tax Cuts and Jobs Act (TCJA) on day one of his administration. Whether he can follow through on his proposals is in doubt following the Senate races in November, and again in January. On corporate taxes, during the campaign President-Elect Biden proposed raising the corporate tax rate from 21% to 28%, a proposal criticized by many prominent Republicans including President Trump. He also said he would impose a new 15% corporate minimum tax based on book income for companies with more than $100 million in annual income, and allow for NOL (Net Operating Losses) carry forwards. President-Elect Biden also floated the idea of implementing an offshoring penalty of 10% (producing offshore for sales into U.S.), which would apply to the underlying income tax and result in an additional 2.8% tax assuming a 28% rate, for a 30.8% total corporate rate on that income).

On the individual tax front, President-Elect Biden promised to raise the top income tax rate to its previous high of 39.6%, and cap itemized deductions for those making over $400,000 at 28%. On capital gains, President-Elect Biden committed to taxing capital gains at the top rate of 39.6% for taxpayers making over $1,000,000 a year. He also proposed eliminating carried interest.

If Republicans keep a majority in the Senate in January following the Georgia runoff elections, the Biden team will be facing a Congress which will be very unlikely to pass tax increases or repeals of TCJA measures. If there is a narrowly divided 50-50 Senate, with a Vice President Harris casting the deciding vote for Democratic control, the Biden Administration agenda will still likely be hampered by moderate Democrats unwilling to take aggressive steps on raising taxes. All-in-all, the election appears to have pointed to a middle road tax policy that is much less aggressive than candidate Biden proposed.

Incoming Biden Administration May Consider Regulatory Actions to Push International Tax Policies

Key Point:

- *A Biden Administration may seek to alter GILTI and other regulatory regimes, as an aggressive legislative agenda seems less likely with the balance of power in the Senate still at issue.*

In the height of campaigning in September, the Biden campaign announced measures designed to discourage offshoring — in some cases supplementing details President-Elect Biden had provided on his proposed business tax changes. For example, the Biden tax plan would increase the Global Intangible Low-Taxed Income (GILTI) rate to 21 percent, move the minimum tax to a country-by-country determination, and end the exemption for deemed returns under 10 percent of a qualified business asset investment. However, as the Senate will be either very narrowly controlled by Democrats or controlled by Republicans, it is unlikely an aggressive GILTI proposal or other international proposals from the Biden tax agenda would be enacted, leading to speculation that Treasury may undertake regulatory changes as one way to move the issue forward in a Biden Administration. Short of legislative action, which could prove difficult if the Republicans maintain a Senate majority, a Biden Treasury could revisit recently issued regulations. The possible regulatory changes could include a litany of recent TCJA international tax regulations, including foreign tax credit regulations (T.D. 9922, REG-101657-20) which also implicate GILTI, as well as regulations attempting to limit the fallout from the TCJA's downward attribution repeal (T.D. 9908, REG-110059-20), which had the effect of creating far more CFCs than before, and regulations allowing for the waiver of deductions to escape the BEAT (T.D. 9910). Whichever path the incoming Administration hopes to pursue will most likely depend on how the balance of power in the Senate concludes in January after the Georgia runoff elections, but in any case aggressive policy is not likely to move through a narrowly divided Congress.

FINANCIAL SERVICES

SEC Finalizes Rules to Harmonize the Exempt Offering Framework

Key Points:

- *The SEC approved a final rule to promote capital formation by harmonizing the exempt offering framework.*
- *Commissioners Herren Lee and Crenshaw opposed the rule, arguing that it fails to adequately protect retail investors.*

On November 2, the Securities and Exchange Commission (SEC) approved a final rule on "Facilitating Capital Formation and Expanding Investment Opportunities by Streamlining Access to Capital for Entrepreneurs." The final rule was approved by a 3-2 vote, with Commissioners Allison Herren Lee and Caroline Crenshaw voting nay. The SEC issued a press release, which included a fact sheet explaining the rule. The fact sheet states:

> The Securities and Exchange Commission today amended the rules under the Securities Act of 1933 to simplify, harmonize, and improve certain aspects of the exempt offering framework to promote capital formation while preserving or enhancing important investor protections.

The amendments generally:

- Establish more clearly, in one broadly applicable rule, the ability of issuers to move from one exemption to another;
- increase the offering limits for Regulation A, Regulation Crowdfunding, and Rule 504 offerings, and revise certain individual investment limits;
- set clear and consistent rules governing certain offering communications, including permitting certain "test-the-waters" and "demo day" activities; and
- harmonize certain disclosure and eligibility requirements and bad actor disqualification provisions.

