

WHAT'S NEW IN WASHINGTON



July 2017

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On June 30, Congress gavelled out for the July 4 recess after postponing a critical vote to begin debate on an Affordable Care Act (ACA) repeal-and-replace bill. Senate Majority Leader Mitch McConnell (R-KY) and the GOP caucus have worked for the last two months in countless hours of behind-the-scenes meetings on what many believe to be a long-shot effort to unite 50 of the 52 Republican senators.

Senators from both sides of the aisle have taken issue with the manner in which the bill has been written and the lack of opportunities to voice concerns and offer amendments through the traditional committee markup process. GOP leadership has countered by noting that the upcoming Senate floor debate will allow several dozen bipartisan amendments to be offered and voted upon.

Substantive concerns have been expressed by a handful of moderate Republican senators over cuts to Medicaid, while more conservative Republican senators have voiced their concern that the legislation does not go far enough in the direction of a complete repeal. The debate on this issue will continue when the Senate gavels back in on July 10, and it awaits a new score from the Congressional Budget Office on a revised bill. In the meantime, calls to cancel or shorten Congress' annual August recess have begun to grow louder.

After celebrating the Independence Day holiday in Washington, D.C., President Trump headed to Poland and then Germany for the G-20 summit. Mr. Trump is expected to meet some critics who are concerned with his administration's maneuvering on the international stage so early into his presidency. A topic of conversation among the world leaders: steel and aluminum trade.

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

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Tax Reform Efforts Continue at a Slow Pace

While Congress continues to debate health care reform, Republican leaders maintain that tax reform is a top priority for this year. The process that Congress is most likely to use to advance tax reform legislation is budget reconciliation, a procedural tool currently being used to repeal and replace the ACA. While budget rules allow Senate Republicans to pass legislation with a simple majority, Congress must first adopt a Fiscal Year 2018 (FY18) budget with reconciliation instructions before the process can move forward. Lawmakers have yet to pass an FY18 budget, and internal House Republican politics have further delayed release of a budget for committee consideration.

Another hurdle is the division among Republicans over what tax reform should look like and whether it must be paid for. House Republicans continue to work off of their June 2016 tax reform "[Blueprint](#)," but policy fault lines have emerged within the party on key provisions of the proposal. Most notably, concern has been expressed by several Republican senators with the border adjustment tax, a key element of the Blueprint, which taxes imports while exempting exports. Another issue of disagreement is the Blueprint's elimination of net interest deductibility in favor of full and immediate expensing.

Debate also continues to swirl over how to handle the ACA-related taxes, like the net investment tax and the 0.9 percent Medicare surtax on high earners. Republican tax leaders adamantly support repealing the taxes through the current reconciliation effort, providing lawmakers with greater flexibility in designing tax reform legislation. The division comes as Senate Republicans are mulling delaying, or doing away with, repeal of some of the ACA taxes in order to secure more support for their repeal-and-replace bill and blunt the Democratic criticism that the bill is a tax-cut bill for the wealthy while reducing insurance coverage from millions.

In an attempt to bridge the policy differences among the Blueprint, the President's tax reform [plan](#) and other proposals for reform, congressional leaders will be working with key administration officials to draft a consensus document on tax reform to be released sometime in September.

Finally, while the administration and House Republicans have largely driven discussion on tax reform this year, the Senate has begun to make moves on tax reform. On June 16, Chairman Hatch sent out a [request](#) for stakeholders to offer their recommendations and perspectives on reform. Comments are due to the Senate Finance Committee by July 16. The Chairman also announced on June 27 that the Finance Committee will be forming teams to look at specific areas of the tax code, an effort that will be led by Finance Committee Republicans, including:

- International Tax System: Sens. Rob Portman (R-OH) and Mike Enzi (R-WY)
- Individual Code: Sen. Chuck Grassley (R-IA)
- Business Code: Sen. John Thune (R-SD)
- Energy Tax Policy: Sens. Dean Heller (R-NV) and Bill Cassidy (R-LA)
- Agriculture: Sen. Pat Roberts (R-KS)

Unlike the Finance Committee's previous efforts to advance tax reform, these working teams will include only Republicans.

