

What's New in Washington

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Lawmakers returned from their Independence Day recess prepared for more legislative fireworks over a slew of outstanding agenda items, including a showdown over the Supreme Court nomination of Judge Brett Kavanaugh to replace retiring Justice Anthony Kennedy.

The Senate will continue to move forward on a batch of executive and judicial nominations. The Senate Judiciary Committee will begin its consideration of the Kavanaugh nomination with confirmation hearings coming as early as August and a Senate floor vote as early as September. The chamber is also hoping to consider opioid legislation, as well as the Water Resources Development Act. Senate leaders have also stated that appropriations bills will continue to be a priority.

In the House, leadership is preparing a second “minibus” appropriations package that will include Department of the Interior and Financial Services spending measures. House lawmakers also may consider reauthorization of intelligence programs; action on health insurance premiums (e.g., Health Insurance Tax, Medical Device Tax and Health Savings Accounts); a second turn at tax reform; and a follow-on package of bipartisan financial services reforms that the Senate was unable to carry in its Dodd-Frank reform bill.

The House and Senate also will be working to reconcile differences and finalize three major bills in July: the National Defense Authorization Act (NDAA); the Farm Bill and the first mini-bus appropriations bill containing Energy and Water, Military Construction and Veterans Affairs, and the Legislative Branch appropriations. Depending on the pace of proceedings, lawmakers could reach a compromise on each of these bills allowing for final passage later in July or early August.

The current short-term extension of the National Flood Insurance Program also expires at the end of July. Last year, the House passed a long-term reauthorization, and the Senate passed another short-term reauthorization as part of its Farm Bill. There will be discussion between the chambers as members work to prevent the program from lapsing by passing a stand-alone measure or as part of a larger package, such as the Farm Bill.

Finally, trade issues will continue to dominate discussion in Washington as the administration continues to deploy trade remedies and Congress weighs when and whether to respond. Two items in particular are expected to remain a focus of congressional discourse on trade. First, Sen. Bob Corker (R-TN) is expected to continue pushing his proposal to require congressional approval of the administration’s tariffs. Second, the NDAA contains provisions that would reinstitute a ban on U.S. exports to Chinese telecom giant ZTE unless the administration can certify that the company has not violated the U.S. law for a year. The ZTE language will be a hotly debated item in the NDAA conference that is currently meeting to resolve differences in the House and Senate NDAA bills.

With a full plate of agenda items highlighted above, Congress will be hard-pressed to address all of its outstanding issues, forcing many of these legislative battles to the lame-duck session following the 2018 midterm election.

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TRADE WAR TARIFFS HIT HOME

The trade war between U.S. and major trading partners escalated further last week. After imposing steel and aluminum import tariffs against most countries at the end of May, a volley of retaliatory tariffs from major trade partners has been imposed over the course of the last month. Trading partners such as Canada, Mexico and the European Union have imposed counter-tariffs, many of which are intended to target politically sensitive products from politically important regions in the United States.

The United States Trade Representative (USTR) announced that it is taking action against what it deems as China's unfair trade practices in the form of forced technology transfers and intellectual property theft, as illustrated in the Section 301 investigative report. The first list of products that USTR identified applies an additional duty of 25 percent on products from China classified in certain enumerated subheadings of the Harmonized Tariff Schedule of the United States. These tariffs are applied to \$34 billion worth of Chinese goods imports and took effect on July 6, 2018. China responded almost immediately with retaliatory tariffs on U.S. goods. Also on July 6, USTR outlined a process for companies to seek specific product exemptions from the tariff order. A second list of U.S. proposed tariffs to be imposed on \$16 billion in Chinese imports is currently open for public comment. On July 10, USTR announced a third list of U.S. proposed tariffs, this time imposing 10 percent of additional duties on Chinese imports totaling \$200 billion. This third list is intended to respond to China's retaliatory tariffs on July 6.

In addition to these actions, the President also launched a Section 232 investigation into automobiles and automobile parts. The public hearing on this investigation is on July 19, and Commerce Secretary Wilbur Ross has indicated that he plans to move quickly to provide a report and recommendations to President Trump. The threat of new tariffs on automobiles and automobile parts, combined with the impact of the other U.S. tariffs imposed in recent weeks, along with the impact of the retaliatory tariffs imposed by our trading partners, has begun to galvanize opposition on Capitol Hill. Sens. Corker and Toomey have been actively seeking a legislative solution to restrict the administration's authority under Section 232. However, the chance that this legislation passes Congress and is signed by the President are low at the moment.

Akin Gump Strauss Hauer & Feld LLP is uniquely positioned to assist companies impacted by these tariffs. Our war room on trade includes world-class trade lawyers working hand in glove with world-class trade policy lobbyists. Please do not hesitate to reach out to our team as you seek relief from the increasing burden of tariffs from around the world.

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HOUSE COMMITTEE CONSIDERS 340B REFORMS

With opioid legislation now passed out of the House, the Energy and Commerce Committee has turned its attention to other health care priorities, including pending public health bills and proposed changes to the 340B Drug Pricing Program. The program, which provides discounted drugs to hospitals and other entities that serve a disproportionate share of uninsured and low-income patients, has come under increased scrutiny as it has

expanded in recent years.

