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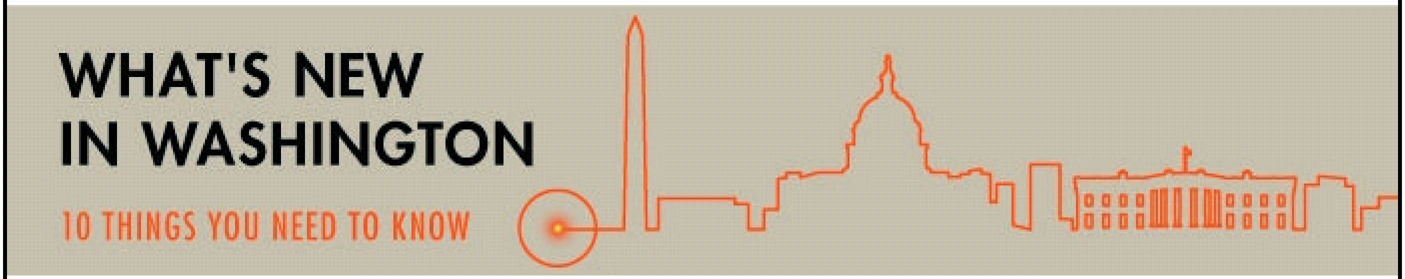

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March 31, 2017

As the Trump presidency completes its first 10 weeks, the administration is celebrating big wins on the regulatory reform front while nursing some wounds from a major defeat on efforts to repeal and replace the Affordable Care Act (ACA). While health care reform is on pause for the moment, Republicans are turning to tax reform as the next major policy priority and continuing to use executive orders (EO) and the Congressional Review Act to roll back Obama-era regulations. Funding for the government expires on April 28, 2017, so Republicans and Democrats will face the first test of bipartisanship in the next few weeks as they seek to fund government agencies, including the Department of Defense, through the end of September. All eyes will be on the Senate next week as the Supreme Court nomination of Judge Neil Gorsuch takes center stage.

Here are 10 things that we believe are worth focusing on from the last two weeks:

1. Gorsuch Nomination
2. Possible Repeal of ISP Security Rules
3. TSA's New Restrictions on Electronic Devices
4. "Energy Independence" Executive Order
5. Secretary Tillerson in Asia
6. Bilateral Trade and NAFTA Renegotiations
7. FDA User Fees Reauthorization
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Gorsuch Nomination

Amid pressure from his left-leaning base, Senate Minority Leader Chuck Schumer (D-NY) stepped up his opposition to the nomination of Judge Neil Gorsuch to fill the late Justice Antonin Scalia's seat on the Supreme Court. Sen. Schumer recently announced his intention to mount a minority filibuster of the nomination just years after Senate Democrats used the nuclear option to eliminate the filibuster for all non-Supreme Court nominees. Republicans need at least eight Democrats to vote to end debate and move to a final vote on the nomination, and they have inched closer to that goal with the March 30 announcement that Sens. Joe Manchin (D-WV) and Heidi Heitkamp (D-ND), both up for re-election in 2018, intend to cross party lines to vote to confirm Gorsuch. Despite the news, Sen. Schumer continues to express confidence that the Democrats can, and will, deny GOP leadership the necessary votes to get the nomination over the finish line.

Republicans continue to target swing-state Democrats, including the 10 up for re-election in 2018 in states that President Trump won. If Senate Democrats' filibuster moves forward, however, pressure will mount on Senate Majority Leader Mitch McConnell (R-KY) to use the nuclear option to remove the 60-vote threshold required to end a stalemate. Analysis of the 2016 presidential election shows that a sizeable group of Republicans grudgingly voted for President Trump to ensure a conservative successor to Justice Scalia. With the direction of the Court in the balance, conservative pressure could prompt reluctant Republican senators to support a rules change. From the White House, President Trump has already approved the use of the nuclear option to break a Democratic filibuster of the Gorsuch nomination, which would grant the President a legacy item within his first 100 days in office.

Looking forward, Republican leadership hopes to wrap up consideration of the Gorsuch nomination, with or without using the nuclear option, in early April. Democrats forced a delay on a vote by the Senate Judiciary Committee until the week of April 3, but Sen. McConnell reiterated his commitment to confirming Gorsuch by April 7, when Congress begins its Easter recess.

