



ML Strategies Legislative Update

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Summer is (Almost) Over & Congress is Back!

While summer isn't officially over until September 22, for most here in the nation's capital the vacations are nearly completed and it is back to work as Congress returns from the long August recess and Labor Day holiday.

Rounding out 2015 and the first session of the 114th Congress, the House is scheduled to be in session for 11 weeks before the year's end, while the Senate is scheduled to be in session for 12 weeks. Both chambers face a number of significant legislative challenges with several "must pass" bills needing action before pending expiration dates, while other proposals that don't have a deadline could still see action – some this year, and others likely slipping to 2016.

While this update addresses the various legislative proposals separately, ML Strategies' view is that the most likely scenario is some potentially very large legislative vehicles moving at the end of the year, including perhaps a large appropriations deal that addresses future spending, as well as a package that could include an increase in the debt limit, a highway bill, and a tax extenders bill. While none of these omnibus legislative packages are likely to include any major tax reform measure, repeal the Affordable Care Act (ACA or Obamacare), or end President Obama's climate change agenda, they could include some more modest proposals such as fixes to the ACA, territorial tax reform, delay of the Administration's proposed ozone rule, relaxing to some degree the ban on crude oil exports, and others.

A more unpredictable aspect of the Congressional agenda is how presidential politics could have an impact. For instance, Senator Ted Cruz (R-TX) is threatening to force a government shutdown over funding for Planned Parenthood, while Senator Rand Paul (R-KY) is raising privacy concerns that could impact the fate of the cybersecurity bill.

Following are some of the legislative proposals that are likely to be addressed over the next few months, including those with a high probability of final passage this year, as well as others that could see action but perhaps not final passage until 2016.

Fiscal Year 2016 Appropriations

With the next fiscal year starting on October 1st, the full House has approved six of the twelve annual spending bills, while work in the Senate on appropriations stalled earlier in the summer with Democrats blocking action in an effort to influence the larger debate over spending levels for domestic and defense priorities by providing sequestration relief. As early as September 9th, we could see a proposed Continuing Resolution (CR) from House Republicans that is "mostly clean" of non-spending language and will fund

federal activities for some short period of time until a longer-term solution is negotiated. Without an agreement or a CR, we could see another government shutdown. Still unclear is how – or even if – reconciliation will be used in the budgetary process. Congressional Republicans have long eyed using the reconciliation process to repeal Obamacare, but there are obstacles to its use for this purpose, including the recent Congressional Budget Office (CBO) score that showed it to be a budget buster.

Highway Bill

Before leaving for the recess, the House and Senate approved a three-month authorization of the Highway Trust Fund (HTF) that, at the time, lawmakers believed would provide funding for the HTF through mid-December, potentially setting up a fall debate on a multi-year surface transportation measure. However, on September 8th, the Department of Transportation (DOT) updated its estimate for when the HTF would likely require another cash infusion. In its latest calculations, DOT said the HTF's mass transit and highway accounts are unlikely to run out until sometime between July and October 2016, potentially eliminating some of the urgency for Congress to act on a multi-year extension this year. Before leaving for August, the Senate passed a six-year transportation bill that included a five-year reauthorization of the Export-Import (Ex-Im) Bank. While the House was previously expected to take up a similar measure upon its return, the latest announcement from DOT may lessen the priority the highway bill is given on the legislative agenda. While the DOT update eases some of the pressure for Congress to act quickly identify pay-fors and determine how to handle the Ex-Im Bank reauthorization, the new estimate also continues to complicate the prospects for a long-term highway bill extension because it pushes the funding deadline up against Election Day 2016.

Export-Import Bank Reauthorization

The Ex-Im Bank's authorization expired on June 30th despite an aggressive campaign by the business community to see it reauthorized. This left the Ex-Im Bank unable to launch any new work, but with funding through the end of the current fiscal year on September 30th to continue working on existing projects. As noted above, the six-year Senate transportation bill includes a five-year reauthorization of the Bank. With strong House Republican opposition to renewal of the charter and the prospects for a long-term transportation extension unclear, the debate will continue on how to handle the Ex-Im Bank reauthorization post-recess. The White House has included Bank reauthorization in a list of projects it would like to see included in the CR described above.

Customs Reauthorization

The Trade Facilitation and Enforcement Act reauthorizes activities of U.S. Customs and Border Protection and also includes provisions to modernize the customs process, including language that would increase the U.S. de minimis duty threshold for low-value imports and provisions related to intellectual property protection. The bill was taken up during consideration of other trade measures earlier this summer and has been passed by the House of Representatives and Senate, but needs to be conferenced to reconcile differences over various issues such as currency manipulation.

