

Client Alert

Divided Electorate, Divided Congress: What it Means for Healthcare and Energy Policy in the Lame Duck and the 118th Congress

November 23, 2022

With the midterm elections (mostly) behind us (Republicans won a narrow House of Representatives majority, and Democrats will retain their slim Senate majority), Congress will return to Washington next week to tackle a list of must-pass items before the conclusion of the 117th Congress. Topping the must-do list in this period referred to as the “lame duck” session is funding the government for the remainder of fiscal year 2023 before the current continuing resolution (CR) expires on December 16 and passing the National Defense Authorization Act (NDAA), the annual defense policy bill. Many other issues are likely to be taken up in what is expected to be a very active end of the 117th Congress. In addition to these legislative priorities, the Senate will likely pass the annual tax extenders bill, try to fit in a few other priority bills that have waited all year or are time sensitive, and continue to process federal judicial nominations and agency appointments that need Senate confirmation.

Heading into the new Congress in 2023, with the narrowest Senate majority and House leadership not yet decided, expect to see a move away from the Speaker-dominant House leadership model with small factions and individual members trying to exert influence over the agenda. The narrow margins also set up a dynamic whereby President Biden and both parties in Congress will be motivated to find some common ground on legislation during the lame duck session and in the next two years. Join the Crowell Government Affairs Group for a webinar discussion on December 14, at 1 PM ET about the lame duck and what to expect with the 118th Congress.

The following is what we expect to be on the agenda for the balance of this Congress and an early look at some of the key policy issues going into 2023.

Lame Duck

The full House passed its version of the NDAA in July, and the Senate Armed Services Committee approved a version of the bill the end of that month. With pre-conferencing on a compromise bill well underway, Congress is expected to approve this legislation after the Thanksgiving break before it takes on government funding. With Republicans set to control the House and legislative agenda in 2023, Democrats want to complete work on a full omnibus appropriations package to fund the federal government for the balance of the fiscal year, which ends September 30, 2023.

Both parties have significant work to do to complete negotiations on the spending package, and some Senate Republicans and Democrats are growing concerned that time is running out to pass an omnibus spending bill before the end of the year. Negotiators still have not agreed on topline spending levels, leaving little time to iron out differences on specific spending priorities before December 16. However, with the top two Senate

negotiators (Pat Leahy (D-VT) and Richard Shelby (R-AL)) retiring at the end of this year, we expect a spending deal will be reached before the next Congress is seated even if that means passing a short-term extension before the CR expires on December 16.

The passage of a clean FDA User Fee Reauthorization Act in September, which included the reauthorization of the Prescription Drug User Fee Act (PDUFA), left out a number of more controversial items that may make their way into a year-end omnibus package. While many of these provisions enjoy some degree of bipartisan support, their significant cost may result in some being left out or made smaller when passed. At the very least, we expect Congress will avert the significant Medicare physician fee schedule cuts set to take effect on January 1. We also expect Congress to further extend telehealth flexibilities and waivers that allow for Medicare reimbursement beyond the end of the federally declared COVID-19 Public Health Emergency (PHE). (The 2022 Consolidated Appropriations Act (CAA) included an extension of a subset of telehealth-related policies for 151 days past the end of the federally declared PHE). As well, there is bipartisan support for new authorizing FDA regulations for in-vitro diagnostics and lab-developed tests and accelerated FDA approval program changes.

With Senator Burr (R-NC) retiring, there is also potential for the omnibus spending bill to include at least some pieces of the PREVENT Pandemics Act, which Senator Burr authored with Senator Patty Murray (D-WA). The White House is also seeking supplemental funds for Ukraine and disaster relief as well as an additional \$10 billion funding request for additional COVID-19 response funding. We expect Congress will agree to Ukraine and disaster relief funding requests; but we do not expect Congress to include any additional significant COVID-19 funding in the omnibus spending bill.

Finally, Congress is also likely to address certain tax issues as part of the end of year spending package, with discussions continuing on extending the expanded child tax credit and a myriad of so-called tax extenders that have expired or will expire this year. Congress failed to advance a tax extenders package last year, so the list of expired or expiring programs is longer than usual and include, among others: 100 Percent Bonus Depreciation for Equipment and Machinery; Amortization of R&D Expenses; Limit on Business Interest Expenses Based on EBIT; and certain other CARES Act and American Rescue Plan related items.

What's ahead for 2023, the 118th Congress

While many are suggesting that gridlock will rule in the 118th Congress, even with the House positioned to pursue an aggressive oversight agenda, we expect that the President and both parties in Congress will be motivated to seek consensus to enact legislation over the next two years. With razor thin margins, House Republicans will be challenged to unite their conference behind legislation, but there will be consensus around scrutiny of the Biden Administration. We expect several healthcare topics will be the subject of oversight hearings aimed at the administration, including: health sector consolidation, health system not-for-profit status, the 340B drug discount program, PBM practices, and substance abuse, among others. National Institutes of Health, the Centers for Disease Control and Prevention, and other agencies involved in the pandemic response will also be heavily scrutinized. There will also likely be rigorous scrutiny of private sector use of Provider Relief Fund dollars and other COVID-19-related funding and flexibilities.

Some areas of common ground for healthcare-focused legislation in 2023 potentially include:

- With the COVID-19 PHE likely expiring in 2023, PHE flexibilities, particularly around telehealth, if not addressed in the lame duck
- Inflation, healthcare costs, and workforce shortages
- Expiring funding or cuts in October 2023 (e.g., Medicaid DSH cuts, community health center funding)
- Addressing perennial problems with formula-driven updates and shortcomings in the 2015 Medicare Access and CHIP Reauthorization Act driving physician reimbursement
- Policies to rein in Medicare Advantage costs
- If it doesn't move in the lame duck, reauthorization of the Pandemic and All-Hazards Preparedness Act (PAHPA) will be up in 2023. (Originally signed into law in 2006, PAHPA created the assistant secretary for preparedness and response position at HHS and covers the Biomedical Advanced Research and Development Authority and the government's ability to develop and acquire medical countermeasures)

Regarding energy-focused policy, under Republican leadership, the House will perform oversight of the Biden Administration's accomplishments, including how funding is spent on projects from the Infrastructure Investment and Jobs Act (IIJA) and the Inflation Reduction Act (IRA). We expect oversight of the Department of Energy Loan Guarantee Program, OPEC, and U.S. Securities and Exchange Commission requirements for public company disclosure of risks regarding climate change. The Farm Bill, a five-year authorization, will also be a priority for passage in the 118th Congress. We expect the legislation will again include an energy title, which determines policy for the development of farm and community renewable energy systems through a variety of programs, including grants and loan guarantees.

What Difference Will the Outcome of the Georgia Senate Run-off Make?

While Democrats have secured the Senate majority, they want to win the December 6 GA run-off election and claim the 51st seat to create some breathing room in the Senate, currently tied at 50-50 as we end the 117th Congress. Now, every single Democratic vote is needed to pass Democratic legislation, with Vice President Kamala Harris casting the tie-breaking vote. Over the last 2 years, Sens. Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ) frustrated the Biden administration's efforts to pass—and forcing it to pare down—its legislative agenda, including a sweeping domestic spending and climate change package. Moreover, Democrats want to improve their math going into 2024, when they will need to defend 23 of the 34 Senate seats up for election that year.

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