



ML Strategies Update

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## OUTLOOK FOR FALL & LAME DUCK

As summer ends and we look ahead to cooler weather, a historic presidential election, and a legislative and regulatory calendar that has numerous measures ready for activity, ML Strategies is pleased to share our outlook on what to expect in the final quarter of 2016.

The House and Senate are both set to return September 6 from an exceptionally long August recess that started this year in mid-July to accommodate the party presidential nominating conventions in Cleveland and Philadelphia. The House is scheduled to be in session for four weeks and the Senate for five weeks when they will both break again for the month of October to campaign. Elections are held on Tuesday, November 8 and the outcome – the election of Hillary Clinton or Donald Trump to the presidency, and decisions by voters that will impact which party will hold the majorities in the House and Senate – will play a significant role in determining the legislative calendar and agenda for the remainder of the year. The current lame duck calendar has the House in session for 16 days and the Senate in session for 20 days between the election and year-end.

We can count on some bills moving during the September work period, such as a short-term Continuing Resolution (CR) to fund the federal government for some period of time, likely into mid- December. In the post-election lame duck session, we expect to see passage of the annual defense authorization bill. Less certain, but possible, for final passage later this year would be the energy bill, very different versions of which were approved in a bipartisan vote in the Senate, but on a near party-line vote in the House. Other matters will be on the agenda, at least in terms of debate, but are assumed to have very little to no chance of passage. This would include the Trans-Pacific Partnership trade agreement, which was always going to be difficult given opposition from labor and the environmental community, and the nomination of Merrick Garland to the Supreme Court.

The federal agencies will continue to advance the president's regulatory agenda in the waning months of the Obama Administration. A Trump victory in November and retention of the Senate by the GOP could put these late regulatory actions in jeopardy as any regulation finalized after May 23 could be blocked by the next Congress under the Congressional Review

Act of 1996. However, a Democratic Senate and Clinton presidency would be expected to support a continuation of the Obama Administration's regulatory goals. It is important to note that the CRA has only been used successfully one time.

While the next few months will be busy, ML Strategies will also be looking ahead to January 2016 when we will issue our annual Outlook for what to expect in the new 115<sup>th</sup> Congress.

## APPROPRIATIONS

Despite the now yearly goal of getting the appropriations process back to some semblance of "regular order," none of the 12 annual spending bills for Fiscal Year 2017 have seen final approval and the new fiscal year starts on October 1<sup>st</sup>. It is safe to say that no one on Capitol Hill wants to see a government shutdown in the weeks leading up to the November elections, so a short-term Continuing Resolution (CR), funding federal activities at Fiscal Year 2016 (FY2016) levels, will almost assuredly be approved during the September work period – starting on October 1 and running until sometime in mid-December. After that, it is difficult to predict what will happen, but we could see another long-term CR into next year, or a year-end Omnibus bill that would include FY2017 spending along with other policy drivers such as an extension of certain energy tax provisions, legislation regarding the Treasury Department's inversion rule, or provisions related to the Environmental Protection Agency's ozone rule. These and other policy provisions could serve as drivers to ensure passage of an Omnibus bill.

All 12 spending bills have been approved by the House Appropriations Committee, while five have been approved by the full House – Defense, Financial Services, Interior-Environment, Legislative Branch, and Military Construction-VA.

Similarly, all 12 spending bills have been approved by the Senate Appropriations Committee, while three have been approved by the full Senate – Energy and Water Development, Military Construction-VA, and Transportation-HUD.

Committee-approved spending levels for Fiscal Year 2017 are:

Agriculture: The House provides \$21.3 billion in discretionary funding - \$451 million below the FY2016 enacted level and \$281 million below the President's budget request. The Senate provides \$21.25 billion in discretionary funding - \$250 million below the FY2016 enacted level.

Commerce-Justice-Science: The House funds at \$56 billion – an increase of \$279 million over the FY2016 enacted level and \$1.4 billion above the President's budget request. The Senate funds at \$56.3 billion - \$563 million above the FY2016 enacted level and \$1.6 billion more than the President's budget request.

Defense: The House funds at \$517.1 billion - \$3 billion above the FY2016 enacted level and \$587 million below the President's budget request. The bill also provides \$58.6 billion in Overseas Contingency Operations (OCO)/Global War on Terrorism (GWOT) funding. The Senate provides \$515.9 billion in base Department of Defense funding and \$58.6 billion in OCO funding. The President's budget request sought \$517.7 billion in base funding and \$58.6 billion for OCO.

Energy-Water: The House funds at \$37.4 billion - \$259 above the FY2016 enacted level and \$168 million above the President's budget request. The Senate funds at \$37.5 billion - \$355 million above the FY2016 enacted level and \$261 million above the President's budget request.

Financial Services: The House funds at \$21.7 billion - \$1.5 billion below the FY2016 enacted level

and \$2.7 billion below the President's budget request. The Senate funds at \$22.4 billion - \$1 billion below the FY2016 enacted level and \$2 billion below the President's budget request.

Homeland Security: The House funds at \$41.1 billion – \$100 million above the FY2016 enacted level and \$432 million above the President's budget request. The Senate funds at \$48.07 billion - \$245 million above the FY2016 enacted level and \$740 million above the President's budget request.

Interior-Environment: The House funds at \$32.095 billion - \$64 million below the FY2016 enacted level and \$1 billion below the President's budget request. The Senate funds at \$32.034 billion - \$125 million below the FY2016 enacted level.

