

Fall Congressional Forecast: Eye on Federal Funding and Health Care

Article By:

Sylvia Kornegay

Timothy Perrin

Congress faces a crowded agenda this fall comprised of must-pass policy initiatives and potential political messaging opportunities in the lead up to the November midterm elections. With control of both chambers at stake, the House and Senate have only a few weeks in session before Election Day to act on major priorities. This alert previews the fall Congressional landscape with a focus on federal appropriations and health care.

Federal Appropriations

Congress' most immediate priority is passing a short-term Continuing Resolution (CR) to keep the federal government operating past September 30th at current Fiscal Year (FY) 2022 spending levels. This will allow the House and Senate to reach a final agreement on FY 2023 funding. Only half of the yearly appropriations bills have cleared a single chamber; the House on July 20th passed a consolidated package that comprised six of the 12 annual spending bills, including funding for the Food and Drug Administration (FDA). The House moved forward on this measure despite a standstill by bicameral House and Senate leadership (the "Four Corners") on topline FY 2023 spending figures and indications by House Democrats that there was no clear path for the House-passed bills. Similarly, Senate Appropriations Chairman Patrick Leahy (D-VT) released Democrats' proposed spending legislation in late July with the caution, "It is my hope that by releasing these bills and making clear what the priorities of Senate Democrats are, we can take a step closer toward reaching a bipartisan compromise after months of stalled negotiations."

The FY 2022 CR may extend into mid-December and is one of a limited number of legislative vehicles expected to clear Congress before the end of this year. Therefore, it will attract efforts to attach riders spanning a range of policy and political issues, including:

- *Biden Administration Priorities*. On September 2nd, the White House Office of Management and Budget (OMB) [released](#) its request to Congress outlining its critical needs in a short-term CR. While the largest funding priorities in OMB's request are aid for Ukraine, COVID-19, monkeypox, and natural disasters, the package also seeks support for other core areas such as Afghan resettlement, Department of Defense operational and training cost increases, a

new national '988' suicide hotline, and the Department of Health and Human Services (HHS) Office of Refugee Resettlement.

- *Congressional Democrats.* The U.S. Supreme Court *Dobbs* decision overturning *Roe v. Wade* heightened Democrat efforts to expand federal access to abortion services. Both the House and Senate FY 2023 Labor, Health and Human Services spending bills would strike the Hyde and Weldon amendments that bar federal funding for abortions and to public programs that discriminate against health care entities refusing to provide, cover, or refer for abortions. Additionally, Senate Democrats may consider attaching a provision to the CR to codify same-sex marriage.
- *Congressional Republicans.* GOP members have resisted efforts this year to authorize additional funding for COVID-19 relief, arguing that the Biden Administration still has the authority at its disposal to repurpose existing unspent or unobligated dollars, which it did earlier this year. Their position on social riders may be more nuanced: while Republicans have signaled that repeal of the longstanding Hyde and Weldon amendments are non-starters in fiscal talks, 47 House Republicans joined Democrats in a floor vote earlier this year to codify same-sex marriage. This outcome suggests that there may be a similar path to 60 votes in the Senate.

FDA User Fee Reauthorizations

Congress is facing a September 30th deadline to reauthorize the FDA user fee programs. This five-year authorization is considered a must-pass bill as it provides critical funding for the FDA, but it has hit roadblocks in its path to passage.

There are three different versions of the reauthorization bill in play. The House passed the Food and Drug Amendments of 2022 (H.R. 7667) earlier this summer. The Senate Health, Education, Labor and Pensions (HELP) committee reported out a different bill, the Food and Drug Administration Safety and Landmark Advancements Act (S. 4348) that has yet to reach the Senate floor. HELP Ranking Member Richard Burr (R-NC) is opposing some policy riders attached to the House and Senate bills and has introduced a "clean" bill, stripped of any riders.

It is unclear how user fee reauthorization gets to the finish line at this point. A temporary clean reauthorization may be attached to the CR to allow for additional time for key players to reach agreement on the policy riders. Another potential route is for committee leadership to continue negotiations with Senator Burr to pare down number of riders to reach agreement. There is a high likelihood it will get done, especially because failure will cause disruption and furloughs at the FDA at a critical time in the pandemic response.

