COVID-19 Public Policy Group Report

April 18, 2020

On Friday, the Cybersecurity and Infrastructure Security Agency (CISA) released Version 3.0 of its Essential Critical Infrastructure Workforce guidance. The changes in its latest document, which seeks to advise state and local governments on defining essential critical infrastructure workers, were aimed at clarifying previous guidance, including to change all references to employees or contractors jointly as workers and to add more detail to the section on healthcare and public health. CISA continues to emphasize that this guidance document is not binding, but notes that "[a] common national picture will ultimately benefit us all."

Also Friday, President Donald Trump and the U.S. Department of Agriculture (USDA) announced details of a $19 billion program funded by the bipartisan CARES Act and accounts established by earlier congressional coronavirus measures passed by Congress to provide relief to the agricultural sector and feed hungry children and families. The new Coronavirus Food Assistance Program (CFAP) will provide $16 billion in direct support "based on actual losses for agricultural producers where prices and market supply chains have been impacted and will assist producers with additional adjustment and marketing costs resulting from lost demand and short-term oversupply for the 2020 marketing year caused by COVID-19." USDA will also partner with area distributors to purchase $3 billion in fresh produce, dairy, and meat to maintain the nation's food supply and assist charitable and faith-based organizations serving the hungry.

Meanwhile, the contours of a potential bipartisan agreement to resolve the small business loan standoff have begun to emerge. With the CARES Act's Paycheck Protection Program (PPP) sidelined until further notice due to lack of funds, the Trump Administration is talking directly with congressional Democrats about a way forward that would potentially add about $75 billion for hospitals and health systems to the $251 billion in small business loan money for the PPP being sought by the Administration. President Trump and House Minority Leader Kevin McCarthy (R-CA) both said Friday that they would support the inclusion of hospital funding in the forthcoming small business relief package, marking a key concession to House Speaker Nancy Pelosi (D-CA) and Senate Minority Leader Chuck Schumer (D-NY). There is no indication yet as to whether additional funding for state, territorial and local governments, another top Democratic demand, would be included as well.

Tax and Economic Development Updates

Yesterday, the Treasury Department announced that veterans and their families who did not file tax returns for tax years 2018 or 2019 will automatically receive their Economic Impact Payments – similar to what the Treasury announced would be the case for recipients of Social Security and Supplemental Security Income benefits. Additionally, the Internal Revenue Service (IRS) also released data that shows the number of individual tax returns that have been filed is, not surprisingly, down almost 13-percent from last year – a decrease that is likely the result of the three-month extension of the tax filing deadline due to the COVID-19 pandemic. Note, too, the IRS has also issued guidance significantly expanding relief from tax filing and payment deadlines for non-profit entities in response to the COVID-19 pandemic. Our team has drafted an analysis about such relief, as well as a summary table describing COVID-19 legislation that has an impact on tax-exempt organizations.

The Small Business Administration (SBA) released updated data yesterday about the loans made through the PPP as of April 16, before funds were officially exhausted. As we continue to report, negotiations between Treasury Secretary Steven Mnuchin and congressional leaders to provide additional funding for the PPP continue. While the timing and substance of an agreement remain uncertain, there is mounting pressure to reach agreement to fund this critical program. This is likely the reason behind House Minority Leader McCarthy's proposed compromise to provide funding for the PPP and hospitals, while leaving Democrats' desire to provide additional funding for states and municipalities for future legislation. Meanwhile, as congressional scrutiny of lending under the PPP increases, Senate Minority Leader Schumer and other senior Democrats sent a letter to the Treasury Department and SBA requesting data about both the PPP and Economic Injury Disaster Loan (EIDL) program.

As we await action by Congress to fund the PPP, the Federal Reserve Board yesterday announced that it will temporarily modify the rules to permit certain bank directors and shareholders to apply for PPP loans for their small businesses, suggesting that this will "bolster the effectiveness" of the program. This announcement follows the SBA's recent announcement clarifying that lenders can offer PPP loans to businesses owned by their directors and certain shareholders, subject to certain restrictions.

