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Akin Gump
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WHAT'S NEW IN WASHINGTON

November 2017

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Congress continues its heavy workload with the Thanksgiving recess roughly three weeks away. On October 26, the House passed the Senate's Fiscal Year 2018 budget resolution by the slim margin of 216-212—opening the door for Republicans to pursue President Trump's top priority of tax reform with a simple majority under budget reconciliation. House Republicans released their long-awaited tax reform plan this week and are scheduled to mark up the legislation next week in the House Ways and Means Committee. Senate Republicans are expected to release their package in the middle of next week (week of November 6) and mark up their bill in the Senate Finance Committee during the week of November 13. President Trump is urging the House and Senate to put tax reform on his desk by the end of the year.

Tax reform debate has continued simultaneously along with efforts to provide disaster relief and stabilize health care markets. On October 26, President Trump signed a $36.5 billion emergency aid measure to refill disaster accounts and bail out the federal flood insurance program. The funds in the bill are intended to aid not only Florida, Texas and Puerto Rico after devastating hurricanes, but western states that have suffered from massive wildfires as well. Since damage is still being assessed, it is expected that Congress will be pressed to provide further disaster aid. Additionally, the Bipartisan Health Care Stabilization Act of 2017 authored by Sens. Lamar Alexander (R-TN) and Patty Murray (D-WA) has continued to gain traction in the wake of a more favorable Congressional Budget Office (CBO) score than previously proposed health care bills.

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

Tax Reform Begins in Earnest

On November 2, 2017, the House Ways and Means Committee released its much-anticipated plan for reforming the tax code for businesses and individuals, entitled the Tax Cuts and Jobs Act of 2017 (TCJA). The bill marks the beginning of what Republican leaders hope will be a speedy and successful race to enactment by the end of 2017. The plan makes significant changes to all aspects of the corporate, pass-through, international and individual sections of the tax code.

A link to Akin Gump Strauss Hauer & Feld LLP's analysis of TCJA is available here and again at the end of this section. The analysis includes key highlights; descriptions of the plan's treatment of corporate, pass-through, international and individual portions of the tax code; and a chart comparing the new proposal to other recent Republican tax proposals, including former Committee Chairman Dave Camp's H.R. 1.

Key highlights of the plan include:

- Corporate and Pass-Through:
  - corporate tax rate of 20 percent
  - pass-through rate of 25 percent on 30 percent of income designated as business income, with the remaining 70 percent taxed at individual rates as compensation income
  - five-year period of immediate and full expensing of depreciable assets
  - a limit on deductibility of net interest expense in excess of 30 percent of pretax earnings, with carveouts for small businesses (under $25 million), regulated public utilities, and real property trade and business

        - no grandfather for existing debt.

- International:
  - shift from a worldwide system of taxation to a territorial system whereby U.S.-based companies are exempt from U.S. tax on profits earned overseas
  - provisions intended to prevent base erosion, including a global minimum tax and a new excise tax on certain related-party payments
  - one-time transition tax on deferred income of foreign affiliates (aka deemed repatriation), with a bifurcated rate of 12 percent for cash and cash equivalents and a 5 percent rate on illiquid assets.

- Individual:
  - consolidation of the current seven tax brackets into four at 12, 25, 35 and 39.6 percent
  - doubled standard deduction ($12,000 for individual, $24,000 joint)
  - mortgage interest deductibility capped at $500,000 for new homes, up to $10,000 for property tax deduction; eliminates deductibility of other state and local taxes.

The Ways and Means Committee is scheduled to begin its markup of the legislation on Monday, November 6, at noon. The markup is expected to consume the balance of the week, with a built-in deadline of finishing by Thursday, November 9, with Veterans Day observed on Friday, November 10. While this would require a quick turnaround post-markup, Speaker Ryan has said that he plans to put the bill on the House floor for a vote the week of November 13.

The Senate Finance Committee is working to finish its version of tax reform. Finance could unveil its plan as early as November 8, with a markup planned for the week of November 13. Senate Majority Leader Mitch McConnell (R-KY) told senators that they may be in session the week of Thanksgiving for a possible Senate floor vote on the bill.