The Energy and Commerce Committee's Health Subcommittee held a hearing on July 11 to examine more than a dozen bills and discussion drafts. These included measures advanced by both supporters and critics to address various aspects of the program and its funding.

H.R. 4392, introduced by Reps. David McKinley (R-WV) and Mike Thompson (D-CA), would reverse cuts to 340B drug discounts for hospitals included in the 2018 Hospital Outpatient Prospective Payment System Final Rule. H.R. 6071, introduced by Rep. Doris Matsui (D-CA), also would overturn the payment cuts while clarifying the 340B program's intent and expanding eligibility to serve populations affected by the opioid crisis.

Other measures under consideration would clarify the patient definition under the 340B statute, require hospitals to report on how they use program savings, and give additional rulemaking authority to the Health Resources and Services Administration. The Subcommittee also examined legislation to establish a 340B user fee (H.R. 6240), as proposed in the President's Fiscal Year (FY) 2019 Budget Request. Similar proposals focused on transparency and hospital accountability were included in the administration's drug pricing "Blueprint."

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BE IN THE KNOW ABOUT TAX REFORM 2.0

This week, House lawmakers will continue their discussions around "Tax Reform 2.0," the House's follow-up to the Tax Cuts and Jobs Act (TCJA, P.L. 115-97). Late last month, Chairman Kevin Brady (R-TX) of the tax-writing Ways and Means Committee laid out a timeline for the House process, saying that the Committee would begin circulating a draft to House Republicans of what a package would potentially look like this week; would gather feedback from Republican lawmakers throughout the month of July; and would then release a legislative outline in August, with votes (both Committee and floor) scheduled for later in the fall. The Chairman has said that he does not envision 2.0 as being a single bill, but "a package of two, three, or four approaches with permanency being one of them."

What's in?

The most-talked about provisions of Tax Reform 2.0 are the so-called "permanency provisions", measures that would make permanent certain temporary changes in the TCJA. This includes both the reduction in individual income tax rates and the newly created pass-through (199A) deduction, which both expire after the end of 2025 under the TCJA due to Senate budget rules. Chairman Brady has also indicated that a savings package could be part of 2.0, saying that "the timing is right to help families save more and earlier in their life, whether it's for healthcare, or school for their kids, or retirement in the long-term." This package could include provisions from the Senate's Retirement Enhancement and Savings Act (RESA), which passed the Finance Committee by a vote of 26-0 in 2016, and the Ways and Means Committee has announced that it will mark up bills that expand Health Savings Accounts later this week.

What's out?

Rumors had swirled in late June that the Ways and Means Committee may be considering "Rothification" (i.e., the elimination of pretax retirement benefits) as a part of Tax Reform 2.0; however, in a statement to tax analysts last week, a spokesperson for the Committee said that "[t]he Ways and Means Committee has no plans to revisit the issue of so-called Rothification as part of any 2.0 proposals, and any rumors to the contrary are simply not correct." The Senate Finance Committee had briefly considered Rothification as part of the TCJA but discarded the idea due to member concerns and pushback from the administration. There were also rumors last month that changes to the TCJA's international provisions may be a part of 2.0, but any changes in that area will likely wait until after international implementation regulations are issued later this year.

What's on the fence?

Some see 2.0 as an opportunity to index capital gains for inflation, a long-time goal of

current National Economic Council Director Larry Kudlow and Vice President Mike Pence. Treasury Secretary Mnuchin was asked in late June whether the Treasury Department could unilaterally index capital gains to inflation; he said that, “[i]f we’re not able to complete Tax 2.0, then we’ll go back to the drawing board and decide whether we want to consider this on a non-legislative basis.” Also, earlier this month, President Trump floated the idea of further lowering the corporate tax rate from 21 percent to 20 percent in 2.0. The President had originally proposed a 15 percent corporate rate for tax reform; however, Senate Reconciliation rules (requiring revenue neutrality after 10 years) limited how low the corporate rate could actually go. For his part, Chairman Brady has been noncommittal on including capital gains changes in a second round of tax reform, stating this week that “It hasn’t been determined yet, but [the Committee is] certainly looking at it.”

What does it mean?

Most likely nothing at this point. Unless the House can cobble together a bipartisan retirement savings bill that is reconcilable with the Senate’s RESA effort, any tax bill would likely face a steep climb to get past the Senate’s 60-vote filibuster rule before November.

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NDAAs APPROACHES FINISH LINE

The Senate passed their version of the FY19 NDAA on June 18 by a margin of 85-10. The legislation includes roughly \$716 billion in spending and allows for a conference committee to be formed with the House of Representatives which passed its version of the bill by a margin 351-66 on May 24. Additional provisions that could be negotiated in conference include a provision in the Senate bill that would block the President’s deal to lift the ban on Chinese telecommunications company ZTE, as well as the possible inclusion of the Foreign Investment Risk Review Modernization Act (FIRRMA). The House and the Senate will work through the last three weeks of July to reconcile their respective bills (H.R. 5515 and S. 2987) with the goal of sending a final version to the President’s desk to be signed into law before the House leaves for its August recess.