Commissioners Herren Lee and Crenshaw opposed the rule, arguing that it fails to adequately protect retail investors. In a statement, Crenshaw stated:

> Today's rule significantly expands private market access to investors without first putting in place appropriate investor protections. As a result, issuers will be able to conduct larger and more frequent private offerings with fewer restrictions. These offerings will be made to a pool of investors with varying levels of risk tolerance, information access, investment experience and bargaining power. There are tradeoffs in that decision. Unfortunately, today's release fails to engage in any substantive way with the crucial threshold question of whether those tradeoffs are – or even can be – balanced in a way that adequately protects retail investors. Not only that, the rule fails to address the fact that in the private markets, the rich and well-connected typically have better access to the most promising companies, while retail investors get the leftovers – too often, unfortunately, the losers.

The rule is effective 60 days after publication in the *Federal Register*.

SEC Commissioner Allison Herren Lee Speaks on Climate Risk and Financial Regulation

Key Point:

- *Commissioner Herren Lee called for the SEC to work with market participants to create a standardized climate risk disclosure regime for financial institutions.*

On November 5, SEC Commissioner Allison Herren Lee gave a speech entitled "Playing the Long Game: The Intersection of Climate Change Risk and Financial Regulation." Lee discussed the SEC's role in addressing climate change, stating:

> Broadly, we must ensure that we work with fellow regulators to understand and, where appropriate, address systemic risks to our economy posed by climate change. To assess systemic risk, we need complete, accurate, and reliable information about those risks. That starts with public company disclosure and financial firm reporting, and extends into our oversight of various fiduciaries and others. Investors also need this information so they can protect their investments and drive capital toward meeting their goals of a sustainable economy.

Commissioner Lee explained that policy should be informed by accurate data, and added that "those steering the capital that drives our economy need it." She spoke of the "extraordinary demand we see in markets today for climate-related disclosure", but she added that there is "demand for ESG-related information more broadly."

Lee emphasized the need for standardized disclosures by financial institutions, in order to ensure the availability of accurate and reliable data. She explained:

> The SEC should work with market participants toward a disclosure regime specifically tailored to ensure that financial institutions produce standardized, comparable, and reliable disclosure of their exposure to climate risks, including not just direct, but also indirect, greenhouse gas emissions associated with the financing they provide, referred to as Scope 3 emissions. There is a concentration of risk in the financial sector that is not readily ascertainable except through Scope 3 emission disclosures. I'm encouraged to see that at least one major U.S. bank has now joined its international counterparts in voluntarily committing to Scope 3 emissions disclosures. Again, however, some level of regulatory involvement is needed to achieve standardized, comparable, and reliable disclosure in this critical area.

Senate Banking, House Financial Services Committees Hold Financial Regulator Oversight Hearings

Key Points:

- *Senate Banking Committee Chairman Mike Crapo (R-ID) praised the regulators for their response to the pandemic and urged them to provide additional flexibility.*
- *Ranking Member Sherrod Brown (D-OH) criticized the regulators and accused them of favoring the interests of Wall Street over those of consumers.*
- *House Financial Services Committee Chairwoman Maxine Waters (D-CA) said she will push to undo many of the regulatory changes implemented under President Trump.*

This week, the Senate Banking Committee and the House Financial Services Committee held hearings on the oversight of financial regulators. Federal Reserve Vice Chairman for Supervision Randal Quarles, Federal Deposit Insurance Corporation (FDIC) Chair Jelena McWilliams, Acting Comptroller of the Currency Brian Brooks, and National Credit Union Administration (NCUA) Chairman Rodney Hood testified at both hearings.

Vice Chairman Quarles stated that the pandemic created stress in the market, which led to a "retreat to cash," which forced the Federal Reserve to intervene in the market. He stated that banking organizations were an important shelter from financial distress. He said the Federal Reserve took actions to ensure banks could serve in this role without threatening their safety and soundness. He stated that the Federal Reserve's action has helped to calm the market, noting that the economy is recovering faster than expected. Quarles asserted that the Federal Reserve remains committed to using its full range of tools for as long as needed. He said a durable financial recovery demands that banks lend actively, reflect gains and losses accurately, withstand unexpected shocks, and help customers adapt. He stated that the Federal Reserve has taken a range of actions to encourage banks to aid customers, as well as to allow banks to participate in emergency lending programs. He emphasized that bank liquidity and capital remain high and have actually increased at the largest banks over the course of the pandemic. He asserted that banks are well-positioned to serve as a bulwark against broader financial and economic distress.

