

July 2020

Congress, White House Prep for Next Coronavirus Bill

Congressional leaders and Administration personnel are prepping for expected negotiations on a late July coronavirus crisis response bill. Issues in play include subsidies for health insurance for the unemployed, Paycheck Protection Program (PPP) modifications, employer liability protection, some tax issues, back-to-work pay, and unemployment benefits.

During the week prior to the Fourth of July and the beginning of a two-week Congressional recess, there were multiple hearings in both the House and Senate looking at how well the new coronavirus crisis response laws enacted are working. The hearings—held by the Senate Finance, House Financial Services, and Senate Health, Education, Labor and Pensions (HELP) Committees—also considered what additional new laws may be needed to help the U.S. dig out from the virus-triggered recession.

While Congressional support for another coronavirus crisis response bill is not universal, there does seem to be consensus that another new law should be enacted. However, there is considerable controversy about what the bill should (or should not) include. The key issues include:

- **PPP:** The PPP, while widely popular, has been marred by a variety of glitches and stumbling blocks. New legislation to address these problems (see story below for more details) is likely in the next coronavirus crisis response bill.
- **Subsidies for health insurance premiums for the unemployed:** High on the priority list for inclusion in the next coronavirus crisis response bill is a way to help people left unemployed by the pandemic pay for their

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health insurance. Ideas under consideration include subsidies for COBRA continuation coverage and expanded subsidies for Affordable Care Act (ACA) health insurance. This is not a slam-dunk; there are some who oppose either kind of subsidy and among those who support one or the other (or both) there are some who are insisting on restrictions on subsidized coverage of abortion services. There are others who are equally insistent that there be no such restrictions. So, this issue will be a battle.

- ***Employer liability protection:*** Republicans' top priority for the next coronavirus crisis bill is protection for businesses at risk of lawsuits alleging unsafe environments that resulted in the plaintiffs' contracting COVID-19. Democrats are cautiously sympathetic to this issue, noting that businesses that strictly adhere to government guidelines in reopening should not have to fear being sued by either their employees or their customers. However, the GOP proposal on this issue has not yet emerged, although early indications suggest that Republicans will propose five years of protection for businesses complying with government guidelines as they reopen. Reportedly, the choice of which government guidelines to follow would be left up to each business. Some on the left fear the Republican proposal will be overbroad and will as a result deny legitimate lawsuits against businesses that were not adequately careful with their reopening procedures. How this issue will play out will depend on the details of the liability protection proposal. It is expected later this month.
- ***Employee retention tax credit:*** There is bipartisan interest in expanding the CARES Act's employee retention tax credit. The tax credit is and would continue to be refundable against payroll tax liability.
- ***Taxes/targeted business help:*** NAIFA, in conjunction with and in support of life insurance companies, is asking Congress to include two important life insurance tax issues in the next coronavirus crisis response bill. One, the section 7702 issue, would change the interest rate used to calculate a life insurance policy's maximum investment value. The other, the bond characterization issue, would recharacterize insurer-held bonds as ordinary rather than capital assets. Both issues are in play as negotiations on the next bill begin.

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Many lawmakers are looking at ways to help industries particularly hard-hit by the coronavirus crisis and that are continuing to struggle to recover. Plus, those same lawmakers are being bombarded by an ever-growing list of industries seeking extra help. At the top of the list of industries that may get help are travel, entertainment, and meetings/conventions. Ways to help these businesses range from restoration of full deductibility of business meals and entertainment, to a “travel America” tax credit, to acceleration of tax credits to which these businesses may be entitled in the future. Further payroll tax relief is also being discussed.

- ***Paid leave:*** The Families First Coronavirus Response Act’s (FFCRA’s) paid leave provisions last through the end of the year, but Congress may tinker with the current rules. There are problems associated with individuals who could go back to work but for lack of childcare due to their children’s schools/daycare centers being closed—a reason that qualifies the worker for paid leave under the FFCRA rules. Lawmakers from both parties are looking at ways to resolve that problem. One possibility is to provide direct, Federal payments for childcare. Or, some lawmakers are looking at creating government-sponsored childcare programs.
- ***Unemployment benefits:*** Current extra unemployment benefits (\$600/week, payable by the Federal government through State unemployment programs) expire on July 31. Democrats are united in wanting to extend this benefit past its scheduled July 31, 2020 expiration date. Republicans, generally, prefer a back-to-work bonus approach.
- ***Back-to-work payments:*** The GOP is touting a “back-to-work” payment to replace the federal \$600/week unemployment benefit that expires at the end of July. One proposal—offered by Sen. Rob Portman (R-OH)—would give \$450/week to encourage workers to return to work. Another, offered by Rep. Kevin Brady (R-TX), would provide two \$600/week (\$1200 total) payments as a back-to-work bonus payment. Both proposals contemplate the payments only through July 31, 2020, and both would be on top of weekly earnings. Neither is as yet final, nor has either been viewed favorably by Democrats. Democrats continue to

