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Government Funding Bill Passes

House and Senate negotiators agreed on a continuing resolution (CR) to fund the government through December 11, 2020. The agreement passed the House by a bipartisan 359 to 57 vote on September 22. The Senate approved it, by an 84 to 10 vote, on September 30. President Trump signed it into law shortly after midnight, on October 1. The CR includes a temporary extension of and funding for the National Flood Insurance Program (NFIP).

The CR keeps funding for federal agencies at fiscal year 2020 levels until mid-December. Thus, decisions on new spending policy and new funding levels were deferred until December 11, 2020. A new and likely to be hard-fought government funding bill will have to be passed by midnight December 11. Or, Congress will again have to approve a temporary funding measure (another CR) until some time in 2021. Failure to enact one or the other of these pieces of legislation would result in a government shut-down.

The scope and level of controversy surrounding the regular appropriations legislation for fiscal year 2021 will be in question until after the results of the November 3 election are known. And election results could take some time given the record number of mail-in ballots that election officials are currently anticipating.

Prospects: Enactment of this short-term CR guarantees a lame duck Congressional session. Republicans will still be in control of the Senate, and President Trump will still be in the White House for this session. But if Democrats grow their power for 2021—by winning more seats in the House, by taking control of the Senate, and/or by taking the presidency, the fireworks in November-December could be intense. Prospects are unpredictable until the election outcome is known.

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DOL Releases Proposed Worker Classification Rule

The Department of Labor's (DOL's) Wage and Hour Division (WHD has released a new proposed regulation regarding classification of a worker as an employee or as an independent contractor for purposes of the Fair Labor Standards Act (FLSA). The proposed reg significantly broadens the group of workers who can be independent contractors, contrary to the narrow test adopted by California law's ABC test. This is good news for independent financial advisors.

Under the proposed rule, a worker would be found to be an independent contractor or an employee under an "economic reality" test. The test consists of two core factors—the nature and degree of the worker's control over the work, and the worker's opportunity for profit or loss based on initiative and/or investment. These two core factors shape the decision as to whether a worker is economically dependent on someone else's business or is in business for him/herself, the proposed reg states.

The test also includes three other factors "that may serve as additional guideposts in the analysis," WHD says. These factors include the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the service recipient, and whether the work is part of an integrated unit of production. In explaining the proposed regulation, WHD also states that "actual practice is more relevant than what may be contractually or theoretically possible in determining whether a worker is an employee or an independent contractor."

This proposed regulation contrasts with California's ABC test which finds that a worker is an employee unless the following three factors are all present:

- The worker is free from the control and direction of the hiring entity in connection with the work's performance, both under the contract for the performance of the work and in fact
- The worker performs work that is outside the usual course of the hiring entity's business
- The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

This proposed Federal regulation is open for public comment until October 25, 2020.

Prospects: This proposed regulation, which is significantly more employer-friendly than the ABC test and therefore is the object of substantial controversy, is on a fast track to finalization. This is because DOL is concerned about potential efforts, if partisan power shifts after the November 3 elections, to undo this broader approach to determining a worker's status. Expectations are that the agency will finalize the regulation as soon as possible, although WHD officials assure observers that they will carefully consider all comments submitted.

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Final IRS Disability Account Rules Expand Contribution Option

On October 1, 2020, the Internal Revenue Service (IRS) posted final regulations for the NAIFA-backed Achieving a Better Life Experience (ABLE) accounts.

The ABLE Act of 2014 allows states to create tax-advantaged savings programs for eligible people with disabilities. Under new rules from the IRS, ABLE account beneficiaries can save more on their own and transfer unused college savings funds.

The final regulations adopt changes related to the 2017 tax law, which amended Section 529A to allow certain "designated beneficiaries" to contribute more than the annual gift tax limit of $15,000 to their ABLE accounts.

The new rules:

- Allow employed account holders to contribute, capped at the poverty line for a single-person household in their state, through 2025.
- Allow for tax-free rollovers from the same beneficiary's 529 college savings plan to their ABLE accounts.
- Expand the "hierarchy" of people authorized to establish or sign off on changes to ABLE accounts. The additional types of people include any individual selected by the eligible ABLE account holder; the account holder's agent under a power of attorney; a conservator or legal guardian; the account holder's spouse, parent, sibling, or grandparent; or a representative payee appointed by the Social Security Administration.
- Require a qualified successor must be named before the account holder's death; otherwise, any remaining assets in the account pass through the decedent's estate, minus the corresponding estate taxes.

NAIFA continues to champion ABLE accounts for working-age people with disabilities who can use these savings accounts to cover qualified disability expenses and can lead to financial independence over time.

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