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Possible Repeal of ISP Security Rules

On March 23, 2017, the Senate voted 50-48 to repeal the Federal Communications Commission's (FCC) Internet privacy rules, which were promulgated in late 2016 by the FCC under the leadership of former-FCC Chairman Wheeler and, if effective, would subject broadband Internet Service Providers (ISP) to comprehensive notice/disclosure requirements, customer approval requirements, data security obligations and data breach notification requirements. On March 28, 2017, the House passed the same resolution by a vote of 215-205. Advisors for President Trump have stated that they will recommend that he sign the bill into law. Shortly after the House vote, FCC Chairman Pai ensured the American people that the FCC will work with the Federal Trade Commission (FTC) to ensure that consumers' online privacy is protected through a "consistent and comprehensive framework." Chairman Pai supports exclusive FTC oversight of broadband providers' privacy practices pursuant to the FTC's well-established, technology-neutral consumer privacy framework.

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TSA's New Restrictions on Electronic Devices

On March 21, 2017, in close coordination with its intelligence-community partners, the Transportation Security Administration (TSA) announced new restrictions in airport security procedures titled "Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States." Under the new procedures, passengers on direct flights to the United States from certain points of departure will not be allowed to bring personal electronic devices larger than a cell phone or a smart phone into the cabin. According to the TSA press release, the new policy is based on intelligence indicating that "terrorist groups continue to target commercial aviation and are aggressively pursuing innovative methods to undertake their attacks, to include smuggling explosive devices in various consumer items." TSA cited several terrorist attacks targeting commercial aviation, including "the 2015 airliner downing in Egypt, the 2016 attempted airliner downing in Somalia, and the 2016 armed attacks against airports in Brussels and Istanbul."

In its press release, TSA provided examples of the following large electronic devices that will not be allowed in the cabin on affected flights: laptops, tablets, e-readers, cameras, portable DVD players, electronic game units larger than a smartphone and travel printers/scanners. In general, a smart phone or other device cannot be larger than 16 cm X 9.3 cm to be allowed in the cabin. Prohibited devices will need to be placed in checked baggage. Approved medical devices may be brought into the cabin after additional screening.

TSA, an agency within the Department of Homeland Security, is implementing the new security measures through the Security Directive (SD)/Emergency Amendment (EA) process, a confidential process that includes industry notification. Through this process, the affected airlines were notified by TSA and were given 96 hours to comply with the new restrictions. The new security measures apply to 10 specific airports: Queen Alia International Airport (AMM), Cairo International Airport (CAI), Ataturk International Airport (IST), King Abdul-Aziz International Airport (JED), King Khalid International Airport (RUH), Kuwait International Airport (KWI), Mohammed V Airport (CMN), Hamad International Airport (DOH), Dubai International Airport (DXB) and Abu Dhabi International Airport (AUH). British authorities announced similar restrictions for direct flights to the United Kingdom, but the list of affected airports is slightly different from those announced by TSA (the countries on the U.K. list are Jordan, Egypt, Turkey, Saudi Arabia, Lebanon and Tunisia). None of the airports on either the TSA list or the U.K. list are located in the six countries previously affected by the Trump Administration's EO on suspension of visa issuance.

The announced security measures do not apply to flights departing for the affected countries, only to flights from those countries bound for the United States. Domestic airports affected by the new security measures are Atlanta (ATL), Boston (BOS), Chicago O'Hare (ORD), Dallas-Ft. Worth (DFW), Ft. Lauderdale (FLL), Houston Intercontinental (IAH), Los Angeles (LAX), Miami (MIA), Orlando (MCO), New York Kennedy (JFK), Philadelphia (PHL), San Francisco (SFO), Seattle-Tacoma (SEA) and Washington Dulles (IAD). No flights operated by U.S. airlines are affected because, currently, no U.S.-based airline operates direct flights to the U.S. from the 10 specified airports. However, some of the affected flights are code-share flights with several U.S. airlines.

The new security measures apply to all passengers on direct flights from the 10 designated airports, regardless of citizenship or trusted traveler program status. TSA announced that these restrictions may be lifted in case of changes in intelligence information, but that for now, the new security measures will remain in effect indefinitely.

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"Energy Independence" Executive Order

Following the collapse of the Republicans' ACA repeal and replace efforts, President Trump took steps to steady the administration's agenda by tackling another of his campaign promises: rolling back Obama-era environmental regulations. On March 28, 2017, President Trump signed a long-awaited EO on energy regulations. Dubbed the

"Energy Independence" EO, the centerpiece is a directive to the Environmental Protection Agency (EPA) to initiate the process of withdrawing and rewriting the Clean Power Plan (CPP), President Obama's marquee environmental policy that set limits on carbon emissions from fossil fuel-powered electricity plants. Due to federal requirements, the EPA cannot automatically rescind the CPP, but, instead, it must do so through a rulemaking process with notice and public comments.

