

January 8, 2021

Washington Update

This Week In Congress

Senate – The members of 117th Congress were sworn in to the House and Senate. The House and Senate met in a joint session to count the votes of the Electoral College. Congress voted down objections to the certification of Arizona and Pennsylvania’s electoral votes. Following delays to remove protestors who breached the Capitol Building, Congress certified President-Elect Biden’s Electoral College victory.

House – The House adopted its rules package for the 117th Congress ([H. Res. 8](#)). The House passed the FedRAMP Authorization Act ([H.R. 21](#)), Congressional Budget Justification Transparency Act ([H.R. 22](#)), the Inspector General Protection Act ([H.R. 23](#)), the Construction Consensus Procurement Improvement Act ([H.R. 26](#)), and the Settlement Agreement Information Database Act ([H.R. 27](#)).

Next Week In Congress

Senate – The Senate will be in recess, but will meet in pro forma session. The Senate is scheduled to reconvene on January 19.

House – The House will be in recess, but will meet in pro forma session. The House is scheduled to reconvene on January 21.

TAX

Reconciliation Receives Renewed Attention as Georgia Runoffs Leave Balance of the Senate 50-50 and Puts Control in Democrats’ Hands

Key Point:

- *With the balance of power in the Senate sitting at a 50-50 tie, and control going to Democrats with a Vice President Harris, many are eyeing the reconciliation process to pass future legislation.*

With the runoff election in Georgia earlier this week leading to a 50/50 balance of power in the U.S. Senate (with the VP casting the deciding vote for control to Democrats after January 20), there is a renewed interest on Capitol Hill in what a Democratic Congress and President would seek to achieve in the 117th Congress.

Many have identified budget reconciliation as a tool where action on legislative priorities can occur without 60 votes in the Senate. Created as a part of the Congressional Budget and Impoundment Control Act of 1974 (the Budget Act), budget reconciliation allows for expedited consideration of certain tax,

spending and debt limit legislation. Reconciliation is a procedural tool that is most important in the Senate where, in most cases, the Senate would need 60 votes to move legislation and more recently subject to unlimited debate (filibusters) are the norm. Reconciliation bills are able to be considered on the Senate floor under a limited period of time essentially preventing a filibuster and by mere majority vote margins.

A precondition of reconciliation legislation is a Budget Resolution adopted by Congress containing instructions, so the 117th Congress will have some steps to go through before attempting budget reconciliation.

The essential elements of Reconciliation are as follows:

- The Byrd Rule allows Senators (only utilized in the Senate) to raise a point of order (which requires a 60 vote threshold to defeat the point of order) to block provisions in a reconciliation bill that the Senate Parliamentarian deems to be “extraneous.”
 - An extraneous provision tends to be interpreted as a provision which:
 - Does not increase or decrease revenue or where the change is “merely incidental.”
 - It is not in compliance with the reconciliation instruction to a Committee in that body’s budget resolution.
 - Is objected to by the Chairman of the Committee under which the jurisdiction of the provision would fall.
 - Would increase the deficit of any fiscal year beyond the budget window covered by the reconciliation measure, which is usually 10 years, unless other provisions of the measure fully offset the out-years costs.
 - Does not make changes to Social Security’s retirement, survivors or disability programs.

The reconciliation process has been successful on a limited basis in past decades, generally when one party controls Congress and the White House. In the past 30 years the process has only been successful 22 times, however; its successes do include some notable legislation. This legislation includes a substantial portion of President Obama’s 2010 health care law, President Bush’s 2001, and 2003 tax cuts, President Clinton’s 1997 expansion of the CHIP program, and most recently the Tax Cuts and Jobs Act (TCJA).

One shouldn’t underestimate the challenges, however, especially in the Senate. It may be more difficult to get moderate Democrats such as Senator Manchin (D-WV), and Senator Kelly (D-AZ) on the same page as more liberal Senators such as Senator Warren (D-MA), and Senator Sanders (I-VT). However, given the potential for making policy and revenue changes, it is almost assured that budget reconciliation will be pursued this year in the 117th Congress.