Lastly, while much of the debate and discussion is going on behind closed doors, the House Ways and Means Committee is planning to hold two hearings in July on tax reform issues related to the individual code and small businesses.

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NAFTA Public Hearings

The Office of the United States Trade Representative (USTR) held public hearings on June 27-29, following the USTR's 90-day notification to Congress on May 18, 2017, regarding the intent to renegotiate the North American Free Trade Agreement (NAFTA), as well as the USTR's *Federal Register* notice published on May 23, 2017, requesting public comment. More than 12,400 comments were submitted, and more than 140 individuals testified regarding their recommendations to the negotiation process over the course of three days. Common themes that the panelists addressed included calling for a "do no harm" approach to negotiating in some industries (primarily agriculture); addressing the Rules of Origin provisions; addressing labor and environmental standards; strengthening intellectual property protection; addressing Country of Origin Labeling; getting a quick, trilateral agreement done with transparency; addressing the *de minimis* threshold between countries, investor-state dispute settlement, financial regulations, data flow, innovation and currency manipulation; and eliminating trade barriers that prevent a level playing field for U.S. companies and improving market access to conduct more business.

Panelists included representation comprising members of Congress; the agriculture, technology and telecommunications industries; manufacturers, producers and laborers; representative bodies for regulation and industry safety standards; chambers of commerce; and border communities. Almost every panelist that dealt in trading goods and/or services noted that they do the most trade with Canada and Mexico, and, if these countries were not their leading trade partners, they were in the top five. Panelists called for modernization to the 24-year-old agreement to include chapters to address innovation such as e-commerce, which has developed to unforeseen levels since the advent of the original agreement. While some panelists suggested to "do no harm" and make no changes to some provisions, others asked the USTR to borrow from other more recent agreements, such as the Trans Pacific Partnership (TPP) and the U.S.-Korea Free Trade Agreement (KORUS). A prominent suggestion made by many industry groups was to not only use the opportunity to negotiate a new NAFTA, but to use the opportunity to use this trade agreement as a model for all U.S. trade agreements going forward. The public hearing gives foresight to the negotiations that can begin no earlier than August 16. The USTR plans to publish a detailed summary of negotiating objectives on July 17.

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Administration and Congressional Efforts to Reshape Financial Regulations

During the 2016 U.S. presidential election, candidate Donald Trump frequently criticized the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") that overhauled the U.S. banking system following

the financial crisis. After his inauguration, President Trump took initial steps to roll back Dodd-Frank. On February 3, 2017, President Trump signed an [Executive Order](#) (EO) setting out a series of core principles for financial sector regulation and directed the Treasury to review existing laws and recommend changes to the financial regulatory regime. Additional presidential directives instructed the Treasury to specifically review the Financial Stability Oversight Council's (FSOC) authority to designate banks and non-bank financial firms as systemically important and assess the government's Orderly Liquidation Authority (OLA) by which the Federal Deposit Insurance Corporation (FDIC) is permitted to wind down financial institutions. The Treasury delivered its first mandated [report](#) on June 12. In the document, the Treasury focuses its review on the depository system, and it promised future reports on other aspects of the financial system, including capital markets, asset management and non-bank financial institutions.

Running in tandem with the administration's review of Dodd-Frank regulations, congressional Republicans have also begun efforts to repeal the law. On June 8, the House advanced the Financial Creating Hope and Opportunity for Investors, Consumers, and Entrepreneurs ([CHOICE](#)) Act, a measure that seeks to roll back much of Dodd-Frank. Democrats largely oppose the CHOICE Act, and the legislation is expected to be a nonstarter in the Senate. Instead, Senate Banking Committee leaders are pursuing bipartisan consensus on fixes to Dodd-Frank, primarily as they relate to regulatory relief for small, less complex financial institutions.

