ML Strategies Legislative & Regulatory Update

ML Strategies Capitol Hill & Executive Branch Fall Preview

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With Labor Day now behind us, Washington returns to a fairly significant workload for September and October in the run-up to the midterm elections in November. The House is in session for the next two weeks before returning home for a state work period (Sept. 17-21). Theoretically, they will then return to DC for three weeks—through October 12—but there's a good chance they will adjourn before that date so that members can campaign in their districts. Although not exhaustive, the following is ML Strategies' guide on what to watch over the next few months from Capitol Hill and the Executive Branch agencies. While all issues addressed in this update may not be completed before the midterms, we anticipate that they will take up the bulk of the legislative and regulatory agenda. With that said, the Senate has taken up the nomination of Brett Kavanaugh to serve on the Supreme Court and that process has the potential to impact the agenda on other items. With that said, the Senate has taken up the nomination of Brett Kavanaugh to serve on the Supreme Court, and that process has the potential to impact the agenda on other items. We expect the Senate, which remained in session throughout its normal recess period in August, will likely continue to focus on Judicial and Executive branch nominations.

Appropriations

The appropriations process is well underway in both the House and the Senate, which provides a somewhat positive outlook for Congress to avoid a shutdown when the government runs out of funding on October 1. The House passed six of the twelve appropriations bills before adjourning for summer recess, and is expected to pass the final six shortly after returning in September. Meanwhile, the Senate is in the process of passing bills in a minibus format: grouping bills together in small packages in August. The Senate has passed its Agriculture-FDA, Interior-Environment, Financial Services, and Transportation-HUD measures. Defense and Labor-HHS-Education are on the docket next.

While the appropriations process is moving smoothly through the summer, it may hit snags as fall approaches and the bills need to be reconciled. In July, differences over how to divide up $1.24 trillion in discretionary spending for 2019 forced the House and the Senate to delay conference talks on the first three-bill legislative packages. While chairs of both Appropriations Committees have expressed optimism that their differences can be resolved during the first week of September, broader disagreements remain. However, in a departure from the appropriations process of recent years, bipartisan Senate leadership has agreed to debate bills on the floor and allow amendments while abstaining from adding "poison pill" riders.

The unknown factor in the relatively smooth process thus far is President Trump's reaction to the content of the spending bills. He has made clear that funding a border wall within the Homeland Security budget must be a priority of spending legislation, while Congress would prefer to deal with that issue after the midterms. The President's stated aversion to signing further omnibuses has contributed to the development of the minibus legislative vehicle in the Senate, which the House has not yet adopted. If successful, Congress may well present the President with patchwork appropriations legislation with the controversial Homeland Security budget separated out, so the President cannot veto the entire budget and send the government into a shutdown. We will continue to monitor developments in the process and content of appropriations bills.

Education

While it is not expected that there will be much movement within the area of education over the next two months, it is important to mention that in August the Senate advanced H.R. 6157, which contained both Defense and Labor-HHS-Education measures. This bill funds the Department of Education at $74.9 billion for fiscal year 2019 (FY 2019). Of note, the bill also includes funding increases to special education, school improvement programs, rehabilitation services, and higher education. Specifically, state grants under the Individuals with Disabilities Education Act (IDEA) would total $13.5 billion, a $125 million increase from FY 2018. Although the bill has passed the Senate, the House must pass its own Labor-HHS-Education bill on the floor, or choose to pass the Senate's "clean" version. Leaders in both the House and Senate have agreed that this bill must be signed into law no later than September 30.

In the House of Representatives, 17 Democrats on the Education and Workforce Committee recently introduced a bill, The Aim Higher Act, meant to reauthorize the higher education system. Proposals included in the bill include protecting and expanding the Public Service Loan Forgiveness program, reducing the cost of college for students by creating a state/federal partnership that incentivizes states to offer two years of free community college to students, and improving training for teachers and other school leaders so they can improve school quality. This bill contrasts with the House GOP's rewrite of the Higher Education Act—the Promoting Real Opportunity, Success, and Prosperity through Education Reform (PROSPER) Act (H.R. 4508)—which was introduced by Rep. Virginia Foxx (R-NC) in December 2017, and marked up by the House Committee on Education and the Workforce. We expect that the House will work to put forth a bipartisan proposal on higher education at some point after the November midterms.

Health Care

As of this writing, both the House and Senate Committees on Appropriations have cleared their respective Labor, Health and Human Services, and Education (LHHS) appropriations bills, H.R. 6470 and S. 3158, meaning each chamber will have to pass its respective bills and move to conference. The machinations that will go into the bill to keep the government funded are not likely to involve health care issues, though we cannot rule out a push to address the "doughnut hole". (The Medicare Part D doughnut hole is the period in which Medicare Part D beneficiaries' prescription drug costs lies in between the initial coverage limit and catastrophic coverage threshold.) The March spending deal, known as the Bipartisan Budget Act, ended the donut hole for Medicare Part D in 2019 instead of 2020, in addition to requiring drug companies to provide a higher discount for costs for seniors in the doughnut hole. It is possible that a rollback of some of these changes will find its way into conversations around the next budget deal.

