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February 23, 2018

Washington Update

This Week in Congress

House – The House is in recess until Tuesday, February 27, 2018.

Senate – The Senate is in recess until Tuesday, February 27, 2018.

Next Week in Congress

House – The House may consider H.R. 1865, the **Allow States and Victims to Fight Online Sex Trafficking Act of 2017**; H.R. 4296, a **measure changing capital requirements for systemically important banks**, and H.R. 4607, the **Comprehensive Regulatory Review Act**.

Senate – The Senate may consider H.R. 2579, the **Broader Options for Americans Act** and the nominations of **Elizabeth L. Branch, A. Marvin Quattlebaum, Karen Gren Scholer, Tilman Eugene Self III, and Terry A. Doughty** to be United States District Judges and **Russell Vought** to be Deputy Director of the Office of Management and Budget.

TAX

Treasury Officials Indicate Initial Guidance On Interest Limitation Out Soon

Key Points

- *Section 163(j) notice will be released in the next two weeks and will cover limitations on the deductibility of interest.*
- *Treasury and IRS are reviewing whether new rules under the TCJA will be applied on a member-by-member basis or a consolidated group basis.*
- *Guidance aims to help the private sector understand how the government is viewing the issues.*

On February 20, Treasury Deputy Tax Legislative Counsel Krishna Vallabhaneni said that Treasury is planning to issue a notice within the next two weeks to address some of the "big picture questions gating questions" under the new Section 163(j) limitations on the deductibility of interest. The new section limits the amount of business interest expenses that can be deducted to 30 percent of earnings before interest, taxes, depreciation, and amortization. Vallabhaneni said Treasury plans to issue more than one piece of guidance on the many issues related to the limitation. Specifically, he stated that the Treasury Department and the Internal Revenue

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Service (IRS) are reviewing whether the new rules will be applied on a member-by-member basis or a consolidated group basis. He noted that the two agencies will be reviewing section 163(j) issues for the "foreseeable future."

At the same event, Dana Trier, Treasury Department Deputy Assistant Secretary (Tax Policy), said the Section 163(j) notice will address areas of consensus and will not include specifics on how to apply the limitation rules. Trier said, the purpose of the initial guidance is to give the private sector a first glance at how the government is viewing those issues so they can weigh into how Treasury should approach the proposed regulations

For more information about tax issues you may email or call Christopher Hatcher at 202-659-8201. Nick Karellas, Henry Homans, and Ryan Schnepp contributed to this section.

FINANCIAL SERVICES

Treasury Releases Report on the Orderly Liquidation Authority

Key Point:

- *The report recommended the creation of a Chapter 14 of the Bankruptcy Code for distressed financial companies, but also retaining the Orderly Liquidation Authority as an emergency tool for use under extraordinary circumstances.*

On February 21, the Treasury Department released a report entitled, "Orderly Liquidation Authority and Bankruptcy Reform." The report was issued in response to an April 21, 2017 memorandum from the President directing the Secretary to examine the Orderly Liquidation Authority (OLA) created by Title II of the Dodd-Frank Act (DFA) and propose recommendations for its reform.

The report states that Treasury's research led them to "conclude unequivocally that bankruptcy should be the resolution method of first resort," recommending the creation of a Chapter 14 of the Bankruptcy Code for distressed financial institutions. However, while the report states that Title II of the DFA "creates a resolution authority that confers far too much unchecked administrative discretion, could be misused to bail out creditors, and runs the risk of weakening market discipline", it does not call for entirely eliminating the OLA. Instead, it recommends several reforms to the OLA.

