Washington Update

November 4, 2022

This Week In Congress

Senate – The Senate was in recess and met in pro forma sessions.

House – The House was in recess and met in pro forma sessions.

Next Week In Congress

Senate – The Senate is in recess and will meet in pro forma sessions. Senate Majority Leader Schumer announced that the next roll call vote will occur on Monday, November 14, when the Senate will resume consideration of the National Defense Authorization Act (NDAA) and judicial nominations.

House – The House is in recess and will reconvene on November 14.

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TAX

Debt Ceiling May Be a Key Issue After the Midterm Election

Key Points:

- *Some Republicans have expressed a plan to use the debt limit to extract budget or spending restraint next year.*
- *Democrats have recently raised the idea of using the budget reconciliation process in the upcoming lame-duck session to raise the debt limit if Republicans retake one or both chambers in the midterms, but it would be procedurally difficult and seems to have low odds.*

Addressing the debt ceiling is an issue that has garnered greater attention recently. Some Republicans have expressed support for using the debt limit to extract budget or spending restraint concessions next year. However, some Republicans have expressed concern about using the debt ceiling as a bargaining chip, noting the issue does not always lead to the leverage others hope. If Republicans take control of the House, House Minority Leader Kevin McCarthy (R-CA) will likely become the Speaker of the House. Leader McCarthy has expressed concern about raising the debt limit without Congress changing its current spending behavior. However, Leader McCarthy has also said he understands voters want to see accomplishments and he does not want to get bogged down in a funding fight early in his tenure.

Facing possible changes in control in the House and Senate, Democrats recently have reportedly discussed using the budget reconciliation process in the upcoming lame-duck session to raise the debt limit so they can take the issue off the table before Republicans can use a debt ceiling bill to try to extract spending cuts. Under the budget reconciliation process, lawmakers are allowed to pass a bill to raise the debt ceiling by a simple majority; in this case, Democrats could raise the debt ceiling without any Republican support. However, Democrats would need to originate a new budget resolution for fiscal year 2023 with instructions to raise the debt limit by a fixed amount. The budget reconciliation process can be very time-consuming and would likely eat into the Senate floor time to confirm President Biden's outstanding nominees and other end-of-the-year policy priorities. A lame duck debt limit increase may be a discussion point, but at this stage seems to have low odds of occurring.

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Ways and Means Republicans Pushing TCJA Extension

Key Points:

- *On October 26, 2022, seven Ways and Means Committee Republicans held an 80-minute online webcast on making TCJA provisions permanent, a policy goal next Congress or in advance of 2026.*
- *Republicans describe the TCJA tax overhaul as laying the groundwork for the greatest U.S. economy ever, while Democrats label the TCJA as a giveaway to the wealthy and corporations.*

The Tax Cuts and Jobs Act (TCJA) remains a dividing issue between Republicans and Democrats. While Republicans describe the tax overhaul as laying the groundwork for the greatest U.S. economy ever, Democrats label it a giveaway to the wealthy and corporations. On October 26, 2022, seven Ways and Means Committee Republicans held an 80-minute online webcast on making TCJA provisions permanent. Without Congressional action, 23 provisions in TCJA are set to expire at the end of 2025, including most of the individual tax rates and related measures as well as 199A passthrough deduction. The Republicans on the Ways and Means Committee argue that allowing the TCJA provisions to expire will result in a significant tax hike on middle-class families and businesses. In practical terms, this issue is unlikely to be resolved until closer to the 2025 expiration, but the policy debate will occur next Congress and into the next Administration.

The Treasury and IRS Request Comments on Several More Aspects of the Inflation Reduction Act Tax Credits

Key Points:

- *The Treasury and IRS published three more notices saying they intend to issue guidance on four energy-related tax credits authorized through the Inflation Reduction Act (IRA).*
- *Guidance will be published after a 30-day comment period*

The Department of the Treasury and the Internal Revenue Service (IRS) last month published six notices seeking comments on aspects of the clean energy provisions in the Inflation Reduction Act (IRA).

This week the Treasury issued three more notices covering several more IRA energy tax credit issues. These notices cover:

- Notice 2022-56 requests comments related to the qualified commercial clean vehicles provisions (IRC 45W) and the alternative fuel vehicle refueling property (IRC 30C).

- [Notice 2022-57](#) requests comments related to the credit for carbon capture (IRC 45Q).
- [Notice 2022-58](#) requests comments related to the credit for the production of clean hydrogen (IRC 45V) and the clean fuel production credit (IRC 45Z).