Acting Comptroller Brooks stated that he is also optimistic about the development of new products, suggesting that this progress will benefit consumers and businesses and give them greater choice and autonomy. He said the Office of the Comptroller of the Currency (OCC) believes that consumers, businesses, and the economy are best served when this innovation occurs within the banking system and "the system is allowed to evolve as consumer preferences evolve." He stated that the banking system is strictly regulated and supervised, suggesting that innovation will be safer in a supervised environment. He noted that over the last decade a large portion of payment processing has migrated from the banking sector to less-regulated shadow banks. He stated that the OCC remains committed to encouraging responsible efforts to develop innovation in safe, sound, and fair ways. Chair McWilliams said beginning in March the financial regulators began taking action to provide stability in financial markets, including targeted regulatory and supervisory action to support lending and other financial intermediation. She said they will continue to pursue further action as appropriate.

Senate Banking Committee Chairman Mike Crapo (R-ID) praised the regulators for their responsiveness during the pandemic, urging them to continue to provide regulatory flexibility to financial institutions to support economic recovery. In particular, he called on the regulators to ensure small and mid-sized banks do not face additional regulatory scrutiny based on asset thresholds due to their participation in the Paycheck Protection Program (PPP) and other recovery facilities.

Senate Banking Committee Ranking Member Sherrod Brown (D-OH) harshly criticized the regulators, asserting that they have put Wall Street ahead of consumers. Brown stressed the need to take action to combat climate change and expressed support for breaking up the biggest banks. Senator Brian Schatz (D-HI) noted that New York charter banks are including climate change factors in risk management frameworks. Quarles responded that he is following this and supports this decision. Schatz responded that the Federal Reserve had observed the "Network for the Greening of the Financial Systems" and asked when it would join as a member in a more formal manner. Quarles responded that the Federal Reserve has requested membership, and he was not certain when it might be granted but thought it might occur before the spring.

House Financial Services Committee Chairwoman Maxine Waters (D-CA) stated America rejected President Trump's dangerous policies last week, and Americans have now given President Elect Biden a mandate to revoke actions of the Trump Administration. She expressed hope all members of Congress will be able to come together and remove harmful policies of the Trump Administration. She urged regulators to focus aid on the pandemic response, and she expressed concern over rules issued by regulators unrelated to the COVID-19 pandemic. She noted regulators have sought to remove the Volcker rule and other prudential requirements for large banks. She emphasized she will be working with the Biden Administration to roll back these actions. Ranking Member Patrick McHenry (R-NC) responded that the election outcome is not a vote for "House progressives." He stressed the Committee must work to have a serious conversation on financial stability during the pandemic. He thanked the regulators for their decisive efforts during the pandemic to provide certainty and clarity for the financial system. He encouraged regulators to continue to examine regulations in their purview to increase stability in the financial services sector. He noted efforts of the OCC to bring greater definitions to bank partnerships for fintech firms have been crucial to small businesses around the nation. He stressed regulators must not stand in the way of business creativity and innovation, and he urged the majority to come together and find bipartisan solutions to challenges facing the nation.

Senate Appropriations Committee Proposes $1.894 Billion Budget for the SEC

Key Point:

- *The Senate Appropriations Committee proposal would fund the SEC at $1.894 billion, which is slightly lower than the $1.92 billion level passed by the House.*

On November 11, the Senate Appropriations Committee released its Fiscal Year (FY) 2021 spending bills. Under the committee's FY2021 Financial Services and General Government bill the SEC would receive an operating budget of $1.894 billion for FY 2021, which is below the $1.92 billion passed by the House earlier in the year. The Senate proposal matches the President's budget request and is $80 million above the FY2020 enacted level.

The bill would also fund the Commodity Futures Trading Commission (CFTC) at $304 million for FY2021, which is the same as in the House-passed bill and $20 million more than the FY2020 enacted level.

Upcoming Hearings and Meetings

November 17
SEC Oversight: The Senate Banking Committee will hold a hearing on "Oversight of the Securities and Exchange Commission." SEC Chairman Jay Clayton will testify at the hearing.

November 18
CFPB Advisory Committees: The Consumer Financial Protection Bureau (CFPB) will hold a joint meeting of its Credit Union Advisory Council, Community Bank Advisory Council, and Consumer Advisory Board.