A link to the Akin Gump analysis of TCJA can be found here and reflects changes from Chairman Brady's substitute amendment released today, which primarily made technical changes.

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Treasury Releases Two More Reports on the Financial Services System

On February 3, 2017, President Trump signed an Executive Order (EO) setting out a series of core principles for financial sector regulation. The EO directed the Treasury to review existing laws to determine how closely they promote the stated core principles. The Treasury delivered its first mandated report focused on the depository system on June 12.

In October, the Treasury released two additional reports on the financial system that analyzed capital markets and asset management and insurance markets. In the first report, the Treasury noted the importance of sound capital markets as a source of liquidity for American businesses and, among the recommendations included in the report, suggested:

- streamlining disclosure requirements and tailoring those requirements to the size of the companies going public
- harmonizing regulations between the Securities and Exchange Commission and the Commodity Futures Trading Commission
- allowing for more public input into the rulemaking process, as well as more robust economic analysis of proposed rules
- adopting rules allowing for pooled investments in private and less-liquid offerings
- repealing Dodd-Frank provisions governing disclosure requirements related to conflict minerals, mine safety, resource extraction and executive compensation.

The report on asset management and insurance markets focused on four key areas: evaluation of systemic risk, effective regulation, engagement in international regulatory forums, and support of economic growth and consumer choice. Among other suggestions, the report recommended:

- permitting an activities-based analysis of systemic risk of asset management and insurance companies
- promoting the U.S. regulatory framework for asset management and insurance in international forums
- fostering improved coordination among the Federal Insurance Office and state insurance regulatory authorities
- encouraging sound liquidity risk management programs used by asset managers and insurance companies
- delaying the implementation of the fiduciary rule pending further analysis by federal regulatory agencies and the states
- expanding consumer choice by permitting employer-sponsored retirement plans to utilize annuities as an investment choice.

Looking forward, the Treasury is expected to release a fourth report containing reform recommendations for nonbank financial institutions. Moreover, the Treasury is due to release two additional reports targeting specific aspects of the financial system instituted by the passage of Dodd-Frank. On April 21, the White House released two presidential memoranda expanding on the February 3 EO. The documents directed the Treasury to review specific portions of Dodd-Frank. The first directed Treasury Secretary Steven Mnuchin to review the Financial Stability Oversight Council's (the "Council") authority to designate banks and nonbank financial firms as systemically important, with particular emphasis on the process the Council uses in its determinations. The second memorandum called for a review of the government's orderly liquidation authority by which the Federal Deposit Insurance Corporation is able to carry out liquidation and wind down financial institutions. The memoranda ordered the Treasury to report its findings by mid-October, a deadline which the Treasury missed. It is unclear when Treasury officials will release those additional reports.

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Legislative Changes Proposed to Foreign Investment Review Process

CFIUS Reform Bill

Sen. John Cornyn (R-TX) and Rep. Robert Pittenger (R-NC) are set to introduce identical bills that would dramatically expand the purview of the Committee on Foreign Investment in the United States (CFIUS). The draft legislation, which arises in the context of increased scrutiny of Chinese investments in high-tech industries, is expected to receive Trump administration approval and have bipartisan sponsorship.

The draft legislation calls for an expanded definition of "covered transactions" to capture certain noncontrolling investments and joint ventures, including transactions dealing with "critical technologies" and "critical infrastructure." Additionally, the bill would require parties to certain transactions to file short-form notices (dubbed "declarations") with CFIUS prior to closing. It also introduces filing fee requirements and extends the timeline for CFIUS review, among a variety of other modifications to the CFIUS regime.

Proposed Economic Review of Foreign Investment

Sens. Chuck Grassley (R-IA) and Sherrod Brown (D-OH) have floated legislation that would allow the U.S. government to screen incoming investment for its effect on domestic industry and the U.S. economy. While CFIUS currently screens foreign direct investment for national security concerns, no process exists to weigh the economic impact of investments. The senators claim that their proposed bill would better align the United States' screening mechanism with those of Europe, Canada, Australia and China.

