

U.S. legislative outlook: with midterms quickly approaching, what can get done?

Blog post by Director Robert Etter, 16 June 2022

As Congress embarks on its summer work period, the calendar looms ever larger as an obstacle to passing major legislation. A quick look at the Congressional schedule reveals only a handful of weeks when both the House and Senate will be in session prior to the August recess. In addition to the calendar, midterm politics increase the headwinds for legislative action. With the November midterms approaching and President Joe Biden's approval ratings stuck in the low 40s, members of Congress in tight races will be increasingly reluctant to take tough votes on controversial issues if they think doing so might hurt them in November. And Republicans will be increasingly reticent to give Democrats legislative "wins" in anticipation of gaining control of at least one chamber of Congress in 2023.

Even with these obstacles, a few viable legislative items are worth tracking as summer approaches:

The Bipartisan Innovation Act: The Bipartisan Innovation Act has been moving through Congress in various forms for over a year. The bill is a high priority for Senate Majority Leader Chuck Schumer (D-NY) and has already passed both the House and Senate in different forms. A conference committee convened last month is currently attempting to resolve the differences and finalize the bill.

Broadly speaking, the legislation is designed to support American competition against China, promote semiconductor manufacturing in the United States, and invest scientific research and development. It also contains provisions to strengthen supply chains, along with trade and foreign policy provisions.

In addition to being a signature item for Schumer, President Biden has also prioritized this bill as one of his best chances to notch a legislative win with his Build Back Better plan stalled. While the Bipartisan Innovation Act enjoys support from both sides of the aisle, the conference committee is grappling with contentious provisions on trade and other issues that could complicate its prospects. Additionally, the scope of the bill and sheer number of conferees (over 100 members) means work on a final agreement could drag through the summer. The longer negotiations take, the harder it will be to pass the bill.

One more attempt at Build Back Better? The administration and Democratic leadership are still working to salvage what is possible of their signature Build Back Better (BBB) plan. Democrats spent months during the second half of 2021 trying to enact BBB, which began as a long list of policy priorities including universal pre-school, immigration reform, paid family leave, climate-change measures and more. The roughly \$2 trillion package was to be paid for with tax and health savings and could be passed without Republican votes using the complex budget reconciliation process. However, through a combination of procedural obstacles and opposition by moderate Democratic

senators, most notably Sens. Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ), the effort was whittled down and eventually shelved at the end of last year when Sen. Manchin declared his opposition to the package.

In the last few months, however, Sen. Manchin has signalled at least some openness to revisiting a drastically reworked version of the bill. Manchin's version would be paid for with tax reform that would undo or revise parts of President Trump's 2017 Tax Cuts and Jobs Act, with half of the revenue raised going toward deficit reduction and the other half paying for programs that address issues such as prescription drug prices and climate change. However, Sen. Manchin still has the concerns around inflation and spending he cited when he came out in opposition the BBB bill in December.

At this point, the prospects for passage of even a scaled back BBB seem dim but negotiations with Sen. Manchin are quietly continuing. And there may be an increasing sense of urgency for Democrats to get something done using budget reconciliation due to a looming healthcare cliff: Affordable Care Act premiums are set to increase at the end of this year with many voters receiving notice of those increases right around the time of the midterms. This could be a significant political problem for Democrats, and one that feeds into Republican messaging blaming the incumbent party for rising inflation. Republicans will not be inclined to provide the votes to fix the health insurance premium cliff, so Democrats' best hope of addressing it may be attaching a fix to the Build Back Better bill currently sitting in the Senate.

All of this adds up to long odds for getting a bill resembling BBB over the finish line, but the administration and Democratic congressional leadership will likely continue pushing in the coming weeks to see if some combination of changing the scope of the bill, rebranding it as an inflation-fighting measure, and lowering the spending amount will pass muster with their caucus.

Fiscal Year 2023 government funding: Government funding for FY 2022 expires at the end of September, and Congress will need to enact funding for FY 2023 by that point to avoid a government shutdown. There have been no real indications that Republicans are interested in forcing a shutdown just a month prior to the midterms. But given omnibus appropriations for FY 2022 were not enacted until March of this year, it is reasonable to expect that Congress may need to enact a continuing resolution (CR) - extending government funding at the prior year's rate - while it works through FY 2023 appropriations.

