

The road ahead: What's coming in the final months of the 113th Congress and the Lame Duck session

September 3, 2014

Our Washington team examines how election concerns—and results—will influence legislation on the hot issues, discusses the trends in the House and Senate races and looks into the crystal ball of election predictions.

Contents

Notes from the editors 2

Energy 3

Financial Services and Taxation 3

Health Care 5

Immigration 5

FY 2015 Appropriations 6

Telecommunications 6

Cybersecurity 7

Export-Import Bank 8

Election Outlook 8

Notes from the editors

As Congress returns from the August recess, election year politics will play an increasing role on Capitol Hill. Congress is expected to be in session fewer than a dozen days between now and Election Day. This will tempt Congressional leaders to bring to the floor a series of “messaging bills” meant to draw contrasts between Democrats and Republicans, and force vulnerable incumbents to stake out positions on controversial issues ahead of the November elections. The piece of legislation most likely to reach the President’s desk in this limited timeframe is a continuing resolution to keep the federal government operating at the current budget levels until final appropriations measures can be enacted. Gone from the debate this year is the prospect of a government shut-down that shrouded past funding extensions—nevertheless, it will be difficult for substantive legislation to advance until after the November elections. Other issues may be a part of the fiscal debate, such as anticipated executive actions by the President on immigration that have elicited a strong reaction from some Republicans.

Dentons’ look at the road ahead in Washington provides a snapshot of the key issues on the agenda before November 4 and in the “Lame Duck” session to follow. Our team examines how election concerns will influence the legislative process and prospects, and how the ultimate election results may influence legislation in the “Lame Duck” and beyond. We also take a look at the trends in the competitive House and Senate races and offer a brief outlook on the most competitive races.



Energy

House Majority Leader Kevin McCarthy (R-CA) plans to revisit several energy and environmental measures in late September, including bills to: approve the Keystone XL (KXL) pipeline, block federal limits on carbon emissions from power plants and expand access to drilling offshore and on federal lands. This will require tough votes for Democratic House members. Energy issues will be important in states like Colorado, Iowa, Kentucky, Louisiana and West Virginia.

Senate Energy Committee Chair, Senator Mary Landrieu (D-LA), recently joined Republicans to pass a bill out of committee approving the KXL pipeline. Senate passage of that bill is unlikely, but it allows Landrieu to tout her pro-energy record, and her role as Chair of Energy serves to highlight issues on which she differs with the Obama Administration's policies on

oil and gas. We expect Landrieu to hold more hearings on issues that will resonate in Louisiana: revenue sharing, energy production on federal lands and coastal restoration.

The Obama Administration will continue work on energy-related regulatory initiatives. In late August, the Environmental Protection Agency (EPA) sent its final 2014 Renewable Fuel Standard (RFS) to the Office of Management and Budget (OMB) for a review that may be complete before Election Day. The Department of Energy finalized its new review process for applications to export liquefied natural gas (LNG) to non-Free Trade Act countries on August 14, and could soon approve several pending applications. The Department of Commerce could act soon to clarify the Administration's crude oil export policy by defining more clearly what qualifies as a refined product that falls outside the ban on exports.

Financial Services and Taxation

Tax Extenders. GOP lawmakers would like to pass "extenders"—bills to extend permanently some of more than 50 expired tax breaks—rather than just extend them for two years, as the Senate would prefer. House Republicans would like to renew the tax breaks in a piecemeal fashion, rather than accept the Senate's approach of a comprehensive extenders bill. They are at an impasse.

In April, the Ways and Means Committee favorably reported six separate bills—each to make permanent an expiring tax provision. None of the six bills included revenue offsets. Democrats are calling for "pay-fors" to cover the costs of permanent extensions estimated by the Congressional Budget Office (CBO) at nearly \$1 trillion in revenue

over the next 10 years. Three of the six stand-alone extenders bills have passed the House, with no prospect of consideration in the Senate. Senate Majority Leader Harry Reid (D-NV) attached the Senate extenders package—a two year extension of the 50 expired tax breaks—to a bill addressing healthcare for veterans. The bill then stalled after Republican senators voted against moving forward, despite general support for the underlying veterans' legislation. It is unlikely that any tax extenders legislation will become law this year.

