Lame Duck: What needs to get done vs. what actually will get done

Congress returned to Washington from the campaign trail only to be confronted by the mountain of work they left behind. Congressional leadership elections, a December 11 funding deadline to avoid a government shutdown, on-again/off-again COVID-19 stimulus negotiations, and formally beginning and ending a conference on the National Defense Authorization Act (NDAA). And those are just the “big ticket” items that need to be addressed before Congress adjourns for the December holidays.

Always in the mix at the end of the year are a hodgepodge of bipartisan supported tax extenders. Business groups are focused on reducing uncertainty, so there could be action on the 30-some extenders in the lame duck. And if a tax extender package fails to come to fruition (not the first time), look to Congress to retroactively address expiring alcohol, excise, airline, clean energy and other miscellaneous provisions early in the 117th Congress.

So what are the dynamics at play over the next couple of months, and how will they drive outcomes? Let’s take a look.

Leadership Elections

Among the first orders of business for the returning Congress is electing leaders for the coming Congress. While the recent election changed who will occupy the White House come January 20, it did not alter who will lead the House and Senate, remembering of course that the two Georgia Senate runoffs will determine who ultimately controls the upper chamber. Current Majority Leader Mitch McConnell (R-Kentucky) was unanimously approved to remain the Republican Senate leader, and Democrats have re-elected current Minority Leader Chuck Schumer (D-New York) for the 117th Congress.

In the House, Speaker Nancy Pelosi (D-California) was approved to keep her gavel, despite the already public infighting between progressive and moderate Democrats, and Rep. Kevin McCarthy (R-California) was re-elected to return as Republican leader. With the same people occupying the same positions, one might expect the same outcome: gridlock. But because of the outcome of the presidential election, the incentives to finish up this year’s business have been altered, and President-elect Biden will be pushing for Congress to clear the decks next session.

Government Funding

Before the election, Congress passed a continuing resolution to keep the government running until December 11. Now that they’ve returned, providing funding through the end of the 2021 fiscal year is the first order of business.
The House passed 10 of the 12 annual appropriations bills last summer in two so-called “mini-bus” packages. The Senate has taken no action on appropriations bills this year except to release committee drafts of each bill as a starting point for discussions. Senate Appropriations Chairman Richard Shelby (R-Alabama) has indicated his interest in pursuing an omnibus bill wrapping all 12 into one big package - a sentiment echoed by Speaker Pelosi and House Majority Leader Steny Hoyer (D-Maryland). The incentive for Republicans is to get the bills enacted while President Trump is still in the White House in order to keep funding levels lower and maintain policy riders that Republicans support. Meanwhile, Democrats are keen to clear the decks of 2020 business so that an incoming Biden administration, already burdened by a raging pandemic and a faltering economy, can avoid a potential government shutdown in the early days of the new presidency.

So, is there a deal? Not so fast. Both chambers need to agree on funding levels for each bill, the so-called 302(b) levels. Ordinarily, these are established by a budget resolution adopted earlier in the year, but that did not happen. Predictably, the two chambers are far apart on both topline numbers and programmatic priorities.

There are also policy riders that are diametrically opposed. For instance, there will be a fight over funding of Planned Parenthood as well as the “Mexico City policy” that bans foreign assistance to organizations that provide abortion services. There is also disagreement over further funding for President Trump’s border wall. The big question is whether the Democrats continue to press for additional COVID-19 funding through the appropriations process. The effort by Democrats to attach COVID-19 language to various appropriations bills earlier in the year is among the reasons that the previous bipartisan agreement to prevent new policy riders has caused the process in the Senate to break down. If a big spending bill does come together, look for Senate Energy and Natural Resources Chairwoman Lisa Murkowski (R-Alaska) to work tirelessly to add her American Energy Innovation Act (AEIA) as a rider.

**COVID-19 Relief**

A deal on a new round of relief to deal with COVID-19 could alleviate some of the problems facing the appropriators, but the recent election did not really alter the contours of the disagreement that prevented passing a relief bill before the election. Leader McConnell has said that a new round of relief is necessary but has again rejected the level of spending that Democrats have proposed. Democrats still want a multi-trillion dollar package that includes more funding for both state and local governments and wide-scale testing. Republicans want to spend far less, are opposed to additional funds for state and local governments and want to include liability protections for businesses and universities. Democrats oppose broad liability provisions. As Senator Roy Blunt (R-Missouri) observed, “I think both sides are saying they want one, but both sides are saying they want the one they want (emphasis added).” The prognosis here is not promising.

**National Defense Authorization Act (NDAA)**

Every year for the last 59 years, the NDAA has been signed into law and the leaders of the House and Senate Armed Services Committees are loath to break the streak. While there are generally funding and policy differences between the two chambers, this year features an especially high-profile provision that has drawn a veto threat from President Trump.

Both the House and Senate passed language that would require the Department of Defense to change the names for military installations that were named for Confederate military leaders. However, Senate Armed Services Committee Chairman Jim Inhofe (R-Oklahoma) has sided with President Trump and said the final bill would not contain the provision. House and Senate Democrats have insisted that it remain in the bill, citing that both chambers passed similar provisions, although the Senate adopted it by voice vote; whether there is an
actual majority in the Senate supporting the provision is an open question. An interesting
dynamic here is the two runoff elections in Georgia, where this issue could potentially drive
voter turnout on both sides. One of the bases in question, Fort Benning, straddles the
Georgia-Alabama border. Senator Kelly Loeffler (R-Georgia) has come out publicly against
the provision, while Senator David Perdue (R-Georgia) has yet to take a public position.

The NDAA is also expected to carry a number of “anti-China” provisions. For instance,
the Senate bill contains language prohibiting all federal agencies from purchasing or
leasing telecommunications equipment from either Huawei or ZTE. The House included
an amendment offered by Rep. Brad Sherman (D-California) that would require Chinese
companies to be barred from being listed on US stock exchanges if the Public Company
Accountability Oversight Board (PCAOB) has been unable to inspect the companies’ audit
work papers for three consecutive years. The telecommunications amendment seems likely
to be carried in the final bill. However, the de-listing bill will not be a part of NDAA. Instead,
it has been scheduled for a separate vote on the House Floor this week. It is expected to
pass overwhelmingly.

What Gets Done

Look for the NDAA to be passed before Congress adjourns since both chambers passed their
versions with veto-proof margins. The question remains, will the president follow through
on his veto threat, and will there be time to consider a veto override before Congress
adjourns for the holidays. An omnibus is possible if COVID-19-related legislation is dealt with
elsewhere.

Otherwise, look for Congress to kick this can into next year with tax extenders hitching
a ride. COVID-19 stimulus is where both sides seem furthest apart. While Speaker Pelosi
and Majority Leader McConnell both have some incentive to get it done, the actual path to
passage remains unclear.
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