Beyond the CPP, the EO would roll back other existing regulations, including the three-year moratorium on new coal leases on public lands, the plan to reduce methane emissions from oil and gas wells, and the guidance to agencies to consider the social costs of greenhouse gases when conducting an environmental impact assessment under the National Environmental Policy Act. Despite appeals from conservatives, the EO does not claw back the EPA's authority to regulate greenhouse gases, and it also does not remove the United States from the 2015 Paris Agreement (the "Agreement"), which committed signatories to taking steps to fight climate change. Without the CPP, however, it will be difficult for the United States to meet the emissions target set out by the Agreement.

Looking forward, the EO is expected to face significant challenges. The timeline for implementing the changes remains ambiguous, given that the President has yet to nominate individuals to fill key environmental leadership positions at the EPA and the Department of the Interior. Moreover, the implementation of the President's energy agenda will likely face strong legal challenges from both environmental groups and Democratic attorneys general, who have signaled an eagerness to take on the President on energy and environmental issues.

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Secretary Tillerson in Asia

Secretary of State Rex Tillerson arrived in Asia on March 15, 2017, for his first official foreign trip. President Trump ran on a campaign of economic nationalism and a stronger U.S. military, with significant attention placed to pushing against China. However, media accounts indicated that Secretary Tillerson offered a softer tone than the President, but areas of difference remained. At a news conference with Foreign Minister Wang Yi, Secretary Tillerson appeared to depart from not only the President's rhetoric, but from that of previous administrations, by stating that the U.S.-China relationship is guided by "nonconflict, nonconfrontation, mutual respect and win-win cooperation."

Much attention was paid to the fact that Secretary Tillerson allowed only one reporter to accompany him on the trip. Additionally, he held only one press conference during his planned stops in Japan, South Korea and China. State Department officials have tried to justify the lack of broader press participation by labelling the trip a "listening tour." This development added to mounting criticism from the press about the visibility and accessibility of the Secretary of State. Meanwhile, most of Secretary Tillerson's department leadership offices remain vacant.

Furthermore, despite the lack of press access, Secretary Tillerson still managed to make headlines during his trip. When asked about North Korea's recent missile tests and acts of provocation, Secretary Tillerson stated that, if North Korea's weapons program were to reach a level "that we believe requires action," then "all options," including preemptive military action, would be "on the table." These statements intrigued the international community in a month that has seen North Korea conduct as many as three missile tests in direct violation of multiple U.N. Security Council resolutions. U.S. and Chinese parties addressed but failed to agree on a common approach to dealing with North Korea's nuclear program. The dialogue between Secretary Tillerson and his Chinese counterparts laid the groundwork for Chinese President Xi Jinping's upcoming visit to Mar-a-Lago on April 6-7, 2017.

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Bilateral Trade and NAFTA Renegotiations

As part of the administration's effort to comply with the consultation requirements of the Trade Promotion Authority, Commerce Secretary Wilbur Ross met with House Committee on Ways and Means members on March 28, 2017, in a North American Free Trade Agreement (NAFTA) focused meeting. Discussion was almost solely focused on the administration's approach to renegotiation. In response to questions, Secretary Ross said that Mexico has informed us that it would like the negotiation to be completed by December and that the White House is aware of the political ramifications of negotiations drifting into Mexican elections next year.

Secretary Ross focused on the "21st century" improvements that can be made to NAFTA (i.e., the Trans-Pacific Partnership (TPP)), not losing market access that the United States currently has and improving enforcement provisions. Concerns on labor rights and improving labor laws in Mexico were expressed by Democrats. Both sides of the aisle pressed for ensuring that U.S. agriculture market access is not harmed. When asked by a Republican about a bilateral deal with Japan and ensuring that the TPP gains were not watered down, Secretary Ross responded that TPP would be the starting point for talks with Japan. The expectation from staff is that the formal White House notification of its intent to enter into negotiations with Canada and Mexico may occur as early as next week.

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FDA User Fees Reauthorization

With the American Health Care Act no longer under active consideration, Congress and stakeholders are focusing increased attention on reauthorization of the Food and Drug Administration (FDA) user fee agreements (UFAs). The Senate Committee on Health, Education, Labor, and Pensions and the House Energy and Commerce Committee have begun to hold hearings on the user fee programs for prescription drugs, medical devices, biosimilars and generic drugs. They each require reauthorization every five years, allowing the FDA and industry to negotiate performance goals and procedures for the next five years. The laws are set to expire on September 30, 2017. In addition to providing supplemental resources to the FDA's premarket review programs, as "must pass" legislation, the UFAs serve as a vehicle for substantive policy proposals to amend the Food, Drug, and Cosmetic Act. Potential substantive riders that are under active consideration include legislation to:

- allow for importation of drugs from Canada, provided that they meet certain safety criteria (e.g., S. 469; S. 92)
- expedite drug approvals (e.g., expedited pathway for important generics lacking competition) (e.g., S. 2615; S. 183; H.R. 749)
- allow terminally ill patients to try experimental therapies that have completed Phase 1 testing, but have not yet been approved by the FDA ("right to try") (e.g., H.R. 878)
- establish a regulatory system for laboratory-developed tests (LDTs) (Summary; Discussion Draft)
- improve the process for inspections of device establishments and for granting export certifications (e.g., H.R. 1736)
- clarify the definition of intended use for drugs and devices and the permissibility of scientific exchange with health care decision-makers (e.g., H.R. 1703)
- address the classification of hearing aids (e.g., S. 670; H.R. 1652).

