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FY17 Appropriations

The House and Senate Appropriations Committees continue to move forward on individual FY17 spending measures based on discretionary spending levels enshrined in last fall's bipartisan budget deal. Nevertheless, prospects for enacting the 12 bills that collectively fund the U.S. government by the start of the October 1 fiscal year deadline are increasingly unlikely. That means Congress will have to enact an interim stop gap measure (called a "Continuing Resolution," or CR) to keep the government operating until final FY17 bills become law.

Three factors account for the need for a CR. First is the abbreviated congressional calendar. With Congress going into recess in mid-July for the national party conventions and the annual August recess, the House and Senate have a total of 12 legislative weeks from May through September to debate, negotiate, finalize and clear for the White House all 12 measures. Although this may be enough time for each chamber to pass a handful of bills, and Senate Majority Leader Mitch McConnell (R-KY) is dedicating floor time to consideration of all 12 Senate bills, the difficult task of negotiating the final legislation will likely have to wait until after October 1. Second, compounding the time crunch is the absence of a budget resolution in the House, which means the House is unable to bring appropriations bills to the floor before May 15, including the four bills approved by the House Appropriations Committee. Third is continued opposition by a group of House Republican fiscal hardliners to last fall's budget deal that serves as the basis for the FY17 appropriations bills being drafted in committee. Although some members of that group have indicated possible floor support after May 15 for national security-related spending measures, such as the Defense and Military Construction-Veterans Affairs appropriations bills, House Speaker Paul Ryan (R-WI) cannot count on them for passing domestic spending bills.

If Speaker Ryan is unable to appease demands of Republican fiscal hardliners, he may need to rely on Democrats to pass the remaining spending bills, something he hopes to avoid doing for high visibility legislation in an election year.

Takeaway: Despite the likely need for an interim CR in the fall, congressional leaders consider the FY17 bills a top priority for this year's legislative session. With little else active on the legislative agenda, the spending bills are the main targets of both political parties for carrying out their respective spending and policy preferences. Bills that have advanced so far include:

- **Agriculture-Rural Development-FDA**: The House Appropriations Committee has approved its version.
- **Commerce-Justice-Science**: The Senate Appropriations Committee approved its version.
- **Energy and Water Development**: The House and Senate Appropriations Committees have approved their respective versions but the legislation's fate in the full Senate is uncertain.

- **Legislative Branch**: The House subcommittee approved its version, but a full committee markup is not yet scheduled.

- **Military Construction**: The House and Senate Appropriations Committees have approved their respective versions.

- **Transportation-Housing Urban Development**: The Senate Appropriations Committee approved its version, which may go to the Senate floor after the Energy and Water bill.

Republicans Fight Back Against Fiduciary Rule

As expected, on April 9, the Obama Administration finalized the so-called Fiduciary Rule. The rule, which was formally adopted by the Department of Labor, requires retirement investment advisors to act solely for the benefit of their clients. Democrats say this will prevent conflicts of interest. Republicans, who fear it will raise the cost of investment advice, have moved to challenge the rule under the Congressional Review Act, which grants Congress 60 days to pass a disapproval measure, thus preventing the rule from coming into force. In the House, Rep. Phil Roe (R-TN) introduced a measure on April 19. That follows Senate introduction of a similar measure the day before by Senate Labor Committee Chairman Lamar Alexander (R-TN), Sen. Johnny Isakson (R-GA) and Sen. Mike Enzi (R-WY). It is co-sponsored by another 30 Senate Republicans.

Takeaway: The path forward for the resolution is unclear, and it would almost certainly face a presidential veto if it is adopted. The Fiduciary Rule is a hallmark financial regulation for the Obama Administration. A two-thirds majority in both chambers would be needed to override a veto.

FAA Authorization

On April 19, the Senate passed HR 636, the Federal Aviation Administration (FAA) Reauthorization Act, by a vote of 95 to 3. The bill authorizes $33 billion in spending to fund the operations of the FAA through the end of fiscal year 2017. The current authorization is set to expire on July 15. Senate Commerce, Science and Transportation Committee leadership expected to include a number of amendments related to taxes, but an objection prevented their adoption. The bill does include new airport security measures, provisions that would give the FAA more oversight of unmanned aircraft operators and manufacturing, and several measures that address the deployment of the NextGen air traffic control system. What the Senate bill does not include is the linchpin of its House companion legislation, the privatization of the nation's air traffic control system.

In February, the House Transportation and Infrastructure (T&I) Committee reported its own FAA authorization legislation that sought to spin off the nation's air traffic control system into a private nonprofit organization. The legislation, proposed by Committee Chairman Bill Schuster (R-PA), is widely opposed by both Senate and House Democrats, and many Republicans are lukewarm to the idea. In response to HR 636's passage in the Senate, Chairman Schuster commented "We will take a look at the completed product, but in the House, we will continue to push forward with the AIRR Act. Transformational air traffic control reform is absolutely necessary to end the unacceptable status quo at the FAA and to ensure the future of America's aviation system."