National Defense Authorization Act (NDAA)

The House and Senate have each passed their annual National Defense Authorization Act (NDAA), but have not yet been able to conclude conference negotiations, which have bogged down over issues such as acquisition reform, military pay and benefit reforms, and the Guantanamo Bay detention facility. With that said, Congress has passed an annual NDAA for the past 53 consecutive years, so odds are this Congress will do the same. However, final action on the NDAA may not come until December.

TSCA Reform

The Frank R. Lautenberg Chemical Safety for the 21st Century Act was reported out of the Senate Environment and Public Works Committee in June and now has 52 cosponsors, suggesting a successful Motion to Invoke Cloture (60 votes needed to end debate and move to consideration) is within reach whenever it is brought up on the Senate floor. In a vote of 398-1 the House passed its own TSCA reform

bill, the TSCA Modernization Act, in June. While the two bills differ, the momentum appears to be on the side of Congress approving a bicameral deal that would reshape decades-old rules for the Environmental Protection Agency to evaluate new chemicals. Depending on the busy fall schedule, we may see movement on TSCA reform before the end of the year, but it may slip into 2016.

Telecommunications

Spectrum continues to be a priority issue on Capitol Hill. The Senate Commerce Committee will likely focus on licensed spectrum in the fall work period, including efforts to draft a bill that identifies ways in which Federal agencies might be incentivized to share or give up spectrum. This potential bill may also include provisions related to wireless towers on Federal lands and in Federal buildings. The Committee may also examine the video and broadband landscape, but it is unlikely they will open the door to further discussions on Title II. Negotiations surrounding a potential net neutrality bill are still ongoing between Chairman Thune and Ranking Member Nelson and there may be a bill in mid-to-late September if they are able to arrive at a consensus. On the House side, the Energy & Commerce Committee will also likely continue examining issues surrounding government spectrum, with more briefings from government agencies including Department of Transportation, Federal Communications Commission (FCC), and National Telecommunications and Information Administration (NTIA). Both chambers will likely also continue to examine issues surrounding unlicensed spectrum and LTE-U. The FCC will begin examination of the proposed transaction involving Charter Communications, Time Warner Cable, and Bright House Networks this fall.

Energy Legislation

The House and Senate are both working on a bipartisan basis to make some updates to energy policy. Just before the recess, the Senate Energy and Natural Resources Committee reported out a broad bipartisan bill that includes a wide range of policy measures, from expediting the Department of Energy's liquefied natural gas export approval process; to increasing electric grid cybersecurity provisions; to reauthorizing basic and experimental energy research programs; to ensuring grid reliability; to providing for 26 energy efficiency provisions, 19 of which are related to building efficiency; to encouraging advanced vehicles; to updating the Federal Energy Regulatory Commission's hydropower licensing process; and more. The five-part bipartisan strategy would be the most significant update to energy law in a decade. The committee managed to avoid issues that could endanger the bill, but the vote sets up a potentially more divisive debate when the measure comes to the Senate floor. Senate Majority Leader Mitch McConnell (R-KY) has not yet committed floor time for the measure. The committee also approved by a large margin the Shaheen-Portman energy efficiency bill (S. 720) as well as the Offshore Production and Energizing National Security Act, which combines Senator Murkowski's plan to lift the 40-year-old ban on crude oil exports with an expansion of offshore drilling and coastal state revenue sharing. Despite the fact that much of the Shaheen-Portman energy efficiency package is included in the broader bill, the committee moved forward with the standalone language as well at the request of Senator Rob Portman (R-OH) in case the broader bill gets bogged down by amendments or unrelated political issues, as the energy efficiency measure did last time around. Given the busy fall schedule, filled with deadlines and expirations of other items, we are likely to see a more serious return to Senate energy legislation in 2016. On the House side, the Energy and Commerce Subcommittee on Energy and Power marked up and approved the lower chamber's four-part bipartisan energy bill also just before the recess. The most controversial measures, including a repeal of the crude oil export ban, language that would have prevented the Department of Energy from implementing furnace efficiency standards, and a repeal of the 2007 law requiring federal buildings to phase out fossil fuel use by 2030, were left out of the package in an attempt to secure sufficient bipartisan support. The package does include measures to streamline the federal citing process for interstate natural gas pipelines and to allow the Department of Energy to take emergency measures to protect grid security, among other things. Committee Chair Fred Upton (R-MI) intends for the full House Energy and Commerce Committee to consider the bill by mid-September, with the legislation on the House floor by the end of the month. Similar to promises from Senate Energy and Natural Resources Committee Chair Murkowski and Ranking Member Cantwell, Representative

Upton and House Energy and Commerce Committee Ranking Member Frank Pallone (D-NJ) have agreed to only add language that both parties can accept, keeping the measure free of “poison pills” that could jeopardize its chances for passage, though the legislation may very well change significantly in the next couple of months.

