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Fiscal Year 2017 Appropriations

Entering 2016, House Speaker Paul Ryan (R-WI) and Senate Majority Leader Mitch McConnell (R-KY) agreed to make FY17 appropriations the centerpiece of this year's legislative agenda. Both pledged "regular order" in the FY17 budget and appropriations process. That meant three things: passing a FY17 budget resolution that honored the increased discretionary spending caps contained in the Bipartisan Budget Act of 2015 (BBA); an accelerated timeline for passing appropriations legislation to accommodate this year's abbreviated Congressional calendar; and passing and conferencing all 12 FY17 appropriations bills that collectively fund the federal government by the October 1 start of the new fiscal year. On February 9, President Obama formally kicked off the FY17 budget season with his $4.1 trillion budget request. However, circumstances are conspiring to make the FY17 process anything but smooth.

Republicans on the House Budget Committee announced they have agreed to a budget framework that would offer multiple options for cutting mandatory spending programs to offset the $30 billion in additional discretionary spending passed by Congress last year. However, Speaker Ryan warned Republicans that undoing last fall's budget agreement with the White House would bring the appropriations process to a halt in the Senate, where Republicans must work with Democrats to pass legislation. Further complicating the effort for a smooth FY17 appropriations season is the unexpected vacancy on the Supreme Court left by the death of Associate Justice Antonin Scalia, setting up a potentially bitter Supreme Court nomination fight that could poison whatever good will still exists between President Obama and Congressional Republicans. That fight may occur at the height of the 2016 presidential primary season in what many agree is an extraordinarily unusual election year dominated by "outsider" candidates and internal party rifts.

Even under the best of circumstances, President Obama's FY17 budget request sent to Congress causes difficulties for the House and Senate Appropriations Committees. First, although the President adheres to the BBA's discretionary spending caps in FY17 ($551.5 billion for defense and $518.5 billion for non-defense), he proposes to pay for a host of current programs through a mix of funding under the control of appropriations committees and the authorizing committees, complicating efforts at an agreement. Second, the President proposes to replace mandatory sequestration starting in FY17 and FY18 with major tax increases and cuts in mandatory spending unacceptable to members of both political parties.

The President's budget request contains three major initiatives with which President Obama hopes to cement his legacy: a $1 billion "Cancer Moonshot;" a multi-billion dollar "21st Century Clean Transportation Initiative;" and a multi-billion dollar "Clean Energy Initiative" that builds on President Obama's climate change agenda. All three are funded by increases in mandatory spending financed by a mix of tax increases (including a per barrel $10.25 oil tax) and cuts in Medicare and Medicaid programs unlikely to see the light of day in a presidential election year. This again puts the House and Senate Appropriations Committees in the position of having to pay for new initiatives for which there may be bipartisan support – such as the Cancer Moonshot – with finite budgetary resources under the strict FY17 discretionary spending caps.

Takeaway: Although recent developments suggest that Congress may again struggle to meet the October 1 fiscal year deadline for enacting all 12 spending bills into law, current information suggests that regular spending bills are expected to be negotiated and become law at some point before the year is out, whether in the form of individual free-standing measures or as part of a consolidated omnibus appropriations package. Therefore, engaging House and Senate member offices, the relevant authorizing committees and the House and Senate Appropriations Committees regarding spending and policy priorities, preferences and projects remain very important. With respect to the appropriations bills, the deadlines for member requests are fast approaching, therefore all requests must be filed in a timely manner.

Next Steps on the Trans-Pacific Partnership

On February 4, representatives from 12 nations signed the Trans-Pacific Partnership (TPP) at a ceremony in New Zealand. Now that the deal has been finalized, the focus shifts to Washington and the debate over ratification in the Congress. Under the terms of the Trade Promotion Authority law passed in 2015, President Obama cannot formally submit legislation implementing the agreement to Congress until at least 30 days after submitting the final legal text of the agreement. At that point, the House and Senate will have 90 legislative days to accept or reject the agreement without amendments.