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Meanwhile, Senate appropriators included pointed language in a transportation funding bill reported on April 21, urging the authorizers to forego a contentious fight over removing air traffic control from the FAA, and threatening to cut off funding for any such effort. "Given the growing Congressional opposition to removing the ATO (Air Traffic Control Organization) from the FAA, the Committee will prohibit funding for this purpose should there be any effort to bypass the will of Congress," the appropriators wrote.

Takeaway: Despite the prevailing wisdom that a bipartisan accord could be achieved quickly on FAA reauthorization absent the contentious air traffic control privatization measure in the House bill, T&I Chairman Shuster appears to remain committed to the proposal. With the current FAA extension expiring on July 15, and with limited legislative days remaining until Congress adjourns on that day for the Presidential nominating conventions and the summer recess, some believe it may be impossible to reconcile the House and Senate bills by then. In that case, look for possibly another extension authorizing the agency through the election.

Zika Emergency Supplemental

On April 7, the White House announced it will be repurposing $589 million to aid in the fight against Zika – $510 million of the remaining funds from the fight against the Ebola virus and $79 million from other accounts used to fight epidemics and to stockpile vaccines. This action comes in the wake of significant congressional Republican opposition to the Obama Administration's $1.9 billion emergency supplemental spending request. However, the White House insists that it has not given up on passing a supplemental appropriation, and on April 18, it submitted an updated version of the supplemental request that redirects previously requested money away from a contingency fund and laboratory construction efforts and toward vaccine research and development.

House Republicans continue to express concern over the request. When discussing a perceived lack of clarity from the Administration, House Appropriations Committee Chairman Hal Rogers (R-MI) said "[W]e simply cannot get adequate information from the administration about what moneys they absolutely need today and what they need for '17, and we simply haven't gotten it."

However, in the Senate, Senators Patty Murray (D-WA) and Roy Blunt (R-MO) are negotiating a bipartisan proposal to provide at least $1.1 billion of the President's $1.9 billion emergency appropriations request. Chairman of the Senate Appropriations Committee Thad Cochran (R-MS) said that negotiations are ongoing and any agreement is likely to be attached to an unnamed spending bill.

Takeaway: Despite the Obama Administration's submission to Congress of an updated emergency supplemental funding request, congressional Republicans remain unconvinced, insisting Democrats are more interested in publicizing the issue than in coming to some sort of an agreement. House Republicans are pushing for all Zika-related funding to be included in the 12 regular appropriations funding bills.

Efforts to Combat the Opioid Crisis

According to press reports, House Republican leaders are not planning to include new funding in their legislative response to the national opioid epidemic. The lack of funding for the long-awaited package is likely to set off a major battle with House Democrats, who have demanded millions of additional dollars for initiatives like prescription drug monitoring and doctor education programs. Republican leaders, however, insist that all spending should be included in the 12 regular appropriations funding bill. The legislation, which may end up being included in as many as eight separate bills, is expected to be made public in the first week of May. In March, the Senate overwhelmingly passed legislation aimed at combatting the opioid epidemic, but failed to include any funding in support of the efforts.

Takeaway: Republican leaders say they hope to pass the House proposals in May and move to conference the House and Senate legislation sometime this summer. Funding projects for efforts to fight the country's opioid crisis have been included in a number of congressional Republicans' appropriations bills.

Mental Health Reform Efforts Continue

Mental health reform advocates in Congress are facing numerous obstacles to advancing legislation in both the House and the Senate. In the House Energy and Commerce Committee, Democrats and Republicans have failed to come to an agreement over how best to move forward and are supporting two separate legislative proposals.

In the Senate, it looked as if bipartisan legislation was advancing with the March 16 Senate Health, Education, Labor & Pensions (HELP) Committee passage of the S. 2680, the Mental Health Reform Act of 2016. However, Senator John Cornyn (R-TX) is pushing to combine his mental health bill with the Senate HELP Committee's legislation. Some Senate Democrats, including Senator Chris Murphy (D-CT), an advocate of mental health reform and a co-sponsor of S. 2680, objects to certain sections of Sen. Cornyn's bill that he says would make it easier for mentally ill people to acquire guns. If the controversial provisions are adopted, it could undermine Democratic support for S. 2680. Senator Murphy said such provisions would prevent him from supporting the bill. "We're still talking to [Cornyn] about whether we can move forward without those provisions," Murphy said. "Obviously I can't support a bill on the floor that has those provisions in it."

Takeaway: Negotiations between Senate HELP Committee leaders and Senator Cornyn remain underway, but mental health reform advocates fear that if the gun-rights provisions from Senator Cornyn's legislation make it into the bill, it will doom the legislation's chances at passage.

21st Century Cures/Innovations Bills

The Senate Health, Education Labor & Pensions (HELP) Committee advanced a total of 19 biomedical innovation bills that complement the House-passed 21st Century Cures Act, but the Committee agreed the legislation will not be considered on the floor without an agreement on mandatory funding for the National Institutes of Health (NIH). HELP Committee Chairman Lamar Alexander (R-TN) said the package could be "the most important bill Congress enacts this year...but we're not there yet." Senate Democrats have proposed a $5 billion per year "Biomedical Innovation Fund" for NIH and the Food and Drug Administration projects.

