



ML Strategies Update

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Post-Election Congress Returns for Lame Duck Session What to Expect?

Last week, ML Strategies shared our thoughts on what to expect in the post-election lame duck Congress. The unknown factor at that point in time was who would be elected President on November 8th, which party would be in the majority in the House and Senate, and how those ballot box decisions would impact the legislative agenda for the remainder of the current 114th Congress. With the votes in and counted, Donald Trump is now the president-elect and will be sworn in as the 45th President of the United States on January 20, 2017. The Republican party also fared well in the elections and has retained majorities in the U.S. Senate and the U.S. House of Representatives.

The outcome of the presidential election was, for most observers, unexpected leaving the lame duck agenda somewhat up in the air. Last week we outlined a number of measures likely to see action in the lame duck, with four – a spending bill for the current fiscal year, a defense supplemental funding request, an annual defense authorization bill, and a water resources bill – topping the list. Two big casualties of the election are Senate action on the Supreme Court nomination of Merrick Garland and the Trans-Pacific Partnership (TPP).

Given the outcome of the election, it is quite possible that the lame duck session will be very short with Republicans wanting to save any significant legislative work for next year when they will have a Republican President in the White House.

Congress will return next week and we anticipate that House Speaker Paul Ryan and Senate Majority Leader Mitch McConnell will want to engage with their respective caucuses on how to proceed, as well as with the Trump transition team on their legislative priorities upon taking office. A possible scenario is that the lame duck will be very short, with the only real legislative work being a Continuing Resolution (CR) to fund federal activities into next year – as part of a short term CR to a date uncertain. The current CR expires on December 9. While the National Defense Authorization Act (NDAA) has been approved for the past 54 years, there is precedent for doing so retroactively,

so we could potentially see the NDAA slipping to 2017 when congressional Republicans will not have to negotiate with the Obama Administration over differences in defense vs. domestic spending levels. The Water Resources

Development Act (WRDA) has seen broad bipartisan support, but some of the more conservative

Republicans in Congress could argue that the WRDA bill should be revisited in the next Congress when they can have a stronger position on some of bill's provisions.

A second, less likely, path forward is that we will see an effort to clear the deck in the lame duck to give the Trump Administration and new congress a clean slate next year. There is precedent of this approach, for example in 1980 when the incoming Reagan Administration worked with the House and Senate, both controlled by Democrats, to clear a number of measures before the Reagan Administration took office and the GOP took over the majority in the Senate.

Until these five parties – the House Speaker, the Senate Majority Leader, the House and Senate Republican caucuses, and the Trump transition team – are able to develop a strategy on how to proceed in the lame duck we can still assume that some of the legislative measures and nominations discussed below could potentially still advance but we should be prepared for a very short legislative agenda.

While we await a decision on how the lame duck will proceed, ML Strategies has prepared an overview of potential key members of the transition team of the incoming Trump Administration. It can be found [here](#).

Upon its return on November 14, the House is scheduled to be in session for 16 days during November and December, with the Senate scheduled for 20 days. Much of the legislative work of the lame duck will occur after the Thanksgiving recess. While there are a limited number of legislative days left this year, there are a few items that are strong candidates for action, such as Fiscal Year 2017 appropriations, the annual National Defense Authorization Act, and the Water Resources Development Act. There are also various other measures that could see action before the conclusion of the 114th Congress.

Leadership for next Congress: Aside from legislative work, the lame duck will also see the House and Senate elect leaders for the next congress. Senate Majority Leader Mitch McConnell (R-KY) is expected to remain GOP leader, while Democrats will have a new leader with Senator Harry Reid (D-NV) retiring at the end of this congress. Senator Chuck Schumer (D-NY) is nearly certain to be elected the new Democratic leader. Prior to the election, in the House of Representatives the GOP was potentially facing turbulence with House Freedom Caucus unhappiness with Speaker Paul Ryan (R-WI) and his distance from the party's presidential nominee. His tenure as Speaker now appears secure. House Democrats are expected to retain Rep. Nancy Pelosi (D-CA) as their leader.