Terrorism Risk Insurance Act (TRIA). The reauthorization of the TRIA, a program set to expire at the end of 2014, faces many hurdles in the House. In July, the Senate passed a bipartisan seven year TRIA reauthorization bill (S. 2244) by a vote of 93-4, but the House did not take up its version of a TRIA reauthorization bill before the August recess. Prospects are increasing that the issue of TRIA's reauthorization will not be resolved until the Lame Duck session after the election.

The current version of S. 2244 has the support of the White House and would make only minor changes to the 2007 TRIA reauthorization. In contrast, House Financial Services Committee Chairman Jeb Hensarling (R-TX) has sought consistently to eliminate, or radically scale back, the TRIA program and the federal role in

terrorism insurance. Unable to do that, Hensarling has supported H.R. 4871, a TRIA reauthorization bill favorably reported out of the committee by Republicans on June 20th on a party-line vote. H.R. 4871 would extend TRIA for five years, increase the insurer co-pay to 20 percent, raise the program's trigger from \$100 million to \$500 million and bifurcate the program so that the federal share of coverage for nuclear, biological, chemical or radiological (NBCR) attacks would be greater than the federal share of coverage for non-NBCR attacks. House Democrats strongly support passage of S. 2244 and unanimously oppose H.R. 4871.

Corporate Tax Inversion.

Controversy continues to grow over inversions—cross-border transactions in which a US firm merges with an offshore entity to establish tax residency in a foreign country with a lower corporate tax rate. President Obama has called companies who do inversions “corporate deserters who renounce their citizenship to shield profits”. Democrats seek to pass stand-alone legislation to curb corporate inversions, while most Republicans believe that inversions should be addressed, if at all, only as part of a comprehensive tax reform proposal.

Various legislative proposals have been offered to limit or prevent the use of corporate inversions by raising

the foreign ownership threshold for the post-merger entity from 20 percent to 50 percent; broadening the ban on the award of federal contracts to inverted corporations or reducing the amount of interest inverted companies can deduct. Senate Finance Committee Ranking Member Orrin Hatch (R-UT) believes that reform of the tax code is the only way to completely address inversions. He argues that any interim steps to address inversions must not be retroactive or punitive, should be revenue neutral, must favor a territorial tax system and not impede progress toward comprehensive tax reform. There is no reason currently to believe that Finance Committee Chairman Ron Wyden (D-OR) and Ranking Member Hatch can agree on legislation that both the Senate and House would pass and the President would sign.

The President may use his executive authority to address corporate inversions as many Democrats have urged. It is unclear how much can be accomplished administratively. The Treasury Department is now putting together a range of administrative options for executive action that Secretary Jack Lew says would “change the economics of inversions” but has not yet identified any of the administrative options under consideration.



Health Care

A divided Congress and presidential veto threat will preclude the enactment of any Affordable Care Act (ACA)-related legislation when Congress returns to Washington. It is unlikely that the appropriations fights of the past to defund the ACA will recur, apart from rhetoric and amendments with little chance of passage.

The ACA is certain to play a role in many close elections around the country (particularly in Senate races), however, the impact of the law on voters' thinking is unlikely to reach 2010 or 2012 levels. Public opinion of the law has barely shifted since its enactment; the electorate substantially has turned to other issues.

The second annual open enrollment period will begin November 15, after the election. For the three month open enrollment period, the bulk of health reform activity will be directly related to the experiences of consumers in open enrollment. Congress also has temporarily fixed the Medicare physician payment formula through March 31, 2015, avoiding the annual end-of-year scramble to enact Medicare legislation.

Immigration

More than a year after the US Senate passed a comprehensive immigration reform bill, and despite the stream of undocumented migrants from Central America, immigration reform remains stalled in Congress, where the House is expected to take no further action on a reform bill. President Obama has recently indicated that he may use executive orders and agency action to affect changes in our immigration system. He is considering action to provide additional green cards for high-tech workers and family members of US citizens and to forestall deportation for many undocumented immigrants currently in the US.

White House action on immigration is expected soon, following the failure of negotiations with Congress to pass a measure to address the recent surge of migrants from Central America. The president's proposed \$3.7 billion package to address the border crisis, and more modest measures from Republicans in Congress, fell victim to the election politics of immigration, a particularly powerful issue in states where key Senate races will be decided. The President's likely executive actions will further roil the immigration debate. Republicans will cite it as executive overreach. Immigration reform will not pass in this session of Congress, and the politics of the issue ensure that it will be difficult to pass next year.





