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WHAT'S NEW IN WASHINGTON

April 2018

Congress returned from its spring recess with a host of issues to address—trade, Trump administration nominations and opioid legislation sitting atop the priority list. Given the ongoing data scandal at Facebook, privacy issues are front and center for Congress, with CEO Mark Zuckerberg set to testify before committees in both chambers this week. Bipartisanship will be put to the test on these and other issues just weeks after congressional Republicans and Democrats joined together to pass legislation funding the government through the end of September.

On March 22, lawmakers approved a $1.3 trillion omnibus spending package that will fund the federal government through the end of Fiscal Year 2018 (FY18), which ends on September 30. Fully, the omnibus appropriated $694 billion for defense programs, including Overseas Contingency Operations, and $591 billion for nondefense spending. Key programmatic funding increases included:

- Infrastructure: $21 billion
- National Institutes of Health: $3 billion
- Opioids: $3.2 billion
- Border Security: $1.57 billion
- Election Security: $1.57 billion
- School Safety: $2.3 billion

Beyond funding, the omnibus also contained several policy changes, including revisions to the 2017 tax reform law related to agriculture cooperatives, expansion of the Low-Income Housing Tax Credit and a pay increase for members of the Armed Forces.

Despite bipartisan efforts, disagreements over abortion provisions and other issues derailed an attempt to include provisions to stabilize the Affordable Care Act (ACA) insurance markets by restoring funding for cost-sharing reduction (CSR) payments and funding state reinsurance programs. Democrats failed to secure provisions enhancing federal gun laws, but the omnibus did include language lifting the prohibition on gun violence research at the Centers for Disease Control as well as language from the Republican-backed Fix National Instant Criminal Background Check System (NICS) Act that closes loopholes in the federal background check system. A permanent fix to President Trump's rescinding of the Deferred Action on Childhood Arrivals was also not included.

Looking forward, the omnibus was likely one of the last major pieces of "must pass" legislation for the year, though there are some other "must pass" bills that will receive attention over the coming months, including FY 2019 appropriations, the FY 2019 National Defense Authorization Act and reauthorization of the Farm Bill. Though these and other measures, such as opioids abuse proposals, are top priorities for Congress, the remaining options for lawmakers to attach policy riders are limited. Moreover, as Election Day draws nearer, lawmakers will find it progressively more difficult to advance their priorities, as campaign politics begin to have an increasing effect on the substance and pace of legislating.

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

Omnibus and FY19 Appropriations Process

The FY18 omnibus was made possible, in part, by the Bipartisan Budget Act of 2018 (BBA), which was enacted in February. For months, negotiators worked to secure a deal to lift the government-wide budget caps imposed by budget sequestration. The resulting BBA raised the caps in near-equal measure for both defense and on-defense spending. The BBA also re-empowered appropriators after a string of short-term Continuing Resolutions (CR) by providing them the flexibility they lacked under budget sequestration.

The ability to continue on a bipartisan path in the development and passage of spending legislation will be tested almost immediately, as the FY19 appropriations season has begun in earnest. Appropriators in both chambers have already begun accepting member appropriations requests. Following the passage of the omnibus, the House Appropriations Committee extended subcommittee submission deadlines to April 11, and the Senate Appropriations Committee deadlines run through the end of April, although the cutoff dates and times vary by subcommittee. (Note: each office has its own internal timeline and procedures, with deadlines generally set well in advance of the subcommittee cutoff dates.)

While regular order requires Congress to pass each of the 12 appropriations bill separately, this has not occurred since 1996. With a midterm election around the corner, lawmakers are likely to rely on a short-term CR to fund the government past September 30 into the post-election "lame duck" session of the 115th Congress.

Even though Congress may not take final action on FY19 appropriations until after the election, there exist opportunities for clients to engage with legislative offices to identify priorities and advocate for their inclusion in future funding measures. Work products deliberated and crafted by the subcommittees over the coming months will serve as the base for the final appropriations package, likely in December 2018.

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Health Care Issues Remain Pending After Omnibus

Passage of the FY18 omnibus spending package left unaddressed several outstanding health care issues, some of which may be addressed by Congress later in the year. Notably, the pharmaceutical industry was unable to secure language in the omnibus that would have reversed an increase in drug makers' share of costs for seniors in the Medicare Part D "donut hole," an increase that was included in the BBA earlier this year. The final spending package also did not include a measure that would eliminate "pass-through" status for biosimilars under the 340B Drug Pricing Program, while at the same time expanding the pass-through status length from three years to five.