End of Year Omnibus and Stimulus Bill Includes a Number of Tax Extenders, Some COVID Measures

Key Point:

- *Passed on December 21, 2020, the recent omnibus and stimulus package includes a number of relevant tax extenders, as well as COVID tax measures.*

On December 21, the House and Senate passed a \$2.3 trillion omnibus appropriations and COVID-19 relief stimulus package ([H.R. 133](#)). President Trump later signed the Act into law on December 27 after initially criticizing the amount of direct payments to individuals and other aspects of the bill the week before. Along with direct payments to individuals, and a second round of Paycheck Protection Program (PPP) funding, the bill included a number of tax provisions including;

- An extension of the Employee Retention Tax Credit (ERTC) until July 1, 2021 and an increase in the credit percentage from 50% to 70%.
- An extension of the Paid Sick and Family Leave Tax Credit until March 31, 2021.
- An extension of the additional \$300 of federal unemployment insurance until March 14, 2021, and it also applies this extension to cover self-employed individuals and gig-workers.
- \$600 payments through the IRS to many individuals and their dependents.
- Extension of tax extenders, some for one year, and others including CFC look-through, WOTC, and New Markets Tax Credit through 2025.
- Permanent changes to return the miscellaneous medical expense deduction threshold to 7.5%, 179D energy efficiency deductions, excise tax relief for smaller producers of wine, beer and distilled spirits, for example.

The JCT issued this linked [revenue score](#) that lists of all revenue measures in the omnibus spending package.

For more information about tax issues you may [email](#) or call Christopher Hatcher at 202-659-8201. Josh Hansma contributed to this section.

FINANCIAL SERVICES

Senator Sherrod Brown (D-OH) Expected to Serve as Senate Banking Committee Chairman

Key Points:

- *With Democrats set to gain a narrow majority in the Senate, Senator Sherrod Brown (D-OH) will serve as chairman of the Senate Banking Committee, with Senator Pat Toomey (R-PA) serving as ranking member.*
- *Brown stated that his priorities as chairman would include pandemic recovery, addressing systemic racism, fighting climate change, and creating an economy “that works for everyone.”*

On January 5, a pair of Senate runoff elections were held in Georgia. The AP has declared Raphael Warnock (D-GA) the winner of his race against Senator Kelly Loeffler (R-GA) and Jon Ossoff (D-GA) the winner in his race against Senator David Perdue (R-GA). The results of the elections have not yet been certified, but are not expected to change.

With Warnock and Ossoff set to become new senators after certification, the Senate would have a 50-50 split in the 117th Congress, with Vice President-Elect Kamala Harris serving as the tie-breaking vote to give Democrats a majority. Under a Democratic Majority, Senator Sherrod Brown (D-OH) would serve as chairman of the Senate Banking Committee. Brown has served as ranking member of the committee since the 114th Congress. Senator Pat Toomey (R-PA) would serve as ranking member of the committee.

Senator Brown released a [statement](#), in which he outlined some priorities and stated:

We have a lot of work to do to recover from this pandemic, address systemic racism, fight climate change, and create an economy that works for everyone, no matter who they are, where they live, or what kind of work they do. As Chairman of the Senate Committee on Banking, Housing, and Urban Affairs, I am confident that we can create a better system centered on the Dignity of Work.

NYSE Announces Plan to Delist Three Chinese Telecom Companies

Key Points:

- *The NYSE will delist three Chinese telecommunications companies in order to comply with an executive order by President Trump.*
- *The NYSE announced the delistings on December 31, but reversed its decision on January 4, before reinstating the delisting plan on January 6.*

On December 31, the New York Stock Exchange (NYSE) announced plans to delist three Chinese telecommunications companies in order to comply with an [executive order](#) signed by President Trump prohibiting Americans from investing in Chinese companies which supply and otherwise support China's military, effective January 11. The three companies are China Telecom, China Mobile and China Unicom.

On January 4, the NYSE [announced](#) it had reversed its decision to delist the three companies, following consultation with relevant regulatory authorities. On January 6, the NYSE reversed course again and announced that it would delist the three companies, based on "new specific guidance" from the Treasury Department.

Treasury Secretary Steven Mnuchin reportedly contacted NYSE President Stacey Cunningham to express his disapproval of the NYSE's initial reversal. Senator Marco Rubio (R-FL) also [tweeted](#) his opposition to the NYSE's second announcement that it would not delist the companies.