Labor-HHS: The House funds at \$161.6 billion - \$569 million below the FY2016 enacted level and \$2.8 billion below the President's budget request. The Senate funds at \$161.9 billion - \$270 million below the FY2016 enacted level and \$2 billion below the President's budget request.

Legislative Branch: The House funds at \$3.48 billion - \$73 million above the FY2016 enacted level and \$152 million below the President's budget request. The Senate funds at \$3.021 billion - \$23.5 million above the FY2016 enacted level and \$251.565 million below the President's budget request.

Military Construction-VA: The House funds at \$81.6 billion - \$1.8 billion above the FY2016 enacted level and \$1.2 billion below the President's budget request. The Senate funds at \$83 billion - \$3.1 billion above the FY2016 enacted level and \$160 million above the President's budget request.

State-Foreign Operations: The House funds at \$52 billion - \$595 million below the FY2016 enacted level and \$691 million below the President's budget request. The Senate funds at \$52.08 billion - \$591 million below the FY2016 enacted level and \$687.4 million below the President's budget request.

Transportation-HUD: The House funds at \$58.2 billion - \$889 million above the FY2016 enacted level and, when accounting for various program shifts within the President's budget request for these funds, the legislation represents a reduction of \$4.9 billion below the budget request. The Senate funds at \$56.474 billion - \$827 million below the FY2016 enacted level and \$2.9 billion below the President's budget request.

## **BANKING**

Back in July, five bills to boost capital formation passed the House, all with little to no opposition. Given their strong bipartisan support, the bills, which are described below, could pass the Senate when Congress returns.

The SeniorSafe Act of 2016: Sponsored by Representative Kyrsten Sinema (D-AZ), this bill, H.R. 4538, would exempt financial advisors who report the financial exploitation of seniors from liability, provided that they did so in good faith and with reasonable care).

The Supporting America's Innovators Act of 2016: Introduced by Representative Patrick McHenry (R-NC), this bill, H.R. 4854, would raise the cap on the number of investors, from 100 to 500 people, for certain venture capital funds).

The Fix Crowdfunding Act: Authored by Representative Patrick McHenry (R-NC), this bill, H.R.

4855, would increase the amount of money that can be collected through crowdfunding).

The U.S. Territories Investor Protection Act of 2016: Filed by Representative Nydia Velasquez (D-NY), the bill, H.R. 5322, would extend the regulations governing mainland mutual funds to mutual funds based in Puerto Rico, the Virgin Islands, and other U.S. possessions); and

The National Securities Exchange Regulatory Parity Act of 2016: Sponsored by Representative Ed Royce (R-CA), this bill, H.R. 5421, would grant a "blue sky" exemption to any security listed on a "national securities exchange" that is registered with the Securities and Exchange Commission.

Even if all these bills pass, their impact will pale in comparison to the effects of banking regulations that are poised to be finalized this year. Bankers should pay close attention to the following rules:

The Federal Reserve's Derivative Rule: The grand aim of this proposal is to prevent future taxpayer bailouts for financial firms. The rule would bar investment firms from canceling financial contracts for forty-eight hours after the bank's holding company files for bankruptcy. The rationale behind the two-day waiting period is that it would spare the market from a financial crash caused by banks trying to quickly unload their risky assets like derivatives.

The Federal Banking Agencies' Net Stable Funding Ratio Rule: This proposed rule seeks to improve the resilience of big banks to market vagaries by requiring them to have a minimum level of stable funding relative to the liquidity of their assets, derivatives, and commitments over a one-year period. The proposal is a joint product of the Federal Deposit Insurance Corporation, the Federal Reserve, and the Office of the Comptroller of the Currency.

The Consumer Financial Protection Bureau's Payday Lending Rule: In an attempt to combat predatory lending practices, this proposed regulation would require "payday" and other short-term lenders loan money only to borrowers whom they have determined can repay their loan(s).

Joint Agencies' Incentive-Based Compensation Rule: This proposed rule has two parts: 1) It would require banks to stagger the payment of executives' bonuses over at least four years; 2) it would empower banks, in seven years or less, to "claw back" bonuses from executives who lost the firm money through reckless risk-taking. Authored by six federal agencies, this rule intends to encourage banks to better scrutinize the risk of their investments.

The Securities and Exchange Commission's Rules on Mutual Funds: One proposed rule would require increased disclosure of retail investors' mutual fund holdings from registered investment companies (RICs) and investment advisors; the other would give mutual funds the tools to slow the pace of withdrawals.

Also worth following are two rules that are expected to be released this year:

The Consumer Financial Protection Bureau's Prepaid Card Rule: This proposal is expected to extend protections to prepaid card users that are similar to those that cover credit card holders.

The Commodity Futures Trading Commission's Rule on Algorithmic Trading: Under this proposal, automated traders would have to register with the CFTC, which would have access to their business source codes in order to reconstruct market events. This impending rule seeks to

mitigate the risks associated with high-frequency trading.

Also likely to see some activity before the end of the year is legislation related to the Iran Sanctions Act, which is discussed further in the Foreign Policy section of this report.

