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WHAT'S NEW IN WASHINGTON

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The exuberance of a November election victory for Republicans has given way to the difficult reality of passing legislation in a closely divided Senate. While the GOP has made significant gains in the area of regulatory reform and secured a majority on the Supreme Court with the confirmation of Justice Neil Gorsuch, the first seven months of the Trump administration have not led to the major early legislative successes that both President Trump and Republican legislators had hoped to achieve.

July was a very active month in Congress and for the administration, but Republicans were unable to accomplish one of their chief goals: repealing and replacing the Affordable Care Act (ACA). With the Senate Republican version of repeal and replace dramatically failing in the wee hours of the morning by one vote, repeal efforts, at least for the time being, are postponed indefinitely.

GOP lawmakers are expected to pivot after Labor Day to their other top legislative agenda: tax reform. Like health care, there will be a high degree of difficulty. Nevertheless, simplifying the tax system and lowering tax rates will likely be a more natural political act for Republicans than trying to determine the proper role for the federal government in delivering health care.

Amid all of the debate over the ACA in July, the White House saw the dismissal of several senior staff in quick succession, culminating with the President installing former general and Department of Homeland Security Secretary John Kelly as his new Chief of Staff. General Kelly acted swiftly in his new role by making key personnel decisions and immediately seeking to establish his position as the most senior staffer in the West Wing, in an attempt to streamline command and reporting that has purportedly been an issue in the early days of the Trump presidency.

Here are some things that we believe are worth focusing on since our last issue:

Repeal and Replace Stalls in the Senate

In a significant defeat for the GOP, Senate Republicans’ latest health reform proposal failed on a vote of 51-49 in the early hours of Friday morning, July 28. Sens. Susan Collins (R-ME), John McCain (R-AZ) and Lisa Murkowski (R-AK) voted with all Democrats against Majority Leader Mitch McConnell’s (R-KY) “skinny repeal” amendment, the Health Care Freedom Act, which would have zeroed out the ACA’s individual mandate penalty, eliminated the employer mandate for eight years, extended the moratorium on the medical device tax, provided new funding for community health centers, raised contribution limits for Health Savings Accounts for three years and defunded Planned Parenthood for one year. A number of Republican senators agreed to vote for the measure only to move the bill to the next step in the process: conference committee negotiations with the House on a more comprehensive plan. House Speaker Paul Ryan (R-WI) assured Senate Republicans on Thursday night that the House would indeed go to conference if the skinny repeal bill passed. However, Sen. McCain, who cast a decisive vote against the measure, stated that he could not vote for legislation that “offered no replacement to actually reform our health care system." Friday's vote followed several days of intense debate, during which Senate Republicans voted down two other proposals: the Better Care Reconciliation Act, which would have repealed and replaced most of the ACA, and the Obamacare Repeal Reconciliation Act, which sought to gut most of the health reform law and replace it at a later date.

Leader McConnell took to the floor after the vote in the early hours of Friday morning and returned the underlying bill (H.R. 1628) to the Senate legislative calendar, postponing further consideration of the reconciliation legislation indefinitely. He expressed disappointment with the outcome and stated that it is "time to move on" to other agenda items. President Trump, meanwhile, voiced frustration with the result on Twitter and continues to urge Republicans to finish the job while threatening to "let Obamacare implode" in order to bring Democrats to the negotiating table on ACA repeal and replace. Notably, the administration has not indicated whether it will continue to make cost-sharing reduction (CSR) payments to insurers, despite calls from congressional leaders to do so. If the CSR payments are discontinued, insurers have estimated that premiums for coverage through the ACA exchanges could increase by roughly 20 percent.

While conservatives have vowed to continue the fight against the ACA, it is unlikely that Republican leaders will renew their repeal efforts in the near future, given the lack of agreement on the issue and increasing pressure to pass other priority legislation in the fall, including government funding, extension of the debt limit, tax reform, Children's Health Insurance Program reauthorization and the Medicare extenders package.

Despite ongoing pressure from the administration, Senate Republican leaders indicated that, until legislators can craft a package that garners 50 Republican votes (with Vice President Pence breaking a tie), the Senate will move on to other business. Finding 50 votes will be even more difficult with Sen. McCain out for an undetermined period of time.