The report recommended the following policy changes:

- Treasury recommends that the FDIC's latitude to treat similarly situated creditors differently should be narrowed to conform to the bankruptcy standard under which only critical vendors may be given favored treatment if necessary.
- Treasury recommends that in a resolution involving a bridge company, after the transfer of assets and liabilities to the bridge, the bankruptcy court be given the responsibility for administering the claims of those whose liabilities were left in the receivership.
- Treasury recommends that the statutory tests for determining when a financial company is in "default or in danger of default" (a condition to being placed into OLA) be clarified to require that each test is likely to be met within a specified period, to be no more than 90 days from the determination.
- Treasury recommends repeal of the tax-exempt status of the bridge company.
- Treasury recommends that the FDIC finalize its notice regarding the SPOE [single point of entry] strategy; if there are any circumstances under which the FDIC does not believe SPOE would be the

preferred resolution method, it should make those clear.
- Treasury believes that advances from the OLF should have as short a duration as possible.
- Treasury believes that loan guarantees should be preferred over direct lending; loans and guarantees should only be extended if a premium interest rate or guarantee fee is charged.
- Treasury believes that the FDIC should seek high quality assets as collateral, publish a list of assets eligible to serve as collateral for an OLF loan, and only accept a different form of collateral with the approval of the Secretary of the Treasury.
- Treasury recommends that any assessments be charged as soon as reasonably possible.
- Treasury recommends allowing a court to review all seven—rather than two, as currently permitted—of the Secretary of the Treasury's findings required for putting a company into an OLA receivership under the "arbitrary and capricious" standard.
- Treasury recommends consideration of the following alternatives:
    - Replacing the current ex ante truncated judicial review with a full judicial review after the appointment of the FDIC as receiver.
    - Retaining ex ante review but clarifying that, in the event of an appeal, the district court's decision is to be reviewed by the circuit court de novo and without regard to the arguments made in the district court.

The recommendations regarding the addition of an enhanced Chapter 14 bankruptcy regime for financial companies includes the following:
- Treasury endorses statutory provision of standing to domestic regulators to raise issues and be heard in the Chapter 14 bankruptcy case.
- Treasury recommends providing that a court may grant standing to foreign regulators where relevant.
- Congress should consider providing that a court should give deference to a Federal Reserve determination as to the financial stability implications of a transfer to the bridge company.
- Treasury recommends that U.S. regulators redouble their efforts to establish protocols for cooperation with their foreign counterparts with the aim of giving all parties confidence in the feasibility of the bankruptcy approach.
- Treasury endorses the designation by the Chief Justice of a set of bankruptcy judges in advance to preside over any Chapter 14 bankruptcy case.
- Congress should consider the alternative approach of designating district court judges.
- Treasury recommends that the definition of "capital structure debt" include all unsecured debt for borrowed money other than QFCs, as provided for in the most recent House and Senate bills. However, unlike these bills but consistent with the Hoover Institution's proposal, Treasury further recommends the inclusion in the definition of "capital structure debt" of a secured lender's unsecured deficiency claim for an under-secured debt.
- Treasury recommends against including an asset threshold in defining which financial companies are eligible for Chapter 14.
- Treasury recommends that the definition of "covered financial corporation" under Chapter 14 be consistent with the definition of "financial company" contained in both Title II and the FDIC implementing regulations.

House Financial Services Committee Chairman Jeb Hensarling (R-TX) issued a press release criticizing the report, in which he stated:

> Although today's report from the Treasury Department makes a number of positive

recommendations – like narrowing the ambit of executive discretion and proposing a new chapter in the bankruptcy code – it regrettably does not recommend repealing OLA. On its face, this is inconsistent with the President's core principle. Dodd-Frank's Orderly Liquidation Authority *expressly enables* taxpayer funded bailouts; it does not prevent them. It is therefore difficult to square today's report with the President's clear guidance on this issue.

FSOC Executive Meeting

Key Point:

- *FSOC members discussed bank holding company applications under section 117 of the Dodd-Frank Act, the reevaluation of the designation process for nonbank financial companies, and market volatility.*

On February 21, the Financial Stability Oversight Council (FSOC) met in executive session to discuss a "potential process for considering applications from bank holding companies or their successors under section 117 of the Dodd-Frank Act (DFA)." According to the readout from the meeting, "staff gave a presentation regarding how the Council could consider applications under section 117, including engaging with applicants, conducting written or oral hearings, and analyzing potential risks." In addition, the Council discussed its ongoing reevaluation of the designation process for nonbank financial companies and the Council discussed recent financial market volatility. Council members explained that they continue to monitor market developments, they provided updates on fluctuations in various asset classes, and they discussed the impacts on financial institutions and markets.