Two recent legislative developments could potentially further Republicans efforts to scale back Dodd-Frank. Congressional Republicans have begun seeking legislative vehicles that would allow smoother passage of changes to the financial regulatory framework. One avenue is through the appropriations process. On June 29, the House Appropriations Financial Services Subcommittee approved its spending measure for FY18. The legislation would enhance Congress' control over the Consumer Financial Protection Bureau (CFPB), repeal the Volcker Rule prohibiting proprietary trading and limit regulators' power to regulate non-bank institutions that agencies determine pose a threat to the financial system. Republican lawmakers have also indicated that they are prepared to include financial services reform in reconciliation instructions in the FY18 budget resolution. The reconciliation process allows for a simple Republican majority to pass certain legislation in the Senate instead of the enhanced 60-vote threshold for most legislation. Leaders on the House Financial Services Committee intend to request that the Budget Committee include reconciliation instructions that would allow Congress to bring the CFPB into the normal appropriations process and rescind the OLA.

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Senate's Version of Health Reform Legislation Faces Tough Political Hurdles

Senate Republicans were unable to reach consensus on a draft health care bill last week, pushing a vote on the measure until after the July 4 recess. A draft of the Senate's Better Care Reconciliation Act of 2017 (BCRA) was released on June 22 and included a number of notable changes from the House-passed American Health Care Act (AHCA), such as a more gradual phaseout of enhanced federal funding for Medicaid expansion, delayed repeal dates for certain ACA taxes and retention of the ACA's premium tax credit system. Almost immediately upon its release, Sens. Ted Cruz (R-TX), Ron Johnson (R-WI), Mike Lee (R-UT) and Rand Paul (R-KY) announced their opposition to the bill and warned that they would not vote for the measure without changes. At the same time, moderates' concerns about the draft's cuts to Medicaid intensified after the Congressional Budget Office (CBO) released its cost estimate projecting that the legislation would increase the number of uninsured by 22 million over a decade. This is only slightly fewer than the number of uninsured estimated for the AHCA. In light of the opposition, Majority Leader Mitch McConnell (R-KY) was forced to delay a procedural vote planned for June 28.

These setbacks have prompted President Trump to renew calls for Congress to repeal the ACA now and work on replacement legislation later on. Nonetheless, work continues on the BCRA, and Leader McConnell has sent revisions to the CBO for scoring. A bill is expected on the Senate floor no earlier than the week of July 17. Leadership is reportedly considering several new policies intended to secure the needed 50 votes for passage, including up to \$45 billion in additional funding to combat the opioid crisis, a provision allowing individuals to use health savings accounts to pay insurance premiums and continuation of the ACA's 3.8 percent tax on net investment income. Meanwhile, Sen. Cruz has offered a proposal that would allow insurers to sell plans that do not meet the ACA's coverage standards as long as they sell at least one plan that does meet the standards. Sen. Cruz says that the proposal would bring down premiums, but other Senate Republicans are worried that the changes would undermine coverage protections for those with pre-existing conditions. As senators use the July 4 recess to further review and assess the legislative impact of the BCRA, the path forward for the bill remains challenging.

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Clean Water Rule—The More Things Change, the More They Stay the Same

On June 27, 2017, the Environmental Protection Agency (EPA) and the Department of the Army took the first of two steps to replace the Obama administration's Clean Water Rule (CWR), effectuating an early directive set out by President Trump in an EO titled Restore the Rule of Law, Federalism, and Economic Growth by Reviewing the

“waters of the United States” Rule (March 1, 2017). In this first step, the agencies seek to reinstate, by rule, the definition of waters of the United States (WOTUS) that the CWR was written to replace. See, Prepublication Version of Docket No. [EPA-HQ-OW-2017-0203](#). Notably, it is this “old version” of the WOTUS rule that is currently being implemented across the country, due to a stay of implementation of the CWR by the 6th Circuit Court of Appeals. So, provided this rule is codified, we are right back where we started at the beginning of the previous administration.

Nevertheless, there are a few items to keep an eye on over the coming months:

- Expect this WOTUS Rule to be final soon. The rule is open for public comment for 30 days and calls for input on only the question of “whether it’s desirable and appropriate to re-codify in regulation the *status quo* as an interim first step pending a *substantive* rulemaking to reconsider the definition of ‘waters of the United States.’” Prepublication Version at p. 18 (emphasis added).
- Expect new litigation upon finalization, particularly from those who favored the CWR’s scientific approach to analyzing which waters are subject to federal jurisdiction.
- Once the CWR is replaced, the case pending before the Supreme Court on the question of whether the district courts or the circuit courts review the definition will be mooted. Will the agencies move quickly enough to moot the question?