## **DEFENSE & NATIONAL SECURITY**

### National Defense Authorization Act (NDAA)

On May 18<sup>th</sup>, the House of Representatives passed its NDAA by a vote of 277-147. The Senate passed its version of the bill on June 14<sup>th</sup>, by a vote of 85-13. On July 13<sup>th</sup>, the conference committee process officially got underway with its first closed-door meeting. As the NDAA has been signed into law for the past 54 consecutive years, conventional wisdom is that a final conference report will ultimately become law, despite President Obama's threats to veto both the House and Senate bills. The NDAA conference negotiations are expected to smooth out the differences between the House and Senate bills and also aim to address the concerns raised by Secretary of Defense Ash Carter in a letter sent to Armed Services Committee members in mid-July.

Staffers for the Armed Services Committees were expected to continue conference proceedings throughout the month of August, with the goal of unveiling a compromise bill during the post-Labor Day work period and achieving final passage before Election Day. The ambitious timeline is thought to be politically motivated, with House and Senate Republican leadership angling for an opportunity to force the White House to veto the annual defense policy bill during the peak of campaign season. However, it would not be a stretch for final passage of the NDAA to slip to the post-election lame duck session.

Perhaps the largest issue of contention is the difference between base spending authorized by the House and Senate bills. The President's FY17 budget request for the Department of Defense (DOD) included \$582.7 billion in base funding and \$58.8 billion in Overseas Contingency Operations (OCO) funding. While the Administration's proposal reflected a slight increase from FY16 enacted funding levels, it left DOD with roughly \$23.9 billion less than it has been projecting through the Future Years Defense Program (FYDP). To correct the discrepancy, the House Armed Services Committee authorized the defense budget at a topline of \$610 billion, the same as the President's FY17 budget request, but marked up their bill using a base defense budget that was \$18 billion above the Pentagon's budget request. This additional \$18 billion, to be used to pay for weapons systems and reverse personnel reductions, comes out of the OCO fund, which is not subject to sequestration. By moving this \$18 billion allocated for supporting operations in Iraq, Syria, and other conflict regions into the base budget, and with the \$5 billion the Pentagon already has allocated, the total in made up funding would be \$23 billion. As this leaves enough OCO funding for just the first few months of FY17, the House approach would force the new President to pursue a supplemental spending bill early in his or her term. Meanwhile, the Senate Armed Services Committee took a different path, seeking to add an additional \$18 billion to the OCO fund as an amendment during floor debate. That amendment ultimately failed, as did an amendment seeking to boost discretionary spending, leaving the Senate bill to authorize just \$543 billion in base spending for defense.

Aside from the base spending issue, there are numerous policy provisions that need to be reconciled between the House and Senate versions of the defense bill. For example, the Senate bill includes a number of controversial acquisition reforms, including the elimination of the Undersecretary of Defense for Acquisition, Technology and Logistics, which were not addressed in the House bill. Additionally, the Senate bill includes language that would require

women to register for the draft, which again was not included in the House-passed version of the bill. Finally, there are a number of other military personnel provisions where the House and Senate have a difference of opinion, including on troop levels, military pay raises, military commissaries, parental leave, survivor benefits, and the military health care system.

#### Fiscal Year 2017 Defense Appropriations

As noted above, the FY17 defense appropriations bill has also been held up over the political dynamics related to the topline base budget for defense spending. While Congress will need to pass a CR before the election to circumvent a government shutdown, FY17 defense appropriations are unlikely to be resolved until the lame duck as part of an end-of-the-year spending package.

By way of background, the House passed its \$578.8 billion FY17 defense appropriations bill on June 16<sup>th</sup>, by a vote of 282-138. Following the example set by defense authorizers, the House defense appropriations bill makes use of \$15.7 billion from the OCO account to pay for unfunded requirements, typically not funded out of the emergency war budget. For this reason, the House bill sets OCO funding to sunset on April 30, 2017, which again would force the newly elected President to act quickly to move a supplemental spending bill through Congress. While there is general consensus on the need for greater defense spending, many policymakers view this utilization of OCO funds as a budget gimmick. Further, Democrats oppose an increase in defense spending without proportionate budget relief for domestic spending, which has also led the White House to issue a veto threat against the House bill. This potentially creates a scenario where a new budget deal, that aims to lift the caps on both defense and non-defense spending, is required to complete the FY17 appropriations cycle.

On the other side of Capitol Hill, the full Senate has yet to pass its FY17 defense appropriations bill, another factor suggesting defense spending may not be resolved until the lame duck. While Republican Senate leaders had sought to pass the bill before the start of the extended summer recess, Senate Democrats twice blocked a procedural vote that would allow consideration of the bill. The bill reported out of the Senate Appropriations Committee in May includes \$574.6 billion in base defense spending, in addition to \$58.6 billion for OCO, explicitly reserved to fund overseas military operations and to last all of FY17. Despite its departure from the House approach, Senate appropriators managed to fund roughly \$15.1 billion in unfunded requirements by redirecting monies from various accounts in the base budget.

Before the end of the July work period, Senate Majority Leader Mitch McConnell (R-KY) set another cloture vote on the defense appropriations bill for September 6<sup>th</sup>, which could potentially allow the Senate to take up the bill in the post-Labor Day work period. However, this procedural motion is also likely to fail as Senate Democrats have staked out the position that the defense bill should be left for an end-of-the-year spending package, and that they will continue to block all spending bills unless they receive assurance from GOP leadership that the defense measure will honor the 2015 Bipartisan Budget Act.

#### **ENERGY & ENVIRONMENT**

In addition to their part in the appropriations process, energy issues will garner attention during the conference of the energy bills (S. 2012 and H.R. 8) and potentially during an end of the year tax extenders debate. If energy legislation does move forward, it will do so most likely during the Lame Duck session, in part because it will be easier to get votes for it then, but also because conferees need to work through the 1600+ page reconciliation bill.