SEC Votes to Modify Compliance Date for Open-End Fund Liquidity Classification

Key Points:

- *SEC voted to delay the classification requirements of the open-end fund liquidity risk rule by six months.*
- *SEC staff release additional FAQs related to the liquidity classification process.*

On February 21, the Securities and Exchange Commission voted to extend the deadline by which open-end funds must comply with certain elements of the SEC's liquidity risk management program rule. The SEC adopted the open-end fund liquidity risk rule in October 2016. The new date, which is a six month extension, provides additional time for funds to complete the implementation of the final rule's classification requirement, including other elements tied to the classifications. The other portions of the rule, such as those creating investor protections, to adopt a liquidity risk management program, and to limit investments to 15 percent of the fund's portfolio, will go into effect as scheduled. The new compliance date for the classification and classification-related elements of the liquidity rule is June 1, 2019 for larger fund groups and December 1, 2019 for smaller fund groups. The other requirements will go into effect as scheduled on December 1, 2018 for larger fund groups and June 1, 2019 for smaller fund groups.

SEC staff also issued an additional set of FAQs related to the liquidity risk rule focusing on questions that have arisen with respect to the liquidity classification process.

UPCOMING EVENTS

February 27

Monetary Policy: The House Financial Services Committee will hold a hearing to

receive the Federal Reserve's semi-annual monetary policy report to Congress. Federal Reserve Chairman Jerome Powell is scheduled to testify at the hearing.

Community Financial Institutions: The House Small Business Committee will hold a hearing entitled, "How Red Tape Affects Community Banks and Credit Unions: A GAO Report."

March 1

Monetary Policy: The Senate Banking Committee will hold a hearing to receive the Federal Reserve's semi-annual monetary policy report to Congress. Federal Reserve Chairman Jerome Powell is scheduled to testify at the hearing.

March 8

Investor Advisory Committee: The SEC will hold a meeting of its Investor Advisory Committee (IAC). The agenda for the meeting includes discussions on: (1) Regulatory Approaches to Combat Retail Investor Fraud; (2) Cybersecurity Risk Disclosures (which may include a Recommendation of the Investor as Owner Subcommittee); (3) Financial Support for Law School Clinics that Support Investors (which may include a Recommendation of the Committee as a Whole); (4) Dual-Class Share Structures (which may include a Recommendation of the Investor as Owner Subcommittee); and (5) Efforts to Combat the Financial Exploitation of Vulnerable Adults.

For more information about financial services issues you may email or call Joel Oswald at 202-659-8201. Alex Barcham and Rebecca Konst contributed to the articles.

ENERGY & ENVIRONMENT

Cantwell Announces a Series of Energy Bills

Key Points:

- *Late last week, Senate Energy and Natural Resources Committee Ranking Member Maria Cantwell (D-WA) announced the introduction of four energy bills that could be incorporated into a larger "comprehensive" energy package.*
- *The bills focus on: smart buildings; electric grid security; grid modernization; and energy workforce development.*

On February 16, Senate Energy and Natural Resources Committee Ranking Member Maria Cantwell (D-WA) announced "several bills to be considered for comprehensive energy legislation…[including] bills [that] address enhancing cybersecurity in the energy sector, modernizing and securing the grid, expanding our energy workforce, and accelerating the transition to cost-saving smart buildings."