Nevertheless, members on both sides of the aisle are still searching for a path forward on health reform. Senate Health, Education, Labor and Pensions Chairman Lamar Alexander (R-TN) has announced that he intends to hold hearings to field proposals for short-term market stabilization plans. Chairman Alexander also has asked the administration to continue making CSR payments to insurers in the near term while he works on a bipartisan basis with HELP Committee Ranking Member Patty Murray (D-WA) to advance market stabilization legislation.

In the House, a similar effort is under way to soothe insurance markets, led by a bipartisan group of lawmakers from the so-called Problem Solvers Caucus. Other members are looking for ways to revive repeal and replace on their own, including an effort by Sens. Bill Cassidy (R-LA) and Lindsey Graham (R-SC) to provide block grants to state governments to use either to continue ACA-related programs in their states or craft an entirely separate health care system.

Whether any of these efforts to stabilize markets or reform provisions of the ACA will be successful remains to be seen. The political and policy fault lines on health care will make it challenging to pass major health care legislation in the Senate, not to mention the House.

Back to top

New U.S. Sanctions Imposed on Russia, Iran, North Korea and Venezuela

On August 2, 2017, President Trump signed the Countering America's Adversaries Through Sanctions Act of 2017 (H.R. 3364) (the "Act") into law. The Act significantly expands economic sanctions against Russia, Iran and North Korea, and received overwhelming bipartisan support from both houses of Congress, having passed in the U.S. House of Representatives by a margin of 419-3 and in the Senate by a margin of 98-2. The Act makes significant changes to current U.S. sanctions imposed on Russia, Iran and North Korea, including secondary sanctions targeting non-U.S. companies that engage in proscribed business with the three countries.

With regard to Russia, the Act expands the current Russia sanctions program to impose significant new sanctions targeting the Russian energy sector; certain defense and intelligence agencies of the Russian government; privatization of state-owned assets; and activities related to corruption, support of Syria, sanctions evasion and human rights abuses. The Act requires congressional review of any action by the President to terminate or waive the application of Russia-, Ukraine- and Crimea-related sanctions, including the delisting of entities designated under these authorities.

The Act gives the administration new authority to impose sanctions on persons who engage in certain Iran-related activities, but without encroaching on U.S. sanctions relief under the Joint Comprehensive Plan of Action. The imposition of U.S. sanctions is now authorized against persons knowingly involved in activities that materially contribute to the government of Iran's ballistic missile program. Additional sanctions are also imposed on Iran's Islamic Revolutionary Guard Corps for terrorism-related reasons.

Additional provisions in the Act seek to block North Korea's direct and indirect access to the U.S. financial system. Extraterritorial U.S. sanctions may be imposed on any person who, subject to certain exceptions, knowingly maintains a correspondent account with any North Korean financial institution, and certain prohibitions have been imposed on U.S. financial institutions regarding establishing or maintaining correspondent accounts with non-U.S. financial institutions. The Act also authorizes the imposition of sanctions on foreign governments and persons from foreign countries that engage in an expanded list of activities that are inconsistent with U.S. foreign policy interests in North Korea or that violate United Nations Security Council sanctions against North Korea.

Separately, and in addition to the new sanctions law, on July 31, the U.S. Department of the Treasury's Office of Foreign Assets Control added Venezuelan President Nicolas Maduro to its list of Specially Designated Nationals and Blocked Persons ("SDN List"). This follows the designation of 13 current and former Venezuelan government officials to the SDN List on July 26. As a result of these sanctions, transactions by U.S. persons with President Maduro or the other listed parties are prohibited, and all of the assets of these Venezuelan officials subject to U.S. jurisdiction are frozen.

To read our alert on Russia, Iran and North Korea sanctions, please click here.

To read our alert on Venezuela sanctions, please click here.

Back to top

Big Six Jumpstart Tax Reform

The failure of Senate Republicans to advance ACA repeal and replace has forced an indefinite delay in the GOP's health reform effort. While moves to revive health reform could be successful at some point, many lawmakers are looking to pivot to another agenda item to give the President and congressional Republicans their first major legislative victory of 2017: tax reform.