To effect actual change, the agencies will have to take the second step and draft the substantive rule. This will present a much more difficult task. The term “waters of the United States” has been mired in litigation since the early days of the Clean Water Act. Any replacement rule will similarly face a difficult path (particularly since the agencies have signaled an intent to place greater emphasis on the “States’ primary responsibility and right to prevent, reduce and eliminate pollution”), making this the optimal time for affected businesses to provide input.

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Section 232 Investigation on Steel and Aluminum Imports

The Trump administration has followed through on a campaign promise by reviewing the effect of steel imports on the U.S. economy and, more importantly, national security. The Commerce Department review relies on a little-used provision of the Trade Expansion Act of 1962 (19 U.S.C. § 1862), known as Section 232, which gives Trump significant authority to investigate whether imports threaten national security.

A conclusion that steel imports do, in fact, endanger U.S. national security would give Trump a number of options at his disposal to remedy the issue, including imposition of tariffs and other measures to curb imports and thereby protect the U.S. steel and aluminum industries. The Secretary of Commerce, Wilbur Ross, is due to release a report on the matter as soon as this week. Mr. Trump warned that other unfair trade practices, such as dumping and subsidies, by China and other countries could also be offset with tariffs. The President’s decision to target steel and aluminum imports on national security grounds could have wide-reaching ramifications on U.S. geopolitical alliances and affect global markets.

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FAA Reauthorization

With current Federal Aviation Administration (FAA) authority due to expire on September 30, both the House and the Senate marked up FAA reauthorization bills last week.

On June 27, 2017, the House Transportation and Infrastructure Committee passed a six-year, \$65.25 billion reauthorization of the FAA. The bill would spin off the nation’s air traffic control systems into a not-for-profit corporation, which has been a priority of Chairman Bill Shuster (R-PA) and now has the support of President Trump. The bill passed 32-25, largely along party lines. Chairman Shuster said that he hopes the bill will get to the House floor next month.

On June 29, 2017, the Senate Commerce, Science, and Transportation Committee approved its own four-year, \$68 billion reauthorization of the FAA. The Senate bill would not spin off the air traffic control system into a nonprofit corporation. Chairman John Thune (R-SD) has said that he does not have the support of enough members in the Senate for the House air traffic control plan.

Both bills include provisions to incorporate commercial drones into the airspace while recognizing safety, privacy and security issues, and they would impose new requirements on commercial airlines. The bills also would add new mandates on airlines and require rulemakings that could add mandates.

Assuming that the House and Senate are able to pass their respective bills, the bills then would be reconciled in a Conference Committee. Not only is it not clear whether the House Republican leadership will support the Transportation Committee bill, but Senate Commerce, Science, and Transportation Committee Chairman John Thune (R-SD) has said that the differences over treatment of the air traffic control system have the “potential” to derail negotiations. Chairman Thune has not ruled out a short-term FAA extension in the event that an agreement

cannot be struck before the September 30 deadline. Extensions of the FAA bill have been the norm in recent years, making it the most likely outcome.

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Supreme Court Partially Lifts Injunction on Travel Suspension Executive Order; Will Hear Case in Fall 2017

On June 26, 2017, the Supreme Court granted certiorari in *Trump v. IRAP*, the case that deals with the travel suspension EO restricting visa issuance to applicants from six countries (Iran, Libya, Somalia, Sudan, Syria and Yemen). The case will be heard on the merits in the fall of 2017. The Court also consolidated the cases previously heard in the 4th and 9th Circuits, and ruled that the travel and refugee bans “may not be enforced against foreign nationals who have a credible claim of a bona fide relationship” with a U.S. person or entity. In accordance with a presidential memorandum, the portions of the travel suspension allowed under the Court’s decision went into effect on June 29, 2017.

