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Please contact any member of our Legislative and Government Affairs Practice Group or one of the contributors listed below if you have questions regarding this newsletter.

Editor

Katie M. Cochran
kmcochran@Venable.com
202.344.4283

Contributors

Megan Malone
mmalone@Venable.com
202.344.4621

Samuel Olchyk
solchyk@Venable.com
202.344.4034

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The Looming Threat of a Government Shutdown Remains

The deadline for a government shutdown is hours away and while progress has reportedly been made, it is far from certain that an agreement can be reached in time to avert the first shutdown in 15 years. The current stopgap funding expires Friday, April 8th at midnight. If a shutdown were to occur, some areas of the government would have to suspend their activities until a funding bill was agreed upon, which would affect about 800,000 workers. Federal employees performing jobs deemed as "essential", such as defense, health care, national security, or emergency-related would be exempt from the shut down.

On Tuesday, President Obama met with congressional leaders at the White House in hopes of negotiating a deal, but no deal was reached. Late Wednesday night, President Obama again called House Speaker John Boehner (R-OH) and Senate Majority Leader Harry Reid (D-NV) back to the White House for another meeting to discuss budget negotiations. All parties involved left the meeting with a similar message; progress had been made, which made them a bit more optimistic, but there was still no agreement on a budget.

Earlier, House Republican leaders introduced a week long funding extension. Their bill cut $12 billion in spending and funded the Department of Defense for the remainder of the fiscal year. The House is scheduled to vote on the one-week extension today. President Obama was quick to reject the idea of another stopgap bill saying, "we've already done that twice." House Republicans are blaming the Administration for increasing the chances of a shutdown by rejecting this one-week extension. Democrats are accusing Republicans of continually changing their budget cut requests in order to meet the strict demands of tea party members. Senator Reid said, "Every time we agree to meet in the middle, they (Republicans) move where the middle is. The Republican leadership has the tea party screaming so loudly in its right ear that it can't hear what the vast majority of the country demands. The country demands we get this done." Although both sides in public remain hopeful, agency heads have begun preparation for a shutdown.

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Dodd-Frank Act: Slowly Repeal It All Or Just Slow It Down

The GOP takeover in the House of Representatives last fall prompted many to question the future of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), and whether an attempt would be made to repeal the financial regulatory overhaul.

Up until last week, Representative Michelle Bachman (R-MN) was the only member of Congress to have introduced legislation (H.R. 87) repealing the entire Dodd-Frank Act. Her bill, however, has been largely ignored by House leadership. Nonetheless, this past Friday, Senator DeMint (R-SC) announced the introduction of similar legislation (S. 712) which has more than twice the number of cosponsors (18 in total), including that of the Senate Republican leadership, than Bachman's legislation has garnered. While DeMint's bill seems to have healthy support, the chances of it passing are highly unlikely.

The more likely scenario will be the approach House Republicans took at the beginning of 112th Congress; cut the budget of those agencies in charge of writing the new rules under the Dodd-Frank Act and hold multiple investigative hearings on controversial provisions of the law. This systematic approach allows them to slow the implementation process, while buying time to review specific provisions they claim are overly burdensome and costly for companies to comply with. For example, Title VII of the Dodd-Frank Act, regulating the over-the-counter ("OTC") swaps markets, is one provision Congress has focused on.

The Dodd-Frank Act requires the SEC to write over 100 rules, and the CFTC is to write over 50 rules by July 15, 2011; many of them jointly with the SEC. CFTC Chairman Gary Gensler has recently stated that many of the rules will miss this deadline due to budgetary constraints. This, he said, is due to the House Republicans' plan to reduce the CFTC's budget of $168.8 million by $56.8 million. The GOP spending bill also reduces the SEC's $1.12 billion budget by $25 million. Both CFTC Chairman Gensler and SEC Chairwoman Mary Schapiro have repeatedly testified that the cuts in their budgets will impede each agencies' ability to properly write and implement the rules required under the Dodd-Frank Act.

The Sarbanes-Oxley Act of 2002 required a total of 16 rulemakings and six studies that were proposed and implemented over a two-and-a half year time period. The Dodd-Frank Act requires a total of 240 rulemakings and nearly 70 studies, with most of the final rules to be promulgated within 360 days of the enactment of the law, followed by a swift implementation period. Needless to say, a bipartisan view exists that the regulators could use more time with the rulemaking process, particularly since the Dodd-Frank Act created several new entities and oversight of new markets. More precisely, drafting new rules for the never-regulated swaps market is a daunting task, given the highly technical and complex nature of the market, as well as the very short amount of time to be completed.

The CFTC and SEC must undertake rulemakings in a multitude of areas, including corporate governance, capital and margin requirements, end-user exceptions, whistleblowers, clearing, data recordkeeping and recording requirements and position limits. The CFTC has been proposing rules at a lightening pace and has issued approximately fifty rules thus far, creating a great deal of criticism during recent oversight hearings of Dodd-Frank. Republicans have expressed deep concern that both the CFTC and SEC are issuing rules at such a fast pace, making these rules overly prescriptive. According to some lawmakers, the joint rules are not harmonized and are not being proposed in a systematic way due to the fact that each agency is more concerned about meeting the deadline, rather than "getting it right." For example, the CFTC has proposed several rules that require the definition of a swap, yet this definition remains undefined to date. Republicans and the industry have been highly critical, saying this creates confusion and uncertainty within the industry which can affect the markets. To further the confusion and uncertainty, the CFTC and SEC have reopened the comment periods for some of the proposed rules, which may be viewed as the agencies trying to "get it right."