After months of discussion surrounding efforts to rewrite U.S. tax law, a group of top congressional and administration officials recently laid out a road map for a path forward on revamping the tax code. On July 27, tax reform's "Big Six"—House Speaker Paul Ryan (R-WI), Senate Majority Leader Mitch McConnell (R-KY), House Ways and Means Chairman Kevin Brady (R-TX), Senate Finance Chairman Orrin Hatch (R-UT), Treasury Secretary Steven Mnuchin and National Economic Council Director Gary Cohn—released a joint statement identifying common goals and next steps for tax reform efforts.

Though light on details, the statement laid out a handful of policy agreements. Most notably, the group removed a major impediment to Republican unity on tax reform by agreeing to shelve the controversial border adjustment tax (BAT), which would have levied a tax on imports to the United States while simultaneously exempting income from exports from taxation. The statement also noted that key priorities will be lowering rates, accelerating expensing and transitioning away from the United States' worldwide system of international taxation to a territorial model. Finally, the Big Six pledged to make permanency in tax reform a priority, but some are reading into that statement a slight softening on the principle of revenue-neutral tax reform.

In its statement, the Big Six tasked the congressional tax-writing committees—House Ways and Means and Senate Finance—to begin drafting tax reform legislation. While Democrats continue to call for bipartisanship in drafting a tax reform bill, Republican leaders are expected to lead a GOP-only push to use budget reconciliation to advance a rewrite of the tax code. To utilize this legislative avenue, Congress will need to adopt a Fiscal Year 2018 (FY18) budget resolution. The House Budget Committee advanced a budget resolution in July, but internal Republican disagreements on the substance of the budget resolution could delay, or derail, efforts to use the resolution to advance reconciliation instructions for tax reform. Current Budget Chairwoman Diane Black also announced her candidacy for governor of Tennessee on August 2. Republican rules state that she must give up her chairmanship if running for another office, which could delay the process while a successor is selected. However, Speaker Ryan promised a floor vote on the budget resolution in September.

Even if lawmakers are able to agree to an FY18 budget, other divisions exist over what to include in tax reform. These divisions include disagreements among Republicans on how to treat interest deductibility and expensing, the proper rate for pass-through entities, and whether Congress should pursue temporary tax cuts as opposed to comprehensive and permanent reform, which would require Republicans to achieve the difficult reconciliation requirement of revenue neutrality for any permanent provisions. A final challenge will be replacing the BAT, which served as both a large revenue raiser and an anti-base erosion measure.

Looking forward, the timeline for advancing tax reform legislation remains unclear, but White House Legislative Director Marc Short recently stated his belief that tax reform can be wrapped up by the end of 2017, suggesting that Ways and Means and Finance can begin marking up legislation in September. However, with lawmakers facing a raft of deadlines that month, including the need to fund the government past September 30 and raise the debt ceiling, active consideration and ultimate passage of tax reform legislation could be pushed until later in the fall.

Back to top

"Powering America" Hearings

On July 18 and 26, 2017, the House Subcommittee on Energy heard wide-ranging testimony in the first two in a series of “Powering America” hearings to educate members and the public about U.S. electricity generation, distribution, consumption and grid reliability. The first hearing explored diverse market participant perspectives on the state of the electricity industry and included testimony from utility holding companies, independent power producers, a demand response provider, a public power entity and an electric cooperative. The second hearing included testimony from all seven U.S. Regional Transmission Organizations and Independent System Operators on the operation and effectiveness of their wholesale electricity markets and transmission systems. Highlighting stark differences of opinion regarding the interplay between certain states’ economic, environmental and other public policy goals, and the operation of certain wholesale energy markets, several market participant witnesses in the July 18 hearing proposed significant, and often disparate, changes to their markets and how they operate (including on issues such as the role of state subsidies for generation and reforming capacity markets). Several market operator witnesses in the July 26 hearing acknowledged challenges that they face from recent developments in their markets, but cautioned the subcommittee against retreating from competitive market frameworks. While there may not be significant legislative proposals resulting from these hearings in the short term, members likely will use them—and the additional “Powering America” hearings to come—to determine whether and, if so, how, to reform the Federal Power Act to address stakeholders’ and constituents’ concerns. Additional information—including video and transcripts, witness and member statements, and background memoranda—is available here and here. According to press reports, the “Powering America” series will resume after Congress’ August recess.