If they are successful, the measure would become the first comprehensive energy law in nearly a decade. House and Senate conferees, including Senate Energy and Natural Resources Committee Chair Lisa Murkowski (R-AK), committee Ranking Member Maria Cantwell (D-WA), Senators John Barrasso (R-WY), Jim Risch (R-ID), John Cornyn (R-TX), Ron Wyden (D-OR), and Bernie Sanders (I-VT), and 24 Republican and 16 Democratic representatives led by House Energy and Commerce Committee Chair Fred Upton (R-MI) and Ranking Member Frank Pallone (D-NJ), House Natural Resources Committee Chair Rob Bishop (R-UT) and Ranking Member Raul Grijalva (D-AZ), House Science Committee Chair Lamar Smith (R-TX) and Ranking Member Eddie Bernice Johnson (D-TX), House Agriculture Committee Chair Mike Conaway (R-TX) and Ranking Member Collin Peterson (D-MN), and House Transportation and Infrastructure Committee Ranking Member Peter DeFazio (D-OR), will begin meeting shortly after Labor Day to hash out the many differences between House and Senate language. Issues fall into three categories: staff is doing pretty well coming to agreement on the “easy stuff,” such as innovation issues and technical language; there is a lot of discussion ahead on some of the big sticking points between parties, which will probably need to be resolved at a member level; and there are several outlier issues, including CA water politics and forest fire issues, for example. The White House has expressed that it would be interested in seeing some version of the bill get to President Obama’s desk before the end of his term, but is curious to see what the driver is, and notes that two of the trickier items for the Administration are hydropower and biomass. Since the PTC and ITC for wind and solar were addressed at the end of last year, the Land and Water Conservation Fund is probably the biggest driver remaining, but that might be difficult to get from the House. A second driver could be an end of the year tax extenders package, which could include an energy section to include ITC fix issues as well as potentially adding some other items such as offshore wind and carbon capture & sequestration (CCS).

Additionally, members in both chambers have requested floor time to debate rival Water Resources Development Act (WRDA) bills as soon as they return in September. If the House and Senate find time, amidst the abbreviated legislative calendar and a host of other must-pass legislation, to debate and pass respective versions of a WRDA bill, they would still need to negotiate differences between the bills in conference, but there is a serious bipartisan effort underway to come to an agreement before the end of the year.

As President Obama looks toward the end of his tenure in the White House, climate and energy issues continue to play a significant role in his legacy. Should Hillary Clinton win her presidential campaign, we expect there to be a lot of continuity between the two administrations, and the current Administration continues to prepare that path by marching forward with a sector approach to addressing greenhouse gases. The Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration released final fuel economy standards for medium- and heavy-duty vehicles mid-August; the Administration has also already released rulemakings this year on methane emissions from oil and gas operations and landfills as well as an endangerment finding regarding aviation emissions, to name a few. Still to come this year include finalizing updates to the greenhouse gas reporting program, phasing out heat-trapping refrigerants, haze regulation revisions, finalizing revisions to the ozone rule, revisions to the exceptional events rule, and other regulations. The D.C. Circuit Court of Appeals will begin oral arguments over the Clean Power Plan September 27, and unless the courts rule against the agency, the central tenet of President Obama’s climate legacy will be preserved. That being said, pending regulatory actions include more than 3,300 items still moving through the pipeline. Before the end of the year, Federal agencies aim to roll out additional energy efficiency standards, updates to resources management plans, coal ash rules, and additional actions to reduce greenhouse gas emissions. The EPA has more than 50 rulemakings either planned or in process that would impact the regulation of lead, ozone, and other air pollutants other than greenhouse gases. The Department of Energy (DOE) plans to



complete a new rule to employ innovative technologies in its loan guarantee program, finalize more than a dozen energy efficiency rules, and undertake several other efforts in pursuit of the administration's goal to reduce 3 billion tons of CO2 emissions, a key component of the president's Climate Action Plan. The Department of the Interior's (DOI) Bureau of Land Management plans to release by November a final rule to curb the venting and flaring of natural gas from drilling projects on public lands. The Bureau of Ocean Energy Management plans to finalize updates to its 36-year-old regulations governing air emissions from offshore oil and gas activity.

Additionally, President Obama is picking up the pace in designating protected areas, as is common of an outgoing president. He used his executive authority under the Antiquities Act to expand a marine reserve in Hawaii at the end of August making it the largest marine protected area in the world, and set aside 87,000 acres of federal land in Maine the same week. Thus far, President Obama has established 23 new monuments, more than any president, and greatly expanded a few others, and we expect to see monument designations continue at a more rapid rate through the end of the year.

## **FOREIGN POLICY**

### President Obama's Asia Trip

While the 2016 Rio Olympic Games had the Administration largely focused on Latin America, the White House and other cabinet agencies are likely to shift their priority to Asia, to coincide with President Barack Obama's trip to the region September 2<sup>nd</sup>-9<sup>th</sup>. On this 11<sup>th</sup> trip to Asia during his presidency, President Obama is expected to advocate for the Trans-Pacific Partnership (TPP) and explore new opportunities for American companies to compete in developing markets in the Asia Pacific.

