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WHAT'S NEW IN WASHINGTON

10 THINGS YOU NEED TO KNOW

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Congress entered into its spring recess on April 7 having delivered regulatory reforms to President Trump's desk. In the first 75 days of the Trump administration, legislators approved 13 Congressional Review Act resolutions, with President Trump signing 11 thus far. Despite these victories, Congress was unable to deliver President Trump a key legislative goal, and health care reform remains elusive as Republicans continue to disagree over the American Health Care Act (AHCA).

While discussions over changes to the AHCA will continue during the recess, Congress' main focus upon returning to Washington will be to fund the federal government past April 28, when the current Continuing Resolution (CR) expires. All indications point to a hybrid funding bill that includes an omnibus spending package for all appropriations bills for which legislators can find consensus and a continuing resolution for the handful of controversial appropriations bills where there is no bipartisan agreement. The package is expected to also include supplemental funding for defense priorities. One item that Congress is unlikely to include is funding for President Trump's wall on the southern border. All eyes will be on this appropriations package because it will be the first piece of legislation that is required to achieve 60 votes since President Trump was inaugurated.

Here are 10 things that we believe are worth focusing on from the last two weeks:

White House Issues Guidance on 2-for-1 Regulation Policy

On April 5, the Trump administration released a presidential memorandum providing guidance on the implementation of Executive Order (EO) 13771, "Reducing Regulation and Controlling Regulatory Costs," signed by President Trump on January 30. EO 13771 requires federal agencies to rescind two existing regulations for each new rule implemented, with exceptions for emergencies and national security purposes. The memo seems to shift the emphasis from this 2-for-1 requirement to the aggregate economic impact of deregulatory actions mandated by the EO.

Among the clarifying provisions, the memo expressly extends the deregulatory requirements to the category of "significant guidance documents," in addition to significant rules as defined in EO 12866, which have a $100 million annual effect on the economy and/or raise novel legal or policy issues. The memo details the exemption for regulations relating to the military, national security or foreign affairs, as well as the exemption for statutorily mandated regulations, though the latter exemption primarily applies to the timeline of regulatory rescission rather than exempting the regulations from the required cost offsets altogether. Rulemakings that deal with only income transfers between taxpayers and program beneficiaries (e.g., Medicare spending rules) are considered "transfer rules" and are not covered by EO 13771. However, the memo explains that this exemption does not necessarily extend to regulatory requirements that accompany transfer rules.

Net costs will be measured according to methodologies set forth in OMB Circular A-4, based primarily on opportunity costs rather than a regulation's original regulatory impact analysis. Additionally, the memo clarifies that agencies may transfer the cost savings associated with deregulatory actions within an agency, but must apply to the Office of Management and Budget (OMB) to transfer to a different agency. Nevertheless, this sets up the possibility for winners and losers among the industries regulated by the same agency. Lastly, agencies must balance their ledgers each year, and, if an agency fails to issue twice as many deregulatory orders or fails to achieve the requisite cost savings, it must submit a plan to the OMB for coming into full compliance and may be required to solicit feedback in the Federal Register. The full memorandum can be viewed here.

As the Trump administration seeks to clarify the substance of EO 13771, the Department of Justice (DOJ) is also fighting off litigation challenging the EO's legality. The lawsuit—brought by the National Resources Defense Council, the Communications Workers of America and *Public Citizen*—argues that the EO oversteps the President's constitutional authority. On April 10, the DOJ requested that a federal court reject the lawsuit, asserting that the three groups do not have standing to challenge the EO since the order has yet to materially affect any parties. The case is currently before the U.S. District Court for D.C.

Back to top

DHS Policy on H-1B Visa Enforcement

In an effort to protect American high-skilled workers, the Trump administration recently issued new policy guidance and announced enforcement measures related to the H-1B visa program, the most widely used foreign-worker program that allows U.S. employers to hire a total of 85,000 workers per year. On March 31, 2017, U.S. Citizenship and Immigration Services (USCIS), an agency within the Department of Homeland Security (DHS), issued a policy memorandum rescinding earlier guidance on adjudication of H-1B visas for computer-related positions and stating that entry-level computer programmer positions do not require a bachelor's degree and thus do not qualify as "specialty occupations"—an absolute requirement for a successful H-1B petition. According to the USCIS, the memorandum was issued in order "to prevent inconsistencies" in adjudications between the various service centers that currently adjudicate H-1B petitions. The policy memorandum is likely partially driven by changes in technology and the fact that entry-level computer programmer positions may not necessarily require a bachelor's degree anymore. In a sense, the new USCIS guidance is a reflection of those changes in technology and follows a trend in H-1B adjudications that has been developing over the course of the last few years, but the new guidance is the first clear-cut statement from the agency that entry-level computer programmer positions do not qualify as specialty occupations. The memorandum garnered widespread attention throughout the information technology sector that very heavily relies on the availability of H-1B visas.