FY 2015 Appropriations

Despite assent in Congress to the Murray-Ryan agreement—the bipartisan budget conference agreement reached by Senate Budget Committee chairman Patty Murray (D-WA) and House Budget Committee chairman Paul Ryan (R-WI)—on a top line number of \$1.014 trillion for all FY 2015 appropriations, Congress has sent none of its twelve appropriations bills to the President for his signature this year. The House has passed seven bills (Commerce, Justice-Science, Defense, Energy and Water, Financial Services, Legislative Branch, Military Construction and Transportation-HUD), while the Senate has failed to pass even one, though Fiscal Year 2014 will expire on September 30, 2014.

Since Congress is likely to recess from late September through the election, it will almost certainly pass a “Continuing Resolution” (CR) to keep the government running from October 1, 2014 until mid-December 2014. This would allow Congress to put together an omnibus appropriations bill, with all 12 spending bills in a single package, and send it to the President in December. Or Congress could pass another CR during the Lame Duck session and tackle the 12 appropriations bills in early 2015, in the next Congress.

Telecommunications

Congress will continue work on the Satellite Television Extension and Localism Act of 2012 (STELA), which is slated to expire on December 31, 2014. In July, the House approved a bipartisan 5-year extension of the Act, with some changes, including repeal of the set-top box integration ban, prohibiting broadcasters in the same market from joint retransmission consent negotiations, and repeal of rules prohibiting pay-TV providers from blacking out broadcast signals during Neilson “sweeps weeks” periods.

On the Senate side, the Judiciary Committee has reported out a “clean” five year extension, without any of the video reforms that the House adopted. However, Senate Committee on Commerce, Science, and Transportation Chairman Jay Rockefeller (D-WV) and Ranking Member John Thune (R-SD) recently released their “Local Choice”

bipartisan draft proposal. The Senate Commerce Committee would likely consider and report STELA legislation during September, with rumors of a September 17th markup. Majority Leader Reid would prefer for the Senate to pass its STELA bill by unanimous consent. It remains to be seen whether the Local Choice proposal, or any of its components, moves forward with STELA.

The Internet Tax Freedom Act will expire on November 1, 2014. The House has voted for a permanent moratorium on state and local governments taxing access to the Internet. The Senate is considering a shorter-term 10 year extension, but Majority Leader Reid plans to attach the Marketplace Fairness Act, which would require online retailers to collect sales tax. That bill passed the Senate last year. A Senate floor vote is possible in September or it could slip until November, following the election.





Cybersecurity

Congress made some progress on cybersecurity legislation this Congress, but it is doubtful that any more cybersecurity legislation will pass the Senate before the elections. The House has passed numerous cybersecurity bills in this Congress, primarily codifying existing Federal cybersecurity programs, providing increased Federal research and development and enhancing cyber workforce training. However, the House-passed Cyber Intelligence Sharing and Protection Act (CISPA) is seen as the most critical piece of legislation necessary to protect critical infrastructure against cyber threats.

CISPA was sponsored by House Intelligence Committee Chairman Mike Rogers (R-MI) and Ranking Member Dutch Ruppersberger (D-MD) and passed the House in April 2013. It provides for information sharing between the federal government and private sector, and provides liability protections for companies that share cyber threat information with the government. CISPA has been criticized by privacy rights advocates. The President has threatened to veto CISPA due to concerns about individual privacy.

Despite this controversy, Senate Intelligence Committee Chairman Diane Feinstein (D-CA) and Ranking Member Saxby Chambliss (R-GA)

introduced a Senate companion bill to CISPA. Their bill, the Cyber Information Sharing Act of 2014 (CISA), was passed out of the Senate Intelligence Committee in July 2014, by a vote of 12-4. The Administration has raised privacy concerns, but has yet to threaten a veto.

Given the opposition by privacy rights groups and the Administration to the current House and Senate information sharing bills, it is unlikely that there will be any action on either bill before the mid-term elections. After the elections, the prospects for Senate passage and eventually sending a bill to the President will improve but it is unclear if the Senate will allocate floor time for this legislation.