The first stop on President Obama's trip will be in Hangzhou, China, where he will participate in the G-20 Summit. On the margins of the G-20, President Obama is already committed to meeting with Chinese President Xi Jinping, and may also hold bilateral meetings with other world leaders in attendance, such as Indian Prime Minister Narendra Modi. Following the G-20, President Obama will become the first sitting U.S. President to visit Laos, where he will participate in the U.S.-Association of Southeast Asian Nations (ASEAN) Summit and the East Asia Summit. Additionally, President Obama will lead a town hall for the Young Southeast Asian Leadership Initiative Summit, and also hold key meetings with government officials intended to enhance U.S.-Laos cooperation, including with President Bounnhang Vorachith.

### State Department Authorization

Congress has not passed a State Department authorization bill since 2002, but Senate Foreign Relations Committee Chairman Bob Corker (R-TN) and House Foreign Affairs Committee Chairman Ed Royce (R-CA) have indicated they are looking to secure floor votes for an authorization bill this fall.

By way of background, the full Senate passed a State Department authorization bill by unanimous consent in late April. Beyond the authorization of appropriations, the Senate bill also included a number of policy reforms, including, among others, provisions aimed at requiring the U.S. Mission to the United Nations (U.N.) to end sexual abuse and exploitation by peacekeepers, streamlining State Department personnel management, restructuring the consular fee system for passports and visas, and improving diplomatic security overseas. Following passage, the Senate authorization bill was sent to the House Foreign Affairs



Committee, where it was amended and reported from the Committee by a voice vote in late May. A full House vote on the legislation has yet to be scheduled and will compete with other legislative priorities for floor time. However, if the House can pass a bill, it is anticipated the Senate would consider and ultimately pass a House-passed State Department authorization bill.

#### Oversight of Iranian Prisoner Release

While few hearings have already been announced for September, the clarity surfacing during August over the U.S. Government's mid-January \$400 million payment to the Government of Iran in conjunction with the release of three Americans detained in Iran is likely to spark oversight hearings. While Obama Administration officials assert the payment constituted the first installment towards resolving a debt owed to Iran following a canceled arms sales and the negotiations over the repayment were handled separately from those pertaining to the release of hostages, Republicans, including presidential candidate Donald Trump and House Foreign Affairs Committee Chairman Ed Royce (R-CA), have made the case the Obama Administration's use of the repayment as leverage in the prisoner release constitutes ransom. In particular, Chairman Royce has indicated plans to convene a hearing to probe further on this matter. Additional hearings may be possible in the Senate.

#### Alliance for Prosperity in the Northern Triangle

The FY16 omnibus appropriations bill made available up to \$750 million in assistance funding for the Governments of El Salvador, Guatemala, and Honduras via the Alliance for Prosperity in the Northern Triangle aimed at stemming the flow of mass migration. Prior to the obligation of funds, Congress outlined a series of certifications to be completed by the Department of State, in conjunction with the U.S. Agency for International Development (USAID), to ensure the progress of these Central American governments in improving the transparency and integrity of their public institutions. The omnibus directed the State Department to report to the Appropriations, Foreign Relations, and Foreign Affairs Committees on the certifications by September 30, 2016. However, it is now anticipated FY16 certifications may now not be completed until early 2017. Since the State Department is in the process of developing spending plans, and because the FY17 State and Foreign Operations appropriations bills include similar language, this may be an issue to watch in fall 2016.

#### Other Miscellaneous Bills

While the legislative window for the remainder of the year will be tight, Senate Foreign Relations Committee Bob Corker (R-TN) and House Foreign Affairs Committee Chairman Ed Royce (R-CA) have articulated a number of other bills that might try to move by the end of the year. On the Senate side, Chairman Corker has made clear the Countering Iranian Threats Act (CITA), which he introduced in July with Senators Bob Menendez (D-NJ), Joe Manchin (D-WV), and Marco Rubio (R-FL), will continue to top his agenda. This bill would extend the Iran Sanctions Act, expand sanctions for ballistic missile development, support for terrorism, and other illicit activity, and impose new sanctions on transfers of conventional weapons to or from Iran. Meanwhile, Chairman Royce has outlined potential opportunities for House passage of the Digital Global Access Policy (Digital Gap Act), which would promote internet access in developing countries, as well as the State Sponsors of Terrorism Review Enhancement Act, which would require the passage of at least two years to pass without any evidence of support for terrorism for the removal of a designation. Both bills were marked up by the House Foreign Affairs Committee earlier this summer.

## HEALTH CARE

Congress returns after Labor Day for a four-week sprint that will likely be centered on funding the government by way of a CR. Since Congress was last in session, the landscape on a number of health care issues remains unchanged. The Senate version of the House-passed Cures package is still in limbo, and mental health reform is no closer to the finish line than it was after the House finally passed its package after months of negotiating. Congress will have an opportunity to advance some issues in September before returning its focus to the 2016 election. After which there will be a, post-election, "lame duck" legislative session – the scope of potential activity for which are uncertain at this point – to put the finishing touches on the 114th Congress. Here's a look at issues that will likely come up in September:

Zika Virus: Members of both parties are calling on Congress to address the Zika virus crisis, and the consequences of not doing something could be far greater if left unaddressed before the election. While both sides are sticking to their own proposals, which have been non-starters for the other thus far, should Republicans move to address this through appropriations, Democrats would almost certainly join the effort.