The final vote on the Senate bill occurred after senators blocked each other from taking votes on hundreds of proposed amendments, including one from Sen. Corker that would have required approval from Congress for tariffs implemented under the Section 232, which allows the President to impose tariffs to protect U.S. national security. However, the Senate ultimately voted on July 11 by a margin of 88-11 to approve a nonbinding motion to restore congressional authority over tariffs enacted to protect national security. The motion instructs the Senate energy and water appropriations bill conferees to include in the legislation language that would provide a “role for Congress in making a determination under Section 232 of the Trade Expansion Act of 1962.”

On June 18, 2018, the Senate passed its version of the FIRRMA by including it as a provision in its version of the NDAA. On June 26, 2018, the House passed its version of FIRRMA separately from the NDAA. While there are differences between the two versions, both significantly reform and modernize the Committee on Foreign Investment in the United States (CFIUS) process for addressing existing and emerging national security threats. As the differences are sorted out, Government Accountability Office issued a report on July 10, 2018 that confirmed the need for increased review of foreign investment. The report is likely to bolster the bipartisan efforts in Congress to expand CFIUS’ oversight.

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FARM BILL REMAINS A PRIORITY

The reauthorization of agricultural programs through the Farm Bill remains high on Congress’ legislative agenda. In the House, the Farm Bill has gone on a roller-coaster ride, with the chamber initially rejecting the measure on May 18. The conservative Freedom Caucus, who tied its support for the Farm Bill with a vote on an immigration package, joined with Democrats in opposing the bill. After holding an immigration vote to assuage the Freedom Caucus, the House narrowly passed its version of the bill on June

21. The Senate had a much easier time passing its version of the Farm Bill and advanced the legislation on a bipartisan 86-11 vote on June 28.

The two chambers will now need to resolve the myriad differences between the two competing versions of the Farm Bill. While the House could accept the Senate bill, it is far more likely that the chambers will convene a formal conference committee. Controversial issues that conferees will need to address include how to handle the House bill's work requirements for the Supplemental Nutrition Assistance Program, as well as the bills' differing provisions related to commodity supports, crop insurance and conservation programs.

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U.S. EPA REEXAMINES THE ROLE OF THE COST / BENEFIT ANALYSIS IN THE RULEMAKING PROCESS

In what has turned out to be one of his last major policy steps, on June 13, 2018, Scott Pruitt signed an advance notice of proposed rulemaking (ANPRM), "Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process," seeking comment on an effort to develop an agency wide standard for cost-benefit analyses with the stated goal of improved consistency and transparency. A long-standing Executive Order requires that, to the extent allowed by law, the benefits of a regulatory action should outweigh its costs. EO 12866 (58 FR 51735, October 4, 1993). Whether, and how, those assessments include the quantification of social costs and benefits, such as an increased number of deaths or illnesses due to emissions of air pollutants or sea-level rise, can alter the determination on whether a regulation is "worth it." Moreover, the agency has recently considered co-benefits, benefits that were not the primary purpose of the regulation, in arriving at final numbers, an approach that many have criticized.

Through the ANPRM, the agency is generally exploring ways to standardize the cost-benefit analysis, and seeks input on three different aspects of the process: public perception of inconsistencies, how to move forward with a more transparent and consistent Rulemaking Process, and how wide of a scope the Environmental Protection Agency (EPA) should have to govern the cost-benefit analysis in the future. Comments are due on August 13. While this is just the first step in a multifaceted process, it appears EPA is preparing to focus its analyses on economic costs more strictly than it has in the past.

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ANOTHER COG IN THE DEREGULATORY WHEEL(ER)

On July 8, 2018, Andrew Wheeler assumed the role of Acting Administrator of the EPA following Scott Pruitt's resignation in the wake of a series of ethics allegations. Unlike Pruitt, Wheeler is long familiar with the ways of Washington and is well-versed in law and policy. Wheeler has spent his career working in environmental law, early on at the EPA, subsequently serving as the Republican Staff Director of the Senate Committee on Environment and Public Works, and more recently lobbying for coal, chemical and uranium companies. Wheeler inherits a Trump administration environmental agenda that he supports. Perhaps he can more effectively implement that agenda with the aid of the career EPA staff whom he is reported to respect and whom his predecessor marginalized and often ignored.

Wheeler shares his predecessor's distrust of human-caused climate change and interest in dismantling Obama and Bush administration climate policies. Wheeler is likely to follow through on the regulatory reform efforts undertaken by his predecessor, including the substantial revision or all-out withdrawal of the Clean Power Plan, the Clean Water Rule and the CAFÉ standards, as well as continue to usher in policy objectives that are focused on transparency at the agency, including a rule related to the use of scientific studies and the advance notice of proposed rulemaking on the implementation of cost/benefit analyses.

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