A press release describes the bills:

- ***The "Smart Building Acceleration Act"*** (S. 2447): This legislation would "accelerate[] the transition to smart buildings by supporting research and by documenting the costs and benefits of emerging technologies in private-sector and federal government buildings." The legislation also "requires a survey of privately-owned smart buildings, directs smart building retrofits in certain federal buildings to quantify costs and benefits, and directs research and development toward reducing the barriers to the adoption of smart building technology."
- ***The "Enhanced Grid Security Act of 2018"*** (S. 2444): This legislation would direct the Department of Energy "to

identify, enhance and test supply chain vulnerabilities and response capabilities between the DOE and other agencies, national labs and private industry."

- ***The "Grid Modernization Act of 2018"*** (S. 2445): This bill "would authorize new [Department of Energy] demonstration programs to modernize the grid with storage, microgrids, and distribution-level investments in technology like electric vehicle chargers and advanced distributed generation."
- ***The 21st Century Energy Workforce Act"*** (S. 2449): This bill would create "a 21st Century Energy Workforce Advisory Board, a nationwide advisory board at the Department of Energy for the development of a skilled energy workforce in both traditional and clean energy sectors."

Cantwell's reference to "comprehensive energy legislation" indicates her interest in adding the bills to the "Energy and Natural Resources Act of 2017" (S. 1410). Cantwell and Energy and Natural Resources Committee Chairman Lisa Murkowski (R-AK) introduced S. 1410 on June 29, 2017. The bill includes provisions that the Senate approved in 2016 in the "Energy Policy Modernization Act" (S. 2012), and were subject to conference negotiations with the House of Representatives. The two chambers were unable to agree on a final energy bill before the conclusion of the 114th Congress. It is unclear when the Senate may consider S. 1410.

Department of Interior Advances Proposal to Scale Back Obama Administration Venting and Flaring Rule

Key Point:

- *This week, the Department of Interior published a proposed rule that would eliminate or modify provisions of regulations promulgated late in the Obama Administration to limit the amount of natural gas vented and flared on federal lands.*

On February 22, 2018, the Department of Interior's Bureau of Land Management (BLM) published a Notice of Proposed Rulemaking (NPRM) titled "Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements." The NPRM would rescind the following provisions of the Obama Administration's 2016 final rule:

- "Waste Minimization Plans;"
- "Well drilling requirements;"
- "Well completion and related operations requirements;"
- "Pneumatic controllers equipment requirements;"
- "Pneumatic diaphragm pumps equipment requirements;"
- "Storage vessels equipment requirements; and"
- "LDAR requirements."

The NPRM would also replace certain requirements of the 2016 rule "with requirements that are similar to those" included in "Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases" (NTL-4A):

- "Gas capture requirements would be revised to conform with policy similar to that found in NTL-4A";
- "Downhole well maintenance and liquids unloading requirements; and";
- "Measuring and reporting volumes of gas vented and flared".

The Obama Administration's BLM published the final rule titled, "Waste Prevention, Production Subject to Royalties, and Resource Conservation" on November 18, 2016. The original rule was intended "to reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities

on onshore Federal and Indian…leases….[and would] also clarify when produced gas lost through venting, flaring, or leaks is subject to royalties, and when oil and gas production may be used royalty-free on-site." As described in a Department of Interior press release, the rule would require operators to "periodically inspect their operations for leaks, and replace outdated equipment that vents large quantities of gas into the air… [and] limit venting from storage tanks and to use best practices to limit gas losses when removing liquids from wells." Public comments responding to the NPRM published on Thursday are due by April 23, 2018.

Upcoming Hearings and Events

February 27

Energy Infrastructure: The House Energy and Commerce Committee's Energy Subcommittee will hold a hearing titled "State of the Nation's Energy Infrastructure".

LNG and Geopolitics: The House Natural Resources Committee's Energy and Mineral Resources Subcommittee will hold a hearing titled "Liquefied Natural Gas and U.S. Geopolitics."

Pending Legislation: The House Natural Resources Committee's Water, Power and Oceans Subcommittee will hold a hearing on: the "Strengthening Coastal Communities Act of 2017" (H.R. 2947); and legislation to "revise the boundaries of certain John H. Chaffee Coastal Barrier Resources System Units in Delaware" (H.R. 4880).