SEC Chairman Clayton Steps Down, Commissioner Roisman Designated as Acting Chairman

Key Points:

- *Chairman Jay Clayton stepped down effective December 23. Commissioner Elad Roisman was designated as Acting Chairman.*

On December 23, Securities and Exchange Commission (SEC) Chairman Jay Clayton [announced](#) that he was stepping down from the Commission. On December 28, the SEC [announced](#) that President Trump had designated Commissioner Elad Roisman to serve as Acting Chairman. President-Elect Biden has not yet announced a nominee to serve as SEC Chairman. Biden will likely designate one of the Democratic commissioners, Allison Herren Lee or Caroline Crenshaw, to serve as Acting Chair once he is sworn into office.

The SEC has taken several regulatory actions in the past several weeks, including:

- December 22, 2020: Issued a [proposed rule](#) to amend Rule 144 to revise the holding period determination for securities acquired upon the conversion or exchange of certain “market-adjustable securities.” The Commission also voted to propose amendments to update and simplify the Form 144 filing requirements.
- December 22, 2020: Adopted a [final rule](#) to modernize rules that govern investment adviser advertisements and payments to solicitors. As noted by a press release, “The amendments create a single rule that replaces the current advertising and cash solicitation rules. The final rule is designed to comprehensively and efficiently regulate investment advisers’ marketing communications.”
- December 23, 2020: Issued a [statement and request for comment](#) regarding the custody of digital asset securities by broker-dealers in order to encourage innovation around the application of Securities Exchange Act Rule 15c3-3 to digital asset securities.

FinCEN, PWG, OCC Move Forward with Initiatives and Reports

Key Points:

- *FinCEN, the President’s Working Group on Financial Markets (PWG), and the OCC took actions regarding virtual currencies and stable coins.*
- *The PWG also issued a report offering policy recommendations in the money market fund space.*

Over the past several weeks, federal financial regulators have moved forward with regulatory initiatives. These actions include:

- On December 18, the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) issued a [proposed rule](#) to impose requirements for certain transactions involving convertible virtual currency (CVC) or digital assets with legal tender status (LTDA). Under the proposed rule “banks and money services businesses (MSBs) would be required to submit reports, keep records, and verify the identity of customers in relation to transactions above certain thresholds involving CVC/LTDA wallets not hosted by a financial institution (also known as “unhosted wallets”) or CVC/LTDA wallets hosted by a financial institution in certain jurisdictions identified by FinCEN.”
- On December 22, the President’s Working Group on Financial Markets (PWG) released a [report](#) entitled “Report of the President’s Working Group on Financial Markets: Overview of Recent Events and Potential Reform Options for Money Market Funds.” The policy recommendations discussed in the report include:
 - Removal of Tie between MMF Liquidity and Fee and Gate Thresholds;
 - Reform of Conditions for Imposing Redemption Gates;

- Minimum Balance at Risk (“MBR”);
 - Money Market Fund Liquidity Management Changes;
 - Countercyclical Weekly Liquid Asset Requirements;
 - Floating NAVs for All Prime and Tax-Exempt Money Market Funds;
 - Swing Pricing Requirement;
 - Capital Buffer Requirements;
 - Require Liquidity Exchange Bank (“LEB”) Membership; and
 - New Requirements Governing Sponsor Support.
- On December 23, the PWG released a [statement](#) on “Key Regulatory and Supervisory Issues Relevant to Certain Stablecoins.” The statement asserts that regulators are committed to innovation, while also noting, “Stablecoin arrangements must comply with applicable U.S. legal, regulatory, and oversight requirements.”
 - On January 4, the Office of the Comptroller of the Currency (OCC) published a [letter](#) “clarifying national banks’ and federal savings associations’ authority to participate in independent node verification networks (INVN) and use stablecoins to conduct payment activities and other bank-permissible functions.”

For more information about financial services issues you may email [Joel Oswald](#) or [Alex Barcham](#).

ENERGY & ENVIRONMENT

Upcoming Hearings and Events:

January 14, 2021

Biden Administration Energy and Environment Policy: The C. Boyden Gray Center for the Study of the Administrative State will hold a [webinar](#) on “The Future of Environmental and Energy Policy in the Biden Administration”. Participants will include: Jonathan Adler, Case Western Reserve University School of Law; and Lisa Heinzerling, Georgetown University Law Center.