Elementary and Secondary Education Act (ESEA)

In July, the Senate approved the Every Child Achieves Act in a vote of 81-17. The bill was introduced by Senate HELP Committee Chair Lamar Alexander (R-TN) and Ranking Member Patty Murray (D-WA) as a means to modernize the previous reauthorization of ESEA, the No Child Left Behind Act. The House version of ESEA reauthorization, the Student Success Act, was also approved in July by the House in a vote of 218-213. While there is much work to be done to reconcile differences between the two measures, having both passed in their respective chambers bodes well for ESEA reauthorization in this Congress.

Healthy and Hunger-Free Kids Act

On September 17th the Senate Agriculture Committee will markup a bipartisan child nutrition bill to discuss the legislation and any potential changes before sending it to the full Senate for consideration. Congress has until September 30th to reauthorize the Healthy and Hunger-Free Kids Act of 2010, which funds and sets policy for USDA's core child nutrition programs, including the National School Lunch Program and the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). A fight looms over the school lunch program, with Republicans hoping to roll back regulations limiting sodium, fat and sugar as well as the mandates that all grain products are whole grain-rich and that kids take a serving of fruits or vegetables.

21st Century Cures Act

With the passage of the 21st Century Cures bill in the House, attention now turns to the Senate and the planned negotiations to create a final piece of legislation. The Senate Health, Education, Labor and Pensions Committee will work on a bipartisan draft of its variation of the House's 21st Century Cures Act during the fall and intends to pass it by the end of the year. Criticisms remain from the House version of the bill; chief among these is the regulation of health software under FDA authority. The FDA has raised concerns with the House's regulatory language; their attention will now turn to how the Senate will frame current exemptions from health software regulation in their version of the bill.

Targeted Health Care “Fix” Bills

In the wake of the King v. Burwell decision, the business community has written letters to the House and Senate, urging them to take up and pass Affordable Care Act “fix” bills. In this space, the House Ways and Means Committee is currently planning a markup of the following bills, among other possible items: H.R. 2911, the Small Business Healthcare Relief Act, which aims to roll back existing Treasury Department guidance issued under the authority of the Affordable Care Act prohibiting the use of Health Reimbursement Arrangements (HRAs); H.R. 863, the Simplifying Technical Aspects Regarding Seasonality Act of 2015 (the STARS Act), which amends the Internal Revenue Code to exempt seasonal employees from the definition of “full-time employee” for purposes of the employer mandate to provide employees with minimum essential health care coverage; H.R. 1270, the Restoring Access to Medication Act, which would restore the ability of plan participants to use the funds in their Health Savings Account, Flexible Spending Account, Health Reimbursement Account, or Archer MSA to purchase over-the-counter medications; and H.R. 2712, the Commonsense Reporting and Verification Act of 2015, which would provide options for employers to administer and offer health coverage to their employees by creating a voluntary prospective reporting system and streamlining the reporting process for businesses. HRAs in particular are getting attention from Committee members. Other markups, including a markup of H.R. 1624, the Protecting Affordable Coverage for Employees Act, which defines small group markets, may be scheduled. The House Energy and Commerce Committee may take up other bipartisan measures in a markup to follow.

Efforts at Reconciliation & ACA Repeal

In June the House passed a repeal of the medical device tax and the Senate is expected to take up a similar bill by the end of the year, although Majority Leader McConnell has not set a date for a vote on the bill. The House Ways and Means Committee, meanwhile, is working on a bill to repeal health care taxes, including the controversial "Cadillac tax" on high-cost health plans. Roughly half of the House has signed on as co-sponsors to either one of the two Cadillac tax repeal bills. Republicans have not yet made a serious effort to use the reconciliation process for repealing the Affordable Care Act, suggesting that repeal efforts may have to wait at least until next year or even until a Republican president takes office with a Republican majority in Congress could do so with a supermajority. However, no decisions have been made as to how to utilize the reconciliation process, leaving the option on the table. Republicans are also considering using the reconciliation process to reach agreement on tax reform or an issue that could pass out of the Senate with a simple majority vote.

