

October 20, 2017

## Washington Update

### This Week in Congress

**House** – The House is in recess until October 23<sup>rd</sup>.

**Senate** – The Senate confirmed **Callista L. Gingrich** to be Ambassador to the Holy See, **David Joel Trachtenberg**, to be Principal Deputy Under Secretary of Defense and passed [H.Con.Res. 71](#), the **FY2018 budget resolution**.

### Next Week in Congress

**House** – The House is expected to take up the Senate-passed **budget resolution**; H.R. 732, the **Stop Settlement Slush Funds Act of 2017** and H.R. 469, the **Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017**

**Senate** – The Senate is expected to take up the House-passed **emergency supplemental for aid to Puerto Rico, the Virgin Islands and western wildfires**.

## TAX

### **Senate Adopts Budget Resolution Clearing Procedural Hurdle Tax Reform**

#### *Key Points*

- *The Senate adopted a FY2018 budget resolution, reaching a deal with the House to likely avoid a conference committee.*
- *The combined budget bill will include an increase of defense spending without any offsets while giving way for \$1.5 trillion in tax cuts.*

On Thursday, the Senate adopted a FY 2018 budget resolution in a 51-49 vote, setting up consideration of tax legislation through the reconciliation process, which would permit a tax bill to pass with a simple majority in the Senate. The resolution includes instructions for the Senate Finance Committee to draft tax legislation that would lower projected revenue by up to \$1.5 trillion over a decade. Sen. Rand

Paul (R-KY) was the only Republican to vote against the budget.

The budget included an amendment offered by Senate Budget Chairman Michael Enzi (R-WY) that would allow the House to take up the Senate-passed version, likely avoiding the need for a conference. The Enzi amendment would modify the House-passed budget resolution by removing instructions for \$203 billion in mandatory spending cuts and replacing the

#### Table of Contents

<b>Taxes</b>	<b>1</b>
<b>Financial Services</b>	<b>3</b>
<b>Energy &amp; Environment</b>	<b>4</b>
<b>Defense</b>	<b>5</b>
<b>Health</b>	<b>7</b>
<b>Transportation &amp; Infrastructure</b>	<b>8</b>
<b>Technology</b>	<b>11</b>
<b>Trade</b>	<b>16</b>

House language calling for deficit-neutral tax legislation.

Earlier on Thursday, the Senate rejected an amendment that would protect the deduction of state and local taxes. Other notable rejected amendments include an attempt by Senator Mark Warner (D-VA) to require tax reform to be deficit neutral and another amendment from Senator Tim Kaine (D-VA) to require a Congressional Budget Office score prior to voting on legislation.

Following the Senate vote, House Ways and Means Committee Chairman Kevin Brady (R-TX) said in a statement that, “When the budget is signed, sealed, and delivered, the Ways and Means Committee will introduce bold legislation that will deliver tax relief, grow our economy, and dramatically improve the lives of all Americans.”

### Tax Breaks Continue to be Debated Ahead of the Release of Legislation

#### Key Points

- *House Ways and Means Committee Chairman Kevin Brady (R-TX) and National Economic Council Director Gary Cohn confirm tax reform will include a partial business interest deduction.*
- *White House and Congress signal that they are getting close to a deal on the deduction for state and local taxes.*
- *House Ways and Means Committee members will meet next week to continue discussion of tax bill details*

On Monday, National Economic Council Director Gary Cohn indicated that the expected partial limitation on the deductibility of business interest might be limited to corporations. Speaking at an American Bankers Association event Cohn said, “We are envisioning a world where the pass-through

entities do not have any limitation on interest deductibility, whether it’s net or not.” He continued by saying there would be limitations set on interest deductibility for C-corporations. On Wednesday, House Ways and Means Committee Chairman Kevin Brady (R-TX) at an event in Houston said that the Committee’s bill will include a provision allowing a partial business interest deduction. He went on to suggest that the bill could also adjust deductions for homebuyers and charitable donations. According to Brady, the Committee is “exploring the home mortgage deduction” to see if there is a fairer way to use “those resources.”

According to a White House official, the Administration is also considering limiting the deduction for state and local taxes rather than completely eliminating it. The official said the goal is to generate enough revenue from a capped state and local tax deduction in order to offset the cost of doubling the standard deduction. Similarly, Senator Shelley Moore Capito (R-WV) told reporters she “would not be necessarily in opposition” to capping the deduction for those whose income does not exceed a certain amount.

President Trump, speaking at the Heritage Foundation, said proposed tax cuts would result in increased economic output, greater employment, and would yield at least a \$4,000 increase for average household incomes. According to Kevin Hassett, chairman of the

#### Upcoming Dates

***December 8, 2017: Continuing Resolution and Flood Insurance expire.***

***March 5, 2018: DACA deadline.***

***March 31, 2018: FAA Reauthorization expires.***

***December 31, 2017: Title VII of FISA expires.***

Council of Economic Advisers, the reasoning behind the wage increase is that “the lower tax rate reduces the total cost of a firm that’s investing in a capital asset like a machine here in the U.S., and more assets like machines let workers produce more. And when workers can produce more, businesses can afford to pay their workers more.”

The House Ways and Means Committee Republican members are scheduled to have a pair of meetings next week to further cement final details of their proposed tax bill. The meetings are expected to be held next Tuesday from 10 a.m. to 1 p.m. and Wednesday from 9 a.m. to 1 p.m. Senate Finance Committee Chairman Orrin Hatch (R-UT) said he expects his Committee to release their version of tax reform in early November.