Back to top

National Defense Authorization Act

On Friday, July 14, the House of Representatives passed a $696 billion National Defense Authorization Act (NDAA) for FY18 by a margin of 344-81, earning the support of 117 Democrats and all but eight Republicans.

The bill would exceed the President's $603 billion defense budget request and the $549 billion cap on defense spending set under the 2011 Budget Control Act. For the bill to become law, Congress would need to agree to increase or repeal the existing budget caps.

The bill includes $28.5 billion for essential readiness recovery, $74.6 billion for Overseas Contingency Operations funds, $239.7 billion for operations and maintenance, $10.2 billion for military construction, $142.9 billion for military personnel and $33.9 billion for defense health care programs.

Ultimately, 440 amendments were submitted to the House Rules Committee, but only 88 were approved for consideration on the House floor. Notable provisions in this year’s NDAA include language to provide troops with a 2.4 percent pay raise, add five new ships toward the President’s vision for a 355-ship Navy, establish a Space Corps under the Air Force, provide for additional U.S. support for the training and equipping of Syrian fighters against ISIS, authorize the Afghanistan Security Forces Fund at $4.9 billion, increase resources for the European Deterrence Initiative authorized by Congress last year to counter concerns about Russian “aggression,” fund $8 billion for cyber operations, provide $2.5 billion above the President’s request for critical missile defense needs, authorize the National Nuclear Security Administration to modernize the nuclear weapons stockpile, continue annual restrictions against transferring detainees from the detention facility at Guantanamo Bay to the United States and prohibit the use of funds to be made available to deploy members of the armed forces to participate in the ongoing civil war in Yemen.

Controversial proposals that were not included in the final bill include amendments to bar the Pentagon from paying for gender-transition services for transgender troops and require the Secretary of Defense to conduct strategic assessments of the use of violent or unorthodox Islamic religious doctrine to support extremist or terrorist messaging and justification. A proposal to sunset the 2001 Authorization for Use of Military Force (AUMF) did not receive a vote. However, the House did approve an amendment from Rep. Tom Cole (R-OK) that would require a strategy from the administration to defeat the Islamic State, al Qaeda, the Taliban and affiliated groups, as well as an assessment of whether the 2001 AUMF is adequate to accomplish the strategy.

Unlike recent years with a Democratic administration and Republican congressional majorities, the new administration did not threaten to veto the bill. However, Senate action will likely not occur before the start of its August recess. This is largely due to the fact that Senate Armed Services Committee Chairman McCain has returned to Arizona to continue treatment for a brain tumor, but he still plans to return to Congress in September. The Senate likely will focus on passing its own version of the NDAA. Both the House and Senate will then convene a conference committee to reconcile the two bills into a single version that can pass both houses before sending it to the President’s desk.

Back to top

Congress Pushes Back on Antiarbitration Rule

On July 10, the Consumer Financial Protection Bureau (CFPB) released a rule that bans class action waivers in arbitration agreements. Supporters cheered the rule for eliminating a hurdle for consumers seeking restitution through class action lawsuits. Conversely, opponents of the rule argued that the new regulations were drafted through an unfair process that ignored the minimal consumer awards in class action lawsuits and failed to consider less restrictive reforms to consumer arbitration agreements. Critics further argued that the prohibition on class waivers in arbitration agreements will lead to a de facto ban on arbitration because companies will have less incentive to maintain a separate arbitration system for dispute resolutions if they are also facing the threat of class action lawsuits.

Congressional Republicans, long opposed to the CFPB and what they view as its unaccountable director, acted swiftly to overturn the rule. On July 25, the House approved a Congressional Review Act (CRA) resolution rolling back the rule by a largely party-line vote of 231-190. While House Republicans claimed victory, the resolution's fate in the Senate remains uncertain. The Ranking Member of the Senate Banking Committee, Sherrod Brown (D-OH), and other Democrats critical of arbitration clauses vowed to block the resolution and protect the CFPB regulations. CRA provisions allow for resolutions to pass by a simple majority, rather than meeting the 60-vote threshold required to end debate under normal Senate rules. While this will greatly aid Republicans in overturning the rule, the GOP's slim majority leaves little room for defections. This is particularly true with Sen. McCain away from the Capitol.