Funding Response for Opioid Crisis: Addressing the opioid crisis remains a top issue on the campaign trail – especially in pivotal swing states like Pennsylvania, New Hampshire, and Ohio – and appears likely to be addressed this month. When the Senate passed the Comprehensive Addiction and Recovery Act (CARA) earlier this year, Democrats argued that the bill lacked sufficient concrete funding, which Republicans countered would be taken care of during the appropriations process. If Republicans move to add significant funding through appropriations, Democrats would be hard-pressed to fight it.

EpiPens: A high-profile issue that has emerged in the past few weeks is the soaring costs of EpiPens. A pack of EpiPens once cost \$100, but has grown to about \$600 this year. Several members of Congress are looking into this issue, including Senator Grassley (R-IA), Chairman of the Senate Judiciary Committee, who in 2014 led an investigation into price hikes of a pair of Hepatitis C drugs. While Mylan, the manufacturer of EpiPens, recently announced that it would offer 50 percent off vouchers for their product, it sure fuels the sentiments on and off Capitol Hill about prescription drug costs.

Medicare Part B Demo: Should CMS move forward with the Part B demonstration project, by proposing a rule this fall, we could see a Congressional Review Act challenge, potentially forcing CMS to pull the proposal, which could drive a wedge between some Democrats and the White House.

After September 30, Congress will be on recess until November 14th. Much of the forthcoming work for a lame-duck session will depend on the outcome of the election, and how the Senate and House majorities look heading into the next Congress. Here are some potential issues that could come up following the election:

Mental Health Reform: If the Senate flips to a Democratic majority, Democrats will likely want to work up a version of mental health legislation for the next Congress. If the Senate does not flip, there is the potential for it to get done this year. With more than 400 votes for the House-passed mental health package, there is momentum behind the effort.

21st Century Cures: While securing passage this summer for the Senate Cures package was thwarted by funding concerns from senators on the Senate Committee on Health, Education, Labor, and Pensions (HELP), Chairman Lamar Alexander (TN) remains optimistic about passage

this year. If the Senate can pass its version of the 21st Century Cures Act, Speaker Paul Ryan has said he is willing to work out the differences through a conference. Should the effort fail to materialize in 2016, conventional wisdom is that Cures is likely to be included in the User Fee Acts (UFAs) reauthorization next year.

Looking Ahead to 2017 and the Medical Device User Fee Agreement (MDUFA), in a draft deal announced in late August, device companies agreed to pay nearly \$1 billion to the FDA between 2018 and 2022, a 68 percent increase from the previously brokered deal. Details of the deal thus far are sparse but the FDA has said that the increase in payments will provide "critical resources" to its medical device review program. With the final recommendations being presented to Congress in early 2017, this fall will be when stakeholders launch their advocacy campaigns to hit the ground running in the next Congress. Regardless of who is in the majority, MDUFA is up for reauthorization at the end of September 2017, and will be a key priority for the committees of jurisdiction.

## IMMIGRATION & JUDICIARY

Criminal justice reform was the big change to the legal system that many lawmakers had predicted would pass this Congress. However, it probably will not move this year due to the tenor of the presidential campaign and calls by Republican lawmakers like Senators Jeff Sessions (AL) and Tom Cotton (AR) for tougher policies on crime.

The judiciary however may still be the center of attention in the lame duck if the Senate votes on whether to confirm Judge Merrick Garland to the U.S. Supreme Court. Senate Republicans have vowed to wait until the presidential election to consider a successor to the late Justice Antonin Scalia. If Secretary Hillary Clinton were to win the presidency, Republicans would perhaps be inclined to confirm Garland, whose record on the D.C. Court of Appeals suggests he would be a moderate on the high court. Democrats would probably seize the opportunity to confirm Garland, although they likely would face pressure from the left, which would want Clinton to pick a more liberal nominee. Clearly, a lame-duck confirmation is subjects to a lot of ifs – including if time even permits a vote – but it is certainly a possibility.

Another possibility, which was reported on this week, is that Congress might consider an Internet sales tax when it returns. House Judiciary Committee Chairman Bob Goodlatte (R-VA) is circulating a discussion draft of a bill that would permit state and local governments to tax online sales across state lines. Under the bill, the seller's state would determine the goods subject to taxes, while the buyer's state would set the tax rate. The bill may attract bipartisan support, but it likely will come in the crosshairs of conservative Republicans opposed to new taxes as well as members from non-sales tax states.

In July, the House Judiciary Committee passed three bills that may come up for floor votes:

- The Americans with Disabilities Act (ADA) Education and Reform Act of 2015: Sponsored by Representative Ted Poe (R-TX), this bill, H.R. 3765, seeks to reduce litigation over ADA violations. It would give defendants 120 days upon learning of a lawsuit against them to remedy any alleged violations before the plaintiff could proceed with their case;
- Rapid DNA Act of 2015: Introduced by Rep. James Sensenbrenner (R-WI), this legislation, H.R. 320, would permit police in the field to test the genetic material of suspects. A companion bill, S. 2348, authored by Senator Orrin Hatch (R-UT) passed unanimously in the Senate in June; and
- Survivors' Bill of Rights Act of 2016, Sponsored by Representative Mimi Walters (R-CA), this bill, H.R. 5578, would grant victims of sexual assault in federal cases basic rights, such

as access to an evidence collection kit. Senator Jeanne Shaheen (D-NH) filed a companion bill, S.2566, in the Senate where it passed unanimously in May.