Takeaway: Though initial indications were that there was little chance the agreement would be considered before the November election, House Speaker Paul Ryan (R-WI) said recently that "I wouldn't say it's dead, but right now they have a lot of work to do." In particular, Speaker Ryan referenced concerns over cross-border data flows, the dairy industry and proposed regulations on biologic pharmaceuticals. Complicating the issue further, Senate Majority Mitch McConnell (R-KY) echoed many of Speaker Ryan's concerns, saying he does not think TPP has enough support to pass Congress.

Fiduciary Rule

On January 29, the Department of Labor formally submitted a new rule to the Office of Management and Budget (OMB) requiring retirement investment advisers to act solely for the benefit of their clients. The so-called "Fiduciary Rule" has long been a priority of the Obama Administration, which argues it will protect investors from being steered toward pricey but unnecessary financial products.

The financial industry has fought the rule, warning policymakers that the rule would be very burdensome to implement and extremely intrusive. Last year, the House approved a bill to delay the rule's implementation, but the Senate failed to take up the measure. Currently, a number of bills are circulating in the House and Senate that would delay implementation of the rule until the Securities and Exchange Commission issues a final rule that would apply to all retail investment advice, likely significantly delaying the adoption of the Fiduciary Rule.

Takeaway: OMB has until April 29 to review the rule, but news reports are predicting it is likely to be expedited and may be released as early as March.

Comprehensive Energy Bill

On January 27, the Senate began consideration of S.2012, the Energy Policy Modernization Act. If passed, the bipartisan legislation would be the first comprehensive energy legislation signed into law since 2007. The measure is co-sponsored by the Chair and Ranking Member of the Senate Energy and Natural Resources Committee, Senators Lisa Murkowski (R-AK) and Maria Cantwell (D-WA) and has the support of Senate Majority Leader Mitch McConnell (R-KY) and Minority Leader Harry Reid (D-NV). The compromise legislation helps both fossil fuel producers and renewable energy advocates, requiring the Energy Department to accelerate approval of permits to build terminals for shipping natural gas abroad and by requiring operators of the electrical grid to perform major upgrades to the system, allowing energy produced by renewable sources to be more easily integrated into the country's energy mix. The bill also creates and strengthens programs devoted to energy efficiency and permanently authorizes the Land and Water Conservation Fund.

Takeaway: A rare bipartisan bill, the Energy Policy Modernization Act has a chance of becoming law. However, a number of hurdles stand in its way as Senator Murkowski must work to keep the bill free of poison pill amendments, and House Energy and Commerce Committee Chairman Fred Upton (R-MI) must deliver on his commitment to produce a companion bill which would allow a conference to occur and a bill to be sent to the President. Currently, the bill is also being held up by a disagreement over how to pay for efforts to combat the water crisis in Flint, Michigan. Michigan Senators are working with Senate Environment and Public Works Committee Chairman James Inhofe (R-OK) to reach an agreement.

FAA Reauthorization

On February 3, House Transportation and Infrastructure (T&I) Committee Chairman Bill Schuster (R-PA) unveiled a sweeping overhaul of the Federal Aviation Administration (FAA). The bill, which would reauthorize the FAA for six years, separates the FAA's traditional air traffic control mission and hands management to a multimember non-profit called the "ATC Corporation." The new ATC Corporation would be funded by user fees from the aviation industry. Non-commercial corporate jets, piston-powered and military aircraft would be exempt. The bill would also increase funding for the Airport Improvement Program, transfer the NextGen Program to the ATC Corporation and streamline the application process for the passenger facility charge – though the plan does not include the fee cap increase that airports have long requested.

On February 11, the bill was approved by the T&I Committee by a vote of 32 to 22, with two Republicans crossing the aisle to vote in opposition with all Committee Democrats. During the nine hour mark-up, the panel voted down dozens of amendments from Committee Democrats, including one from Ranking Member Peter DeFazio (D-OR) that would have compelled the FAA to sell off its air traffic control assets at fair market value.