The Affordable Care Act (ACA) will also return to the forefront during the congressional work period as we near the upcoming open enrollment period. Recently published regulations that impact the marketplace will likely continue to garner significant attention, including the short-term, limited duration insurance (STLDI) regulation. The strength of the marketplace heading into open enrollment could have consequences in the midterms. Skyrocketing premiums play into the political narrative of both parties (Obamacare is broken! vs. You broke the ACA!). Less pronounced increases in premiums will be much harder to message politically. Also worth monitoring is the ongoing *Texas v. United States* case, in which the Administration is seeking a declaratory judgement that the individual mandate, and provisions on guaranteed issue, community rating, and preexisting condition exclusions be ruled invalid beginning January 1, 2019.

We continue to monitor Section 1115 and 1332 waivers, which states continue to submit to the Administration for approval. Concerning Section 1332 waivers, Wisconsin, Maryland, New Jersey, and Maine all have recently approved waivers. Additionally, there are many pending Section 1115 waivers. We watch to see what provisions of these waivers are approved or denied and if other waivers are challenged legally. These waivers vary in their scope and purpose but are worth monitoring for their state-level impact.

Finally, stakeholders should closely monitor the Administration's push on the regulatory side. There are currently nine pending HHS regulations on the Office of Management and Budget Information and Regulatory Affairs page (OIRA). The removal of safe harbor protections for rebates to plans or pharmacy benefit managers is among the most noteworthy. While speculation runs rampant, details of the proposed regulation (when and if released) are critical.

In addition to these topics, expect activity at the committee level on topics that are relevant to many stakeholders in health care. While the focus will likely be on passing a budget, Congress will continue moving the needle on important issues. However, these issues are the ones we are following most closely as we crawl towards the midterms. We will update as developments warrant and will provide additional updates as we approach the election and lame duck period.

Tax

Following up on their significant victory last year in passing the Tax Cut and Jobs Act, in July the House Ways and Means Committee Republicans released a framework for what they are terming Tax Reform 2.0. This plan would make permanent the individual and small business tax cuts provided for in the Tax Cut and Jobs Act which are due to expire in 2025. Tax Reform 2.0 also includes the creation of a new Universal Savings Account and allows new businesses to write off more initial start-up costs. Issues such as the 25C residential energy tax credit and the Section 179D commercial building tax deduction will likely not be included in Tax Reform 2.0.

The prospects for Tax Reform 2.0 in the House are promising, with Chairman Brady intending to mark up a bill the week of September 10 with the goal of achieving passage in September as Republicans look for another big policy win heading into the midterm elections. However, the outlook is less certain in the Senate. Nine Democrats would have to cross the aisle to help pass the legislation because the budget reconciliation procedure, which was used in 2017 to overcome the 60 vote threshold in the Senate, cannot be used again to ensure passage. Democrats have already made clear they will not support making the individual and small business tax cuts permanent. Final action before the November elections is unlikely; this is something to monitor in a potential "lame duck" scenario.

Meanwhile, individual and business tax filers alike are still awaiting guidance from the Treasury Department and Internal Revenue Service (IRS) on the implementation of many provisions of the Tax Cuts and Jobs Act. On August 16 Republican members of the Senate Finance Committee wrote to Treasury Secretary Mnuchin and Acting IRS Commissioner Kautter to clarify the intent of last year's tax reform bill on three provisions: 1) depreciation of real property, 2) deduction of net operating losses, and 3) denial of a deduction for settlement or payment related to sexual harassment or sexual abuse. The letter also states that the committee intends to introduce technical corrections legislation to address any items identified in an ongoing review of the language of the tax reform law.

Telecommunications

Prior to the August recess, Congress made significant progress in passing a number of telecom-related bills. In July, the House passed the PIRATE Act, which would increase penalties for unlicensed radio broadcasters, and the ACCESS BROADBAND Act, which would create an internet connectivity office at the National Telecommunications and Information Administration (NTIA). The House also advanced the Precision Agriculture Connectivity Act, which directs the Department of Agriculture (USDA) and the

Federal Communications Commission (FCC) to form a task force to assess the broadband needs for precision agriculture.

Meanwhile, the Senate continued its work period into August, which led to continued work in committee. The Senate Commerce Committee held an FCC oversight hearing featuring four of the five FCC commissioners who were asked questions about alleged hacking of the FCC's net neutrality comments, the agency's decision to block a merger between Sinclair Broadcast Group and Tribune Media, and the availability of unlicensed spectrum for next-generation mobile technologies. In June, Chairman Thune wrote a letter to Commissioner Pai asking the commission to write rules for use of the 6 GHz band, commonly used for Wi-Fi and Bluetooth technologies. Chairman Pai has also indicated that the commission may move forward on a Notice of Proposed Rulemaking (NPRM) later this fall, potentially in October, on the 6 GHz space.

