ML Strategies Legislative Update

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ML STRATEGIES FALL PREVIEW

Summer isn't quite over yet, but the August recess is coming to an end and Congress returns next week to resume work on a number of outstanding issues, as the Trump Administration continues to aggressively implement the president's agenda.

The House of Representatives is scheduled to be in session for just 12 days in September, while the Senate is scheduled for 17 days of legislative work, making for an exceptionally tight timeframe with several "must-pass" items having looming end-of-the-month deadlines. Expect the month of September to be consumed with funding for the next fiscal year, raising the federal government's debt limit, and dealing with an anticipated emergency relief funding proposal for states impacted by Hurricane Harvey. At question is whether there is consensus within the two parties to address these measures and avoid the consequences of failing to act.

This report, although not exhaustive, gives a high-level update on some of the more pressing items that Congress is likely to consider in September and into the fall including appropriations and budget, the debt limit, defense, education, health care, tax reform, telecommunications, and trade.

APPROPRIATIONS & BUDGET

The House and Senate Appropriations Committees have been working through the 12 annual spending bills for the upcoming fiscal year, which begins on October 1, but have done so without a Fiscal Year 2018 (FY18) budget resolution setting spending levels.

With the end of the current fiscal year approaching fast, no FY18 spending bills have seen final approval, although the House of Representatives has approved a national security minibus package that includes the Defense, Energy and Water Development, Legislative Branch, and Military Construction/Veterans Affairs appropriations bills. One of the first items to be tackled by the House this month will be a second minibus that includes the remaining eight FY18 spending bills: Agriculture, Commerce/Justice/Science, Financial Services, Homeland Security, Interior and Environment, Labor/HHS/Education, State/Foreign Operations, and Transportation/HUD.

In the Senate, the Appropriations Committee has so far approved the following FY18 bills: Agriculture/Rural Development/FDA, Commerce/Justice/Science, Energy and Water Development, Legislative Branch, Military Construction/Veterans Affairs, and Transportation/HUD. Upon return this month, the committee will resume work on the remaining measures.

No one expects the House and Senate to complete all twelve spending bills before September 30, so look for a Continuing Resolution that will extend government funding for a period of months – perhaps into December.

It also has to be noted that the end of the current fiscal year coincides with the date by which the Treasury Department says the federal government's debt limit must be raised in order to avoid default (see below for more information on the debt limit issue). Some of the most conservative Republicans in Congress may oppose a debt limit increase, meaning the GOP would have to rely on Democratic votes for approval of a debt limit vehicle – which could carry other legislative priorities.

President Trump has demanded that Congress provide funding for his proposed border wall with Mexico, alluding to a possible government shutdown if the funding is not provided. Conversely, if the funding for the border wall is provided against the wishes of Democrats, we will be watching to see whether Democrats will leverage their debt limit votes for concessions on other spending and policy priorities – perhaps including efforts on health care related to market stabilization to address issues with the Affordable Care Act.

DEBT LIMIT

The Department of the Treasury has indicated that September 29 is the deadline for increasing the federal government's debt limit – i.e. the amount of money the government can borrow to meet its existing financial obligations. Without an increase in the debt limit, the federal government will be at risk of default. Treasury Secretary Mnuchin has stated he would like to see a "clean" increase in the debt limit without any unrelated provisions, as has Senate Majority Leader McConnell (R-KY) and House Speaker Ryan (R-WI), while some conservative Republicans in the House of Representatives are arguing that they want to see the debt limit increase serve as a vehicle for various policy priorities. Mick Mulvaney, Director of the White House Office of Management and Budget, has indicated previously that he could support linking spending cuts with a debt limit increase. However, making spending cuts a condition for a debt limit increase is anathema to Democrats.

The debt limit has been raised 15 times over the past two decades and for most of those increases this was a perfunctory duty. Only in recent history has it become contentious, most notably in 2011 and 2013 during the Obama Administration when the White House and Congress nearly failed to reach agreement in time to avoid default. Congressional leadership and Administration officials were meeting before the August recess to find a path forward, but left for the recess without any agreement, making the next few weeks all the more dramatic as the deadline approaches.