January 19, 2021

FERC Meeting: The Federal Energy Regulatory Commission (FERC) will hold its monthly [open meeting](#).

February 2-5, 2021

NASEO Conference: The National Association of State Energy Officials (NASEO) will hold the virtual [Energy Policy Outlook Conference](#) to discuss energy policy, funding, and market outlook for 2021.

February 3-4, 2021

EAC Meeting: The Department of Energy’s Electricity Advisory Committee (EAC) will hold an [open meeting](#).

For more information about energy and environment issues you may [email](#) or call Frank Vlossak at 202-659-8201. AC Veith contributed to this report. Updates on energy and environment issues are also available on [twitter](#).

HEALTH

HHS Releases Additional Funds for Testing, Vaccine Distribution

Key Points:

- *The Department of Health and Human Services announced the Centers for Disease Control and Prevention will provide over \$22 billion to states, local governments, and territories to assist in the response to the pandemic.*
- *The additional funding was provided in the Coronavirus Response and Relief Supplemental Appropriations Act.*

On January 6, the Department of Health and Human Services (HHS) announced the Centers for Disease Control and Prevention (CDC) would provide over \$22 billion in additional funding to states, localities, and territories to respond to the COVID-19 pandemic. HHS Secretary Alex Azar stressed the agency is “making these billions in new funds available to states as quickly as possible to support our combined efforts to end the pandemic.”

Funding will be provided to jurisdictions before January 19, 2021. Of the \$22 billion, \$19 billion will be allocated to jurisdictions through the existing Epidemiology and Laboratory Capacity cooperative agreement to support testing, contact tracing surveillance, containment, and mitigation. Awards will go to 64 different jurisdictions including all 50 states and five major cities. Over \$3 billion will be made available through the existing Immunization and Vaccines for Children cooperative agreement to support a range of vaccination activities.

Funding tables for the COVID-19 testing can be viewed [here](#) and vaccination activities can be viewed [here](#).

Courts Halt Implementation of MFN Rule

Key Point:

- *Before the interim final rule creating the Most Favored Nation Demonstration became effective on January 1, three different federal courts halted its implementation. A fourth case has been stayed based on the prior rulings.*

In November, the Centers for Medicare and Medicaid Services (CMS) published the “Most-Favored Nation Rule” creating a Medicare payment model to align payment for Medicare Part B drugs with international prices. The model would require immediate, mandatory participation and cover an initial 50 drugs that account for the highest Medicare spending with additional drugs being phased in over the duration of the model. Because the rule was issued as an interim final rule, it became effective immediately upon publication. The new policy was set to begin January 1, 2021 with public comments accepted until January 26, 2021.

In issuing an interim final rule, CMS did not follow the traditional notice and comment process for promulgating regulations. Under the Administrative Procedure Act, the agency must find good cause to waive notice and comment and that a delay in the effective date would be contrary to the public interest. It is on this basis that multiple lawsuits were filed in different federal jurisdictions seeking temporary restraining orders and/or preliminary injunctions halting the rule from becoming effective.

In three cases, the courts granted plaintiffs motions issuing either temporary restraining orders or preliminary injunctions halting the rule from going into effect pending resolution of the litigation. In a fourth case, the action was stayed based on the rulings of the other three courts. All courts granted the order based on the government's failure to follow notice and comment and lack of "good cause" shown to justify the interim final rule. The agency is enjoined from enforcing the rule pending completion of the notice and comment process.

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

TRADE

USTR Says Digital Tax Implemented by India, Italy, and Turkey Harms U.S. Companies, Delays Retaliatory Tariffs Against France To Evaluate Broader Response

Key Points:

- *The Office of the U.S. Trade Representative (USTR) said that digital service taxes adopted by India, Italy and Turkey unfairly discriminate against big U.S. internet companies.*
- *USTR issued a Federal Register announcing an indefinite suspension of Section 301 tariffs on \$1.3 billion worth of French goods.*

On Wednesday, the Office of the U.S. Trade Representative (USTR) said that digital service taxes adopted by India, Italy and Turkey unfairly discriminate against big U.S. internet companies. They announced that they would not be taking any actions against the countries but will continue to evaluate options, potentially considering broader actions against all countries with digital taxes. USTR conducted these investigations under Section 301 of the 1974 Trade Act, which allows the agency to unilaterally impose tariffs in retaliation for unfair trade practices.