Following the Court’s decision, the Department of State (DOS) and the Department of Homeland Security (DHS) issued guidance on what constitutes a “bona fide relationship” for the purposes of visa issuance to applicants from the listed countries. In the family context, a bona fide relationship is a “close family relationship” that is defined as “a parent (including parent-in-law), spouse, fiancé, child, adult son or daughter, son-in-law, daughter-in-law, sibling, whether whole or half, and including step relationships.” Both the DOS and the DHS stated that close family does not include “grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law, and any other ‘extended’ family members.”

The DOS also clarified in a cable to all of its diplomatic and consular posts that a bona fide relationship with an entity in the United States “must be formal, documented and formed in the ordinary course,” rather than for the purpose of evading the EO. The DOS cable provided examples of such relationships (e.g., a worker who has accepted an offer of employment from a company in the United States or a student who has been admitted to a U.S. educational institution). In contrast, the cable indicated that an individual whose only tie to the United States is a hotel reservation, whether paid or not, will be unlikely to succeed in establishing the existence of a bona fide relationship with a U.S. person or entity.

The U.S. Refugee Assistance Program (USRAP) is suspended for 120 days, as the result of the Court’s decision, except for cases where an applicant has a credible claim of a “bona fide relationship” with a person or entity in the United States or obtains a national interest waiver from the DOS or Customs and Border Protection (CBP). The DOS cable confirmed that asylum processing will not be affected by the EO, and family members who are applying to join their asylee or refugee spouses or parents in the United States will be issued visas. However, there is limited guidance as to whether assistance by a refugee resettlement agency to incoming refugees will qualify as a bona fide relationship under the Court’s ruling. The DOS confirmed that refugees will continue being interviewed for their visas and that additional guidance will be provided to consular posts on this issue.

Both the DHS and the DOS stated in their guidance that the following individuals will not be affected by the EO: individuals with currently valid visas or other travel documents issued by the U.S. government; lawful permanent residents; asylees and refugees who have already been admitted to the country; diplomats; dual nationals, even if one of the citizenships they possess is from one of the six designated countries; landed immigrants of Canada; individuals who were present in the United States on June 26, 2017, even if they exit the country and apply for a subsequent visa; and individuals who had a valid visa on June 29, 2017. In addition, according to the EO, both the DOS and CBP can review individual cases and grant waivers on a case-by-case basis if a foreign national demonstrates that his or her entry into the United States is in the national interest, will not pose a threat to national security, and that denying entry during the suspension period will cause undue hardship. CBP issued guidance to all ports of entry and airline carriers that is consistent with the DHS and the DOS guidance on the implementation of the EO and Court’s decision.

The practical implementation of the Court’s decision is unlikely to yield results different from how the administration has already handled visa issuance for applicants from the six designated countries. Despite the nationwide injunctions by the 4th and 9th Circuits, the DOS had implemented a detailed questionnaire for applicants in those countries and considered the visa applications on a case-by-case basis, similar to the exemptions originally contemplated in the EO. It is anticipated that the administration will continue to evaluate visa applications in the designated countries in a similar manner.

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Qatar Diplomatic Relations

Despite a multitude of domestic policy issues to handle, such as health care, the Trump administration is dealing with an ongoing diplomatic crisis between Qatar and 13 other nations. In early June, six countries—Bahrain, Egypt, Libya, the Maldives, Saudi Arabia and the United Arab Emirates (UAE)—severed economic and diplomatic relations with Qatar due to Qatar’s relationships with, and support for, terrorist organizations, including Hamas,

Al-Qaeda and others. Three other nations—Comoros, Mauritania and Senegal—joined the bloc in cutting ties with Qatar; four others—Chad, Djibouti, Jordan and Niger—reduced diplomatic relations with Qatar. A group of these countries has developed a list of steps Qatar must take to sever its links with terror groups, but Qatar has not shown a willingness to do so. Kuwait has stepped forward to mediate, and Secretary of State Rex Tillerson has indicated that he is working with Kuwait to facilitate a resolution. Since the diplomatic rift began, President Trump has repeatedly called upon Qatar to reform and stop financing terrorist organizations.

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