DEFENSE

The 2017 National Defense Authorization Act (NDAA) process is well underway. The House version of the NDAA authorizes defense programs to receive $688.3 billion in discretionary funding. The authorization would include $613.8 billion in base discretionary funding. This amount exceeds the $549 billion defense spending cap, which was enacted under the 2011 Budget Control Act (BCA). It also would authorize $74.6 billion in Overseas Contingency Operations (OCO) funding that doesn't count against the cap. It should be noted that the White House did not include any OCO funding in its budget request. Among many provisions, the House NDAA includes a key defense acquisition reform provision in the form of an "online marketplace" for the federal government's purchase of commercial off the shelf (COTS) products – stakeholders should keep an eye on how this provision proceeds through conference. In addition, the House NDAA calls for advancement to a 355 ship Navy as soon as practicable, and authorizes funding for 87 F-35 strike fighters. The House passed their version of the NDAA on July 14th.

Meanwhile, the Senate NDAA, which has passed out of committee but has not yet been considered on the floor, authorizes a base defense budget of $640 billion, which also exceeds BCA cap amounts. The Senate version does not include a defense acquisition reform provision, but does request 94 F-35 joint strike fighters along with several classes of Navy ships to begin alignment for a 355 ship navy.

The pressing question is when and how the NDAA is considered by the full Senate. Majority Leader McConnell (R-KY) plans to move on the NDAA in September, but with so many other pressing issues which must be resolved this month, along with Senate Armed Services Chairman McCain's (R-AZ) health concerns, the NDAA may not be considered until October. There remains a great deal of uncertainty on NDAA timing, but the end of the year deadline is inflexible, and Congress has not failed to pass a defense authorization bill since 1961.

EDUCATION

Within the House Appropriations Committee's recently approved second FY18 appropriations minibus (discussed above), the Labor-HHS-Education language provides for approximately $157.9 billion in discretionary funding, $5.05 billion less than Fiscal Year 2017 (FY17). With regard to education-specific funding, the measure would provide $65.8 billion, a $2.45 billion decrease from FY17 funding levels. Higher education will be funded at $2 billion, a $17.3 million dollar decrease from FY17. It is important to note that the Senate Appropriations Committee has not released a Labor-HHS-Education bill for FY18.

In addition to approving the FY18 Labor-HHS-Education funding package, the House unanimously passed H.R. 2353, the Strengthening Career and Technical Education for the 21st Century Act (the Carl D. Perkins Career and Technical Education Act (ACT)) by voice vote at the end of June. The law, last reauthorized by Congress in 2006, is intended to support and increase the quality of technical education across the country.

Between 2006 and 2016, the Perkins Act provided an annual amount of $1.3 billion to career and technical education programs in all 50 states. The House version of the ACT would be authorized for six years, and aims to more closely align itself with the Workforce Innovation and Opportunity Act (WIOA), which was reauthorized by Congress in 2014. Under the bill, overall federal funding formulas would remain the same as they exist in current law. However, the formulas may be increased to accommodate states who wish to devote more resources to rural areas or areas with large numbers of Career and Technical Education (CTE) students.

The ACT streamlines state application processes by allowing states to submit a combined plan for CTE and WIOA; simplifies application processes for local education providers; updates accountability measures that rely on four core indicators to resemble those in WIOA that focus on employment outcomes, earnings, completion rates, and the percentage of CTE concentrators in non-traditional fields; and creates a small competitive grant to support national innovation. After its passage out of the House, the bill was referred to the Senate Committee on Health, Education, Labor, and Pensions (HELP).

As the HELP Committee begins to hold hearings related to health care this fall, committee staff continue to work on Higher Education and Perkins reauthorization language. The Department of Education has also signaled that they are looking at changes in Higher Education related to student loans and gainful employment requirements. Given that Perkins reauthorization and Higher Education have been on the list of issues that the House Education and Workforce Committee have been working on over the past year, it is likely that these will be legislative priorities for Congress in the fall.

HEALTH CARE

Following the health care rollercoaster we have been on this year, the last month was a welcome breather for the health care world. However, as we look ahead for the balance of the calendar year, we go into the fall with a number of issues that should move through Congress along with a set of policies that could. Four questions remain on top of everyone's mind: (1) how will the health care "minibus" provisions move; (2) will a market stabilization package come together; (3) will cost-sharing reductions (CSR) payments continue to be made or formally authorized; and (4) will ACA "repeal and replace," be resurrected yet again?