Congress still may address other drug pricing issues this year, however. Sen. Patrick Leahy (D-VT) continues to seek passage of the CREATES Act (S. 974), which aims to promote generic competition, has bipartisan support and could be a potential vehicle for drug pricing reforms. In addition, Health and Human Services (HHS) Secretary Alex Azar announced that the administration will be rolling out a number of drug pricing proposals in April that will target discounts going to supply chain "middlemen." Interested stakeholders also are awaiting the release of a final executive order from the President on drug pricing.

House Energy and Commerce Committee Chairman Greg Walden (R-OR) has committed to considering legislation to reform the 340B Drug Pricing Program, and the Senate Health, Education, Labor and Pensions (HELP) Committee also is exploring potential reforms.

An effort to advance ACA market stabilization legislation stalled last month, disappointing insurers who say they may have to raise premiums for the 2019 plan year if Congress does not pass such legislation soon. Senate HELP Committee Chairman Lamar Alexander (R-TN), Sen. Susan Collins (R-ME), Energy and Commerce Chairman Greg Walden (R-OR) and Rep. Ryan Costello (R-PA) introduced the Bipartisan Health Care Stabilization Act on March 19. A dispute over abortion coverage sank efforts to include it in the FY18 omnibus appropriations bill, and it is unclear whether Congress will take up market stabilization legislation later this year.

The FY18 omnibus spending bill did include nearly $4 billion in funding to combat the opioid crisis, including $1 billion in new funding for grants to states and tribes. On April 11, the House Energy and Commerce Committee will hold its third and final legislative hearing on the opioid crisis, examining more than a dozen bills related to coverage and payment issues. Chairman Walden indicated his desire to bring comprehensive opioid legislation to the House floor before Memorial Day, although it is possible the timing may slip to June.

The Senate HELP Committee also announced a legislative hearing on the bipartisan Opioid Crisis Response Act draft bill for April 11. While the Energy and Commerce and HELP committees have primary jurisdiction over many of the key issues related to the opioid crisis, other House and Senate committees are also weighing legislative action on the issue.

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Trump Administration Continues Push to Modify Trade Policy

Despite the administration's hardline actions on steel and aluminum early last month, its posture softened somewhat later in the month as evidenced by discussions of exclusions as well as progress wrapping up the Korea-United States Free Trade Agreement (KORUS) renegotiation. Nevertheless, April has started out with the Office of the U.S. Trade Representative (USTR) releasing a list of $50 billion in Chinese goods it intends to hit with additional 25 percent tariffs as a result of its Section 301 investigation, the Chinese releasing their own $50 billion list in retaliation and President Trump responding by directing his administration to consider tariffs on an additional $100 billion on Chinese imports.

Steel and Aluminum Trade Action

On March 8, 2018, President Trump signed presidential proclamations imposing a 25 percent tariff on steel imports and a 10 percent tariff on aluminum imports. On March 22, the President confirmed a period of immunity until May 1 for Argentina, Australia, Brazil, Canada, Mexico, all member countries of the European Union and South Korea. The tariffs, imposed under Section 232 of the Trade Expansion Act of 1962, as amended, went into effect on March 23, 2018. USTR is charged with considering and negotiating country-specific exemptions, and the U.S. Department of Commerce is charged with considering "specific requests from affected domestic parties" to exclude certain products, based on "a lack of sufficient U.S. production capacity of comparable products" and "specific national security-based considerations." Commerce began processing applications on March 19.

301 Actions

As a result of the administration's Section 301 investigation into China's IP practices, forced technology transfers, and licensing and cyber policies, on March 22, President Trump announced he will impose tariffs on about $50 billion worth of Chinese goods. At the signing ceremony, he called this action "the first of many" with respect to China. Trump directed (i) the USTR to make public a proposed list of Chinese tariff line items that will be hit with a 25 percent tariff and (ii) Secretary Mnuchin to recommend investment restrictions within 60 days. The United States also requested WTO consultations with China over its discriminatory technology licensing requirements. The proposed tariff list was issued on April 3 and covers a wide range of items, including semiconductors, engines, agricultural and textile machinery, batteries, tires, robots and medical products. Public comments are due May 11, and the Section 301 Committee will hold a public hearing on May 15. On April 4, China indicated that it will be initiating a dispute with the United States at the World Trade Organization over its actions, claiming the Trump administration's intent to impose tariffs on $50 billion worth of Chinese goods is a "gross violation" of the WTO's fundamental principles.