February 28

Pipeline Safety Information-Sharing: The Pipeline and Hazardous Materials Safety Administration's (PHMSA) Voluntary Information-Sharing Working Group will hold a meeting "to discuss and identify recommendations to establish a voluntary information-sharing system." The "agenda will include briefings on topics such as mandate requirements, integrity management, data types and tools, in-line inspection repair and other direct assessment methods, subcommittee considerations, geographic information system implementation, lessons learned, examples of existing information-sharing systems, safety management systems, and more."

Water and Power Legislation: The Senate Energy and Natural Resources Committee's Water and Power Subcommittee will hold a hearing on the following bills: the "J. Bennett Johnston Waterway Hydropower Extension Act" (S. 1142, H.R. 2457); the "Authorized Rural Water Projects Completion Act" (S. 1556); legislation "to establish a procedure for the conveyance of certain Federal property around the Jamestown Reservoir in the State of North Dakota…" (S. 2074); the "Endangered Fish Recovery Programs Extension Act of 2017" (S. 2166); and legislation to "amend the Federal Power Act with respect to the criteria and process to qualify as a qualifying conduit hydropower facility" (H.R. 2786).

Puerto Rico Electric Infrastructure: The House Energy and Commerce Committee's Oversight and Investigations Subcommittee will hold a hearing titled "Update on the Restoration of Puerto Rico's Electric Infrastructure."

Markup of Pending Legislation: The House Natural Resources Committee will hold a markup to consider pending legislation.

Public Lands Legislation: The House Natural Resources Committee's Federal Lands Subcommittee will hold a hearing on the following bills: the "Camp Nelson Heritage

Park Study Act" (H.R. 1992); the "George W. Bush Childhood Home Study Act" (H.R. 3008); legislation to "extend the retained use estate for the Caneel Bay resort in St. John, United States Virgin Islands…" (H.R. 4731); and legislation to "direct the Secretary of the Interior to conduct a special resource study to determine the suitability and feasibility of establishing the birthplace of James Weldon Johnson in Jacksonville, Florida, as a unit of the National Park System" (H.R. 5005).

March 1

FERC Budget: The House Energy and Commerce Committee's Energy Subcommittee plans to hold a hearing on the President's Fiscal Year 2019 budget proposal for the Federal Energy Regulatory Commission.

March 2

Gas Pipeline Safety Rulemaking: The Pipeline and Hazardous Materials Safety Administration (PHMSA) will convene a meeting of its Gas Pipeline Advisory Committee (GPAC). The GPAC "will be considering the proposed rule titled, 'Safety of Gas Transmission and Gathering Pipelines,' which was published in the Federal Register on April 8, 2016, (81 FR 20722) and on the associated regulatory analysis."

April 10-11

Distributed Energy Resources and the Bulk Power System: The Federal Energy Regulatory Commission (FERC) "will hold a technical conference to discuss the participation of distributed energy resource (DER) aggregations in Regional Transmission Organization (RTO) and Independent System Operator (ISO) markets, and to more broadly discuss the potential effects of distributed energy resources on the bulk power system."

For more information about energy and environment issues you may email or call Frank Vlossak at 202-659-8201. Updates on energy and environment issues are also available on twitter.

HEALTH

Administration Released Proposed Rule on Short-Term Insurance

Key Points:

- *The proposed rule seeks to provide additional and more affordable coverage options by changing the maximum duration for short-term, limited-duration insurance to a maximum of less than twelve months from the current maximum of less than three months.*
- *Comments on the proposed rule are due April 23, 2018.*

On February 21, the Administration released a proposed rule to expand the availability of short-term, limited-duration insurance. This change is expected to provide more choice and affordability for health coverage. Comments on the proposed rule are due April 23, 2018.