Theoretically, Congress needs to pass a set of health policy extenders called the minibus by September 30th. The "health care minibus" refers to a handful of policy provisions tied together in one piece of legislation. The health care minibus includes programs that were left over from the Medicare Access and CHIP Reauthorization Act (MACRA) that continue to need reauthorization and funding. Will the provisions stick together or will some be considered separately (e.g., CHIP)? This will have to be addressed, but will likely drag into the fall given the sensitive timing of competing priorities, making short term extensions likely (see 2007).

We will also be watching closely to see if the marketplace stabilization package gathers steam. Senator Alexander (R-TN) and Senator Murray (D-WA) will hold four HELP Committee hearings in early September (two the week of September 5th and two the week of September 11th). The first two hearings will include testimony from several governors and state insurance commissioners. For the most part, Republicans and Democrats generally agree on bringing down premiums and creating stability in the marketplace to encourage insurers to participate. However, Republicans and Democrats have vastly different policy positions on how you get there, and it's not clear the extent to which either side is ready to work with the other to address these issues.

On cost-sharing reduction (CSR) payments, we expect that they will continue to be used as a political football until Congress takes decisive action on their future. The Administration continues to threaten not to make the payments. However, payments continue to be made, and plans have already received the payments for August. Will Congress take this issue off the table by formally authorizing their payment?

Finally, let's not forget that Republicans may well take another run at a partisan repeal of the Affordable Care Act. We will continue to listen for any hints of any emerging consensus among the GOP that could get needed votes in the Senate. However, we remain skeptical of any additional action. It is not clear that Republicans have been put under significant pressure from constituents to rectify their failure while they have been home this August.

For a more in-depth health care preview, please click here.

TAX REFORM

With Republican efforts to repeal and replace the Affordable Care Act (ACA) in July unsuccessful (but not yet completely off the table as discussed above), the next big legislative push is expected to be reform of the nation's tax code. The aggressive timeline set by the White House has the bulk of the tax reform legislation drafted by the end of August and the House and Senate committees marking up the bill in September. The White House timeline then has the Housing passing the bill in October and the Senate in November, and the President signing tax reform legislation by the end of 2017. Whether this is feasible is up for debate – many believe the tax reform debate will extend into next year – but the Administration and congressional Republicans are looking for a legislative victory and will be working hard to meet this goal.

Aside from the details of what would be included in tax reform, a primary question is the process by which Congress would pass a reform bill. Unlike the House where legislation is approved by majority vote, in the Senate the 60 vote threshold means that Republicans will either have to work with Democrats on a bipartisan tax reform bill, or use the budget reconciliation process which would require just 51 votes, which Majority Leader McConnell (R-KY) has stated is his plan.

Momentum toward tax reform has been steadily building. Last year, House Republicans released their "A Better Way" blueprint for tax reform, which in some ways draws on the tax reform proposal from then-House Ways and Means Committee chairman Dave Camp (R-MI) in 2014. The Camp proposal never gained traction, but is still talked about as a starting point by many given that it was released as legislative text, whereas the 2016 blueprint was more a statement of principles.

In April, President Trump issued a high-level statement of goals for tax reform, followed in July by a Joint Statement by the so-called Gang of Six representing the Trump Administration and House and Senate Republican leadership. The primary take-away from the Joint Statement was that Republicans were dropping their effort, proposed in the blueprint, to move the U.S. toward a consumption based tax system through a border adjustment tax (BAT). The BAT had met with opposition not just from Democrats but also some Republicans and its removal as an obstacle makes the path toward tax reform easier. In response to the Joint Statement, 45 Senate Democrats wrote a letter to President Trump, Senate Majority Leader McConnell (R-KY), and Senate Finance Committee Chairman Hatch (R-UT) in August outlining three "key principles" they say are prerequisites for bipartisan reform of the tax code: (1) tax reform should not increase the tax burden on the middle class; (2) tax reform should go through regular order and not reconciliation; and (3) tax reform should not add to the deficit.

The Senate Finance Committee is expected to hold at least two tax reform hearings in September focused on corporate and international taxation. The House Ways and Means Committee has not scheduled tax reform hearings for September as of yet.

Proponents of tax reform are optimistic that they will succeed – whether a final bill is passed in 2017 or in early 2018. A leading driver of this optimism is that with unified control of the White House and Congress the GOP needs a significant legislative victory. Further, while the debate over repeal of ACA was highly emotional for many, tax reform is more of an intellectual exercise, leaving room for compromise and, perhaps, even bipartisanship.