The USCIS followed up with a press release on April 3, 2017, announcing additional enforcement measures to aid the agency's efforts in combating H-1B visa abuses, including site visits targeting companies where the USCIS cannot confirm the employer's business information through commercially available data, companies with a high proportion of H-1B workers and companies with H-1B employees working off site at another company. The DOJ, in a press release issued the same day, warned that it "will not tolerate employers misusing the H-1B visa process to discriminate against U.S. workers." On April 4, 2017, the Department of Labor (DOL) issued a statement in support of the DOJ's warning, as well as the USCIS' efforts to "further deter and detect H-1B visa fraud and abuse." The DOL also indicated its plans to, among other things, "rigorously use all of its existing authority to initiate investigations of H-1B program violators" and "continue to engage stakeholders on how the program might be improved to provide greater protections for U.S. workers, under existing authorities or through legislative changes."

Technology companies have long expressed their concerns with the administration's concerted effort to investigate use of H-1B visas by U.S. companies. Industry officials are following these developments closely and are reportedly concerned about more restrictive measures against hiring high-skilled foreign workers and the future of the H-1B program in general.

Back to top

CSR Dispute May Implicate Appropriations Process

With the future of the Affordable Care Act (ACA) in flux, uncertainty abounds for health insurers who must set their rates for 2018 in the coming months. For health plans, regulators and others gathered at the National Association of Insurance Commissioners conference in Denver this past weekend, the most pressing question was whether federal cost-sharing reduction (CSR) payments will continue. The CSRs, which are paid to insurers to reduce cost-sharing for low-income families, are the subject of a House lawsuit that challenges funding for the payments.

The pending litigation puts the federal government and Congress in the position of deciding whether to keep funding the CSRs. Health plans are urging the Trump administration to continue the CSRs, and the Department of Health and Human Services, which has proposed some regulatory changes intended to shore up the ACA marketplaces, may be wary of the destabilizing effect of ending the payments. The Kaiser Family Foundation estimates that the average premium for a benchmark silver plan would need to increase by 19 percent to compensate for the $7 billion in funding that insurers stand to lose if they do not receive federal payment for the CSRs.

Lawmakers could also appropriate funds for the payments as part of a fiscal 2017 spending package. With the current Continuing Resolution set to expire on April 28, 2017, Congress will have just four legislative days after the recess to craft a spending deal; appropriators are leaning toward an 11-bill omnibus package. Rep. Tom Cole (R-OK), chairman of the House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, said that spending on the CSRs could be classified as mandatory funding, since the panel's current health care allocation is not large enough to cover the payments. Republican leaders have acknowledged that any omnibus bill would need some Democratic support to pass.

Back to top

Infrastructure Outlook

President Trump and his advisors have said that they are drafting an infrastructure proposal and may move it on a faster track than previously planned. Transportation Secretary Elaine Chao told a group of New York business leaders last week that the Trump administration planned to send an infrastructure proposal to Congress sometime in May. DJ Gribbin, Special Assistant to the President for Infrastructure Policy, told *The Wall Street Journal* on April 12 that the timing was "still a little bit up in the air," but indicated that they were working on drafting the proposal.

President Trump has pledged to invest $1 trillion over 10 years in infrastructure, including transportation, energy, water, broadband, veterans' hospitals and possibly housing. Administration officials have said that the plan will include tax credits to spur private investment in infrastructure and changes to current law to streamline project delivery. While administration officials have hinted that the proposal would include some money for new projects, the centerpiece of the bill will be tax credits to spur private investment and reforms to streamline the environmental review-and-permit process and expedite project delivery. While both Republicans and Democrats support the idea of infrastructure investment, major questions remain regarding how to fund new spending, the extent to which legislation should provide direct spending versus tax credits and the scope of environmental streamlining. President Trump has noted that infrastructure is popular and that he will work with the Democrats, which he may need to do if Freedom Caucus members, who tend to oppose additional federal spending, oppose the plan.

