

Senate — And Pandemic Relief — Still Hanging In The Balance

By **Andrew Kragie**

Law360 (November 4, 2020, 3:11 AM EST) -- Control of the U.S. Senate remained uncertain early Wednesday as the coronavirus outbreak slowed vote tallying, leaving in limbo a pressing agenda that includes pandemic relief, government funding and federal judge confirmations.

Early results showed Senate Republicans suffering a net loss of at least one seat, with other races that will decide the majority still too close to call amid a surge in mail voting, which slowed many counts. Democrats were projected to maintain control of the U.S. House of Representatives, while the presidential contest remained uncertain. Regardless of how the final tallies emerge in the coming days, Capitol Hill veterans and top lobbyists told Law360 that lawmakers return to Washington later this month with an urgent to-do list.

First, the government will start to shut down Dec. 11 unless Congress approves new funding. The simplest path would be a continuing resolution that extends current budget levels for another few months or even for the rest of the fiscal year that ends Sept. 30.

Muftiah M. McCartin, co-chair of Covington & Burling LLP's public policy group and a former Democratic House staffer, said quick action on a continuing resolution would clear the decks for budget writers to tackle a major stimulus bill and the fiscal year 2022 budget. Other expiring items could get pushed into next year, including a slew of tax extenders that could be paired with Medicare and Medicaid provisions expiring Nov. 30.

Susan B. Hirschmann, a former Republican aide who is CEO of lobbying firm Williams & Jensen PLLC, suggested there could also be an effort to address "surprise billing" in health care. Sen. Lamar Alexander, a Tennessee Republican who chairs the health committee, is retiring and could push for action on his bipartisan proposal — although there's a crowded field of other bipartisan bills. But the presumption is against major changes.

"I think the most likely scenario is a very lame 'lame duck,'" Hirschmann said.

Hill observers anticipate another large coronavirus relief package after months of unsuccessful pre-election negotiations between President Donald Trump's administration and House Speaker Nancy Pelosi, D-Calif.

However, Covington counsel and former Republican aide Bill Wichterman said most GOP senators remain staunchly opposed to another bill with a price tag over \$1 trillion, and even more so after some better-than-expected economic data from the third quarter.

"I'm not sure if Trump will want to start right where the negotiations left off," he said. "There was a demonstrable lack of enthusiasm among congressional Republicans."

Holland & Knight LLP public policy group leader Rich Gold predicted a smaller measure might advance, with Democrats accepting a curtailed version of liability protections in exchange for new state and local funding.

Sander Lurie, a Dentons principal and former chief of staff to Democratic senators, suggested the liability protections might get broader support if they're limited to essential businesses like hospitals and grocery stores and if Congress lets states choose whether to adopt the standards. Some states have already approved some form of pandemic-related protections.

Majority Leader Mitch McConnell — a Kentucky Republican who easily won his seventh term despite a Democratic challenger who drew national attention and funding — indicated Friday that the lame-duck session was not promising for a relief bill, calling it "something we'll need to do right at the beginning of the year."

Along with a relief bill directly responding to the pandemic, advocates expect a major stimulus bill to boost the economy in the coming months, perhaps with a long-awaited infrastructure package that goes beyond highways.

More Democratic wins would put the focus on renewable energy, efficiency projects and mass transit, said former Democratic staffer Roscoe Jones Jr. of Gibson Dunn & Crutcher LLP. Broadband internet funding could draw bipartisan support. Jones predicted stimulus funds might come with "Buy American" requirements and limits on mandatory arbitration for employees, a longtime target for the left.

Lawmakers could aim to spur demand for hard-hit industries like travel and restaurants, Gold said, predicting bipartisan interest in restoring business entertainment deductions.

Advocates expect a sprawling measure meant to inject money into the economy, much like the 2009 stimulus package, the American Recovery and Reinvestment Act.

While the Senate majority remained unclear, individual races already promise to impact the federal judiciary.

Several states saw a Senate seat change parties, which will impact judicial picks for federal district courts. Although Republicans in 2017 nixed the "blue slip" tradition for appeals courts, senators still effectively have veto power for their states' trial courts.

The only seat that slipped away from Democrats on Tuesday was in deep-red Alabama, where Sen. Doug Jones lost to former football coach Tommy Tuberville. That eases the path for Republican-favored judicial picks. The state's solicitor general, former Kirkland & Ellis LLP partner Edmund G. LaCour Jr., has been awaiting action since May, likely stalled because of opposition from Jones.

Judicial picks could look different for the two states where well-known Democrats unseated Republican incumbents.

Arizona GOP Sen. Martha McSally lost to Democrat Mark Kelly, the Associated Press projected, which means the Grand Canyon State will have two Democratic U.S. senators for the first time since 1953. Former Colorado Gov. John Hickenlooper defeated GOP Sen. Cory Gardner.

Judiciary Committee leadership will change hands next year even if Republicans keep the Senate majority. Chairman Lindsey Graham, R-S.C., fought off a surprisingly competitive and well-funded Democratic challenger but plans to give up the gavel after just two years, allowing Sen. Chuck Grassley, R-Iowa, to reclaim the top GOP spot on the panel after a stint leading the Finance Committee.

In other states with competitive races, Republican incumbents mostly appeared on track to re-election, although several remained too close to call as of 3 a.m. Wednesday. Those uncertain outcomes will determine the majority; in the event of a 50-50 divide, the party that wins the White House also gets the Senate majority because the vice president breaks ties.

If Democratic nominee Joe Biden wins the presidency, he will enter office with just a few dozen judicial vacancies, compared to over 120 when Trump took office. Both cases owe to Senate Republicans, who held President Barack Obama to a trickle of confirmations in his last two years and then prioritized confirming Trump's picks. McConnell said last week he plans to use the lame-duck session to confirm two circuit judges and as many as 30 district judges.

--Editing by Kat Laskowski.