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prefer a simple extension of the federal \$600/week unemployment benefit.

Other likely issues that the negotiators will consider include an infrastructure package designed to create jobs, more stimulus payments to individuals, a payroll tax cut for individuals as well as for businesses, and more funds for State and local governments reeling from the cost of their own coronavirus response measures.

- **Prospects:** President Trump and Congressional leaders from both parties believe more help is needed, and so another coronavirus crisis response bill is likely. However, the Democrats' position—the House-passed Heroes Act—is a \$3.5 trillion package, while the GOP wants to cap the next bill at \$1 trillion. Serious negotiations—probably between Senate leaders (Sens. Mitch McConnell (R-KY) and Chuck Schumer (D-NY)), House leaders (Speaker of the House Rep. Nancy Pelosi (D-CA) and Republican Leader Rep. Kevin McCarthy (R-CA)), and Administration personnel (probably led by Treasury Secretary Steven Mnuchin)—on that bill are expected to begin on or around July 20. Insiders in Washington are betting on a swift conclusion to the negotiations, but as with all things Congressional, the discussions could extend beyond such artificial deadlines as the July 31 expiration of unemployment benefits. Still, at this juncture it seems likely that Congress will be voting on a new coronavirus crisis response bill around or soon after the end of July.

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PPP Loan Application Extension Enacted into Law

On July 4, President Trump signed into law an extension of the deadline for applying for a Paycheck Protection Program (PPP) loan. The new loan application deadline is August 8, 2020.

Both the House and the Senate passed the measure by unanimous consent (UC).

There are other PPP proposals also pending. One would extend through the end of the year the time during which PPP loans can be applied for. Also proposed is a provision that would allow small current PPP borrowers to apply for a second PPP loan. Another proposal is the Paycheck Program Recovery Draw Act, would make several changes to the program. In late June, that bill was subject to a UC request to pass it in the Senate, but UC was not forthcoming. So, the bill is still pending. It would:

- Expand the definition of payroll expenses to include more employer-provided group insurance benefits than just health insurance coverage
- Expand eligibility for PPP loans to certain trade associations (501(c)(6) organizations) with 50 or fewer employees for loans of up to \$500,000 so long as the trade association is not principally engaged in lobbying and so long as none of the loan money is used for lobbying activities.
- Make covered supplier costs and covered worker protection expenditures allowable and forgivable uses of PPP funds. “Covered supplier costs” are expenditures to a supplier pursuant to a contract for goods that are essential to the PPP recipient’s operations. A “covered worker protection expenditure” includes adaptive investments to help a loan recipient comply with federal health and safety guidelines related to COVID-19 during the period between March 1, 2020, and December 31, 2020.
- Permit a PPP borrower to select a covered period ending at the point of the borrower’s choosing between eight weeks from loan origination and December 31, 2020.

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- Create a simplified loan application process—the process for loans under \$150,000 would not require borrowers to submit certain documentation but instead attest to a good faith effort to comply with PPP loan requirements and retain relevant records for one year. The process for loans between \$150,000 and \$2 million would not have to submit CARES Act-specified documentation but instead would have to complete the certification required by the CARES Act. These borrowers would also have to retain relevant records and worksheets for two years, and they may complete and submit demographic information.
- Create new “recovery draw” loan products based on the borrower’s revenue size or on whether it will be a short-term loan.

The bill also addresses seasonal employment and lender issues relevant to the PPP. Its provisions would take effect as if they were originally enacted in the CARES Act (i.e., as of March 25, 2020).

Further, after the Treasury Department released information on current PPP loans and borrowers, Congressional eyebrows went way up at the number of loans granted to businesses owned by celebrities, law firms, lobby shops, and even lawmakers themselves. Insiders expect provisions to tighten PPP loan requirements to prevent these kinds of businesses from accessing PPP loans. The PPP still has about \$130 billion to lend, so further funding is not a central part of PPP legislative change discussions.