Export-Import Bank

The fate of the Export-Import Bank (Ex-Im) is in doubt. Its charter is set to expire at the end of September. The agency provides loan guarantees and insurance to foreign companies purchasing US goods, but many Republicans lately have called for its dissolution, arguing that the bank represents corporate welfare and “crony capitalism.” In the past, the Ex-Im Bank has enjoyed bipartisan support. Despite support for the bank’s reauthorization from influential business groups, including the US Chamber of Commerce, it is possible that Ex-Im Bank’s charter could lapse on September 30.

In the Senate, a group of eight senators, led by Senator Joe Manchin (D-WV) and Senator Mark Kirk (R-IL), introduced a bill that would reauthorize the bank for five years, while increasing reporting requirements and boosting its lending

authority to \$160 billion from \$140 billion over a four-year period. The bank’s reauthorization is also a critical topic in many contentious Senate races including Iowa, North Carolina and Louisiana.

Some Republican members called for the committee to find a middle-ground on the bank’s renewal, and impose reforms that would rein in its lending capacities. Disagreement within House Republican ranks—and lawmakers facing tough reelection bids in districts with a stake in Ex-Im-financed exports—could provide critical leverage for a short-term reauthorization. A short-term extension of three to six months also would provide time for House Republicans to organize a reform strategy and negotiate with the Senate, while preserving the opportunity to take advantage of the potential Republican takeover of the Senate in January.



Election Outlook

While a week can be a lifetime in a campaign, our team understands the dynamics of the electoral battlefield in the competitive races and the trends at play in each. Trends can change, and “October Surprises” may dramatically alter the dynamics of a particular race. “Wave” elections may not become apparent until late October. With congressional approval at historic lows, all incumbents face some peril from the electorate—in the current climate, some observers have already speculated that a Republican wave election is possible this year.

Republicans are virtually certain to hold the House, so the race for the Speaker’s gavel will be contested only among Republicans after the election. The effects of the 2010 redistricting combined with the impacts of President Obama’s approval rating below 50 percent create a strong tailwind for House Republican candidate. Although most seats are contested, the number of truly competitive races in the House remains small, numbering in the dozens, with anywhere from eight to 12 “toss up” races for seats held by House Democrats and three to five for Republicans. In all, the universe of

competitive seats is less than a third of the Chamber.

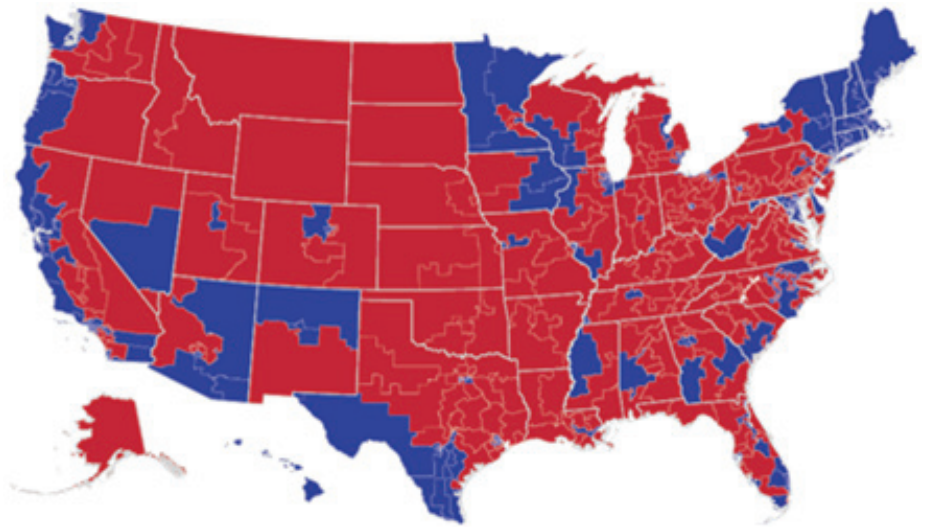
Control of the Senate will be largely determined by races in several states that Republican presidential nominee Mitt Romney carried in 2012. Democrats in Alaska, Arkansas, North Carolina and Louisiana face very strong challengers. The atmospherics of this cycle and polling have consistently shown the challenge they face in these traditionally “red states.” The Democratic-held seats in South Dakota, Montana and West Virginia already seem likely to see a party switch. Bucking the trend at the moment is Senator Mark Begich who holds a slim lead in Alaska. The reelection effort of Mark Udall in Colorado also has national Democrats concerned, and the open seat long held by Democrat Tom Harkin in Iowa has yielded a very tight race. Republicans find themselves closely watching the McConnell-Grimes race in Kentucky (where the Republican Leader remains favored to win but is facing a surprisingly strong challenge). The outcome is uncertain in the Saxby Chambliss open seat in Georgia where Republican David Perdue and Democrat Michelle Nunn remain close in the polls.