FY17 Appropriations: Despite the goal of getting the appropriations process back to some semblance of "regular order", only one of the annual spending bills for Fiscal Year 2017, which began on October 1st, has seen final approval. The year-long spending bill for Military Construction, Veterans Affairs and Related Agencies was the vehicle for the Continuing Resolution currently funding federal activities through December 9th. It is safe to say that few on Capitol Hill want to see a government shutdown just ahead of the holiday season, but it is unclear yet how FY17 spending will be finally resolved. Prior to the election, there were three possible scenarios: 1) a three-month Continuing Resolution at current funding levels, delaying final resolution until March 2017; 2) a one-year CR that would for the most part fund federal activities at current levels through the end of the fiscal year in September 2017; or 3) a year-end

Omnibus bill that would include FY17 spending and other possible policy riders. Last December, Congress approved an omnibus funding the government for the remainder of Fiscal Year 2016 while also extending certain tax provisions and addressing other policy matters so there is recent precedent for that approach again this year. At this point, we anticipate that the four-month CR is the most likely scenario.

Defense Supplemental Spending Request: In late September, Secretary of Defense Ash Carter signaled the Department of Defense (DOD) plans to present Congress with a supplemental spending request during the lame duck work period. According to Pentagon Comptroller Mike McCord, DOD will request a \$6 billion increase in Overseas Contingency Operations (OCO) funds to support President Obama's plans to leave 8,400 service members in Afghanistan through the end of the year, instead of just the 5,500 included in the FY17 budget request. Additionally, the supplemental request would boost resources to support an increase in U.S. military operations against the Islamic State of Iraq and the Levant (ISIL) in Iraq and Syria. As Congress prepares to take up the defense supplemental spending request in the lame duck and perhaps as part of broader budget negotiations, the Administration continues to hold fast to its position that any increase in defense spending should be complemented by an increase in spending on non-defense programs. The defense supplemental could serve as a driver for getting other measures completed this year, such as the defense authorization bill and appropriations for the current fiscal year.

FY17 National Defense Authorization Act (NDAA): As the NDAA has been signed into law for the past 54 consecutive years, conventional wisdom says some form of the defense authorization bill will be signed into law during the lame duck, although there is precedent for doing the bill retroactively. Committee staff are reportedly targeting the first week of December for Congress to take up a final conference report. While pre-recess negotiations were successful in resolving many of the key differences between the House and Senate defense authorization bills, conferees were ultimately unable to agree upon a final conference report before adjournment in late September. While some policy issues within the bill still need to be resolved, the fate of the NDAA could also be impacted by the broader debate on federal spending. While NDAA conferees reached a tentative compromise to increase the base budget for defense by \$9 billion, rather than the \$18 billion proposed by the House bill, it remains to be seen how this funding will be allocated across defense programs. It would also seem likely that President Obama would veto the NDAA if it authorized funding beyond budget spending caps without similar sequestration relief for non-defense spending. In late October, a process that was forcing members of the California National Guard to repay improperly issued enlistment bonuses became a national news story. Secretary of Defense Ash Carter responded quickly by ordering a suspension of repayments and a review of all cases to be completed by July 2017. House Armed Services Committee Chairman Mac Thornberry (R-TX) and Ranking Member Adam Smith (D-WA) have issued a bipartisan statement announcing the NDAA will serve as the legislative vehicle for addressing the California National Guard payments. If a provision correcting this issue were attached to the NDAA, it could make it more challenging for President Obama to veto the final defense authorization bill over other policy disagreements.

