



ML Strategies Update

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ML Strategies, LLC
701 Pennsylvania Avenue, N.W.
Washington, DC 20004 USA
202 296 3622
www.mlstrategies.com

NOVEMBER 2, 2016

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

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 Elections: Aside from legislative work, the lame-duck will also see the House and Senate elect new leaders for the next congress. Senate Majority Leader Mitch McConnell (R-KY) is expected to remain GOP leader, whether his party is in the majority or minority. Democrats will have a new leader regardless of the outcome of the election, 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 – whether that means he is Majority Leader or Minority Leader. In the House of Representatives, the GOP is potentially facing turbulence with the House Freedom Caucus unhappy with Speaker Paul Ryan (R-WI) and his distance from the party's presidential nominee. His tenure as Speaker could depend on how many seats the GOP potentially loses on November 8th and whether a credible challenger for the speakership emerges. 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. However, there are currently three likely 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.

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. 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 to 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. Depending on the election results, either Republicans or Democrats in the House may feel dissatisfied with a small bipartisan bill and choose to wait until next Congress to move forward with a larger measure. Senate Energy and Natural Resources Committee Chair Lisa Murkowski (R-AK), the conference chairwoman, has expressed optimism that negotiations will yield a compromise acceptable to both chambers and the White House, but has acknowledged that the more contentious issues may have to be left by the wayside. Committee Ranking Member Maria Cantwell (D-WA) is also hopeful also that they can finalize the legislation during the lame-duck session.

Tax Extenders: The Omnibus 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 (FAA) reauthorization bill, but that opened the door to members offering various other tax provisions, ultimately tanking the effort. Senate Majority Leader Mitch McConnell (R-KY) has 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.

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. While Senate Majority Leader Mitch McConnell listed passing Cures as one of his top priorities in the lame-duck, its prospects hinge on the outcome of the election. At question is whether an incoming administration – assuming it is a Democratic one – believe it is better off with Cures off the table or held as leverage in next year's negotiations over user fee acts – the Prescription Drug User Fee Act (PDUFA), the Medical Device User Fee Amendments (MDUFA), etc. The same holds true for mental health reform. It's worth noting that there is bipartisan buy-in, as noted by McConnell, seeming to suggest that passing Cures could be a win-win if Administration initiatives like the President's Precision Medicine Initiative and the cancer moonshot receive additional funding. Democrats are also pushing for inclusion of drug pricing and increased spending for the National Institutes of Health as trade-offs for their support. Whether Congress is willing to support those initiatives in an effort to get Cures done remains to be seen.

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.

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, is due to expire 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.

FCC Nominations: Democratic Commissioner Jessica Rosenworcel's bid for a second term on the Federal Communications Commission has been in limbo all year. Senate Democrats argue that Rosenworcel is entitled to a vote due an agreement party leaders struck last Congress to re-confirm Republican Commissioner Michael O'Rielly in December of 2014 and Rosenworcel the start of 2015. The conventional wisdom a month ago was that the Senate probably would not re-confirm Rosenworcel in the lame-duck. However, now her prospects seem to have brightened. Although party leaders have not scheduled a vote for her re-nomination, members of both parties believe the Senate will grant her a second term sometime before Christmas.

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 likely will 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](#).

Supreme Court Nomination: Having declined to hold hearings on President Obama's nomination of Merrick Garland to the Supreme Court, Senate Republicans have vowed to wait until after the presidential election to consider a successor to the late Justice Antonin Scalia. If Secretary Hillary Clinton were to win the presidency, Republicans would perhaps be inclined to confirm Garland, whose record on the D.C. Court of Appeals suggests he would be a relative moderate on the high court. Democrats would probably seize the opportunity to confirm Garland, although they likely would face pressure from the left, which would want Clinton to pick a more liberal nominee. Clearly, a lame-duck confirmation is subject to a lot of ifs – including if time even permits a hearing, floor consideration, or vote – but it is certainly a possibility.

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.

Trans-Pacific Partnership: Trade, specifically free trade agreements, has become a campaign issue, with both Hillary Clinton and Donald Trump staking out their opposition to the Trans-Pacific Partnership (TPP) trade agreement between 12 Pacific nations – Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. TPP is a high priority for the Obama Administration, and the president would very much like to see Congress approve the agreement before the end of his Administration. However, despite strong support from the business community for the agreement, there is strong opposition on Capitol Hill from both Democrats and Republicans. The Obama Administration will continue to push for approval in the lame-duck, but the likelihood of success is increasingly dim.

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 Omnibus 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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