Mental Health

The post-pandemic spike in mental health and substance use disorders (MH/SUD), combined with recent mass shootings and the toll of the opioid epidemic, has increased the urgency for lawmakers to enact policies that expand access to MH/SUD services and ultimately decrease the prevalence of these challenges. In the wake of two high-profile shootings earlier this summer, Congress passed bipartisan gun safety and behavioral health legislation that boosted existing federal mental health and school safety services programs. This included funding that will grow the number of mental health counselors based in schools. This legislation was notable because it was bipartisan and combined

the issues of gun safety and behavioral health. Shortly after that legislation was enacted, the House passed a broader MH/SUD package (H.R. 7666) which would reauthorize and enhance existing federal programs.

Although the Senate has not yet taken action on broader MH/SUD legislation similar to the House-passed bill, the Finance Committee and HELP Committee have been developing policy solutions over the past year. With the end of the 117th Congress drawing near, it is expected that these panels will hold hearings and issue position papers to solicit feedback from the stakeholder community. This committee action in the Senate will likely lead to the chamber considering its own package of broader MH/SUD provisions this fall. However, a compressed Congressional calendar, the results of the November elections, and the size and scope of the lame duck Congress could lead Senate leaders to attach the House-passed bill (H.R. 7666) to an end-of-the-year package. While the Senate could simply accept this language to be expedient, it is more likely that Senate champions will seek to negotiate program funding levels and to insert policies that remove access barriers.

Telehealth

The federal expansion of telehealth services during the COVID-19 public health emergency is widely viewed as one of the silver linings of the pandemic because it helped individuals access many different types of care they otherwise would not have received. In fact, telehealth has been credited with limiting the spread of COVID-19 and reducing the risk of opioid overdoses. As a result, there is great interest among lawmakers in both parties in extending many of the pandemic telehealth flexibilities.

Just before Congress adjourned for the August recess, the House, in an overwhelmingly bipartisan vote, passed legislation (H.R. 4040) that would extend the Medicare telehealth waivers through December 31st, 2024. This measure, which is strongly supported by President Joe Biden, now awaits action in the Senate and could be legislation the chamber takes up prior to the November elections to generate a political win to tout on the campaign trail. However, Senate Finance Committee leaders have said that they are crafting their own version of a telehealth bill, which is anticipated to build on legislation introduced in 2020 and include enhanced access to MH/SUD telehealth services. Committee leaders are seeking support from Senate leaders to pursue their approach. Depending on when this policy proposal is unveiled, it seems likely to be considered in an end-of-the-year package that includes other Medicare provisions. In this scenario, Senate and House leaders would negotiate the parameters of a telehealth expansion, which would give Senate champions an opportunity to insert their policy priorities not already included in H.R. 4040.

As policymakers work to address these pressing issues in the coming weeks, stakeholders should note that other areas are likely to receive attention in the lame duck session as Congress almost immediately will face new legislative deadlines following the midterms. These include:

Medicare Physician Payment Cuts. In 2021 Congress passed The Protecting Medicare and American Farmers from Sequester Cuts Act (PMAFSCA) which provided a one-year 3% boost to Medicare payments for physicians. That increase, intended to help physicians during the COVID-19 pandemic, is set to expire on December 31st, 2022, if Congress does not act. This is just one of many cuts to Medicare payments physicians are facing in 2023. Physician groups are mobilized and urging Congress to include an extension of the 3% payment increase in any year-end package, with the promise of working toward long-term payment reform. While they have the support of many in Congress and have had success in securing year-end fixes to imminent payment cuts, it is unclear whether Congress will be willing to act this year.

R&D Amortization. Lawmakers have signaled strong bipartisan and bicameral interest in retroactively delaying or repealing the five-year amortization of domestic research and development (R&D) expenditures (15 years for foreign R&D costs) enacted by the 2017 Tax Cuts and Jobs Act (TCJA). TCJA amended Section 174 of the U.S. Tax Code to no longer allow the immediate expensing of research and experimental expenditures beginning January 1st, 2022. This provision nearly was included in the FY 2022 omnibus spending bill earlier this year and the recently enacted CHIPS Act dedicated to boosting domestic investments in manufacturing. The R&D fix has been discussed as a legislative candidate for inclusion in a comprehensive year-end package that also may include expiring tax extenders, among other provisions.

Shelagh Foster also contributed to this article.

© Polsinelli PC, Polsinelli LLP in California

National Law Review, Volume XII, Number 251

Source URL: <https://natlawreview.com/article/fall-congressional-forecast-eye-federal-funding-and-health-care>