The bill would require parties to a "covered transaction" to submit written notification to the Secretary of Commerce, who would have 15 days to approve or notify the parties that more time is needed to complete the review. After further review, the Secretary can decide to approve, prohibit or require modifications of the transaction. The bill defines a covered transaction as any merger or acquisition or greenfield investment that would result in foreign control of a business engaged in interstate commerce worth at least $1 billion or would result in foreign state-owned enterprise control of a U.S. business worth more than $50 million. The legislation would also authorize the chair and ranking member of the Senate Finance Committee or House Ways and Means Committee to request that the Secretary of Commerce review a foreign investment of any size.

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International Trade Dialogues Expected to Intensify in November

Trump's Trip to Asia

President Trump will make his first visit to Asia as U.S. leader on November 3-13, 2017. He will arrive in Japan on November 5, the Republic of Korea on November 7, China on November 8, Vietnam on November 10 and the Philippines on November 12. In Vietnam, the President will participate in the Asia-Pacific Economic Cooperation (APEC) Economic Leaders' Meeting and deliver a speech at the APEC CEO Summit. In the Philippines, he will celebrate the 40th anniversary of U.S.-Association of Southeast Asian Nations (ASEAN) relations at the U.S.-ASEAN Summit and participate in bilateral meetings. While the trip was originally supposed to extend until November 14, it has been announced that the President will skip the gala celebration dinner for the 50th anniversary of the ASEAN and return to the United States early.

Accompanying the President will be Secretary of State Rex Tillerson, Commerce Secretary Wilbur Ross, Treasury Secretary Mnuchin, United States Trade Representative (USTR) Robert Lighthizer, National Security Advisor H.R. McMaster and senior policy advisor Stephen Miller. With respect to trade, USTR Lighthizer is expected to meet with his counterpart, Korean Trade Minister Kim Hyun-chong, to continue discussions on the U.S.-Korea Free Trade Agreement (KORUS), as well as participate in the APEC meeting in Vietnam.

Also with respect to trade, a high-profile focus of the trip will be trade relations with China, since they have been tense this year with Sections 232 investigations on steel and aluminum and Section 301 investigation on Chinese acts, policies and practices on intellectual property, technology transfer and innovation. On October 26, the U.S.

Department of Commerce issued a memo on maintaining China's nonmarket economy status and issued preliminary determinations on dumping various goods, such as aluminum foil.

NAFTA

At the end of the last round of negotiations, it was announced in a joint statement that the next round will take place in Mexico City from November 17-21, a departure from the pace of meeting every three weeks in previous rounds. It was also indicated that the negotiations would extend through the first quarter of 2018. USTR Lighthizer said in his closing statement that he was surprised to meet resistance from the trading partners and accused them of being "difficult." Mexico and Canada have labeled the United States' proposed provisions as obstructionist and have expressed concerns that the United States may be proposing extreme demands and provisions with one-sided benefits to give the administration reason to withdraw from the agreement.

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Senate Finance Committee Releases Draft Medicare Extenders Bill

On October 26, bipartisan leaders of the Senate Finance Committee circulated a discussion draft of legislation that would extend a number of expiring Medicare payment programs. Among other provisions, the draft legislation:

- extends the low-volume inpatient hospital adjustment through fiscal year 2022; starting in fiscal year 2018, the pay adjustment would be based on total discharges rather than just Medicare beneficiaries
- extends the Medicare Dependent Hospital program through fiscal year 2022; the draft would require the Government Accountability Office (GAO) to conduct a study on the program
- extends the add-on payments for all ground-ambulance services and the super-rural ambulance add-on payments through fiscal year 2022; the discussion draft also requires the Department of Health and Human Services to develop a data collection system to collect cost, revenue, utilization and other information
- permanently repeals the therapy caps beginning January 1, 2018, and would continue to require an appropriate modifier on claims over the current exception threshold
- extends the current 1.0 physician work Geographic Practice Expense Index (GPCI) floor through 2019 and requires the GAO to assess the appropriateness of the current method for calculating the work GPCI adjustment
- extends the home health rural add-on, increasing it from 3 percent to 4 percent for counties with a population density of six or fewer individuals per square mile; the add-on would then be phased down to 1 percent by 2022.

The Finance Committee noted that an extension of Medicare Advantage Special Needs Plans (SNP) was not included in the draft because the CHRONIC Care Act (S. 870), which the Senate passed in late September, included a permanent extension of SNPs. Offsets for the extenders are still under discussion, but the final package is expected to be fully paid for. The extenders are likely to move as part of a year-end deal in December and may be paired with Children's Health Insurance Program reauthorization legislation.