Net neutrality also remains a hot topic on the Hill, although it is increasingly unlikely that the House will consider the Congressional Review Act (CRA) when they return in September. Recently, Rep. Mike Coffman (R-CO) became the first Republican to sign onto the effort to roll back the net neutrality rule changes. In May, the Senate voted 52-47 to restore net neutrality rules, which was a symbolic victory for Democrats who are seeking to leverage the issue against Republicans in the midterm elections.

Looking ahead, there could be a number of committee shakeups on the horizon, depending on the outcome of the election. According to sources, Sen. Roger Wicker (R-MS) could become the top Republican on the Senate Commerce Committee if Chairman Thune (R-SD) joined Senate leadership as Majority Whip. On the Democratic side, if Sen. Bill Nelson (D-FL) loses his reelection campaign, Sen. Maria Cantwell (D-WA) would become the top Democrat on the Commerce Committee. In the meantime, the Senate Commerce Committee and House Energy and Commerce Committee remain committed to working on telecom bills throughout the lame duck season.

Trade

Since first announcing global tariffs on steel and aluminum in March, President Trump has further escalated his efforts to upend the existing global trade order in favor of the United States.

Additional tariffs on $50 billion worth of Chinese products were proposed in April, with approximately $34 billion worth of those tariffs going into effect on July 6. The remaining $16 billion worth of tariffs became effective on August 23. On July 11, following retaliation from China, the President announced tariffs on an additional $200 billion worth of Chinese products, and a public hearing was held on August 20-23. We anticipate an announcement on these tariffs in the coming weeks.

On May 23 at the direction of the President, an investigation was launched to determine the effects on national security by imports of automobiles, including cars, SUVs, vans and light trucks, and automotive parts. A public hearing was held in mid-July. Further action on these tariffs is not likely until early 2019.

While many on Capitol Hill have for years raised concerns about China's trade practices, there is a widely held view among both Republicans and Democrats that these tariffs are worrisome. However, to date there has been no successful action to wrestle control of trade policy away from the Administration. Sen. Corker (R-TN) tried and failed to amend the annual Defense Authorization bill with language that gives Congress the opportunity to approve or disapprove tariffs based on national security grounds. On August 1, Sens. Portman (R-OH), Jones (D-AL), Ernst (R-IA), and Alexander (R-TN) introduced the Trade Security Act (S. 3329) requiring the Department of Defense, rather than the Department of Commerce, to justify new tariffs based on national security concerns. The bill also increases the role of Congress by expanding the process for disapproval of national security-related tariffs. We anticipate that Congress will continue to seek ways to exert its authority on trade.

The annual National Defense Authorization Act, signed into law by President Trump last month, included important reforms and updates to the review process at the Committee on Foreign Investment in the United States (CFIUS) as well as updates and codification of Department of Commerce practices related to export controls. While the legislative work on CFIUS and export controls is complete, many of the reforms will not enter into effect until new regulations are promulgated. We anticipate that the regulatory process will get underway in the very near future. Read more on this from ML Strategies HERE.

Finally, the Administration continues negotiations with Canada and Mexico on an update to the North American Free Trade Agreement (NAFTA). On August 27, the White House announced an agreement with Mexico on NAFTA, clearing the way for Canada to return to the table for negotiations on a final updated agreement between the three nations.

Transportation

It's not quite planes, trains, and automobiles, but there is a significant amount of legislative and regulatory activity underway impacting the transportation sector.

With the current authorization for the Federal Aviation Administration set to expire on September 30, Senate Commerce Committee Chairman Thune (R-ND) will seek to advance the FAA Reauthorization Act(S. 1405) on the Senate floor this month. The House approved its FAA Reauthorization (H.R. 4) in a 393-13 vote in April.

The FAA Reauthorization will most likely also serve as the vehicle (no transportation pun intended!) for other transportation-related measures, including reauthorization of the Transportation Security Administration (TSA) and the National Highway Traffic Safety Administration (NHTSA). Those measures are largely noncontroversial and could help to run up the vote tally in favor of the FAA bill. Also a candidate for inclusion is autonomous vehicles legislation, the AV START Act (S. 1885). Last September the House approved by voice vote the SELF DRIVE Act (H.R. 3388). The Senate's AV legislation as unanimously approved by the Senate Commerce Committee last November. That the House bill was approved by voice vote and the Senate bill approved unanimously in committee is indicative of the broad bipartisan support for AV legislation. However, some hurdles have arisen, particularly with regard to forced arbitration clauses used by AV manufacturers that prohibit any rider injured in an AV from suing the manufacturer or participating in a class action lawsuit. If Commerce Committee is able to address remaining concerns with the AV START Act Chairman Thune intends to offer the bill as an amendment to the FAA Reauthorization.

So far, approximately 45 amendments to the Senate FAA Reauthorization have been agreed to for floor consideration, and staff on the committee expect that number could rise to more than 75. With the current FAA authorization expiring on September 30, we could see another straight extension for some undetermined amount of time if the reauthorization is not passed by then.

Finally, we anticipate continued debate over the Administration's proposal to halt an Obama Administration plan to raise automotive fuel efficiency requirements to approximately 47 miles per gallon by 2025 and end California's ability to set greenhouse gas emissions standards that exceed federal standards.

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