Water Resources Development Act (WRDA): The last WRDA bill was approved by Congress and signed into law in 2014 to address the needs of the nation's harbors, locks, dams, flood protection, and other water resources infrastructure. Returning the WRDA process to a two-year schedule, the Senate approved a new WRDA measure by a vote of 95-3 on September 15, with the House approving its version of the WRDA bill on September 29 by a vote of 399-25. Following the oversight and review process established in the 2014 WRDA bill, the new WRDA 2016 measures authorize infrastructure improvements that have been proposed at the local level, reviewed by the U.S. Army Corps of Engineers, and submitted to Congress for consideration. Congressional staffers are working in an informal conference during the recess to reconcile differences between the House- and Senate-passed measures, and are hoping to move the bill quickly when Members return after the elections. The House measure includes \$170 million in emergency funding to address the water crisis in Flint, MI, and other

areas, while the Senate version includes \$220 million for this purpose.

Energy Bill: The House and Senate measures vary significantly, and staff has been working diligently over the recess on a possible compromise between the chambers' competing bills. Both address infrastructure issues, efficiency, and sportsmen's provisions, as well as, among other things, imposing a new deadline for the Department of Energy to make final decisions on applications to export natural gas. At the end of October Senate energy conferees sent a proposed conference report to their House counterparts as the two chambers prepare a lame duck effort to complete the first bipartisan energy bill in almost a decade. It remains to be seen whether the two chambers can come to an agreement on the measure, particularly given the vast difference between the two bills. Given the election results, House Republicans may feel dissatisfied with a small bipartisan bill and choose to wait until next Congress to move forward with a larger measure.

Tax Extenders: The Omnibus appropriations bill passed last December included language to extend or make permanent 52 tax provisions, setting the stage for potential similar action this year. Three dozen tax provisions are set to expire at the end of 2016, about half of which are related to energy and energy efficiency. The remaining provisions pertain to the deduction of mortgage insurance, tuition and education expenses, and senior medical expenses just to name a few. Among the energy-related provisions are investment tax credits for technologies such as qualified fuel cells, microturbines, combined heat and power facilities, and thermal energy properties that were left out of last year's Omnibus due to a drafting error. There was an effort to rectify the error earlier this year by including these energy-specific provisions in the Federal Aviation Administration reauthorization bill, but that opened the door to members offering various other tax provisions, ultimately tanking the effort. Prior to the election Senate Majority Leader Mitch McConnell (R-KY) had indicated that a tax extenders package is one of the things he is open to accomplishing during an end of the year debate, but it remains to be seen how open to an agreement the House may be on the matter. As with other issues, the election results could mean these provisions expire at the end of the year and possibly retroactively renewed next year, potentially as a part of a comprehensive tax reform effort.

21st Century Cures Act / Mental Health Reform: Much of the health care legislation left on the table when Congress left town – the 21st Century Cures Act, for example – has been hanging in the balance for nearly all of 2016 and congressional leadership and chairmen of the relevant committees are attempting to build momentum to secure passage in the lame duck. Senate Majority Leader Mitch McConnell outlined this week that passing Cures as one of his top priorities in the lame duck, and Chairman Fred Upton will continue to apply pressure to get something done before his term as Chair of the Energy & Commerce Committee expires. Also, there are indications to keep an eye on that Republicans may be willing to support the Cancer Moonshot or Precision Medicine initiative as means for getting Cures done. As for mental health reform, the legislation sponsored by Rep. Tim Murphy (PA-18), which garnered a vote of 422-2 earlier this year, is so close to the finish line that there is little reason for Congress to push this into next year.