The CRA sets a deadline for congressional review, which is likely to fall near the end of October or beginning of November, depending on the number of pro forma legislative days Congress uses during the August recess. If Congress passes the resolution by the deadline and the President signs the measure as expected, the rule would be overturned. If overturned by Congress, the CRA prevents the CFPB from issuing future rules that are substantively similar to the antiarbitration rule, and, thus, future efforts to reform arbitration would need to be done by congressional action or by the courts.

Back to top

Senate Passes Long-Awaited FDA User Fee Package

On August 3, 2017, the Senate passed the FDA Reauthorization Act (FDARA), which will fund the U.S. Food and Drug Administration's (FDA) review of prescription drugs, biologics and medical devices for a five-year period beginning October 1. President Trump is expected to sign FDARA into law. FDARA renews the FDA's authority to collect fees from the prescription drug and medical device industries by reauthorizing the Generic Drug User Fee Amendments, the Biosimilar User Fee Act, the Prescription Drug User Fee Act and the Medical Device User Fee Amendments.

FDARA is critical to the FDA's operations, since user fees contribute about $1.4 billion per year to the FDA's budget of approximately $5 billion. The legislation contains numerous riders, which, coupled with FDA policy goals stated in the agency's Commitment Letters, are intended to foster innovation, improve the FDA's efficiency and advance medical product safety. Riders of note are summarized briefly in our recent alert found here.

Back to top

Senators Introduce Reforming American Immigration for a Strong Economy Act

On August 2, 2017, Sens. Tom Cotton (R-AR) and David Perdue (R-GA) introduced the Reforming American Immigration for a Strong Economy (RAISE) Act, which would create a skills-based immigration points system, end the Diversity Visa Program, and reduce the number of family-based immigrants and refugees.

The bill would alter the immigration system, shifting the preference away from family relations and, for the first time, creating a points-based system for immigration. Under the proposed points-based system, prospective immigrants would apply to the eligible applicant pool and would then be ranked based on their education; age; amount of investment in a U.S. business that they manage; job offer for a high-paying job; English-language ability; and receipt of major international awards, such as the Nobel prize or an Olympic medal. Applicants with doctoral degrees in STEM (Science Technology, Engineering and Math) would receive the most points for education, followed by applicants with professional degrees, applicants with master's degrees and so on. Applicants who are 26-31 years old would yield the highest number of points for age, and applicants who invest at least $1,350,000 into a new commercial enterprise and keep the money invested for at least three years—as well as manage the commercial enterprise as their primary occupation—would earn points as well. Every six months, the Department of Homeland Security (DHS) would invite the top-ranked applicants to submit their applications for permanent residence within 90 days of the DHS notification, for a total number of 140,000 green cards issued under the program per year.

Furthermore, the bill would modify the categories of people who can immigrate to the United States based on a family relationship. If passed, the bill would allow U.S. citizens to petition for only their spouses and minor children to be admitted to the United States as permanent residents (i.e., green card holders). (The current law also allows adult U.S. citizens to petition for their parents, adult children and siblings. All of these categories of beneficiaries would be eliminated under the proposed legislation.) Green card holders would retain their ability to sponsor spouses and minor children for permanent residence.

The bill would also create a new nonimmigrant visa for parents of U.S. citizens. It would be issued for an initial period of five years and could be extended further, in five-year increments. Recipients of this visa would not be authorized to be employed in the United States and would not be eligible for any federal, state or local public benefit, and the sponsoring U.S. citizen would be responsible for the parent's support, regardless of the parent's resources. The sponsoring U.S. citizen would also be required to obtain health insurance for the parent before the parent could be issued the visa.

The bill does not affect those who have already received their green cards or are scheduled to receive an immigrant visa within one year of the bill's enactment.

The RAISE Act limits the number of refugees who may be admitted to the United States to 50,000 annually. The bill also eliminates the Diversity Visa Program ("green card diversity lottery") in its entirety. The bill's sponsors estimate that these limitations, along with the elimination of most of the family-based categories, would lead to a reduction in the number of legal immigrants from approximately 1,000,000 to approximately 600,000 in the first year of enactment and to approximately 500,000 per year by the end of the first decade.