There are some encouraging signs with respect to the FY 2023 appropriations process. The "four corners" - the Chairs and Ranking Members of the House and Senate Appropriations committees - reportedly have already met to discuss "top line" budget numbers, something that did not occur until much later during the previous year's process. Additionally, Senate Appropriations Chairman Leahy (D-VT) and Ranking Member Shelby (R-AL) are both retiring at the end of this Congress and would surely like to get one more year-long funding deal before they leave. Inflation will also make the pain of operating under a continuing resolution at last year's spending levels more acute on both the defence and non-defence side of the ledger.

However, despite these positive signs, the fact remains that this is a midterm election year, when partisan tensions are more likely to flare up. This dynamic, coupled with Congress' frequent history

of enacting one or more CRs to begin a fiscal year, makes a CR until after the midterms the likeliest government funding outcome at the end of September. The question then becomes whether a year-long deal is possible in December. If Republicans win the House, will their leadership want to “clear the decks” of government funding issues for their incoming majority, or will they want to punt to early 2023 to try to get a better deal once that majority is in place? The answer to that question will determine much of the legislative outlook for the beginning of 2023.

The National Defence Authorization Act (NDAA): The NDAA is the cornerstone piece of legislation dealing with US defence and national security policy. The bill has been enacted every year for 61 years, and while it is not technically a “must-pass” piece of legislation (in the sense that the government will not shut down in its absence), it is a critical bill and Congress treats it accordingly. In addition to its importance for defence policy, because the NDAA is enacted every year, it can act as a reliable legislative vehicle to which other, sometimes loosely related provisions may be attached. Leader Schumer, for example, unsuccessfully tried to attach a previous version of the Bipartisan Innovation Act (discussed above) to last year’s NDAA. Further, with the ongoing war in Ukraine, Congressional consideration of the NDAA will provide a forum for robust debate about the US response to the conflict and will attract consequential - and controversial - amendments on the topic as well.

The NDAA negotiation process typically starts moving during the summer, and both the House and Senate Armed Services Committees have already announced they will consider the bill at both the subcommittee and full committee level this month. In recent years the bill has been enacted toward the end of the year. Expect this year to follow a similar cadence.

Other legislative items: In addition to the items above, a number of other legislative items could gain traction, most notably any bill arising out of the ongoing *negotiations around gun control*. Any deal that emerges will likely be substantively incremental but given the involvement of Sen. Chris Murphy (D-CT), Democrats’ leading advocate on the issue, and John Cornyn (R-TX), a member of Republican Senate leadership representing Texas, a state that is a major supporter of gun rights, such a deal could move to the Senate floor very quickly.

Separately, the administration has been for months sounding the alarm on the need for additional *covid-19 funding*. While Congress was close to a funding deal earlier this spring, it was ultimately scuttled over border and immigration politics, and remains stuck in a congressional stalemate. It is possible that if another wave of covid-19 cases or a more deadly strain emerges a deal could come together.

There has also been a flurry of activity around *tech legislation*, including action on antitrust, privacy and digital advertising. Some of these bills have strong bipartisan support from key committee members who are urging floor action this year. Senate Judiciary Antitrust Subcommittee Chair Sen. Amy Klobuchar (D-MN), for example, is pushing hard for a floor vote on the antitrust bill she introduced with Judiciary Committee Ranking Member Sen. Chuck Grassley (D-IA). The bill has ideologically diverse and broad bipartisan support, which gives it real momentum. However, it has also been the subject of intense lobbying by the tech industry, and even some Democrats - particularly those up for re-election - are cool to the idea of bringing the bill up for a vote on the

Senate floor this year. Given these headwinds, along with competing legislative priorities and the shrinking Congressional calendar, it is easy to imagine this and other tech bills ending up on the cutting room floor this year.

Finally, as the midterms draw closer, Democratic leadership will likely pursue votes on ***messaging bills*** to support vulnerable members in tough elections, for example on measures addressing inflation and consumer prices, even though those measures are not likely to pass in today's hyper-partisan environment. As the midterms approach expect more votes of this variety.