Takeaway: The 21st Century Cures package hangs in the balance while Senate HELP committee leaders try to finalize mandatory funding and offsets to pay for the measure. Consideration by the July 4 recess is still possible, although prospects look bleak.

CMMI Unveils New Primary Care Payment Model

On April 11, the Center for Medicare and Medicaid Innovation (CMMI) announced a five-year Comprehensive Primary Care Plus model (CPC+) to build upon its ongoing Comprehensive Primary Care Initiative. CPC+ will be a regionally-based, multi-payer model that includes two primary care tracks focused on improving care delivery, specifically: 1) access and continuity; 2) care management; 3) comprehensiveness and coordination; 4) patient and caregiver engagement; and 5) planned care and population health. Under both tracks, primary care practices will be reimbursed a risk-adjusted prospective case management fee and will have the opportunity to receive performance-based incentive payments with higher payments under Track 2. In an effort to encourage the use of health IT and data sharing, beginning in 2018, participating primary care practices will be required to use certified electronic health record technology. Track 2 participants will be required to sign a memorandum of understanding with health IT vendors demonstrating vendors' commitment to partnering with practices.

Takeaway: CPC+ represents the Center for Medicare and Medicaid Services (CMS) largest investment in primary care transformation. Each track outlined in the announcement will include up to 2,500 primary care practices, and CMS intends to select up to 20 geographic regions for the model. CMS will accept payer proposals for participation in CPC+ until June 1, 2016, and practices will be required to submit applications for the selected regions between July 15, 2016 and September 1, 2016.

MACRA Implementation Rule Released

On April 27, the Center for Medicare and Medicaid Services (CMS) released its long awaited proposed regulation implementing the Medicare Access and CHIP Reauthorization Act (MACRA). Enacted on April 16, 2015, MACRA most notably repealed the sustainable growth rate formula for calculating Medicare payment updates for physicians. In its place, MACRA directed CMS to develop a new merit-based incentive payment system (MIPS) for eligible clinicians and to incentivize their participation in alternative payment models, or APMs.

As proposed, beginning in 2017, Medicare physicians and other eligible clinicians will have the option of participating in either the MIPS or APMs with the goal of moving clinicians toward greater health care transformation. In doing so, eligible Medicare clinicians will have the opportunity to be excluded from MIPS program requirements and receive a five percent bonus payment from 2019 through 2024 and a higher fee schedule update after 2026. The MIPS replaces a patchwork of programs, including the Physician Quality Reporting System, the Value Modifier Program, and the Medicare Electronic Health Record Incentive Program, rewarding or penalizing clinicians based on their performance across four categories – quality, advancing care information, clinical practice improvement activities, and cost.

While initial reactions to the proposed regulation are positive, clinicians will be cautiously evaluating their ability to satisfy the proposed APM requirements. CMS has already identified a handful of eligible APM models, including the downside risk-bearing tracks of the Medicare Shared Savings Program and the new CPC+ model.

Meanwhile, members of Congress have already indicated their interest in ensuring that any implementation of MACRA aligns with the intent of the law and enables Medicare clinicians to participate effectively.

Takeaway: The long-awaited MACRA proposed regulation establishes a new two-path Quality Payment Program based on the MIPS and APMs. The regulation takes significant steps to improve care delivery and incentivize the shift away from fee-for-service. CMS will accept comments on the proposed regulation through June 27.

Long-Awaited Medicaid Managed Care Rule Released by CMS

On April 25, the Center for Medicare and Medicaid Services (CMS) announced it had finalized the long-anticipated Medicaid Managed Care rule. The rule, which will be published in the May 6 edition of the Federal Register, will take effect in July. According to CMS, the final rule "modernizes the Medicaid managed care regulations to reflect changes in the usage of managed care delivery systems." The rule "aligns, where feasible, many of the rules governing Medicaid managed care with those of other major sources of coverage, including coverage through Qualified Health Plans and Medicare Advantage plans; implements statutory provisions; strengthens actuarial soundness payment provisions to promote the accountability of Medicaid managed care program rates; and promotes the quality of care and strengthens efforts to reform delivery systems that serve Medicaid and CHIP beneficiaries."

Notably, the rule subjects Medicaid Managed Care providers to medical loss ratios (MLRs). The rule also establishes Medicaid and CHIP's first quality rating system, which will give consumers more information about plans. This is similar to Medicare Advantage's star rating system.

Takeaway: The new Medicaid Managed Care rule, which is more than 1,400 pages long, is a significant change to the Medicaid Managed Care system that has become the most common form of Medicaid, covering nearly 48 million Americans. Given the breadth of the changes (CMS hasn't issued any new regulations for the program since 2002), those active in the Medicaid Managed Care sector should pay particular attention to the newly released rule.

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