Trade Promotion Authority

President Trump officially requested a Trade Promotion Authority (TPA) extension on March 20, extending his fast-track trade authority by three years. His request, which was expected, cites the 2018 Trade Policy Agenda in asserting that the administration "has launched a new era in American trade policy, driven by a determination to use the leverage available to us as the world's largest economy to open foreign markets, and to obtain more efficient global markets and fairer treatment for American workers. One of the major pillars supporting my trade policy is the pursuit of better trade deals." NAFTA (North American Free Trade Agreement) is one of those deals, but President Trump also expressed interest in exploring other trade agreements, including in Africa and Southeast Asia.

Also on March 20, the New Democrat Coalition issued a statement urging the Trump administration use TPA to exercise greater oversight and step up its engagement on trade in order to work together with Congress to complete and not hinder high-standard trade agreements. The Business Roundtable issued a similar statement the following day.

NAFTA

On April 4, USTR Lighthizer decided against hosting an official eighth round of NAFTA negotiations and to, instead, host ministerial meetings with Canadian Foreign Affairs Minister Chrystia Freeland and Mexican Economy Secretary Ildefonso Guajardo in Washington D.C. the first week of April. The three partner countries agreed to close out seven additional nearly completed "modernization" chapters by the end of the week, and press reports indicate that Lighthizer hopes the meeting will lay the groundwork for an agreement in principle by mid-April. This will coincide with the Summit of the Americas in Lima, Peru, which President Trump, Prime Minister Justin Trudeau and President Enrique Peña Nieto are all expected to attend. Mexican Economy Minister Ildefonso Guajardo has said there is "no chance" of a NAFTA deal by this time, but there is an "80 percent" chance of a deal by the first week of May.

KORUS

On March 28, the United States and South Korea formally announced in a joint statement an agreement in principle that includes a tariff phase-out for Korean trucks by an additional 20 years until 2041, a product-specific quota to limit Korean exports of steel to the U.S. and a nonbinding side deal on currency. USTR negotiated an alternative solution to global steel tariffs as part of its KORUS amendment talks. Korea is said to have accepted a 10 percent tariff on aluminum exports.

Some lawmakers, including Sen. Sherrod Brown (D-OH), Senate Finance Committee Chairman Orrin Hatch (R-UT), House Ways and Means Committee Chairman Kevin Brady (R-TX) and trade subcommittee Chair Dave Reichert (W-WA) issued statements supporting the agreement. Congressman Rep. Bill Pascrell (D-NJ), Ranking Member of the Ways and Means trade subcommittee, and Congresswoman Debbie Dingell (D-MI) issued a statement expressing dissatisfaction with the lack of transparency during the negotiating process. Other groups who felt the deal fell flat included Public Citizen and the United Steelworkers.

According to a USTR fact sheet, the amendments and modifications will be subject to review procedures in both countries, including a 60-day consultation with Congress and consent from the National Assembly.

Congressional Hearings on Trade

On March 21, the House Committee on Ways and Means held a hearing on “The U.S. Trade Policy Agenda.” USTR Lighthizer testified before the committee. During the hearing, Lighthizer defended the U.S. negotiating position on investor-state dispute settlement (ISDS) by citing the current system’s threat to U.S. sovereignty and his belief that it encourages outsourcing. Lighthizer emphasized other avenues of recourse for businesses, including state-to-state dispute settlement and contractual protections. In a lengthy exchange, Chairman Kevin Brady (R-TX) rejected both arguments, noting concern that Americans’ property would be “left unprotected against discrimination, foreign seizure, regulatory abuses, and other forms of unfair action.”

On March 22, the Senate Finance Committee held its hearing on the President’s 2018 Trade Policy Agenda. USTR Lighthizer testified before the committee. During the hearing, Lighthizer confirmed that Canada, Mexico, Korea, Europe, Australia, Argentina and Brazil will be temporarily excluded from steel and aluminum tariffs while they negotiate further with the U.S. Lighthizer noted that he expects more Section 301 investigations into areas in which the U.S. faces nonreciprocal and noneconomic competition.

