ML STRATEGIES

Viewpoints

ML Strategies Legislative & Regulatory Update

Washington Post-Election Check List

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As Election Day fast approaches and with the House and Senate majorities potentially at risk for Republicans, there is still much work remaining for the 115th Congress in the upcoming lame duck session when Congress returns on November 13. The outcome of the election – namely whether Republicans can retain unified control of the federal government or we enter into a period of divided government – will strongly influence which policy proposals advance.

Undoubtedly, there are a number of factors that could impact which measures are considered in the lame duck. First and foremost will be the degree to which Members of Congress who have been defeated or are retiring will want to actually engage in substantive legislative work. Also, as we enter into the holiday season the window for consideration of legislation and the field of potential measures that can be adopted narrows considerably.

Furthermore, the ability for anything to get done in the lame duck depends very largely on one person – Senate Minority Leader Chuck Schumer (D-NY). Using the Senate legislative filibuster, Sen. Schumer can lead the Democrats to say 'NO!' to any bill he does not like. Assuming the House flips in November, he can simply wait until Democrats can write and pass their own bills in the House in January. But he can also strategically decide to let himself get rolled if he wants something off the table. This is a big deal for those issues that could be politically controversial, or, frankly, any controversial policy in any subject area.

Once the ballots are counted and we know who holds the House and Senate majorities, we'll be refining our thoughts on the items most likely to move, but please find below a list of items we think are on the table.

For our most recent mid-term election update please click here.

APPROPRIATIONS

Before adjourning in October, Congress passed a two minibus spending packages for FY 2019 that combined funding for five appropriations bills – Defense; Energy and Water Development; Labor/HHS/Education; Legislative Branch; and Military Construction and Veterans Affairs. The remaining appropriations bills were temporarily funded through December 7 and include Agriculture; Commerce/Justice/Science; Financial Services; Homeland Security; Interior and Environment; State/Foreign Operations; and Transportation/HUD.

Of all the items on the lame duck agenda, the one thing that must be done is to fund these remaining seven spending bills one way or another, whether that is through another minibus package of these seven bills, an omnibus package that includes these spending bills along with other policy priorities, or another short-term extension that punts the rest of Fiscal Year 2019 funding into next year and the new Congress. The latter option is certainly possible should the appropriations debate become contentious over issues like funding for the proposed border wall.

Following this year's already very active hurricane season, there is also likely to be a disaster aid package for recovery efforts following Hurricane Michael. Congress has already appropriated $1.68 billion for recovery efforts from Hurricane Florence.

HEALTH CARE

With the opioid package passing both the House and Senate, there are a few outstanding health care issues that could be addressed in the lame duck session, including a number of policies that have been waiting in the queue for some time. Some of these hopeful bills include the EMPOWER Care Act and the ACE Kids Act, which could be voted on in both chambers as soon as December. Additionally, the House and Senate have passed a number of bills this year that have yet to pass the other chamber. For example, the Pandemic and All-Hazards Preparedness Reauthorization Act, which strengthens and improves national public health preparedness and response activities, passed out of the House and still needs a Senate vote. Another example is Protect Medical Innovation Act of 2018, which repeals the 2.3 percent tax on some medical devices that was created under the Affordable Care Act and is currently scheduled to take effect in 2020. The House passed this legislation 283-132 on July 24, 2018.

Although it is not a certainty any of the above mentioned bills will be considered during the lame duck session, one thing we can expect is that there will be a battle over the "doughnut hole" and CREATES. To date, Pharmaceutical Research and Manufacturers of America (PhRMA) has been unsuccessful in changing the doughnut hole closure. PhRMA will continue to push for this during the lame duck session accompanied by a version of the CREATES Act to their liking. The CREATES Act, as introduced, would make it harder for brand drug companies to use FDA-mandated safety programs to prevent generic competition from coming to market and has been pushed as way to get cheaper drugs to consumers. PhRMA opposes the introduced version of CREATES and will continue to push to get these issues solved on their terms.

Finally, we can also expect the Administration to continue to push for its regulatory agenda. As of October 18th, there were 23 regulations pending at OMB, which could be published at any time. Additionally, on October 17th the Administration released its regulatory agenda for the fall and there are many HHS regulations in the queue – ranging from Medicaid premiums and cost pays to policy and technical changes to Medicare Advantage and Medicare prescription drug plans.