On Thursday, USTR issued a [Federal Register](#) announcing an indefinite suspension of Section 301 tariffs on \$1.3 billion worth of French goods in response to France's digital services tax. The tariffs, which were announced in July and subsequently suspended for 180 days, would have impacted French handbags, cosmetics, and soaps. The tariffs were scheduled to go into effect at the end of the 180-day suspension on Wednesday. The USTR is apparently considering a holistic approach on digital taxes, though any actions may have to wait for the incoming Biden Administration to determine.

Still Unclear if USTR Will Impose Tariffs on Vietnam by January 20 Over Currency and Timber

Key Points:

- *U.S. Trade Representative Robert Lighthizer spoke with his Vietnam counterpart regarding the Office of the U.S. Trade Representative's (USTR) Section 301 investigations into Vietnam.*
- *With less than two weeks left of the Trump Administration, doubts continue to grow that the USTR will impose the Section 301 tariffs.*

On Thursday, U.S. Trade Representative (USTR) Robert Lighthizer spoke with his Vietnam counterpart regarding the Office of the U.S. Trade Representative's (USTR) Section 301 investigations into Vietnam.

According to a preliminary Vietnamese government readout, the two parties discussed “the bilateral trade action plan between Vietnam and the U.S., as well as progress made in trade relations” and the two sides expressed “their willingness to continue working closely on finding positive solutions to address trade issues and further boost trade relations between the two countries.”

This week marked the end of the formal comment period of the investigations. The USTR held two hearings with U.S. industry leaders during the comment period in which the leaders urged the USTR to not impose tariffs on Vietnam. With less than two weeks left of the Trump Administration, doubts continue to grow that the USTR will impose the Section 301 tariffs.

The most consequential would be targeting alleged Vietnamese undervaluation of its currency, which would lead to possible tariffs on any import from Vietnam given currency impacts all trade. The U.S. Treasury already found Vietnam undervalues its currency in a Commerce action, so the stage is set but the timing is very tight before January 20. Whether the USTR will act by then remains up in the air.

USMCA Technical Corrections Included in Final Omnibus Package, MTB, GSP Renewal Excluded

Key Points:

- *The omnibus bill passed by Congress contains technical corrections to the U.S.-Mexico-Canada Agreement (USMCA).*
- *Congress did not include the renewal of the Generalized System of Preferences (GSP) or a new Miscellaneous Tariff Bill (MTB) in the final bill.*

The omnibus bill passed by Congress contains technical corrections to the U.S.-Mexico-Canada Agreement (USMCA). The corrections primarily involve issues regarding the transition from the North American Free Trade Agreement (NAFTA) to USMCA. Non-controversial language in the USMCA bill on the North American Development Bank as well as provisions on merchandise processing fees will be included in the final corrections package; however a correction on foreign trade zones had been controversial, but was included nonetheless. The final bill also changes the foreign trading zone provision in the USMCA to the original NAFTA language.

Congress did not include the renewal of the Generalized System of Preferences (GSP) or a new Miscellaneous Tariff Bill (MTB) in the final bill. Both GSP and the MTB expired on December 31.

U.S. to Impose Additional Tariffs on EU in Boeing-Airbus Dispute

The Office of the U.S. Trade Representative (USTR) issued a [Federal Register](#) notice announcing that the U.S. will impose additional tariffs on the EU in response to the EU’s latest tariffs in the Boeing-Airbus dispute. USTR had held back from applying the full WTO authorized amounts of retaliation, and rumors suggest the U.S. was upset by the apparent lack of reciprocity by the EU in calculating its allowed retaliation. Products affected include aircraft manufacturing parts, non-sparkling wines and cognac and other brandies, all from France and Germany.

U.K., EU Reach Bilateral Trade Deal

At the end of 2020, the European Union (EU) and United Kingdom (U.K.) reached an agreement on a post-Brexit trade deal. The deal covers a collective market worth of \$905 billion, as of 2019. The deal allows for tariff-free and quota-free trade until 2021, and includes investment chapters, provisions on fish and data protection, and arrangements for future cooperation on areas such as research and development, and space.

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

This Week in Congress was written by Alex Barcham.