Comments are requested by December 3, 2022; however, consideration will be given to any written comment submitted after December 3, 2022, if such consideration will not delay the issuance of guidance. Guidance is expected to be issued before January 1, 2023, when these credits go into effect.

Joint Committee on Taxation Provides Revenue and Macro Analysis on the Child Tax Credit, Issue Likely to Be Contested in Lame Duck

Key Points:

- *The Joint Committee on Taxation (JCT) reported the Democrats' 2021 Child Tax Credit policy, if made permanent, would cost taxpayers $1.4 trillion over the next decade.*
- *Democrats are planning to use the upcoming lame duck session of Congress to try once again to reinstate or expand the Child Tax Credit.*
- *Republicans have critiqued the Democrat's CTC expansion, arguing it effectively removed work requirements and turning the credit into a monthly stipend.*

The House Ways and Means Committee Republicans released a Joint Committee on Taxation (JCT) analysis of the macroeconomic effects of a proposal to extend and make permanent modifications to the Child Tax Credit (CTC). The analysis included a static revenue score as well as a macroeconomic score, including feedback effects. The JCT determined a permanent extension of the Democrats' 2021 Child Tax Credit policy would cost taxpayers $1.4 trillion over the next decade, about $113 billion more than a static revenue score, and reduce economic growth, business investment, and labor force participation while resulting in higher inflation.

This step came in reaction to broad Democratic support for some expansion or reinstatement of the 2021 version of the CTC. For example, the New Democrat Coalition penned a letter to House Democratic leaders requesting that they prioritize the enhanced CTC in any end-of-year package (as well as addressing R&D Amortization).

Top Republicans on the House Budget and Ways and Means panels published a press release arguing that the permanent extension of the Democrats' 2021 Child Tax Credit policy would cost taxpayers $1.4 trillion over the next decade, reduce economic growth, business investment, and labor force participation while resulting in higher inflation.

Republicans doubled the CTC in 2017 TCJA, but it is not fully refundable which means that an income from working is embedded in the policy of the CTC.

The issue of whether there will be a CTC expansion in lame duck is pivotal as to whether there will be a significant lame duck package, with many Democrats arguing no business tax relief should be enacted without some CTC changes, and Republicans resisting a CTC expansion that they argue Democrats themselves could not muster 50 votes for in the Senate in 2022.

For more information about tax issues you may email or call Christopher Hatcher at 202-659-8201.

FINANCIAL SERVICES

SEC considers Rules on Form N-PX and the Open-End Fund Liquidity Framework

Key Points:

- *The Commission adopted Rules to Form N-PX.*
- *The Commission proposed new amendments to the open-end fund liquidity framework.*

On November 2, the Securities and Exchange Commission (SEC) held an open meeting and adopted final rules to increase proxy voting disclosure by registered investment funds and require disclosure on how they vote proxies relating to executive compensation matters ("say-on-pay"). . The Commission also voted to propose rules relating to open-end fund liquidity risk framework and swing pricing, which is intended to better prepare open-end funds for stressed conditions and to mitigate the dilution of shareholders' interests.

The SEC originally adopted the requirement for registered funds to disclose their proxy votes on Form N-PX in 2003. SEC Chair Gary Gensler stated that the final rules will increase the consistency and usability of Form N-PX, which would enable investors to better understand how their shares are voted and fulfills a mandate from Congress requiring disclosure of say-on-pay executive compensation. He noted that based on feedback, the final rule reduced the number of categories on the form and streamlines the filing process. Gensler explained that the final rule also fulfills a mandate from the Dodd-Frank Act directing the SEC to require institutional investment managers to report votes on certain executive compensation matters ("say on pay"). Commissioner Hester Peirce criticized the rule, saying it claims to increase comparability of proxy voting data, but the groupings will fail because of the level of subjectivity involved in classifying each topic, leading to categorization discrepancies between funds. She stated that a clear declaration of fund voting and lending practices would cost less and be far more effective. Peirce also pointed to the "limited discussion" relating to the opportunity costs of recalling lent shares, noting concern from commenters that mandating disclosure of unrecalled securities without context will place pressure on managers to recall securities to avoid negative ESG ratings. She also stated that large fund managers are able to absorb additional costs, but smaller managers will be at a disadvantage. The final rules were approved by a vote of 3-2, with Commissioners Hester Peirce and Mark Uyeda voting no.

The SEC also voted to propose new amendments relating to open-end fund liquidity risk management and swing pricing. The proposed rule and form amendments would: (1) alter how open-end funds other than money market funds (MMF) and ETFs classify the liquidity of their investments and require a minimum amount of highly liquid assets of at least 10 percent of net assets; (2) require any open-end fund, other than an MMF or ETF, to use swing pricing and implement a hard close; and (3) provide for more frequent public reporting of fund information about funds' liquidity and use of swing pricing.