November 19
Pandemic Insurance: The House Financial Services Committee's Subcommittee on Housing, Community Development and Insurance will hold a hearing entitled, "Insuring against a Pandemic: Challenges and Solutions for Policyholders and Insurers."

November 20
CFPB Academic Research Council: The CFPB will hold a meeting of its Academic Research Council.

December 1
Asset Management Advisory Committee: The SEC will hold a meeting of its Asset Management Advisory Committee. The agenda for the meeting includes updates from the Private Investments Subcommittee, the ESG Subcommittee, and the Diversity & Inclusion Subcommittee, as well as a panel discussion on improving diversity and inclusion.

For more information about financial services issues you may email Joel Oswald or Alex Barcham.

HEALTH

Supreme Court Hears Oral Arguments in ACA Case

Key Points:
- *The U.S. Supreme Court heard oral arguments this week in the case commonly known as Texas v. Azar on the fate of the Affordable Care Act.*
- *According to legal analysts, questions from the Justice's suggest the law may survive.*

On November 10, the U.S. Supreme Court heard oral arguments in *California, et. al. v. Texas, et. al.* otherwise known as *Texas v. Azar* which considers whether the elimination of the individual mandate means the entire Affordable Care Act (ACA) must fall because it was so integral to the law.

Texas and other Republican states initially filed the case after Congress adjusted the penalty under the individual mandate from $695 to $0. The states argued that without the penalty for noncompliance, the mandate was unconstitutional and without the mandate, the other provisions of the ACA are invalid. At the District Court, the judge held the mandate was unconstitutional and threw out the entire ACA. The 5th Circuit upheld the ruling that the mandate was unconstitutional but remanded the case back to the lower court to further consider whether the ACA was invalid. Before the case could be reconsidered, California and the Democrat-led House of Representatives petitioned the Supreme Court for review.

Questions from the Justices focused primarily on two issues: standing and severability. On standing, the Court considered whether those challenging the mandate have actually suffered injury since there is no penalty for not complying with the individual mandate. The attorneys for the Democratic-led states asserted the mandate does not create a legal command or injury for noncompliance. The Republican-led states argued the mandate increases their costs due to more people applying for Medicaid to comply with the mandate. On severability, both Chief Justice Roberts and Justice Kavanaugh made statements that would suggest their support for leaving the rest of the ACA intact noting Congress did not attempt to repeal the rest of the law when it reduced the penalty.

According to legal experts, there are three different paths the Court could take: (1) find the plaintiffs lack standing, throwing out the entire case; (2) find the individual mandate severable from the rest of the ACA; or (3) affirm the District Court ruling that the mandate is unconstitutional and so integral to the ACA that the rest of the law falls with it.

A decision in the case is not expected until sometime next year.

Biden Forms Coronavirus Task Force, Transition Teams

Key Points:
- *President-elect Joe Biden announced the members of his coronavirus task force this week made up of well-known public health officials.*
- *The Biden transition has also announced the members of the initial team coordinating with the Department of Health and Human Services.*

On November 9, President-elect Joe Biden announced the formation of a COVID-19 Advisory Board made up for former government health officials and major figures in academics and medicine. Biden has emphasized COVID-19 will be apriority for the incoming administration and noted he will begin consulting with state and local officials on how to prevent the spread of the virus and address the economy.

The Board will be co-chaired by David Kessler, former Food and Drug Administration Commissioner, Marcella Nunez-Smith, Yale Associate Dean for Health Equity Research, and Vivek Murthy, former Surgeon General. The members of the Board include several former government officials from the Obama and Clinton Administrations along with experts in immunization and public health. Notably, the Board include Dr. Rick Bright, former director of the Biomedical Advanced Research and Development Authority (BARDA) who resigned from that position after raising concerns about the Trump Administration's handling of the virus response.

In addition, Biden has announced the members of his agency review team for the Department of Health and Human Services (HHS). The members of the review team work to ensure a smooth transition between administrations. Currently the team is made up only of volunteers who are serving in their personal capacity. The HHS team is led by Chiquita Brooks-LaSure, most recently with Manatt, Phelps and Phillips, LLP. The team largely consists of individuals from the public section including state government, universities, and think tanks.

Upcoming Hearings and Meetings

November 16
Outlook: The Bipartisan Policy Center will hold an event on "The Election's Impact on Health Care."