Iran Sanctions: The Iran Sanctions Act of 1996, which initially outlined sanctions targeting Iran's energy sector and was later expanded to include other industries, expires on December 31st. Senate Majority Leader McConnell has previously said that any Iran sanctions proposal would need a veto-proof majority before he would give it floor time. Earlier this year, Senate Foreign Relations Committee Ranking Member Ben Cardin (D-MD) made it seem that the Senate could extend the act by unanimous consent. However, he also insinuated that a filibuster may ensue if Republicans tried to expand the scope of the sanctions regime. Republicans also generally support an extension of Iran sanctions legislation, although there are some, such as Senate Foreign Relations Committee Chairman Bob Corker (R-TN), who might favor a broadening of sanctions related to Iran's ballistic missile development, support for terrorism, and the transfer of conventional weapons to and from Iran. House Foreign Affairs Committee Chairman Ed Royce (R-CA) is expected to introduce a clean, ten-year renewal, of Iran

sanctions, which is expected to easily pass the House, immediately upon Congress' return to Washington on November 14th. Given the outcome of the election, some Republicans may feel empowered to push for strengthening the sanctions, rather than an extension, although that would likely be met by a Democratic filibuster in the Senate and a veto from the President if it made it to his desk.

FCC Nominations: Pre-election, the conventional wisdom was that the Senate would vote to re-confirm Democratic Federal Communications Commissioner Jessica Rosenworcel during the lame duck. If that remains the plan, then the Senate probably will vote on her nomination along with a telecom package that includes bipartisan bills such as the MOBILE NOW Act and the SANDy Act. Such a package still has a path in the lame duck, but it may have to wait until next Congress to see any action.

Telecommunications Bills: Should the Senate vote to re-confirm Commissioner Rosenworcel in the lame duck, it could give the greenlight to some of the telecom bills awaiting a floor vote. All eyes are on the Senate following House passage in September of eight telecom bills in one package, titled the "Communications Act Update Act of 2016." The Senate is not expected to accept that measure, at least as it is currently written, but may counter with its own package. The Senate's end-of-year telecom package would likely feature two priorities of Senate Commerce Committee Chairman John Thune (R-SD): the MOBILE NOW Act (S.2555), which seeks to expand next-generation 5G wireless gigabit broadband service, and The FCC Reauthorization Act (S.2644), which would reauthorize the Commission for FY2017-FY2018. The Senate's package may include other pieces of legislation, which we have summarized in a separate, telecom-specific [alert](#).

Tax Treaties: Pending before the Senate are tax treaties with Spain, Switzerland, Luxembourg, Hungary, Chile, Poland, Japan, and the international convention on mutual assistance on tax matters. The treaties were unanimously approved by the U.S. Senate Foreign Relations Committee in November 2015. Such treaties traditionally pass the full Senate by unanimous consent, but these tax treaties have languished due to a hold by Senator Rand Paul (R-KY) as a result of concerns about the exchange of personal financial data. While Senator Paul may continue his efforts to block the treaties, they could still be brought to the floor for a vote by Senate leadership in the lame duck and would be expected to receive the two-thirds supermajority vote required for passage.

EB-5 Regional Center Program Reauthorization: Offering immigrant investors the opportunity to secure permanent U.S. residency by making a minimal capital investment of \$1 million per investor that will also create at least 10 jobs for U.S. workers, the EB-5 Regional Center program has been operating under temporary reauthorizations since late 2015. Pending legislation to reauthorize and reform the program in both the House and Senate has not yet moved, but we expect to see at a minimum another temporary extension of the program, most likely in a year-end appropriations bill as happened last December. More on the EB-5 program can be found at the Mintz Levin [EB-5 Financing Matters](#) blog.

Amending the Justice Against Sponsors of Terrorism Act (JASTA): Almost immediately after overriding a presidential veto of the Justice Against Terrorism Act (JASTA), members of Congress from both parties expressed a willingness to re-visit the legislation, which would create an exception to sovereign immunity in cases of terrorism on U.S. soil, effectively allowing for lawsuits against the Government of Saudi Arabia related to the 9/11 attacks. While the White House forcefully lobbied against the bill, Republican leaders in both the House and Senate argue that the President did not adequately consult with Congress on the potential consequences to the bill as written. While GOP leadership has not set a clear timeframe for a potential fix, Senate Foreign Relations Committee Chairman Bob Corker (R-TN) has suggested JASTA could be re-visited in the lame duck.

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