Finally, the bill would require applicants for naturalization to reimburse the federal government for any public benefits they received in the five years immediately preceding their naturalization.

President Trump voiced his support for the bill at a special bill introduction at the White House on August 2. We will closely follow congressional hearings and debate of the bill in the Senate.

Back to top

Democrats' "Better Deal"

Meanwhile, congressional Democrats have announced a platform called "A Better Deal" to respond to criticisms that Democrats in the last two elections failed to articulate a clear economic program for the middle class. The effort is intended to demonstrate a unified vision of the values of the Democratic Party so that voters can better understand what Democrats stand for. "A Better Deal" is focused on three goals: (1) raising the wages and incomes of American workers and create millions of good-paying jobs; (2) lowering the costs of living for families; and (3) building an economy that gives working Americans the tools to succeed in the 21st century. Under this umbrella, Democrats have released a series of papers with specific proposals on infrastructure, trade, the cost of prescription medicines, the minimum wage, and competition and antitrust, among other issues. Democrats are expected to use the messaging in "A Better Deal" to try to show a contrast to voters between Republicans and Democrats in the hopes that voters who either voted Republican or stayed home in the previous two elections will be motivated to vote for Democrats in 2018.

Back to top

A Crowded Fall Agenda Ahead

When Congress returns from its August recess, lawmakers will face a host of unresolved agenda items and impending deadlines. September 30 is the last day of FY17 along with the expiration date for numerous federal programs and, most notably, current funding of the federal government. If Congress cannot come to some agreement on funding the government by that date, the government will shut down, a scenario that most members say they would like to avoid, but that has been used to try to gain partisan advantage by both sides in the past. Another option would be a short-term stopgap spending measure to give members more time to negotiate. Treasury Secretary Steven Mnuchin has also pointed to September 29 as the likely date when the Treasury's extraordinary measures to prevent default on the nation's debt will be exhausted, with the Secretary urging Congress to raise the statutory debt ceiling before that deadline. See below for a list of upcoming dates for expiring programs and federal funding.

Beyond dealing with the approaching expiration dates, Republicans in Congress are looking to advance other non-deadline-driven agenda items in the fall. The administration and a handful of GOP lawmakers are looking for ways to restart the health care reconciliation process, but many other members are looking to make the pivot to tax reform. With a recent announcement from Senate Majority Leader McConnell that Republicans will seek to go it alone on a rewrite of the tax code, Congress will need to agree to a unified budget resolution for FY18 that includes reconciliation instructions for tax reform. House leaders are looking to hold a vote on an FY18 budget resolution shortly upon returning to Washington in September. Also in the House, Republican leadership hopes to quickly move an omnibus spending package to fund the government for FY18.

The Trump administration will also seek to move forward on several of the President's priorities.

The first round of NAFTA renegotiations is scheduled to take place from August 16 through August 20 in Washington, D.C. Rounds are expected to be held in approximately three-week intervals, with the second round slated to start in Mexico around September 1. The Treasury may also release additional presidentially mandated reports on the financial sector and recommendations on reforming Dodd-Frank.

Finally, the administration is expected to continue to discuss whether to fund the CSR payments made to insurance companies to help cover the expense of providing insurance to low-income Americans. The administration's position on the CSR payments currently remains fluid. The government has made all scheduled payments this year, but following the failure of the Senate to pass an ACA repeal bill, the President has threatened to end the payments, which could create market disruptions and spikes in premium rates for 2018. In the coming days, the administration is expected to clarify its position on the future of the CSR payments.

See below for a list of upcoming expiration dates:

- September 29:
  - Likely debt ceiling deadline when extraordinary measures are exhausted
- September 30:
  - Funding for federal government
  - Federal Aviation Administration authorization
  - National Flood Insurance Program
  - Children's Health Insurance Program funding
  - Medicare/Other Health Extenders (varied expiration dates from September 30, 2017 – January 1, 2018)
  - Food and Drug Administration user fee authorizations
  - National Defense Authorization Act
- December 31:
  - Section 702 of Foreign Intelligence Surveillance Act (Internet Surveillance).

Back to top

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