For our complete health care lame duck preview, please click here.

TAX

While the House of Representatives passed a package of tax legislation known as Tax Reform 2.0 in September, there is still no indication that the Senate intends to act on the bills which were generally viewed as pre-election messaging for Republicans. With that said, President Trump has made recent comments indicating his support for a new ten percent middle class tax cut. The president's comments caught Capitol Hill off guard – there is no pending middle cut tax legislation – but subsequently House Ways and Means Committee Chairman Kevin Brady (R-TX) has said he would work with the White House on the proposal although he has since clarified that he is looking ahead to the next Congress, should Republicans retain the majority, for any such effort. What we are more likely to see is a tax extenders package extending tax provisions that expired at the end of 2017 or set to expire over the coming year. While there is no publicly available tax extenders package yet, Chairman Brady has indicated it is possible we will see an extenders package post-election.

Finally, we're actively monitoring the rollout of guidance from the Treasury Department and the Internal Revenue Service (IRS) on implementation of last year's Tax Cuts and Jobs Act.

TELECOMMUNICATIONS

Since the August recess, the Senate Commerce and House Energy and Commerce Committees have been busy holding a number of hearings. Topics of interest have included 5G, rural broadband, consumer data privacy, the state of the media marketplace, and the much awaited transparency hearing featuring Twitter CEO Jack Dorsey. Looking forward toward the lame duck, conversations surrounding privacy, spectrum, and 5G will continue to be ongoing.

Legislatively, staffers remain optimistic that Congress has the time and willpower to pass some telecom bills, regardless of the outcome of the elections. While there seemed like there was interest in Congress to pass the STREAMLINE Act before the end of the year, recent FCC action on 5G may diminish some of the urgency to pass to bill. It is unclear prior to the elections if Chairman Thune has secured enough Republican commitments to pass the bill this year. On the House side, staffers view the SPECTRUM NOW Act as one bill that could still see movement before the end of the year. While it is unlikely to move on its own, legislators may be looking to attach the bill to the Fiscal Year 2019 appropriations package in December. There has also been a renewed effort to pass the AIRWAVES Act. Senate Commerce and House Energy and Commerce members have mentioned that they have heard voices outside of the committee expressing support for the legislation. However, it is unclear if there is enough support on either side of the aisle within the committees to get the bill passed this year.

For our complete telecommunications lame duck preview, please click here.

TRADE

Since our last update, the Trump administration has concluded negotiations with Mexico and Canada on an updated North American Free Trade Agreement (NAFTA) – now to be known as the United States-Mexico-Canada Agreement (USMCA). This was a significant victory for President Trump who made renegotiation of NAFTA a key campaign promise in 2016. For state-by-state fact sheets on the implications of the USMCA please click here.

The president continues his quest to remake the global trade order with an announcement on from United States Trade Representative (USTR) Robert Lighthizer on October 16 that he has notified Congress of the Administration's intent to negotiate three separate trade agreements with Japan, the European Union, and the United Kingdom.

On October 10 the Treasury Department, as chair of the Committee on Foreign Investment in the United States (CFIUS), issued temporary regulations intended to protect critical technology and intellectual property from potentially foreign harmful investments. The regulations are a result of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which was included in the annual National Defense Authorization Act (NDAA) which was signed into law in August. FIRRMA authorizes CFIUS to conduct pilot programs to implement provisions in the legislation that did not become effectively immediately upon enactment. The pilot program is set to commence on November 10 and implements authorities that expand the scope of transactions subject to CFIUS review to include certain non-controlling investments in U.S. businesses involved in critical technologies related to specific industries and makes effective FIRRMA's mandatory declarations provision for transactions that fall within the scope of the pilot program.

Finally, the Department of Commerce continues to work through the Section 232 exclusion requests for steel and aluminum tariffs, while the Treasury Department reviews the "List One" Section 301 exclusion requests for Chinese goods that were due by October 9. Exclusion requests for "List Two" are due no later than December 18. There is no exclusion request at this point for "List Three" tariffs which are currently set at ten percent but rise to 25 percent at the start of next year should there be no breakthrough between the U.S. and China. We are hearing that if the "List Three" tariffs do increase in January USTR would then announce a process for requesting exclusions. There is significant support on Capitol Hill for establishing an exclusion process for "List Three" with 169 bipartisan members of Congress writing to USTR on October 15 asking that such a process be initiated.

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