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# **The Federal Update for July 26, 2024**

From: Michael Brustein, Julia Martin, Steven Spillan, Kelly Christiansen

Re: Federal Update

Date: July 26, 2024

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## Legislation and Guidance

### Congress Faces Challenges to Pass FY 2025 Appropriations Bills

The plan within the House of Representatives to pass all 12 fiscal year (FY) 2025 funding bills before leaving Washington for their summer recess seems to have been jettisoned this week. Only one of four planned votes on FY 2025 legislation was successful over the past few days, largely due to the introduction of controversial amendments. In addition, plans to vote on several more bills next week, including funding for the U.S. Departments of Labor, Health and Human Services, and Education (Labor-HHS-ED), were cancelled, with House lawmakers starting their summer recess one week early.

Meanwhile, the Senate has passed more than half of their FY 2025 appropriations bills out of the Appropriations Committee but has yet to take any votes in the full Senate. Senate appropriators will continue their committee markups next week, to include the Labor-HHS-ED bill, during their last few days in session before the scheduled summer recess.

House and Senate lawmakers will not return to session until September 9th and will be in recess for the month of October and into the first few days of November due to the Presidential and Congressional elections on November 5th. With the House challenges in passing FY 2025 appropriations bills this summer, and the upcoming election, House leadership is planning to pass a continuing resolution in September, which will extend federal funding at current year levels, to avoid a government shutdown on October 1st. The details of that continuing resolution are still being worked out, with disagreement among House Republicans on how long to extend funding for, as well as whether to attach policy legislation to the measure.

Author: KSC

### ED Asks to Implement Portions of Title IX Rule as Courts Block in More States

The Biden administration has asked the U.S. Supreme Court to allow it to implement certain portions of the updated Title IX regulations after several courts have issued injunctions blocking them from taking effect.

Twenty-six different States have challenged the enforcement of the rule, saying that the expanded definition of “sex” violates the intent of Title IX, among other complaints. A federal judge in the Eastern District of Missouri issued a new order Wednesday that blocks the U.S. Department of Education (ED) from enforcing the rule in Arkansas, Missouri, Iowa, Nebraska, North Dakota, and South Dakota. This order adds to existing rulings blocking the regulations in Alaska, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming, bringing the total to 21 States.

Despite these orders, ED says it will enforce the requirements of the new rule in the remaining States. The agency has issued [a number of new resources](https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html?source=email) for drafting nondiscrimination policies and grievance procedures, as well as a document titled “pointers for implementation.” On Monday it asked the U.S. Supreme Court to partially lift some of the injunctions with respect to portions of the rule that have not been challenged. The request asks the Court to intervene in two specific injunctions, noting that the only portions of the rule at issue in those orders are the expansion of the definition of sex to include gender identity, allowing transgender students to use facilities that align with their gender identity, and defining a hostile environment to include actions based on gender identity. The request says that the lower courts were wrong to block the entire rule because the injunctions are not adequately tailored to match the plaintiffs’ asserted injury. “A partial stay would inflict no cognizable injury on respondents because it would simply allow the Department to enforce provisions of the Rule that are not the source of their asserted injuries and … that they have not even challenged,” wrote Solicitor General Elizabeth Prelogar.

If the Supreme Court agrees to the request, ED could implement provisions regarding discrimination based on pregnancy status and additional changes to grievance procedures. If the request is successful, ED will also likely expand it to include other recent orders.

Author: JCM

### Competing Senate Bills Emerge in Wake of *Loper Bright*

Senators Elizabeth Warren (D-MA) and Bill Cassidy (R-LA) recently introduced competing bills in response to *Loper Bright*, a U.S. Supreme Court case which overturned the long-standing *Chevron* doctrine of deference to federal agencies in the interpretation of federal law. Under the *Chevron* doctrine, federal courts were bound to accept federal agency regulations if they were based on agencies’ reasonable interpretations of Congressional statutes. By overturning *Chevron* and giving free reign to federal courts in interpreting federal regulations, *Loper Bright* substantially weakened federal agencies’ ability to promulgate and enforce regulations.

Senator Warren’s bill, the Stop Corporate Capture Act (SCCA), seeks to codify the *Chevron* doctrine into law, and once again require federal courts to accept reasonable regulations promulgated by federal agencies where statutory language is ambiguous. In addition, the SCCA would allow agencies to reinstate certain rules rescinded by Congress and disclose when industry-funded research is included in agency rulemakings.

On the other hand, Senator Cassidy’s bill, the Upholding Standards of Accountability Act (USAA), would further limit federal agencies’ ability to promulgate regulations. Most notably, the USAA would require agency heads to testify before relevant congressional committees 30 days prior to the publication of any significant final rule. The bill would also require individuals nominated to agency positions that require Senate confirmation to testify before relevant congressional committees prior to appointment.

Given the partisan split in Congress, with a Republican majority in the House and Democratic majority in the Senate, neither of these bills is likely to garner enough support to pass both chambers of Congress.

Resources:

Brian Croce, “Senators introduce vastly different bills on federal rule-making after SCOTUS Chevron opinion,” *Pensions & Investments*, July 23, 2024.

Author: NJK

## News

### Federal Court Strikes Down E-Rate Funding Mechanism

The 5th Circuit Court of Appeals on Wednesday issued a decision saying the funding mechanism for the Federal Communications Commission (FCC) is unconstitutional. The Universal Service Fund, which finances FCC operations including E-Rate, is funded by a surcharge on consumer phone bills. But plaintiffs in this case say that this fee, imposed by regulators at the FCC, is a tax. Because only Congress may impose taxes, the fee runs afoul of the constitution and improperly delegates the collection of the fee to an outside entity.

FCC Chair Jessica Roswenworcel said the FCC will “pursue all available avenues for review.” But without the ability to impose this fee, the FCC would not be able to fund its programs like E-Rate, which subsidizes internet connectivity for schools and libraries, the Lifeline program, which helps pay for phone and internet for low-income families, and other rural connectivity programs.

Despite recent tussles over the scope of FCC programs – for example, whether expanding the E-rate program to offer mobile hotspots is consistent with its operation in “schools and libraries” – the FCC generally enjoys broad bipartisan support. Congress may choose to reinstate the funding mechanism as a tax, but that could take time.

Author: JCM

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