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Fiduciary Rule

On March 28, 2017, the Department of Labor (DOL) sent to the Office of Information and Regulatory Affairs (OIRA) for final approval a rule to delay implementation of the Fiduciary Duty Rule (the "Rule"). An Obama-era regulation, the Rule, which applies a fiduciary standard to financial advisors' recommendations to investors in employee benefit or individual retirement plans, came under scrutiny from President Trump in the opening days of his presidency. On February 3, 2017, President Trump signed a memorandum calling for the DOL to review the Rule, but the document did not delay the Rule's implementation date of April 10, 2017. Consequently, the DOL is proposing a 60-day delay of the Rule's implementation date to June 9, 2017, providing the DOL additional time to complete the White House-mandated review of the Rule. Comments on the review of the Rule are due by April 17, 2017, per the President's memo.

Acknowledging that the implementation delay may not be finalized before April 10, 2017, the DOL announced that the department would not initiate enforcement actions for failures to comply with the rule. To conform to the DOL's policy, the Internal Revenue Service issued guidance on March 28, 2017, temporarily providing relief from penalties associated with violations of the Rule.

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USTR Reports

On Friday, March 3, 2017, the Trump administration issued a report on its trade agenda, signaling that it will use "a more aggressive approach" than past administrations to discourage unfair trade practices. Moreover, with Secretary of Commerce Wilbur Ross already sending a NAFTA notification letter to the chairmen of the Senate Finance and House Ways and Means committees this Tuesday, and the United States Trade Representative (USTR) nominee Robert Lighthizer awaiting confirmation, the Trump administration's trade agenda is beginning to quickly take form.

USTR will soon release its annual National Trade Estimate Report (a country-by-country listing of unfair foreign trade barriers), the Special 301 Report (a list of countries failing to enforce intellectual property standards) and Section 1377 Review (a list of countries not meeting obligations with regard to international telecommunications).

The President's Trade Policy agenda from earlier this month might provide clues as to the contents of the Special 301 Report. In the agenda, the administration stressed the need to ensure that "U.S. owners of intellectual property (IP) have a full and fair opportunity to use and profit from their IP." Throughout the campaign, the President vehemently denounced what he referred to as IP "theft" by China. However, critics see the President's move to unilaterally withdraw the United States from the TPP as a step backward in this regard, given the number of enhanced IP protections that the TPP would have contained.

President Trump has not been particularly vocal on telecommunications issues, but two of the nations that have been central to media reports about his administration—China and Russia—have been flagged in previous Section 1377 reviews by USTR for “restrictive” telecommunications trade practices.

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Congressional Appropriations Preview

Congress is in the midst of building its appropriation package, since subcommittee consideration requests are mostly due this week. The appropriations package must be passed by April 28, 2017, to avoid a complete government shutdown. Having a simple majority in both houses, Republicans have been able to push through legislation on party line alone; however, for appropriations road blocks, there needs to be support from at least 60 members in the Senate. Proceeding through continuing resolutions is the path of least resistance, and thus the likely outcome, but the goal is a bipartisan appropriations package for the rest of Fiscal Year 2017 (FY17). The upcoming Supreme Court nominee confirmation vote for Neil Gorsuch requires 60 votes for confirmation and will test this Congress’ bipartisan temperature, but the appropriations package will be the first legislative test to reach bipartisan consensus.

Looking toward the administration, the Office of Management and Budget (OMB) recently submitted to Congress a menu of suggested spending reductions for legislators to consider as they continue to debate funding the government through the rest of FY17. The OMB recommendations call for $18 billion in cuts from current discretionary spending across the federal government, including appropriations for grants through the Community Development Financial Institutions Fund, State Health Insurance Assistance Program and National Infrastructure Investments.

The recommendations pose significant challenges for current federal grantees, future applicants and government employees funded through the accounts that OMB proposes to trim for the remainder of FY17. Specifically, the recommendations could create business planning uncertainty, since the administration’s official position is that programmatic funds will be reduced or eliminated, even if Congress ultimately rejects the recommendations in part or in full. The recommendations also serve as a preview to how the Trump administration is likely to approach the FY18 and FY19 budgets to be considered in the 115th Congress and to where the President’s future recommended cuts may fall.

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