It is unclear whether a year-end package will include any of the market stabilization proposals that are currently under consideration in Congress. A CBO estimate of the Alexander-Murray proposal, which would extend cost-sharing reduction (CSR) payments for two years and provide additional state waiver flexibility, indicated that the CBO would reduce the federal deficit by $3.8 billion over a decade. The White House and House Republican leadership have expressed dissatisfaction with the plan, however, prompting House Ways and Means Committee Chairman Kevin Brady (R-TX) and Senate Finance Committee Chairman Orrin Hatch (R-UT) to announce an alternative proposal that would pair a CSR extension with relief from the Affordable Care Act's individual and employer mandates. At present, however, it appears that the Hatch-Brady plan lacks the 60 votes necessary to pass the Senate.

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Department of Transportation Launches New UAS Pilot Program

On Thursday, the Department of Transportation (DOT) held a briefing at their Washington headquarters to launch the Unmanned Aerial Systems (UAS) Integration Pilot Program (the "Pilot"). The launch follows a presidential memorandum issued last week, directing the DOT to create the Pilot. During the launch briefing, Earl Lawrence, Director of the Federal Aviation Administration's (FAA) UAS Integration Office, discussed the Pilot application process, described in more detail in this *Federal Register* notice. The FAA also launched a website for the Pilot, which can be found here.

Applications for the Pilot will be administered through the FAA's contracting process. There is a strict timeline beginning on November 8, when the Federal Register Notice is set to be published:

- "Lead Applicants"—state, local, or tribal governments (the list is more expansive), wanting to test UAS integration in their local airspace—will have 20 days (until November 28) to submit a notice of intent to participate in the Pilot by emailing the FAA. Eligible applicants will thereafter be invited to submit applications through the FAA portal. The DOT is encouraging jurisdictions to submit notices of intent even if they do not yet have firm plans for partnering or testing. Lead applicants are limited to one application.

- "Interested Parties"—public or private entities wishing to participate in a Pilot—can request inclusion on the FAA's "Interested Party List" within 35 days (December 13). The Interested Party List is designed to facilitate partnerships in a central repository for those seeking to join a Pilot. Earl Lawrence noted in the briefing that the Interested Party List is merely one way to engage with a Lead Applicant, and encouraged other methods of forming partnerships. Interested Parties may be included in multiple applications.
- Lead Applicants will have 57 days to complete their applications, but just 35 days to complete the first two parts of the application, including a "concept overview" of the proposed Pilot.
- The rest of the application must be submitted within 57 days, by January 4, including, but not limited to, information about the airspace to be accessed, the concept of operations, the team members and the needed infrastructure.
- The DOT may select among completed applications on a rolling basis. Once selected, Lead Applicants will have until May 7, 2018 (180 days), to enter into a Memorandum of Agreement with the FAA.

The full timeline and contracting requirements are available in the screening information request on the FAA's contracting website.

At Thursday's launch event, participants heard from a range of UAS stakeholders and government representatives. FAA Administrator Michael Huerta emphasized the importance of collaboration and finding the appropriate roles for federal, state, and local government and industry. He said that the Pilot provides an opportunity to test and evaluate these roles. FAA Deputy Administrator Dan Elwell remarked that, in traditional aviation, everyone knows where the airport is, but, with drones, entire cities could become an airport. "The Pilot Program will provide the opportunity to test out different models for integrating drones in local airspace," he said. Secretary Elaine Chao championed the program as a means to "allow local communities to experiment with new technologies…on terms that work for them and support a unified and safe airspace." She said that the current restrictions on BVLOS operations, nighttime operations and flights over people are "about to change." "The data collected by the program will create the path forward for the safe integration of UAS," the Secretary explained. Dr. Jaiwon Shin, the NASA Associate Administrator for the Aeronautics Research Mission Directorate, shared during an Urban Air Mobility meeting yesterday in San Carlos that one of the big benefits of the Pilot is that companies such as Amazon and Google, which are innovating in this space, will now be able to bring some of their UAS field trials back home.

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