Another recent criticism was brought to Congress' attention by Republican CFTC Commissioner Jill E. Sommers. Sommers has been critical of the Commission's process of not performing a cost benefit analysis when proposing a rule. Section 15(a) of the Commodity Exchange Act requires the CFTC to only consider the cost benefit analysis, while it is not required to provide a quantitative analysis when proposing a rule. Sommers has been objecting to this for about a month and a half, and in the current political and economic environment, it is receiving a lot of traction. She has urged the agency to follow the President's recent Executive Order on "Improving Regulation and Regulatory Review," which requires agencies to justify the costs of any regulation. As an independent agency, the CFTC is not bound by the Executive Order, but the Commissioner has been publicly pressing the agency to undertake this type of analysis.

House Financial Services Committee Chairman Spencer Bachus of Alabama has publicly stated that he will work on repealing or amending pieces of the Dodd-Frank Act. Similarly, Republican Representative Scott Garrett of New Jersey, who chairs the Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises, has stated that the Republicans do not intend to repeal the Dodd-Frank law due to concerns that it will create uncertainty and confusion in the markets.

With no visible support from the House Republican Leaders, it seems unlikely that Dodd-Frank will be repealed. However, even though Senator DeMint has the support of Minority Leader Mitch McConnell of Kentucky and Senate Banking ranking member, Richard Shelby of Alabama, it will likely be opposed by the Senate's Democratic majority, as well as by President Obama. We are likely to see a technical corrections bill and several more oversight hearings on the Dodd-Frank Act aimed at picking apart controversial provisions of the law. Meanwhile, the agencies will continue to ask for additional funds to help them "get it right."

Megan Malone is a legislative advisor in Venable's Legislative Practice Group. Ms. Malone can be reached at 202.344.4621 or at mmalone@Venable.com.

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Long-Term FAA Reauthorization Passes in House

Late last week, the House passed a four-year, $59.7 billion reauthorization for the Federal Aviation Administration (FAA). H.R. 658 passed by a vote of 223-169. The Senate passed its own version of the bill in February. S.223 is a two-year, $34.6 billion reauthorization. There were over 30 amendments considered in the House, with 14 of those being adopted.

While the House and Senate bills contain significant differences, there are several provisions that are likely be the more heavily debated topics in conference. The most obvious of these issues is the difference in the reauthorization period, as well as the dollar amount. The House version costs $59.7 billion over four years, while the Senate version is two years, costing $34.6 billion. Both chambers will have to work to find some sort of compromise on these two differences. Another issue that has the ability to heat up the debate involves union organization. Language in the House version would overturn a National Mediation Board rule on union elections. Under the Railway Labor Act, the Board supervises union negotiation for the airline and rail industries. By overturning the rule, union-elections would no longer be determined by the majority of votes cast, rather than a majority of eligible voters. In the past, eligible employees that did not cast an actual ballot were counted as a "no". This provision would make the process of forming a union more difficult for airline and railroad workers. President Obama's office has threatened to veto the bill and Senate Democrats do not believe it will stand a chance of passing the Senate should the final bill contain this provision.

Disagreements are also expected between the House and Senate over the Essential Air Service (EAS). EAS guarantees that small communities (usually rural) are served by certificated airlines. The House bill terminates the program in 2013 with the exception of Alaska and Hawaii. The Senate bill retains the program and increases its authorized spending. Senate Commerce, Science and Transportation Chairman, John Rockefeller IV of West Virginia has said the EAS program is one of his highest priorities and he will focus on it when the bill is in conference.

The current short-term extension of the FAA Reauthorization, passed early last week, will expire at the end of May. That extension will give lawmakers time to send their bills to conference and attempt to come to an agreement on a final long-term reauthorization.

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Congress Passes Form 1099 Repeal Legislation

This week, the Senate voted in favor of the House-passed version of H.R. 4, the "Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011." After failing to adopt Senator Robert Menendez's (D-NJ) amendment that would modify the offset in the legislation, lawmakers voted 87-12 in favor of repealing a 1099 form requirement. As the Senate action did not alter the House-passed bill, the legislation now heads to the White House. If signed into law (which is the expectation), the legislation would mark the first significant change to the Democratic supported health care overhaul law.

The disputed provision would require businesses to submit and provide a Form 1099 for every business transaction totaling $600 or more in a given year. According to the National Taxpayer Advocate Service, an Internal Revenue Service ombudsman, the Form 1099 reporting requirement would affect 40 million business and other entities, as well as increase overhead costs for small employers. Both Democratic and Republican lawmakers have panned the provision as overly burdensome to small business. The main concern over the bill is its method of offsetting revenue by requiring families to repay more health insurance subsidies. While the Administration "strongly opposes" the offset, there has not been any mention of a Presidential veto.

Senate Minority Leader Mitch McConnell (R-KY) took the bipartisan support of this repeal as a sign that Democrats are willing to support other efforts to repeal certain aspects of the health care bill. On the other side, Senator Mary Landrieu (D-LA) warned that Democratic support should not indicate a sign that they are willing to "chip away at the health care law." Senator Landrieu, as well as several of her Democratic colleagues, have said they are open to the idea of revisiting different aspects of the law, only if these changes will bring improvement to the measure.

Sam Olchyk is a partner in Venable's Legislative Practice Group. Mr. Olchyk can be reached at 202.344.4034 or at solchyk@Venable.com.

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