Back to top

Rulemaking to Block Illegal "Spoofing" Robocalls

The Federal Communication Commission (FCC) recently initiated a rulemaking proceeding in which it proposes to permit telephone companies to block illegal spoofed robocalls on behalf of their customers. Spoofed robocalls are where the caller ID is faked, hiding the caller's true identity; in some cases, they result in consumer scams or lead to identify theft. Specifically, the rules proposed by the FCC would authorize voice service providers to block calls originating from unassigned or invalid telephone numbers (e.g., telephone numbers that are not assigned under the North America Numbering Plan, not allocated to a phone company or not assigned to a subscribing customer). The proposed rules also would permit such providers to block telephone calls when the subscriber to a particular telephone number requests that calls originating from that number be blocked to prevent its telephone number from being spoofed. In addition, the FCC seeks comment on how to distinguish legitimate use (e.g., a domestic violence shelter seeking to protect victims who make calls, doctors wanting to display their main office number) from illegal spoofing (e.g., telephone scams purporting to be the Internal Revenue Service in order to induce consumers to pay money to the caller). Finally, the FCC is seeking comment on how to address spoofed calls from international locations, where scammers often hide to avoid U.S. legal processes. The rulemaking proposal was supported by all three FCC commissioners.

Back to top

Lobbying Disclosure Filings Require Extra Review

The Government Accounting Office (GAO) recently released the findings from its audit of Lobbying Disclosure Act filings covering the last half of 2015 and the first half of 2016. Among the key findings from the audit, only 83 percent of those audited could provide documentation for income and expenses reported, 15 percent of reports did not properly disclose covered positions that were previously held by registered lobbyists, and more than 10 percent of those reports audited were amended. More importantly, the GAO report highlighted that the U.S. Attorney's Office, which receives referrals from the Secretary of the Senate and the Clerk of the House of Representatives for noncompliant registrants and lobbyists, is actively pursuing "chronic offenders" for enforcement and is currently investigating four cases involving chronic offenders. These four cases are in addition to the 1,331 cases that are pending further action.

Reports covering the first quarter of 2017 are due on April 20. Filers should pay close attention to the information submitted and should update their filings to cover only those activities, and those lobbyists, who were active during the first quarter. Also, filers should review information submitted with respect to registered lobbyists to ensure that all covered positions are disclosed as required by statute.

Back to top

Trump's Visit with China

From April 6-7, 2017, President Trump hosted Chinese President Xi Jinping at Mar-a-Lago. President Trump hailed the talks, which covered a range of critical bilateral matters, as "tremendous." Notably, some key commitments made by Trump on the campaign trail appear to have been at least stalled, if not reversed, including labeling China a "currency manipulator" and hitting Chinese imports with punitive tariffs. In an April 12 interview with *The Wall Street Journal* following the summit, President Trump clarified that the Chinese are "not currency manipulators" and have not been manipulating their currency for months. He justified his policy change by tying it to engaging the Chinese on confronting North Korea, stating that any Chinese trade deal will be "far better for them if they solve the North Korean problem." Trump stated that having a "great deal" with China was "worth having" trade deficits, and Commerce Secretary Ross noted that both nations have agreed to a new 100-day plan for trade talks. While any trade deal or concessions are in the early stages of development, it has been reported that China is willing to offer better market access for financial sector investments and U.S. beef exports in order to open negotiations and help avert a trade war.

Press attention on the summit has focused in part on the fact that President Trump ordered airstrikes on Syria the same evening that President Xi arrived. In an interview with *Fox Business News* on April 12, Trump claimed that, when he informed Xi of the strikes, Xi responded that such weapons are "OK" to use on "anybody that was so brutal." On April 12 China abstained from voting on a United Nations Security Council resolution, which Russia vetoed outright, condemning last week's chemical attack on civilians in Syria. President Trump applauded China's decision, declaring it "wonderful."