On March 22, the House Committee on Ways and Means held a hearing on the steel and aluminum trade action. Commerce Secretary Wilbur Ross testified before the committee. During the hearing, Ross outlined some of the criteria he will weigh in assessing whether products are exempted from Section 232 tariffs on steel and aluminum imports and said he expected the remedies would spur multilateral coordination to rein in global overcapacity.

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Omnibus Provides Funding and Other Opportunities for Infrastructure and Broadband

Infrastructure projects, from roads and bridges to rail and air, received significant funding as part of the omnibus. With more than $21 billion in funding, opportunities to upgrade U.S. infrastructure should abound as this injection takes hold. There is more than $3.5 billion for repairing and improving roads, bridges and highways. There is $1 billion for improvement of airports, with a particular focus on rural and smaller regional airports. And there is $3.1 billion for rail projects, including significant funding for Amtrak to improve its network and approximately $250 million for implementation of positive train control technologies along the U.S.’s rails. In addition, there is $1.4 billion in funding to improve water infrastructure, including grant funding to ensure clean and reliable drinking water and safe waste disposal.

The Trump administration’s larger infrastructure proposal continues to make slow progress in Washington, but it is expected that more advanced discussions—and, possibly, congressional committee action on portions of the proposal—could commence now that Congress has returned from recess. Also of note, D.J. Gribbin, the Special Assistant to the President for Infrastructure and a key advisor inside the National Economic Council (NEC), recently announced that he will soon leave the administration to return to the private sector.

Promoting Broadband Access

Congress took the opportunity in the omnibus to address funding and other obstacles that hinder broadband deployment in rural and other areas of the country. While certainly not sufficient to close the digital divide, the additional funding and policy changes in the omnibus will boost broadband access.

As part of the omnibus, a number of federal agencies received funding to promote broadband deployment in rural America. The Department of Agriculture received the majority of the funding, receiving more than $600 million for Rural Utilities Service (RUS) to fund a new pilot program focused on increasing deployment in communities lacking broadband (initially defined as 10 Mbps download and 1 Mbps upload speed, with authority to modify the definition on an annual basis). The funding requires the RUS to: (1) prioritize unserved areas, (2) provide funding on a technology-neutral basis and (3) ensure no funding is spent to overbuild existing providers’ networks. In addition, the Economic Development Administration (EDA) has received authority to spend a portion of the funds allocated for public works, economic development assistance and other programs, which total $262.5 million, on broadband deployment. Like RUS, EDA is instructed to prioritize unserved areas. EDA will also need to report to Congress within 30 days of the end of FY18 on the number and value of any broadband projects that it funded. Congress also provided $10 million in funding for the Appalachian Regional Commission to continue its efforts to promote deployment in distressed counties in the central Appalachian region. The National Telecommunications and Information Administration (NTIA) was allocated $8.2 million to fund existing broadband programs that it administers and $7.5 million to work with the Federal Communications Commission (FCC) on updating the national broadband map.

In addition to funding, the omnibus included the “Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act” (MOBILE NOW Act), which focuses on ensuring there is sufficient spectrum available for wireless licensed and unlicensed broadband opportunities. The Act also streamlines the application process for siting wireless infrastructure on federal properties, which should help provide greater access and speedier deployment. In addition, the MOBILE NOW Act provides a process for promoting the installation of broadband infrastructure alongside federally funded road construction projects (so-called “dig-once”) that could significantly reduce the cost of deploying broadband infrastructure.

Congress has also asked the FCC, NTIA and others to complete a number of broadband-related reports, including reports on ways to incentivize federal agencies to relinquish or share spectrum they hold, enhancing broadband availability on tribal lands and promoting broadband access for low-income and rural veterans.

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EPA Takes First Step in Weakening National GHG Emissions and NHTSA’s Fuel Economy Standards for Light-Duty Vehicles

On April 2, the Environmental Protection Agency (EPA) issued a Notice of its Final Determination that greenhouse gas (GHG) emission standards for model year (MY) 2022-2025 light-duty vehicles—established under the Clean Air Act in 2012—“are not appropriate in light of the record before EPA and therefore, should be revised.” The Notice overturns the Obama EPA’s January 2017 Final Determination in the Mid-term Evaluation (MTE) process, which upheld the MY 2022-2025 standards in the waning hours of the Obama presidency. The Trump EPA now claims that the prior determination relied on outdated information and “optimistic” assumptions regarding gas prices and consumer demand for advanced technology vehicles; however, the record before EPA now demonstrates “challenges for auto manufacturers,” potential automobile safety concerns and “significant additional costs on consumers.” These standards drive the establishment of the Corporate Average Fuel Economy (CAFE) standards by the National Highway Traffic Safety Administration (NHTSA). Under current CAFE standards, automobile manufacturers must achieve an average fuel economy of 54.5 miles-per-gallon by MY 2025 across its vehicle fleet. Combined, the Obama White House estimated that the standards would result in the avoidance of nearly 6 billion metric tons in GHG emissions while reducing U.S. dependency on foreign oil.