However, there are significant challenges. Despite the broad bipartisan agreement that the tax code needs updating, the last major tax reform bill was signed in 1986 after two years of hearings and debate. Beyond that, the limited legislative days remaining in 2017 for such a significant legislative measure are challenging at best, not to mention filled with the numerous competing issues described in this document. And perhaps most importantly, with just four months left in this year, there is still no actual tax reform bill, although congressional staff are reportedly working on the draft language.

It is also important to note there is some chance that, should comprehensive tax reform prove elusive, we could see something as simple as a temporary tax cut. Whether such an approach would address both corporate and personal tax is unknown, but to only reduce the business tax could prove to be a politically challenging decision going into mid-term elections in 2018.

Some have advocated for merging an infrastructure package with tax reform, but that proposal has yet to gain traction. Then-candidate Donald Trump proposed investing $1 billion in infrastructure through a combination of public and private investment, including $137 billion in tax credits. In July, President Trump signed an Executive Order establishing a Presidential Advisory Council on Infrastructure, and in August signed another Executive Order regarding the environmental and review and permitting process for infrastructure projects. The White House has also released a Fact Sheet covering the key principles of the president's infrastructure proposal.

TELECOMMUNICATIONS

Just prior to the Senate's abbreviated August recess, the Senate cleared six tech and telecom bills, which included the MOBILE Now Act (S. 19), the FCC Consolidated Reporting Act (S. 174), and the DIGIT Act (S. 88). These bills now move to the House for consideration. However, GOP sources in the House have said that the Senate-passed MOBILE Now Act is not likely to pass in its current form.

Additionally, the Senate also approved the nominations of Jessica Rosenworcel and Brendan Carr to be Commissioners at the Federal Communications Commission (FCC). Chairman Pai's re-nomination passed the Senate Commerce Committee in July but still awaits a full Senate vote, potentially expected in September. Still waiting for Committee approval is Trump's nominee to head the Commerce Department's National Telecommunications and Information Administration (NTIA), David Redl, who most recently has filled the role of Counsel for the House Energy and Commerce Committee. Redl's nomination has been held up in Committee by Senator Ted Cruz (R-TX) due to Redl's answers on the Internet Corporation for Assigned Names and Numbers (ICANN).

During the last week of the Senate's session, Senators Gardner (R-CO) and Hassan (D-NH) introduced the Advancing Innovation and Reinvigorating Widespread Access to Viable Electromagnetic Spectrum (AIRWAVES) Act (S. 1682). This legislation encourages the federal government to free up spectrum for commercial licensed and unlicensed use in an effort to expand rural broadband access. The bill has already garnered praise from the FCC's Chairman Pai and Commissioners Clyburn and O'Rielly, as well as many other stakeholders in the telecom industry, including the Information Technology Industry Council, the Wireless Internet Service Providers Association, and the Wi-Fi Alliance.

Looking ahead, the Senate Commerce Committee will hold a hearing on the Lifeline program on September 6. Recently, the Lifeline program has come under fire following the June release of a Government Accountability Office (GAO) report critical of the program. The Lifeline Program, a part of the Universal Service Fund, was established by the FCC in 1985 and provides discounted phone services to qualifying low-income consumers.

Also in September, the Senate Commerce Committee may consider bipartisan legislation to help prevent websites from hosting or facilitating sex trafficking content. Already, the Senate version has 27 cosponsors and the House version is supported by twenty-five percent of the chamber. However, many in the tech industry have voiced opposition to the bills saying they undermine Section 230 of the 1996 Communications Decency Act. As it is currently written, Section 230 limits tech companies' liability for what users post on their platforms.

On the House side, the Energy and Commerce Committee is also expected to have a busy September. First on the agenda is a hearing about the FCC's repacking efforts on September 7. This hearing is replacing the expected net neutrality hearing, which has been postponed indefinitely.

Although the net neutrality hearing has been postponed, Republicans have mentioned that they are expecting to use Rep. Greg Walden's (R-OR) 2015 draft net neutrality legislation as a starting point for potential legislation. In 2015, Democrats were adamantly opposed to Walden's legislation and are not likely to support new legislation if it is similar to the prior 2015 bill. The FCC has an ongoing proceeding regarding net neutrality and recently extended the reply comment deadline to August 30. Congress and the FCC Commissioners have shown an interest in reviewing the over 21 million comments that have been submitted for the record.