November 17-18
Outlook: The Alliance for Health Policy for host a "Post Election Symposium."

November 18
Diabetes: The Hill will host a briefing on "Diabetes & The Future of Healthcare Reform."

For more information about healthcare issues you may email or call Nicole Ruzinski Bertsch or George Olsen at 202-659-8201.

TRADE

EU to Impose Tariffs on $4 Billion Worth of U.S. Goods

Key Points:

- *European Union (EU) member states approved the imposition of tariffs on $4 billion worth of U.S. goods in World Trade Organization (WTO)-approved retaliation for U.S. subsidies to Boeing.*
- *The EU will impose a 15 percent tariff on aircraft, including Boeing jets, and a 25 percent tariff on some U.S. industrial and agricultural goods including fish, cheese, spirits, cotton, and tractors, among others.*

On Monday, European Union (EU) member states approved the imposition of tariffs on $4 billion worth of U.S. goods in World Trade Organization (WTO)-approved retaliation for U.S. subsidies to Boeing. The EU will impose a 15 percent tariff on aircraft, including Boeing jets, and a 25 percent tariff on some U.S. industrial and agricultural goods including fish, cheese, spirits, cotton, and tractors, among others. The tariffs will go into effect on Tuesday.

The U.S. and EU had exchanged proposals for a negotiated solution but disagree on whether or not each side is complying with WTO rulings. The U.S. has argued that there is no basis for the EU tariffs because the State of Washington removed a tax break for Boeing that was the basis for the EU WTO action.

Commerce Department Announces Preliminary Countervailing Duties in Response to Vietnam's Currency Practices

Key Points:

- *The U.S. Department of Commerce has preliminarily determined that tire producers from Vietnam received unfair subsidies.*
- *An Office of the U.S. Trade Representative (USTR) investigation into Vietnam's currency practices could lead them to impose tariffs on a wide range of goods from Vietnam.*

The U.S. Department of Commerce has preliminarily determined that tire producers from Vietnam received unfair subsidies. In June, the Commerce Department launched antidumping and countervailing duty (CVD) investigations into passenger vehicle and light truck tires from Vietnam, South Korea, Taiwan, and Thailand.

The Commerce Department decision is significant because it determined that Vietnam's undervalued currency is among the subsidies primarily countervailed. This is the first time that the Commerce Department has ever made an affirmative CVD determination regarding a foreign currency with a unitary exchange rate.

This Commerce Department announcement follows a recent decision by the Office of the U.S. Trade Representative (USTR) to investigate Vietnam's currency practices. If USTR determines that Vietnam is undervaluing its currency, it could lead them to impose tariffs on a wide range of goods from Vietnam.

President-Elect Joe Biden Emphasizes with UK the Importance of 1998 Good Friday Peace Agreement

Key Points:

- *On a call with British Prime Minister Boris Johnson, President-elect Joe Biden emphasized the importance of protecting Northern Ireland's peace deal and open border in the Brexit process.*
- *Free Trade Agreement negotiations between the U.S. and U.K. are expected to continue in the coming weeks.*

On a call with British Prime Minister Boris Johnson, President-elect Joe Biden emphasized the importance of protecting Northern Ireland's peace deal in the Brexit process. The 1998 Good Friday

Peace Agreement created an open border between Northern Ireland, which is part of the United Kingdom (U.K.), and Ireland, which is part of the EU., but Johnson has put forward legislation that would break the Northern Ireland protocol of the Brexit divorce treaty that seeks to avoid a physical customs border between the British province and EU-member Ireland.

Separately, free trade agreement negotiations between the U.S. and U.K. are expected to continue in the coming weeks.

European Union May Delay Digital Tax

Key Points:

- *European Union (EU) members may be willing to delay a digital tax on technology companies to allow for more time for global talks.*

According to a draft statement, European Union (EU) members may be willing to delay a digital tax on technology companies to allow for more time for global talks. The document is a first draft of formal "Council conclusions" to come from a meeting of EU finance ministers in December. The draft "asks the Commission to contribute to the preparatory work in the Council on the way forward at EU level in case there is no international consensus by mid-2021."

A group of mostly northern EU members have expressed support for the delay so the Organisation for Economic Co-operation and Development (OECD) can have more time for negotiations. France, who has already pledged to begin collecting its own digital tax in December, has been looking for other EU members who support stronger language in the document moving ahead.

For more information about trade issues you may email or call Christopher Hatcher at 202-659-8201. Ryan Sigmon contributed to this section.

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