Chair Gensler stated that open-end funds have an underlying structural liquidity mismatch because they invest in securities across a range of liquidities, and expressed concern that when many investors redeem their shares in a fund at once, it can create issues for investor protection, capital markets, and the broader economy. He pointed to the onset of the COVID-19 pandemic as a reason for the proposal, and he claimed the proposal would lower systemic risk and bring investors greater transparency. Commissioner Mark Uyeda said the SEC previously adopted a rule mandating that funds institute liquidity risk management programs, but the proposal goes further. He argued that the proposal would dramatically alter how investors buy and sell fund shares, and he expressed concern that the proposals could potentially reduce investor choice and come with significant compliance and operational costs, which would ultimately be paid for by fund investors. He stated the SEC may be accelerating an existing trend where ETFs replace mutual funds as the low-cost choice of investors.

The Commission voted 3-2, with Commissioners Hester Peirce and Mark Uyeda voting no, to propose the amendments. The comment period deadline is 60 days after the date of the publication in the *Federal Register*.

Upcoming Hearings and Meetings

November 9

FDIC: The Federal Deposit Insurance Corporation's (FDIC's) Systemic Resolution Advisory Committee (SRAC) will hold an open meeting to provide advice and recommendations on a broad range of policy issues regarding the resolution of systemically important financial companies.

November 10

CFTC: The Commodity Futures Trading Commission (CFTC) will hold an open meeting to discuss two items: (1) the Notice of Proposed Rulemaking on Reporting and Information Requirements for Derivatives Clearing Organizations; and (2) the Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on behalf of Nonbank Swap Dealers subject to Regulation by the Mexican Comision Nacional Bancaria y de Valores.

For more information about financial services issues you may email Joel Oswald or Mahlet Makonnen.

ENERGY & ENVIRONMENT

Biden Opens Door to Windfall Profits Tax

Key Points:

- *On Monday, President Biden gave brief remarks criticizing energy companies for how they allocated their recent profits.*
- *The President suggested that if the companies fail to provide relief to gasoline consumers, he will work with Congress to enact a windfall profits tax.*
- *It would be challenging for congressional Democrats to advance such legislation in the remaining weeks before the end of the year.*

Biden Announcement: On October 31, President Biden spoke at the White House, and called on oil companies to "invest in America by increasing production and refining capacity…[and reducing] prices for consumers at the pump." He warned that if they do not take such action, "they're going to pay a higher tax on their excess profits and face other restrictions." Biden argued that it is "time for these companies to stop war profiteering, meet their responsibilities to this country, and give the American people a break and still do very well."

Congressional Reaction: Following Biden's statement, Senate Finance Committee Chairman Ron Wyden (D-OR) commented on Twitter: "My Taxing Big Oil Profiteering Act would end the perverse incentive helping Big Oil mug families at the pump here in Oregon & nationwide. Glad to see [President Biden] support that effort." As described in a press release, Wyden's bill (S. 4768) would:

- Impose a "21 percent additional tax on the excess profits of oil and gas companies with more than $1 billion in annual revenue";
- Calculate "excess profits…by subtracting a normal return–a 10 percent return on expenses–from current profits";
- Impose a "25 percent excise tax on stock that is repurchased by the corporation"; and
- Prohibit the use of Last In, First Out (LIFO) accounting for large oil companies.

House Energy and Commerce Committee Ranking Member Cathy McMorris Rodgers (R-WA) issued a statement warning that windfall profits tax legislation "would hurt American workers even more, further stifle production, and lead to higher energy prices."

Granholm Comments: On Thursday, Secretary of Energy Jennifer Granholm appeared on CNBC's Closing Bell to discuss the potential windfall profits tax legislation. She declared that the "President has seriously asked [oil companies to] return profits to consumers or put those profits to use in increasing production" and reinforced the conditional nature of the President's call for a windfall profits tax: "Before we go to Congress, we're asking [the oil companies] to consider your consumer". Granholm added that the President's "preference is that the companies take this on" without congressional action. When asked about the release of oil from the Strategic Petroleum Reserve (SPR), she replied, "We have just announced a plan to replenish that reserve…we have lots left."

Upcoming Hearings and Events

November 15

FERC Nomination: The Senate Energy and Natural Resources Committee may hold a hearing on the nomination of Federal Energy Regulatory Commission (FERC) Chairman Richard Glick to serve another five-year term.