Republicans require a pick up of six seats to gain the majority in the Senate —although a majority in the Senate does not bestow complete control. In today’s Senate, effective control and the ability to pass bills comes with 60 votes. If Republicans take the Senate, they will still need some Democratic votes to move important legislation. This is their best opportunity, because the electoral landscape dramatically

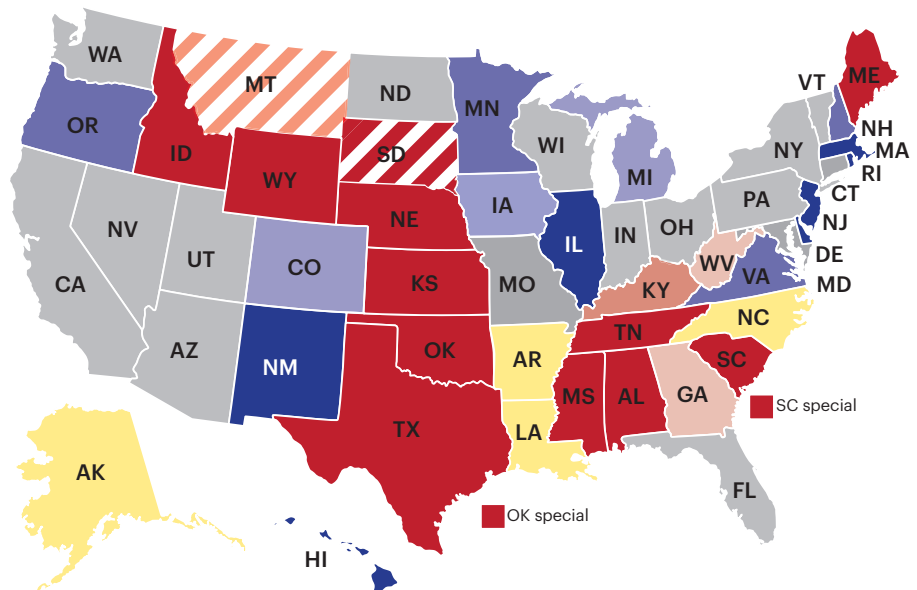
Current breakdown of Congressional districts shifts in 2016 where Senate Republicans will find themselves defending more vulnerable seats than will the Democrats. Political analysts

have suggested that should the Republicans gain the majority in the US Senate in 2014, their majority will be in peril in 2016.

Current breakdown of Congressional districts



Competitive Senate races



Safe D Likely D Leans D R to D Toss-Up No election D to R Leans R Likely R Safe R

Democrats Toss-ups Republicans

About Dentons

Dentons is a global law firm driven to provide clients a competitive edge in an increasingly complex and interconnected world. A top 20 firm on the Acritas 2013 Global Elite Brand Index, Dentons is committed to challenging the status quo in delivering consistent and uncompromising quality in new and inventive ways. Dentons was formed by the combination of international law firm Salans LLP, Canadian law firm Fraser Milner Casgrain LLP (FMC) and international law firm SNR Denton. Dentons' clients now benefit from approximately 2,600 lawyers and professionals in more than 75 locations spanning 50-plus countries across Africa, Asia Pacific, Canada, Central Asia, Europe, the Middle East, Russia and the CIS, the UK and the US. The firm serves the local, regional and global needs of a broad spectrum of clients, including private and public corporations; governments and government agencies; small businesses and startups; entrepreneurs; and individuals.

For more information about key events in the year ahead or to discuss your strategic planning for 2014, please contact John Russell (+1 202 408 6392 or john.russell@dentons.com), Michael E. Zolandz (+1 202 408 9204 or michael.zolandz@dentons.com), Sander Lurie (+1 202 408 7003 or sander.lurie@dentons.com), Thomas Walls (+1 202 408 6424 or thomas.walls@dentons.com), any member of Dentons **US Public Policy and Regulation team** or your Dentons lawyer or professional.

Our locations