To bring greater transparency to the Federal Reserve facilities, the New York Fed yesterday announced that "[t]he Federal Reserve will publicly disclose information regarding the [corporate credit facilities] during the operation of the facilities, including information regarding participants, transaction amounts, costs, revenues and other fees." The New York Fed will run the Primary and Secondary Market Corporate Credit Facilities (CCF), which will serve as a funding backstop for corporate debt. Notably, as relates to these CCFs, a number of industry groups are beginning to raise concerns with the Federal Reserve that language in the term sheets requiring that borrowers have "significant operations in and a majority of its employees based in the United States" may prohibit American multinational corporations from accessing much-needed liquidity. As discussed in our analysis, however, there are a number of other facilities that have been established by the Federal Reserve to "provide as much relief and stability as [possible] during this period of constrained economic activity." One of those facilities, the Main Street Lending Program, has attracted criticism by some lawmakers for excluding non-profits from participating. House Speaker Pelosi recently sent a Dear Colleague regarding how the program excludes such organizations, calling this a "significant blow in particular to entities that are also ineligible for the Paycheck Protection Program."

Finally, implementation of CARES Act business tax provisions continues, with the IRS yesterday issuing guidance outlining procedures related to the technical correction to the 2017 tax reform law's changes related to the depreciation of qualified improvement property (QIP), which was included in the CARES Act. Specifically, the guidance informs taxpayers how to immediately deduct costs associated with QIP (*e.g.*, interior upgrades, such as remodeling, installing energy efficient equipment, or improving handicap accessibility), retroactive to January 1, 2018.

Health Updates

With $70 billion left in the CARES Act's $100 billion Public Health and Social Services Emergency Fund, which was established for hospitals, providers, and other entities to cover lost revenues and unreimbursed expenses attributed to the pandemic, Democrats have advocated for $100 billion to be added to the Fund in an interim relief bill. Yesterday, President Trump and House Minority Leader McCarthy indicated they would support additional funding in a legislative compromise. At this time, we are hearing Republicans may agree to $75 billion for the Fund – $25 billion less than what Democrats have stated is needed. Negotiations are ongoing, and it remains to be seen how Senate Republicans, including Senate Majority Leader Mitch McConnell (R-KY), view this potential deal.

As we reported yesterday, the Department of Health and Human Services (HHS) continues to work on new funding formulas and a timeline for the distribution of the remaining $70 billion in the Fund. HHS Secretary Alex Azar told Members of Congress that more information would be available in one to two weeks. Meanwhile, some lawmakers continue to press HHS to develop a formula that would prioritize entities that did not receive significant funds in the first distribution tranche. Democrats on the Senate Committee on Finance wrote a letter to Secretary Azar, requesting HHS provide transparency over all distributed funds. They also requested HHS utilize a methodology for future distributions that takes into account: providers that did not benefit from the first distribution tranche, the financial impact of the lost revenue from the current moratorium on certain procedures, geographic hot spots, and "the burden on community-based organizations providing routine care essential to keeping patients at home." The lawmakers addressed the President's decision to utilize the Fund to pay for COVID-19 care for the uninsured, stating that HHS should not use the Fund to "make up for gaps in coverage as a result of a state's decision not to expand Medicaid, or the Administration's decision to reject opening a nationwide Special Enrollment Period [on HealthCare.gov]." They stated HHS should ensure all states and providers have necessary resources and "are not penalized for their efforts to expand qualified, comprehensive health coverage."

Senate Committee on Finance Chairman Chuck Grassley (R-IA) joined a bipartisan letter addressed to HHS Secretary Azar, requesting HHS ensure that long-term care facilities caring for seniors and those with intellectual and developmental disabilities receive adequate resources in fighting the coronavirus pandemic. The senators advocated for "a meaningful level of support" from the Fund for these entities. Separately, Chairman Grassley wrote to HHS Secretary Azar and Centers for Medicare & Medicaid Services (CMS) Administrator Seema Verma, expressing concern and asking for more information about the federal response to the coronavirus in nursing homes. On the other side of the Capitol, House Committee on Ways and Means Chairman Richard Neal (D-MA) also focused on issues involving nursing homes, writing to CMS Administrator Verma and stating, "[w]e *must* focus more on our nation's nursing homes, particularly in the areas of transparency and infection control/crisis management."