Iran Resolution

Congress will have until September 17th to act on the Iran nuclear agreement. Both the House and Senate are expected to consider resolutions of disapproval as the first matter of business in the new work period. On September 2nd, the White House secured its 34th Senate vote in support of the agreement, giving the Obama Administration the votes needed to sustain a possible veto of a resolution of disapproval, which would ultimately allow for the deal's implementation. On September 8th, the White House secured 41 votes in support of the Iran deal in the Senate, creating enough momentum in the upper chamber to reject the disapproval resolution altogether. While it was not immediately clear how Senate votes over the next two weeks will be structured, if the 41 Democrats backing the deal stick together on a filibuster, the disapproval resolution may never actually reach the president's desk. Regardless of any activity in Congress, the Obama Administration's implementation of the Iran nuclear accord is expected to move forward.

Cybersecurity & Data Breach

The Senate made some progress toward passing the Cybersecurity Information Sharing Act (CISA) before leaving for August, but was unable to reach final passage of the measure. The last action of the Senate before recess was to reach an agreement to limit amendments, and the Senate could complete work on CISA this fall. After passing the Protecting Cyber Networks Act in April, the House will likely see continued action on the Data Security and Breach Notification Act. This act has a difficult path forward, as privacy advocates argue it leaves consumers worse off by undercutting stronger state laws and eliminating national protections they now enjoy.

Patent Reform

Efforts to pass a patent reform bill will continue when Congress returns, with the House's Innovation Act and Senate's Protecting American Talent and Entrepreneurship Act (PATENT) Act. While there appears to be consensus that legislation should address abusive patent litigation while preserving the enforceability of legitimate patents, there are several sticking points to address before any bill will be passed. The House bill in particular will see a fight, as it splits the pharmaceutical and technology industries, with pharma companies pushing to be exempt from a streamlined patent review process and tech companies fighting to keep the measure intact.

Dodd-Frank Reform

Despite the White House having indicated that the president would veto any legislation to change the Dodd-Frank Wall Street reform legislation, in June the Senate Banking Committee approved, along a straight party line vote, the Financial Regulatory Improvement Act, introduced by Chairman Richard Shelby (R-AL). The legislation faces a steep challenge on the Senate floor where 60 votes would be needed for the legislation to advance. However, Chairman Shelby has indicated that he intends to push ahead in efforts to modify the Dodd-Frank statute. Also in June, Democratic members of the Senate

Banking Committee and House Financial Services Committee joined together to introduce their own, less sweeping, Dodd-Frank reform legislation. The bill, known as the Community Lender Regulatory Relief and Consumer Protection Act, is said to have the unanimous support of all Democratic members of both committees and is intended to offer a more modest “tweaking” of the Dodd-Frank law.

Debt Ceiling

The Congressional Budget Office (CBO) has said that it expects the ability of the Treasury Department to use extraordinary accounting measures to meet the federal government’s financial commitments to be exhausted by sometime in November or December. The last suspension of the debt ceiling expired in March, after which the Treasury Department has used various options to keep the nation’s debt below the \$18.113 trillion limit imposed by Congress. CBO had previously predicted that the debt ceiling would be exhausted as early as October, but increased revenues of \$60 billion from corporate and individual taxes, allow for the later date. Any year-end legislation to increase or suspend the debt ceiling could be used as a legislative vehicle for other measures such as the highway bill.

Tax Extenders

The Senate Finance Committee has approved a two-year extension of more than fifty expiring tax provisions, covering calendar years 2015 and 2016. The House Ways and Means Committee has not yet moved a similar bill, choosing instead to approve several measures that would make certain of these expiring provisions permanent, allowing others to expire. At a minimum, Congress is likely to extend all or almost all of these expiring provisions through the end of 2015, allowing the debate to continue in 2016. We are very likely to see tax extenders be included in an end of the year package, whether that be via some compromise that extends some of them permanently, allows others to expire, and extends some for a brief period while beginning their phase out; a tweaked package; or as a more straight forward extension that buys time for a tax reform debate in 2017. We may also see a return of the compromise measure that ultimately crumbled at the end of the last Congress.

FAA Reauthorization

The House Transportation and Infrastructure Committee is expected to consider the FAA reauthorization bill before its expiration on September 30th. The bill, which would reconfigure the management of the U.S. Air Traffic Control system under a new independent entity, would have a large impact on the deployment of air traffic infrastructure, flight procedures, and technologies under the continued rollout of FAA’s NextGen program. Given House and Senate disagreement on the details of the bill, especially concerns over privatization of air traffic control, it is likely we will see a stopgap funding bill lasting a few months or potentially into mid-2016.

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