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116th Congress Post Government Shutdown Agenda Includes Taxes, RESA, ACA

The new Congress' post-partial government shutdown agenda looks like it will include taxes, retirement savings, and Affordable Care Act (ACA) fixes. However, priorities will differ in the GOP-controlled Senate and Administration from those in the Democratic-controlled House. Following is a rundown of what to expect from Congress once the government is reopened.

- ***Taxes***: House Ways & Means Committee Chairman Rep. Richard Neal (D-MA) says no legislation will move through his committee without hearings on it first. So, expect a lot of hearings. Expected early are hearings on Tax Cuts and Jobs Act (TCJA) issues, and on infrastructure issues. The infrastructure tax issues include both offsets and tax rules to incentivize new infrastructure projects.

    - ***Tax Cuts and Jobs Act:*** Expect Ways & Means to hold hearings on estate tax rules as well as on whether the current exemption amount ($5.6 million/single and $11.2 million/married, indexed) and rates (40 percent) are appropriate. Also likely are hearings on whether and how to eliminate the TCJA limit on the deductibility of state and local taxes, on the new 20 percent deduction for qualified pass-through business income, and on the appropriate corporate and top individual income tax rates.

    - ***Infrastructure***: One of the areas that may give rise to some bipartisan work is an infrastructure bill—a measure to provide funding and incentives for work to repair/rebuild/build new roads, bridges, tunnels, port, train and airport facilities and other infrastructure projects around the country. An infrastructure package will have to be paid for and so Ways & Means will also be exploring ways to generate revenue via changes to other tax rules. This is an area that poses considerable risk to agents, advisors and their clients because so many life and health insurance, annuity, retirement savings and employee benefits programs operate under advantageous tax rules.

- ***Retirement savings***: Rep. Neal has repeatedly said that one of his top priorities is retirement savings. He has already introduced legislation to solve the crisis facing union pension plans, and expects to offer proposals to strengthen the single employer retirement savings system, too. New tax incentives for individuals saving for retirement outside of the employer-based system will also be in the mix. Among the earliest of these efforts is likely to be a renewed effort to enact the Retirement Enhancement Savings Act (RESA).

- ***ACA***: Neal priorities include hearings, with follow-up legislation, on fixes to the Affordable Care Act (ACA). At the top of the ACA tax issue priorities is protecting people with preexisting conditions. Other ACA fixes may include a new look at some ACA taxes, including the health insurance tax (HIT), the Cadillac tax, the medical device tax, and the tanning booth tax. It is unlikely the Democrats will accept any change to the ACA's employer mandate, although an effort to ease some of that mandate's reporting requirements may get some traction.

Also on the Ways & Means Committee agenda is the issue of President Trump's tax returns. The Democratic Caucus is four-square behind having Chairman Neal demand that Treasury provide him with the President's tax returns. As Ways & Means Committee chairman, Rep. Neal has the statutory authority to make this demand. Rep. Neal says he will demand the President's tax returns, but first wants to build a case for doing so, and possibly for making those returns public (or at least sharing them with other members of the committee). So, hearings on this issue are also likely. And based on what (little) the public already knows about President Trump's taxes, chances are that a look at his returns will trigger a deep dive into estate tax rules. It appears that the President has made extensive use of estate planning tools and so Democratic tax writers are virtually certain to delve into whether those tools remain appropriate.

Prospects: Both Committee personnel and Washington insiders believe chances for enactment of RESA (along with tax extenders and IRS Administration reform) are good. There's also a reasonably good chance for an infrastructure package, so long as the inquiry into President Trump's taxes (which is likely to trigger a protracted legal battle) and other Congressional investigations into the President's business activities don't taint the process. However, changes to the TCJA and ACA fixes beyond protection for people with preexisting conditions are less likely this year. Instead, the committee is likely to focus on laying the groundwork for such changes next year, or in 2020.

Federal District Court Rules ACA Unconstitutional

A federal district court in Texas has ruled the entirety of the Affordable Care Act (ACA) is unconstitutional. However, the court put the ruling on hold for the time it will take to appeal it, so the ACA remains in full force and effect pending the outcome of an appeal.

On December 14, 2018, U.S. District Court Judge Reed O'Connor in Fort Worth, TX, ruled that the entirety of the ACA is invalid because one of its central provisions—the individual mandate that people carry health insurance—is no longer valid. The individual mandate became invalid, the court said, because the Supreme Court ruled its constitutionality is based on the fact that it is enforced by an assessment which is a tax, and Congress zeroed out the assessment (tax) in the 2016 Tax Cuts and Jobs Act (TCJA). Judge Reed explained that because the individual mandate is central to the entire law and can't be severed from the rest of the statute, the whole of the ACA is unconstitutional.

The district court ruling is but the first in a multi-step judicial process. The next step is an appeal to the Fifth Circuit Court of Appeals and from there it is highly likely it will go to the U.S. Supreme Court (SCOTUS). Even if expedited, the judicial process will take at least months. And because the district court put its ruling on hold pending appeals, both employers and individuals must still comply with the ACA's requirements until/unless the appellate courts uphold the district court ruling.

The House of Representatives has voted to approve its participation in defending the ACA on appeal. Plus, Maryland is suing the government in a similar case seeking to uphold the ACA's constitutionality. The Trump Administration is not expected to defend the law's constitutionality on appeal—but says they will take (as yet undefined) steps to protect people with preexisting conditions during the appellate process.

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Prospects: For about the next year or so, while waiting for the outcome of the appeals, there will be no change with respect to ACA enforcement/compliance. However, the ruling sparked considerable political issues, many of which are likely to trigger Congressional reaction. Principal among them is concern about the possibility that the ACA's ban on using preexisting conditions in offering/pricing health insurance could be undone. That has already resulted in vows to address the preexisting conditions issue early in the new Congress. And, there will surely be an attempt—driven by voter as well as lawmaker worry about losing preexisting condition protections—to make even more changes to the ACA.

Some of the issues that Washington insiders expect to percolate to the top of the new 116th Congress's ACA to-do list include changing the ACA's definition of full-time work from 30 to 40 hours/week, eliminating or delaying some of the ACA's taxes (like, for example, the Health Insurance tax, the Cadillac tax or the medial device tax), and at least modifying if not eliminating the law's employer mandate.

The bottom line is that for now nothing changes for either employers or individuals in terms of the need to comply with the ACA. However, it is very likely that legislative, regulatory and/or judicial change to the ACA will be at the top of the government's agenda for the foreseeable future.

United States and Great Britain Sign Insurance Agreement

On December 18, the United States and Great Britain signed a bilateral agreement on "prudential measures regarding insurance and reinsurance." The agreement will help provide regulatory certainty and market continuity on insurance issues as Great Britain (United Kingdom) prepares to leave the European Union (EU), according to a Treasury press release.

"The U.S.-UK Covered Agreement, like the covered agreement with the EU, will benefit the U.S. and UK economies and consumers by reducing burdens on insurers and reinsurers while maintaining prudential standards and will enable customers to protect themselves more efficiently against risks. At the same time, it affirms the U.S. state-based system of insurance regulation while increasing growth opportunities for insurers in both the United States and United Kingdom," the Treasury Department said.

Prospects: This is good news for those agents and advisors who have business dealings in England. The "Brexit" issues are many, complex and controversial and so having this agreement on prudential insurance issues is helpful.