On October 12, 2017, the President issued an Executive Order directing the Secretaries of Treasury, Labor, and Health and Human Services to consider regulations to expand the availability of short-term, limited-duration insurance. The proposal would increase the maximum duration of short-term insurance from three months to twelve months. The proposed rule would also revise the required notice that appears in the contract and application for this type of insurance. These revisions are to address any concerns that it may be harder for consumers to distinguish between short-term limited duration coverage lasting almost twelve months and Affordable Care Act (ACA) compliant coverage.

The Centers for Medicare and Medicaid Services notes short-term, limited-duration insurance is generally more affordable than ACA-compliant plans. It projects approximately 100,000 to 200,000 individuals will shift from ACA-compliant individual market plans to short-term, limited-duration plans in 2019.

Read the proposed rule here.

Upcoming Hearings and Meetings

February 26

Medicaid: The Alliance for Health Policy will hold a briefing on "Using State Flexibility to Improve Medicaid Long Term Services and Supports."

Drug Prices: The Commonwealth Fund will hold a conference call briefing on "What is Really Driving High Prescription Drug Costs and What can Congress and the Administration do to Rein Them In?"

Public Health: Trust for America's Health will hold a briefing on "Ready or Not? Protecting the Public's Health from Diseases, Disasters and Bioterrorism."

February 27

Opioids: The Senate Health, Education, Labor and Pensions Committee will hold a hearing entitled "The Opioid Crisis: The Role of Technology and Data in Preventing and Treating Addiction."

Health IT: The Bipartisan Policy Center will hold a discussion on "The Future Role of Government in Health Information Technology (IT) and Digital Health."

Mergers: The House Judiciary Committee will hold a hearing on "Competition in the Pharmaceutical Supply Chain: The Proposed Merger of CVS Health and Aetna."

February 28

ADUFA: The Senate Health, Education, Labor and Pensions Committee will hold a markup of several bills including S. 2434 — Animal Drug and Animal Generic Drug User Fee Amendments."

Opioids: The House Energy and Commerce Committee will hold a hearing entitled "Combating the Opioid Crisis: Helping Communities Balance Enforcement and Patient Safety."

March 1

Opioids: The U.S. Chamber of Commerce will hold a forum on "Combating the Opioid Crisis: From Communities to the Capital."

For more information about healthcare issues you may email or call Nicole Ruzinski Bertsch or George Olsen at 202-659-8201.

TRADE

Industry Groups, Department of Defense Weigh In On Section 232 Investigations on Steel and Aluminum

Key Points:

- *Secretary of Defense James Mattis urged the President to implement "targeted" tariffs on steel and aluminum that will not cause "negative impact[s] on our key allies."*
- *Industry groups have questioned whether the remedies suggested by the Commerce Department will actually help U.S. manufacturing.*

In a memo to Commerce Secretary Wilbur Ross, Defense Department (DoD) Secretary James Mattis wrote that "the systemic use of unfair trade practices to intentionally erode our innovation and manufacturing industrial base poses a risk to our national security." However, he ultimately concluded that because U.S. military requirements for steel and aluminum only represent about three percent of the U.S. production, "DoD does not believe that the findings in the reports impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements." The letter went on to recommend that "if the Administration takes action on steel, DoD recommends waiting before taking further steps on aluminum." According to Mattis, "the prospect of trade action on aluminum may be sufficient to coerce improved behavior of bad actors."

A host of industry groups including the American Institute for International Steel, the National Tooling and Machining Association, the Precision Metalforming Association, and other international steel and aluminum organizations have come out against Commerce's recommendations submitted to President Trump. Domestic industry advocates have argued that broad tariffs and quotas will damage the U.S. manufacturing industry and potentially spark a recession. International organizations have questioned the use of Section 232, noting that previous administrations have not included national defense, global excess capacity, and critical infrastructure needs in these investigations.

For more information about tax issues you may email or call Christopher Hatcher at 202-659-8201. Riyad Carey contributed to this section.

This Week in Congress was written by Ryan Schnepp.