Sources close to the Committee also say that Rep. Marsha Blackburn (R-TN) would like to hold a markup of the Republicans' draft FCC reauthorization bill. The House Subcommittee of Communications and Technology held a hearing on FCC oversight on July 25, which featured Chairman Pai and Commissioners Clyburn and O'Rielly. During the hearing, Rep. Frank Pallone (D-

NJ) called the Republican draft "flawed" and noted that it lacked Democratic input. The bill is expected to face continued opposition from the Democrats.

TRADE

President Trump made renegotiation of the North American Free Trade Agreement (NAFTA) a key component of his policy agenda during the 2016 presidential campaign, and has quickly moved to initiate the process for talks with Canada and Mexico. The Administration's goal is to conclude renegotiation by the end of 2017.

The Administration initiated NAFTA renegotiation in May when the Office of the U.S. Trade Representative (USTR) formally notified Congress of the Administration's intent to begin talks with Canada and Mexico. This was followed up by a Federal Register notice requesting public input on the renegotiation of the trade agreement at a hearing held in June at the U.S. International Trade Commission.

In July, to meet the requirement of publishing negotiating objectives 30 days before beginning talks on any free trade agreement, USTR released the Trump Administration's negotiating objectives which covered: Trade in Goods; Sanitary and Phytosanitary Measures, Customs, Trade Facilitation, and Rules of Origin; Technical Barriers to Trade; Good Regulatory Practices; Trade in Services; Digital Trade in Goods and Services and Cross-Border Data Flows; Investment; Intellectual Property; Transparency; State-Owned and Controlled Enterprises; Competition Policy; Labor; Environment; Anti-Corruption; Trade Remedies; Government Procurement; Small- and Medium-Sized Enterprises; Energy; Dispute Settlement; and other General Provisions.

The initial round of NAFTA talks got underway in mid-August in Washington, DC, with the U.S., Canada, and Mexico presenting texts for their desired language. The talks were held over five days, and U.S. Trade Representative opened by saying that the Administration "is not interested in a mere tweaking of a few provisions and a couple of update chapters. We feel that NAFTA has fundamentally failed many, many Americans and needs major improvement."

Negotiators will meet next in Mexico September 1-5, and then in Canada September 23-27.

OTHER ISSUES

Reauthorization of short-term extensions for the Federal Aviation Administration (FAA) and the National Flood Insurance Program (NFIP) are due by the end of September.

FAA Reauthorization

On June 27, the 21st Century AIRR Act (H.R. 2997) was reported out of the House Transportation and Infrastructure Committee to the House Floor. Just a few days later on June 29, the Senate Committee on Commerce, Science, and Transportation favorably reported the Federal Aviation Administration Reauthorization Act of 2017 (S. 1405). Despite the quick committee action on both sides, movement has stalled on both floors with the clock ticking to the September 30th expiration date. It appears the House will need an extension to avoid authorization expiration, and Senate Commerce Chairman Thune (R-SD) has indicated an extension is possible on the Senate side as well. Chief among the more hotly debated Senate amendments is a provision to change training requirements for regional commercial pilots. This provision was included in the floor version, despite Senate Democratic opposition.

President Trump has proposed privatizing air traffic control, and to that end, the House is due to consider that proposal in their FAA reauthorization. However, CBO just rescored the air traffic control provision in the 21st Century AIRR Act, declaring that the revised bill will add $100 billion to the deficit. This deficit estimate will no doubt increase House Democratic opposition. The Senate version, on the other hand, has no such privatization provision. Many members on both sides of the aisle and in both Houses oppose the privatization measure, arguing that privatization puts air safety at risk. With so many other pressing deadlines and vocal, widespread opposition to the privatization measure, it's very possible the President's proposal could be jettisoned to ease authorization through the conference process.

National Flood Insurance Program Reauthorization

Hurricane Harvey has thrown FEMA's National Flood Insurance Program (NFIP) into the spotlight just as its reauthorization date draws near. The program is currently running a $25 billion deficit, having covered Hurricanes Katrina and Sandy payouts far exceeding premium revenue. If Congress does not reauthorize the NFIP by September 30, FEMA can still provide coverage for existing policies, but future policies will not be issued. September 30 is in the middle of hurricane season, so expect coastal representatives, including those dealing with ongoing Harvey-related catastrophic flooding, to focus on the program once Congress returns. The timeliness of NFIP reauthorization could spark reform efforts to better address flood insurance needs, such as updating mapping technology and increasing premiums for coastal residents and businesses.

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