Prospects: The next coronavirus crisis response bill will almost certainly contain PPP provisions. Negotiators – the leadership of Congressional Republicans and Democrats from both the Senate and the House, and the Administration – plan to start hammering out the next bill on or around July 20.

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DOL New Fiduciary Rule Applicable to Retirement Advisors Triggers Reaction

On June 29, the Department of Labor's (DOL's) Employee Benefits Security Administration (EBSA) proposed a new fiduciary rule applicable to retirement advisors that has triggered reaction from both opponents and supporters of the proposal. The proposed new rule is open to comment until the end of the month.

On June 29th, the Department of Labor (DOL) issued a [proposed exemption](#) to allow investment advice fiduciaries to receive compensation, including as a result of advice to roll over assets from a Plan to an IRA, that would otherwise violate the prohibited transaction provisions of ERISA and the Code. The proposed class exemption is open to comments for 30 days.

At the same time, the DOL issued a [final rule](#) to effect the vacatur of its 2016 fiduciary rule. As you know, NAIFA was one of the parties to the legal action that resulted in the DOL's fiduciary rule being vacated in total. This final rule reinstates the 5-part test to define investment advice fiduciaries and returns PTE 84-24 to its prior form. This document takes the administrative steps necessary to conform the regulatory text and the text of the previously granted PTEs to the Fifth Circuit's vacatur mandate.

The proposed exemption applies to properly licensed registered investment advisers, broker-dealers, banks, and insurance companies (Financial Institutions) and their employees, agents, and representatives (Investment Professionals) who provide fiduciary "investment advice" delivered to ERISA Plan (Plan) participants/beneficiaries with authority to direct investments account assets, IRA owners, and fiduciaries of Plans or IRAs (Retirement Investors).

A more complete analysis of the proposal is discussed in the June [GovUpdate](#) and in a [Memo](#) from NAIFA's outside counsel, Steptoe & Johnson. Briefly, if the Impartial Conduct Standards (below) are met, the proposed exemption allows invest advice fiduciaries to receive third-party

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compensation, is product neutral, and allows proprietary products/limited menus with disclosure.

To be considered an investment advice fiduciary, one must satisfy all prongs of the “5-part test” for advice rendered:

1. as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property
2. on a regular basis
3. pursuant to a mutual agreement, arrangement, or understanding with the Plan, Plan fiduciary or IRA owner
4. that the advice will serve as a primary basis for investment decisions with respect to Plan or IRA assets, and
5. that the advice will be individualized based on the particular needs of the Plan or IRA

Investment advisors must meet these Impartial Conduct Standards:

- ***Impartial Conduct Standards for all investment advice fiduciaries***
 - Provide investment advice that, at the time it is provided, is in the best interest of the Retirement Investor;
 - Charge only reasonable compensation;
 - Make no materially misleading statements (e.g., no material misstatements or omissions regarding fees/compensation, material conflicts of interest, etc.);
 - Seek to obtain the best execution of a transaction (consistent with current securities laws);
- Written disclosure of fiduciary status under ERISA and/or the Code, as applicable;
- Written disclosure of services to be provided and material conflicts of interest arising out of the services/recommendations being given,

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though there is not a specific form. We believe that it is intended that the Reg BI Form CRS will be comprehensive and satisfactory.

NAIFA is still reviewing the proposal and in discussions to focus our comments to the DOL. There are certain requirements on financial institutions, definitions surrounding the 5-part test language and acknowledgment of fiduciary status that will likely be addressed in our comments.

Representatives of consumer groups are expressing concern about whether the proposed rules adequately protect retirement investors. They are also questioning whether DOL Secretary Eugene Scalia, who (prior to becoming DOL Secretary) represented the industry in the lawsuit challenging the now-dead DOL fiduciary rule issued in 2016, has a conflict of interest that would require a redo of this proposed rule. These groups are considering challenging this proposed rule, in court or in Congress or both.

Prospects: Comments on the proposed new rule will provide more clarity about whether this rule, like its predecessor, will be challenged in the coming months. And, comments will shed light on whether there are still questions that must be addressed, either in modifications to the proposed rule or in new rulemaking in the future. Further, it is likely that the outcome of the 2020 November elections could turn out to have a significant influence on the possibility of changing this proposed new rule.

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