These bills may pass as standalones or amendments to a larger bill, like an omnibus. An omnibus would also provide funding for the Department of Justice (DOJ). The House allocated \$29.437 billion to the DOJ in its Commerce, Justice, and Science appropriations bill (H.R. 5393), while the Senate's version (S. 2837) gave the department \$29.2 billion. Both amounts are more than the \$29.044 billion provided to the DOJ last year but less than the Administration's request of \$29.828 billion.

An additional issue that could see activity is reauthorization of the EB-5 Immigrant Investor Program's regional centers. Late last year, as a deadline to extend the authorization for the EB-5 regional center program was approaching, Sens. Charles Grassley (R-IA) and Patrick Leahy (D-VT), chair and ranking member of the Senate Judiciary Committee, joined with Reps. Bob Goodlatte and John Conyers (D-MI), chair and ranking member of the House Judiciary Committee, proposed a bipartisan bicameral compromise that would have reauthorized the program for four years while making much needed reforms. That proposal was rejected, and the existing authorization was extended until September 30, 2016. While September 2016 seemed far away at the time, we are now just weeks away from the expiration and no long-term reauthorization has advanced. With limited legislative calendar days remaining this year any reauthorization of the EB-5 program must be completed during the month September when Congress is in session. Alternatively, we could see an extension of the reauthorization pushing it to the post-election lame duck session of Congress.

## LABOR

Labor policy may take a backseat during the lame-duck session. Other than the labor appropriations bills, no major labor legislation awaits a floor vote in Congress, and the two big labor regulations of the year – the overtime and fiduciary rules – already have been finalized by the Department of Labor (DOL).

Bills seeking to repeal or relax these regulations, almost all of which have been introduced by Republicans, will not become law so long as President Obama is still in office. One bill worth monitoring is the Overtime and Reform Enhancement Act (H.R. 5813). Backed by five Blue Dog Democrats, the bill would raise the threshold for employees who are exempt from overtime pay to \$47,476, as the DOL's rule would, but incrementally over three years. The bill has low odds of becoming law, but it could be the template for bipartisan reform.

Republicans may try to slip riders prohibiting the enforcement of the overtime and fiduciary rules into a final funding bill. These riders appeared in the House's Labor, Health and Human Services, and Education and Related Agencies Appropriations bill (H.R. 5926) but not in the Senate's version (S.3040). However, these riders would face strong Democratic resistance and would probably be no more than bargaining chips for Republicans looking to extract policy concessions elsewhere.

Despite the parties' disagreements over labor policy, labor funding should not be that controversial. The differences between the House and Senate bills' funding allocation for various programs are slight, even though the House's bill passed on a party-line vote while the Senate's passed almost unanimously (29-1). The House version (H.R. 5926) provides \$12 billion to the DOL, which is \$400 million less than the Senate's (S.3040) allocation and \$765 million less than the President's budget request. Some figure within that range probably will be the amount of funding the DOL receives in the lame duck for FY 2017.

## TAX

On Capitol Hill, members of the House Freedom Caucus are reported to be intent on forcing a vote of impeachment against IRS Commissioner John Koskinen, stemming from allegations that the agency targeted conservative groups for scrutiny.

There are 37 tax provisions set to expire at the end of 2016, so there is some chance that we could see a last-minute legislative measure to address these expiring provisions, but a more likely scenario is that any year-end Omnibus bill will include language to extend at least some of the provisions as was done at the end of 2015 when an Omnibus bill included an extension of the Wind Production Tax Credit and the Solar Investment Tax Credit. The 2015 Omnibus did not include the extension of other renewable energy and energy efficiency tax provisions set to expire this year and there have been attempts this year to remedy that exclusion, although none have succeeded. These energy and energy efficiency tax provisions are discussed in the Energy and Environment section of this report.

On the regulatory front, the Treasury Department has proposed new regulations to limit corporate earnings stripping, by allowing the department to reclassify some corporate debt as equity, thereby disallowing the ability of a company to avoid taxes by shifting income to non-U.S. subsidiaries. The proposed regulations have met with blowback from congressional Republicans who argue that the rules, as currently proposed, need more transparency and will also cost more to implement than the department is suggesting. Despite Republican calls for the department to address concerns and reissue the rule, Treasury is expected to move to finalize the rule this year, although we could see some effort in a year-end Omnibus bill to address the issue legislatively.

## TELECOMMUNICATIONS & TECHNOLOGY

The standby list for telecommunications bills in the Senate seeking a lame-duck vote is growing, but none of them is expected to reach the floor unless the chamber votes to re-confirm Democratic Commissioner Jessica Rosenworcel to the Federal Communications Commission (FCC). The holdup stems from an agreement that party leaders struck last Congress to re-confirm Republican Commissioner Michael O'Rielly in December of 2015 and Rosenworcel the start of 2016. Democrats have accused Majority Leader Mitch McConnell (R-KY) of not upholding his end of the deal and have pledged to block consideration of any telecom bills until McConnell relents. Party leaders are now meeting to discuss a timetable for a re-confirmation vote. Should they agree on a date for the vote, the telecom bills waiting in queue could then come to the floor.

The first-up to the gate most likely would be the MOBILE NOW Act (S.2555). Sponsored by Senator John Thune (R-SD), the bill seeks to expand next-generation 5G wireless gigabit broadband service. To achieve that goal, it would direct various federal agencies to evaluate spectrum bands for 5G, including high-band millimeter wave frequencies.