EPA’s determination is just a first step. EPA and NHTSA are planning a joint rulemaking that will likely lead to a comprehensive rollback of their respective standards, which will provide opportunity for comment. Whatever the outcome, litigation is a virtual certainty. EPA Administrator Scott Pruitt has foreshadowed a legal battle with California—which previously received waivers to impose stricter standards—stating, “[c]ooperative federalism doesn’t mean that one state can dictate standards for the rest of the country . . . [as] [i]t is in America's best interest to have a national standard.” Currently, 12 states and Washington, D.C. have adopted California’s emissions standards, accounting for over 30 percent of the U.S. light-duty vehicle market.

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Legislation Introduced to Change Registration for Foreign Agents

On October 31, 2017, Senator Chuck Grassley (R-IA) and Representative Mike Johnson (R-LA-4) introduced identical bills in the Senate and House of Representatives, respectively, entitled the Disclosing Foreign Influence Act (H.R. 4170/S. 2039). If passed, the bill would make a number of changes to the Foreign Agents Registration Act of 1938 (FARA). Under current law, there is an exemption from registration under FARA for foreign agents who register under the Lobbying Disclosure Act of 1995 (LDA), and the Department of Justice (DOJ) does not have the power to compel the production of documents relevant to FARA investigations before initiating criminal or civil proceedings. This bill would repeal the LDA registration exemption, authorize the DOJ to demand the production of documents and testimony, bring the FARA filing schedule in sync with the LDA filing schedule, as well as require DOJ to develop an enforcement strategy for FARA violations. The bill enjoys broad bipartisan support. H.R. 4170 was approved by the House of Representatives Judiciary Committee with a 15-6 vote on January 17, 2018, while S. 2039 has not yet moved out of the Committee on Foreign Relations. Rep. Johnson has said he expects the Senate to take up S. 2039 within weeks.

The Foreign Agents Registration Amendments Act of 2018 (S. 2482), introduced by Senator Dianne Feinstein (D-CA) and Senator John Cornyn (R-TX), was introduced on March 1, 2018, to try to address similar issues with FARA. Like S. 2039, S. 2482 also disposes of the LDA exemption from FARA and steps up enforcement of potential violations. However, unlike S. 2039, S. 2482 adds an exemption to LDA for FARA registrants, so that persons required to register under FARA are exempted from having to register under the LDA. S. 2482 has been also referred to the Committee on Foreign Relations. If nothing else, all of these bills indicate a commitment from lawmakers to step up FARA enforcement and stress the importance of Washington advocacy and lobbying organizations making compliance a priority.

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Update on the Farm Bill

The Farm Bill is a comprehensive legislative package that authorizes policies under the purview of the U.S. Department of Agriculture and is typically enacted every four to six years. Authorizations under the most recent Farm Bill, enacted in 2014, expire later this year. Partisan differences, especially over domestic nutrition programs, and the upcoming midterm elections threaten to delay consideration of a new Farm Bill and force a short-term extension of current policy. Such delays have become common over the past two decades.

House Agriculture Chairman Mike Conaway (R-TX) had hoped to schedule a markup for the week of March 19, but decided to postpone it after he and his Democratic counterpart, Rep. Collin Peterson (D-MN), were unable to agree on provisions primarily related to the Supplemental Nutrition Assistance Program, which makes up 80 percent of the Farm Bill's budget. There is a possibility of draft language being released this month and a potential markup as well. Chairman Conaway has said the Agriculture Committee will proceed in April, even if he is unable to reach agreement with Mr. Peterson, though he would prefer to do so on a bipartisan basis.

Typically, the House moves its version of the Farm Bill before the Senate. Nevertheless, Senate Agriculture Chairman Pat Roberts (R-KS) and Ranking Democrat Debbie Stabenow (D-MI) have both indicated they are making progress toward their own version of a new Farm Bill and could be ready to move a bill by May, even if the House remains at an impasse.

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