Takeaway: The reforms in the FAA reauthorization bill proposed by Chairman Schuster face stiff opposition from House and Senate Democrats, as well as from some in the aviation industry. Senator John Thune (R-SD), Chairman of the Senate Committee on Commerce, Science & Transportation, has expressed openness to the possibility of creating an independent Air Traffic Control System, but has cautioned that whatever plan Congress settles on should not deviate too far from what various aviation sectors currently pay to use the system. Given these and other concerns, House leadership has elected to shelve Chairman Schuster's bill for now. Given this development, odds are that another short term extension will be needed before the current authorization extension expires at the end of March.

EU-U.S. Privacy Shield

On February 2, the U.S. Department of Commerce and European Commission unveiled a new framework for transfers of personal data from European Union (EU) Member States to the U.S. The new framework – dubbed the EU-U.S. Privacy Shield – will replace the EU-U.S. Safe Harbor Agreement, which was invalidated by the European Court of Justice (ECJ) in October 2015. The Commission and Department of Commerce have agreed to terms in principle, but the exact details of the new framework remain under development by officials on both sides of the Atlantic and will require formal approval by the European Commission. To be sure, the raising of the Privacy Shield will be no small feat, but it does hold the promise of providing legal certainty for companies engaged in transatlantic data transfers. On February 25, President Obama signed the Judicial Redress Act, a key step in the process toward solidifying the EU-U.S. Privacy Shield.

Takeaway: Companies with personal information crossing borders need to begin the preparation for what is likely to come next, affirmative audits to ensure compliance with the Privacy Shield requirements.

New EEOC Race, Ethnicity and Gender Reporting Requirements

On January 29, the seventh anniversary of the signing of the Lilly Ledbetter Fair Pay Act, the Obama administration announced an executive action that would require companies with more than 100 employees to report to the federal government employee compensation rates broken down by race, gender and ethnicity. White House officials said that the requirement is intended to bolster the government's ability to penalize companies that engage in discriminatory pay practices and to encourage businesses to police themselves better and correct such disparities. According to the Equal Employment Opportunity Commission (EEOC), the compensation data would be an addition to employment information companies are already required to submit annually on race and gender. The EEOC says that aggregate data will be published to help employers "facilitate voluntary compliance."

Republicans criticized the Obama Administration for sidestepping Congress and instead implementing the changes through the regulatory process. "The way to make meaningful, lasting progress on equal pay for women isn't unilateral presidential action," said Senator Deb Fischer (R-NE). "I urge the president to step up and work with, not around, Congress to make a difference in the lives of working families."

Takeaway: The Administration proposal would modify the EEO-1 form by requiring data on employee compensation to include a breakdown by gender, race and ethnicity. As currently proposed, this information would be reported across 10 job categories and by 12 pay bands and will not require the reporting of specific salaries of each individual employee. Employers will be required to submit the additional pay data as of the September 30, 2017, EEO-1 filing deadline.

President Obama Signs Customs Enforcement Legislation

On February 24, President Obama signed into law H.R. 644, the Trade Facilitation and Trade Enforcement Act of 2015. The legislation provides additional tools to strengthen trade enforcement at ports and borders, bolsters efforts to stop evasion of trade laws and improves the coordination of enforcement efforts. The conference report, which passed the House in December, got bogged down in the Senate after a measure permanently extending the ban on Internet access taxes was added to the bill. An agreement was worked out to let the Internet tax plan remain in the bill with a promise that a sales tax measure will be considered this year. The measure also includes an overhaul of the U.S. Customs and Border Protection Agency, new protections for intellectual property, and new options for the government to crack down on currency manipulation.

Takeaway: The legislation, which passed with strong bipartisan support, is the fourth and final of the major trade bills to pass Congress since last summer. The bill was supported by a wide swath of industry groups but was opposed by labor unions. Labor had supported last year's Senate version of the bill, which mandated import duties against countries found to manipulate their currencies to make their exports cheaper to American consumers. That penalty was dropped, however, from the final bill.

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