Though both sides seemed pleased with the tone and substance of this initial summit, the trajectory of the relationship will depend on critical details to be addressed in the coming months in a series of forthcoming bilateral meetings, including Trump's planned visit to China later this year.

Back to top

Omnibus Executive Order on Trade Deficit

Late last week, the administration issued an Omnibus EO that directs the Secretary of Commerce and the U.S. Trade Representative to submit a report in 90 days that documents the reasons for the United States' trade deficit. The EO itself does not identify the countries under investigation, but states that the report "shall identify those foreign trading partners with which the United States had a significant trade deficit in goods in 2016." However, a set of "FAQs" issued together with the EOs noted the following countries of concern: China, Japan, Germany, Mexico, Ireland, Vietnam, Italy, South Korea, Malaysia, India, Thailand, France, Switzerland, Taiwan, Indonesia and Canada.

Also, according to our sources, it appears that another wave of EOs relating to trade may be out as soon as this week. We understand that the administration has been focused on Buy America/government procurement, and we expect that to be among the topics addressed.

For more information, please see Akin Gump's client alert here.

Back to top

Protecting Confidential Business Information

The Toxic Substances Control Act (TSCA) has long required chemical product manufacturers to submit safety, manufacturing and market data to the Environmental Protection Agency (EPA) for regulatory purposes, but it has also allowed parties to claim certain data as "confidential business information" (CBI) to prevent competitive harm that would come from public disclosure. Citing new authority granted under the Frank R. Lautenberg Chemical Safety Act for the 21st Century (LCSA), which amended the TSCA, the EPA is ramping up efforts to restrict, if not revoke, many CBI claims.

Since the law was passed in June 2016, the EPA has proposed a series of rules designed to implement the LCSA. One of the rules will require companies to report on each chemical that they have manufactured or imported during the last 10 years; the EPA will use these reports to update its 35-year old "inventory" of 85,000 chemicals with a record of use in U.S. commerce. Roughly a fifth of those chemicals currently falls within a confidential portion of the "TSCA Inventory," protecting their chemical identities and other proprietary information from public disclosure. Under the EPA's proposal, however, the EPA will revoke CBI treatment for chemicals where the manufacturer or importer fails to file the necessary report and justification. Where the original manufacturer or importer has changed, or has ceased operating in the U.S. market, the EPA is still considering whether to allow new companies to take their place and seek continued CBI status for protected chemicals. Loss of CBI status could have significant business implications for companies up and down the supply chain.

Of course, the EPA's review of this new information will take significant resources at a time when the President proposes to cut the agency's budget significantly. Still, one of the few areas that the EPA has indicated that it will continue to support is its chemical regulatory program. Clearly, industry will want to follow developments with respect to this rulemaking (and others related to LCSA implementation) closely.

Back to top

Gorsuch Confirmed

On April 7, the Senate voted to confirm Judge Neil Gorsuch to fill the Supreme Court seat left vacant by the February 2016 death of Justice Antonin Scalia. The vote came after the Republican Senate Majority exercised the "nuclear option" to lower the 60-vote threshold to end debate on the nomination to a simple majority, stymying an attempted Democratic filibuster. The decision to use the "nuclear option" came after Republicans failed to secure the eight Democratic votes needed to reach 60 votes.

Looking ahead, the change in precedent will likely remain, just as Senate Democrats' 2013 use of the "nuclear option" enshrined a lower voting threshold for executive branch and non-Supreme Court judicial nominees. Senate Majority Leader Mitch McConnell (R-KY) and Minority Leader Chuck Schumer (D-NY) indicated that, while the filibuster for nominations is now extinct, there is no appetite among either party's members to scrap the legislative filibuster.

Justice Anthony Kennedy swore in Justice Gorsuch on April 10 in the presence of President Trump. Justice Gorsuch's confirmation is a win for Leader McConnell and conservative activists who pushed for the Scalia seat to remain vacant until the next administration. With Republicans in control of the White House and a Senate uninhibited by a judicial filibuster, conservatives are optimistic that additional like-minded judges will populate the federal bench in the future. Indeed, with the top three most senior Supreme Court justices over the age of 78, President Trump could fill another Court vacancy during the remainder of his current term. Moreover, the 2018 Senate map favors Republicans, increasing the likelihood that President Trump's nominees, for positions in both the executive and judicial branches, will face a friendly atmosphere.

Back to top

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