The National Institutes of Health (NIH) announced a public-private partnership to develop an international and coordinated research response to the coronavirus pandemic. The Accelerating COVID-19 Therapeutic Interventions and Vaccines (ACTIV) partnership "will develop a collaborative framework for prioritizing vaccine and drug candidates, streamlining clinical trials, coordinating regulatory processes and/or leveraging assets among all partners to rapidly respond to the COVID-19 and future pandemics." The partnership will include NIH, the Foundation for the NIH, the HHS Office of the Assistant Secretary for Preparedness and Response, the Centers for Disease Control and Prevention, the Food and Drug Administration, and the European Medicines Agency, as well as more than a dozen biopharmaceutical companies.

Trade Updates

Over the past two weeks, there have been growing reports related to COVID-19's impact on the Phase One trade deal between the United States and China. In January 2020, the United States and China officially signed the agreement, which paused trade tensions between the two countries that had been escalating since early in President Trump's presidency. As part of the deal, China committed to buy $200 billion in U.S. products over the next two years, including approximately $75 billion in manufactured goods, $50 billion worth of energy, $40 billion in agriculture products, and $40 billion in services.

China's purchasing commitments were viewed by many as ambitious even then. Because of the COVID-19 pandemic, there is growing speculation that it could fail to meet these targets, especially the non-agricultural products. In an interview taped earlier this month, Chinese Ambassador Cui Tiankai seemed to suggest the same, noting that while China is currently fulfilling its obligations under the Phase One trade deal, it might be wise for the two sides to meet via a conference call to discuss the impact of COVID-19 on the agreement.

The ongoing pandemic could absolutely affect China's ability to meet certain purchasing and other commitments made in the Phase One trade deal. However, Trump Administration officials have been careful not to criticize China's compliance with the agreement publicly. We have also heard from Democratic and Republican sources in Congress that China is moving forward with its non-purchasing commitments, even as it deals with the pandemic. Until President Trump or other high-ranking Administration officials publicly criticize China for failing to meet its obligations, the risk of retaliation by the United States (and thus a resumption of the trade war) remains low.

European Policy Updates

Challenged by the different approaches across the European countries for easing national lockdown measures or prolonging them, European Commission (EC) President Ursula von der Leyen, jointly with the European Council President Charles Michel, provided a Joint European Roadmap to lifting national coronavirus containment measures. While the EC does not have the legal authority to impose an EU-wide strategy, the Joint Roadmap introduces a set of criteria and sanitary measures that can be used in national exit strategies. Further information can be found here.

The EC has been examining how data could play a role in tracking and tracing contacts of people who test positive for COVID-19, and how such efforts need to respect European data protection standards. On April 16, it issued a Common EU toolbox for Member States for mobile applications to support contact tracing in the EU's fight against COVID-19, accompanied by a data protection focused guidance on the usage of apps in support. The Common EU toolbox was developed by the EC in collaboration with the e-Health Network. The related methodology is voluntary, fully compliant with the European data protection and cybersecurity standards (with anonymized data), and should be implemented and approved by public health authorities. More information is available here and here.

Governments across the world are reacting quickly to mitigate the impact of COVID-19 by revamping or amending insolvency laws. This SPB memorandum provides a detailed overview of notable changes to restructuring and insolvency laws in response to the global pandemic, across a selection of jurisdictions including Australia, China, Russia, the UK, the US, France, Germany, Spain, Japan, the UAE, Poland, and the Czech Republic.

A broader view of how clients are implementing contingency arrangements throughout the COVID-19 crisis is reflected in another recent alert focused on supply chains (available here). Clients from the aerospace, automotive, food and drink, retail, industrial, and consumer products sectors have for the most part assessed the potential impact of the pandemic on cash flow, as well as on their customers or end users, and have taken measures to adapt their distribution networks accordingly. However, numerous areas including alternative sourcing, supply chain visibility, regulatory compliance, and financial support have received less attention.

Finally, businesses are starting to look to the longer term, principally with regards to supply chain resilience, risk, and its mitigation. SPB's own Ambassador Matthew Kirk has analyzed how supply chains may look like after the COVID-19, available here.

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