November 15-16

Liquefied Natural Gas: The Pipeline and Hazardous Materials Safety Administration (PHMSA) will hold a "Liquefied Natural Gas (LNG) Research and Development (R&D) Public Meeting and Forum". The meeting will allow "pipeline stakeholders to discuss research gaps and challenges in the LNG industry…[and] serve as a venue for PHMSA, public interest groups, industry, academia, intergovernmental partners, and the public to collaborate on PHMSA's future R&D agenda."

November 17
FERC Meeting: The Federal Energy Regulatory Commission (FERC) will hold its monthly open meeting.

December 1
Carbon Management: The Department of Energy's Office of Fossil Energy and Carbon Management (FECM) will hold a "Carbon Management Day" webinar. The webinar will provide "updates on key initiatives, take a closer look into FECM-funded carbon management projects, and inform stakeholders on how to get involved."

December
National Petroleum Council: The National Petroleum Council (NPC) is expected to hold its 132nd meeting in December. The agenda will include three studies requested by Secretary of Energy Jennifer Granholm: "Deployment of low and zero carbon hydrogen energy at scale through the entire value chain" (request letter); "Reducing emissions of greenhouse gases (GHG) from the U.S. natural gas supply chain" (request letter); and "Short-term actions and transition strategies", which is requested to include "an analysis of the changing global crude supply and how it will positively and/or negatively impact U.S.-based producers, suppliers, and refiners…" (request letter).

For more information about energy and environment issues you may email or call Frank Vlossak at 202-659-8201. Updates on energy and environment issues are also available on twitter.

HEALTH

CMS Releases CY 2023 Medicare Physician Fee Schedule

Key Point:

- *The Centers for Medicare and Medicare Services released its annual update to the Medicare Physician Fee Schedule.*

The Centers for Medicare and Medicaid Services (CMS) has released its annual update to Medicare payment policies for Calendar Year (CY) 2023. The rule updates provider rates on the Medicare Physician Fee Schedule (PFS) and expands access to behavioral health and telehealth services. Provisions in the PFS go in effect on or after January 1, 2023.

The final rule updates the conversion factor for CY 2023 in order to comply with budget neutrality from $34.61 to $33.06. This also reflects the expiration of a statutory three percent payment increase. The rule also finalizes several technical changes for coding and documentation for Other E/M visits.

The final rule updates a number of policies related to telehealth services. It adds several services temporarily available for the duration of the public health emergency (PHE) to the Category 3 telehealth list, allowing those services to be delivered through CY 2023. The inclusion on the Category 3 list is intended to allow more time to gather data that would support the codes being added to the permanent telehealth list. CMS enacted changes in the final rule to conform with the Consolidated Appropriations Act, 2022 which extended several telehealth provisions for an additional 151 days after the end of the PHE such as originating site, certain services through audio-only telehealth, and allowing physical therapies, occupational therapists, speech-language pathologists, and audiologists to furnish telehealth.

To continue investments in behavioral health, the final rule adds an exception to the director supervision requirement to allow behavioral health services to be provide under the general supervision of a practitioners rather than direct supervision when the services are furnished by certain auxiliary personnel. To improve access to opioid treatment programs, CMS finalizes the proposal to permit use of audio-only communication to initiate treatment of buprenorphine in cases where audio-video is unavailable, and all other requirements are met. Periodic assessments through audio-only telehealth are also permitted through CY 2023 to the extent authorized by the Drug Enforcement Administration and the Substance Abuse and Mental Health Services Administration.

Read the full final rule here and the CMS fact sheet here.

For more information about health care issues you may email or call Nicole Ruzinski Bertsch at 202-659-8201.

CYBERSECURITY & PRIVACY

White House Outlines Chemical Sector Cybersecurity Requirements

Key Points:

- *On October 26, the White House announced an expansion of its Industrial Control System (ICS) Cybersecurity Initiative to the chemical industry.*
- *The White House issued a fact sheet describing the new initiative.*

The Biden Administration announced that it is expanding its Industrial Control Systems (ICS) Cybersecurity Initiative to the chemical sector. The Chemical Action Plan proposed would:

- "Focus on high-risk chemical facilities that present significant chemical release hazards with the ultimate goal of supporting enhanced ICS cybersecurity across the entire chemical sector;"
- "Drive information sharing and analytical coordination between the Federal Government and the chemical sector;"
- "Foster collaboration with the sector owners and operators to facilitate and encourage the deployment of appropriate technologies based on each chemical facility's own risk assessment and cybersecurity posture…; and,"
- "Support the continuity of chemical production critical to the national and economic security of the United States."