Other Commerce Committee-approved bills that could see action in the lame duck include:

- The Securing Access to Networks in Disasters (SANDy) Act (H.R. 3998), which aims to improve the resiliency of the nation's communications networks during emergencies by increasing coordination between wireless carriers, utilities, and public safety officials;
- The Small Business Broadband Deployment Act (S.2283), which would extend the FCC's exemption of smaller Internet Service Providers (ISPs) from the enhanced transparency rules under the Commission's new Open Internet rules; and

- The Developing Innovation and Growing the Internet of Things (DIGIT) Act (S.2607), which would establish a working group within the Commerce Department to identify proposals to advance the Internet of Things (IoT).

The Commerce Committee is scheduled to hold a hearing on September 15 on FCC oversight.

The House's telecom agenda likely will not be as ambitious. The lower chamber may vote on Representative Adam Kinzinger's (R-IL) Amateur Radio Parity Bill (H.R. 1301). The legislation, which the House Energy and Commerce Committee passed by voice vote, would order the FCC to adopt rules to protect the rights of amateur radio operators to use radio equipment in deed-restricted communities.

Also on the minds of telecom players is the open question of whether Congress will pass an omnibus or a CR in the lame duck. Either vehicle would include funding for the FCC and the Commerce Department. Both the House and Senate passed Financial Services and General Appropriations Acts that fund the FCC. The House's version (H.R. 5485) would appropriate \$314.8 million to the Commission, which is \$26.3 million less than the Senate version's (S. 3067) allocation of \$341 million. In addition, the House provided \$498.18 million to the Commerce Department in its Commerce, Justice, Science, and Related Agencies Appropriations Act (H.R.5393). Congress is not expected to pass these or any standalone funding bills during the lame duck, as it would have to pass them in rapid fire (which a gridlocked Congress is not wont to do).

Over at the FCC, Chairman Tom Wheeler is trying to finalize several major rulemakings before President Obama leaves office. Four items appear to be at the top of his to-do list:

The Spectrum Auction: The auction, which seeks to reserve more spectrum for wireless devices, has met its deadlines and is on track to finish by the end of the year.

The Set-Top Box Proposal: The purpose of this proposal is to provide households the option to access MVPD services through a third-party box that also offers access to Internet and other programming. Now that the FCC is working with the content industry and has modified the proposal substantially, the odds are favorable that the proposal will be finalized by December.

Business Data Services/Special Access Reform: This proposal would dramatically change how the FCC regulates "special access" – dedicated telecommunications lines that businesses and institutions use to deliver voice and data traffic. Most dramatically, the proposal would phase out the presumption of regulating only the historically "dominant carriers" or ILECs (incumbent local exchange carriers) such as AT&T, Verizon, and CenturyLink, and apply price and service regulation to all providers, including "non-dominant carriers" such as CLECs (competitive local exchange carriers) and cable competitors. Reform got a big boost when Verizon introduced a compromise measure that may be the template for the rulemaking.

Privacy Rulemaking: This proposed rule would require Internet Services Providers (ISPs) to receive opt-in consent from their customers before using or sharing broadband customer data. The proposal is a priority of Chairman Wheeler's. However, the FTC has raised questions about some aspects of the proposed rules, and the FCC has yet to assuage industry's concern that the rules would subject ISPs to tougher restrictions on the use of broadband customer data than it would for edge providers.

The FCC will also be busy implementing final rules, such as those in its order exempting debt collectors from the Telephone Consumer Protection Act. On August 11<sup>th</sup>, the FCC issued the



order, limiting the use of this exemption, which Congress passed back in 2015 as a part of its Bipartisan Budget Act. This follows other recent declaratory rulings on the TCPA from the FCC, such as its August 4<sup>th</sup> ruling clarifying when utilities can contact their customer through automated calling technology. The Commission may also address the TCPA again in October when it is supposed to receive solutions on how to combat robocalls from an industry-led "Robocall Strike Force."

If all these items were not enough, the FCC may also be knee deep in litigation. The Commission is in the process of responding to industry's petitions for rehearing of arguments in the Net Neutrality case at the D.C. Circuit Court of Appeals. It has until October 3<sup>rd</sup> to respond to petitions filed by USTelecom, CTIA, NCTA, and AT&T. The FCC announced on August 29 that it will not, however, appeal a ruling by the Sixth Circuit Court of Appeals that struck down the Commission's decision to preempt laws in North Carolina and Tennessee preventing municipal broadband networks from expanding outside their territories.

## TRADE

Trade, specifically free trade agreements, has become a campaign issue, with both Hillary Clinton and Donald Trump staking out their opposition to the Trans-Pacific Partnership (TPP) trade agreement between 12 Pacific nations – Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. TPP is a high priority for the Obama Administration, and the president would very much like to see Congress approve the agreement before the end of his administration. However, despite strong support from the business community, there is strong opposition on Capitol Hill from both Democrats and Republicans and the likelihood of approval is increasingly dim for TPP.

Ambassador Michael Froman and his colleagues at the United States Trade Representative (USTR) will, in their final months in office, also continue efforts to build support for the Transatlantic Trade and Investment Partnership (T-TIP) between the U.S. and the European Union, although T-TIP will not see final action this year, and it is unclear how the United Kingdom's decision to exit the E.U. will impact negotiations.

Aside from TPP and T-TIP, the Administration will also continue to advance negotiations this year on the Trade in Services Agreement (TiSA), a free trade agreement focused on promoting fair and open competition across an array of service sectors, and the Environmental Goods Agreement (EGA), an agreement aimed at eliminating tariffs on a range of environmental goods. TiSA will be left to the next administration to conclude.

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