CISA Issues Cyber Performance Goal Rework

Key Points:

- *The Cybersecurity and Infrastructure Security Administration (CISA) issued updated cybersecurity performance goals (CPGs) for critical infrastructure companies after a previous version raised concerns.*
- *The previous version of the goals was considered overly prescriptive by industry groups and CISA promised to release sector-specific goals along with broader recommendations.*

In response to industry concerns, CISA updated the cybersecurity performance goals (CPGs) to develop voluntary baseline standards to help owners and operators across 16 critical infrastructure sectors. CISA explained the baseline set of goals is a benchmark for critical infrastructure operators and serves as a combination of recommended practices unique from other control frameworks. CISA emphasized that the CPGs are voluntary and not comprehensive. The agency also issued a checklist that does not "cover broader approaches to risk management" but is a guide to compliance with recommended goals. Industry groups expressed appreciation for the revised CPGs.

For more information about cybersecurity issues you may email Mahlet Makonnen or Frank Vlossak. Jackson Notes contributed to this section.

TRADE

Trade Package Possible but Not a Given for Lame Duck Session

Key Point:

- *Senate Finance Ranking Member Crapo (R-ID) and House Ways and Means Chair Neal (D-MA) agree that the lame duck session following the midterms may result in some year-end trade package.*

Ranking Member Crapo expressed support for trade provisions in a year-end tax extender bill. He highlighted the Trade Adjustment Assistance (TAA) program, which is typically extended as part of a new trade agreement negotiation or extension of Trade Promotion Authority. Democrats and Chairman Neal are keen to see TAA extended and potentially expanded, meaning that a trade package in lame duck may hinge on some agreement between the two sides over TAA. Republicans both in the House and Senate have indicated willingness to cut a separate deal on the Generalized System of Preferences (GSP) and the Miscellaneous Tariff Program (MTB). Action on tariffs, like reforms to Section 301 to create a formal exclusion process, seem less likely, but is a goal for some Republicans.

USTR Visits Europe to Discuss Electric Vehicle Tax Credits, Among Other Issues

Key Point:

- *U.S. Trade Representative (USTR) Tai visited Europe to dialogue with the newly created transatlantic task force to discuss EU concerns with U.S. domestic content and production requirements for the recently enacted electric vehicle (EV) tax credit, which was part of the Inflation Reduction Act (IRA).*

The recently passed Inflation Reduction Act (IRA) includes EV tax credits that could lead to a trade response from the EU, South Korea, China, and Russia. Germany and France are considering retaliatory actions targeted at the U.S. The IRA tax credit allows EVs assembled in North America to qualify for an $7,500 tax credit and went into effect immediately after the IRA was signed. Additional provisions on critical minerals and battery components will go into effect next year and tighten over coming years. The Department of Treasury (Treasury) should issue guidance by the end of the year, which could ease international trade tensions. USTR's readout of some of the meetings included discussions on the IRA, including the creation of a US-EU taskforce on the matter, aviation, Ukraine, and steel and aluminum overcapacity. European Commission Executive Vice President Valdis

Dombrovskis tweeted after the meeting with USTR Tai that it is "crucial that EU & U.S. stay on the same page as we face overlapping global challenges."

Preview of USTR Questionnaire for Public Comments as Part of Four-Year Review of China Section 301 Tariffs

Key Point:

- *The Office of the U.S. Trade Representative (USTR) released a preview of a questionnaire to inform the four-year review process of Section 301 tariffs applied against Chinese imports.*

The USTR shared a preview of a questionnaire as part of the ongoing review of Section 301 tariffs that apply to China's products brought into the U.S. The questionnaire is divided into three sets of questions: the first invites feedback at a macro or economy-wide level, the second set requests points of view from an industry or sector level, and the final set of questions seeks viewpoints from a tariff heading perspective; there are also opportunities for business confidential information to be submitted. No respondent is limited to a specific section.

The opportunity to comment will open November 15, 2022, and close by January 17, 2023, as per prior USTR announcements.

BIS Releases FAQs on Recently Announced Semiconductor and Supercomputer Export Controls

Key Point:

- *The Bureau of Industry and Security (BIS) released frequently asked questions (FAQs) regarding recent export controls on advanced computing and semiconductor manufacturing, supercomputer and semiconductor end use, and entity list modification.*

On October 28, BIS released FAQs to better detail various applications and externalities of the semiconductor and advanced computer manufacturing (advanced computing) export controls. The following questions and answers are summarized below.

- Treatment of Hong Kong as China, but Macao remains separate;
- Definitions of semiconductor fabrication facilities and what constitutes an individual facility;
- Advanced computing export controls affecting exports/reexports;
- Definitions of what constitutes a U.S. person and which U.S. person require licenses;
- New licensing requirements; and

- Encryption items.

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