*For more information about tax issues you may [email](#) or call Christopher Hatcher at 202-659-8201. Nick Karellas, Henry Homans, and Ryan Schnepf contributed to this section.*

## **FINANCIAL SERVICES**

### **SEC Names Brett Redfearn as Director of the Division of Trading and Markets**

*Key Point:*

- *Brett Redfearn previously served as Global Head of Market Structure at JPMorgan Securities.*

On October 18, the Securities and Exchange Commission (SEC) announced that Brett Redfearn has been named Director of the Division of Trading and Markets. Redfearn had been serving as the Global Head of Market Structure for JPMorgan Securities. As noted in an SEC [press release](#), “the division oversees the major securities market participants and infrastructure including, among others, broker-dealers, self-regulatory organizations (including

stock exchanges, the Financial Industry Regulatory Authority, the Municipal Securities Rulemaking Board, and clearing agencies), alternative trading systems, and transfer agents.”

With Redfearn’s appointment SEC Chairman Jay Clayton has now appointed directors for each of the Commission’s five divisions. The other directors are:

- William Hinman, Director, Division of Corporation Finance
- Jeffrey Harris, Director, Division of Economic and Risk Analysis
- Stephanie Avakian and Steven Peikin, Co-Directors, Division of Enforcement
- Dalia Blass, Director, Division of Investment Management

### **Upcoming Hearings and Events**

#### **October 24**

***Insurance:*** The House Financial Services Committee’s Subcommittee on Housing and Insurance will hold a hearing entitled “The Federal Government’s Role in the Insurance Industry.”

***SEC and U.S. Mint Nominations:*** The Senate Banking Committee will hold a hearing on the nominations of Hester Peirce and Robert Jackson Jr. to be members of the Securities and Exchange Commission (SEC). The Committee will also discuss the nomination of the Honorable David J. Ryder to be Director of the United States Mint.

***SEC Chairman Clayton:*** SEC Chairman Clayton will deliver a keynote address at the Securities Industry and Financial Markets Association (SIFMA) Annual Meeting.

#### **October 25**

***Housing Finance:*** The House Financial Services Committee’s Subcommittee on Housing and Insurance will hold a hearing

entitled “Sustainable Housing Finance: Private Sector Perspectives on Housing Finance Reform.”

### **October 26**

***HUD Nominations:*** The Senate Banking Committee will hold a hearing on the nominations of The Honorable Brian Montgomery, to be Assistant Secretary for Housing, Federal Housing Commissioner, Department of Housing and Urban Development (HUD); Robert Hunter Kurtz, to be Assistant Secretary for Public and Indian Housing, HUD; and Suzanne Israel Tufts, to be Assistant Secretary for Administration, HUD.

### **November 1**

***Ex-Im Bank Nominations:*** The Senate Banking Committee will hold a hearing on the nominations of: The Honorable Scott Garrett, to be President of the Export-Import Bank (Ex-Im Bank); Kimberly Reed, to be First Vice President of the Ex-Im Bank; The Honorable Spencer Bachus III, to be a Member of the Board of Directors of the Ex-Im Bank; Judith Delzoppo Pryor, to be a Member of the Board of Directors of the Ex-Im Bank; and Mark Greenblatt, to be Inspector General of the Ex-Im Bank.

### **November 2**

***Consumer Advisory Board:*** The Consumer Financial Protection Bureau (CFPB) will hold a meeting of its Consumer Advisory Board to discuss the Bureau’s “Know Before You Owe: Reverse Mortgages” resources, financial well-being tools and resources, trends and themes, and the final rule on payday, vehicle title, and certain high-cost installment loans.

*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**

### **Upcoming Hearings and Events**

#### **October 25**

***Sage Grouse:*** The House Natural Resources Committee will hold a [hearing](#) titled “Empowering State Based Management Solutions for Greater Sage Grouse Recovery”.

#### **October 26**

***Energy Infrastructure Cyber Security:*** The Senate Energy and Natural Resources Committee will hold a [hearing](#) “on advanced cyber technologies that could be used to help protect electric grids and other energy infrastructure from cyberattacks.”

***Pipelines and Coastal Areas:*** The Pipeline and Hazardous Safety Administration (PHMSA) will hold “a one-day [public meeting](#) to discuss applicable definitions and available geospatial information system (GIS) data sources for marine coastal waters, coastal beaches and the Great Lakes, pertaining to Coastal Ecological Unusually Sensitive Areas (USA).”

#### **November 16**

***FERC Meeting:*** The Federal Energy Regulatory Commission (FERC) will hold its monthly [open meeting](#).

#### **November 29-30**

***Pipeline Safety Information-Sharing:*** The Pipeline and Hazardous Materials Safety Administration’s (PHMSA) Voluntary Information-Sharing (VIS) System Working Group will hold a [meeting](#) “to discuss the objective and scope of the VIS effort, lessons learned from past incidents, best practices, examples of existing information-sharing systems, safety management systems, and the establishment of subcommittees.”

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](#).

## **DEFENSE**

### **Senate Names NDAA Conferees; Mattis Details Concerns With Senate NDAA**

#### *Key Points:*

- *The House and Senate are ready to go to conference committee on the NDAA, suggesting agreement on a final bill may soon be reached.*
- *The Secretary of Defense takes issue with a number of provisions in the Senate-passed NDAA including provisions on cybersecurity, a BRAC round, additional management structural changes, and a proposed Space Corps.*

A week after the House named its conferees and requested a conference committee on the “National Defense Authorization Act for Fiscal Year 2018” (NDAA) ([H.R. 2810/S. 1519](#)), the Senate named its conferees, which include all of the Members of the Senate Armed Services Committee. Typically, conferees are appointed when the Armed Services Committees are close to agreement on a final NDAA, suggesting that a conference report may be agreed upon soon.

This week, Secretary of Defense James Mattis sent a letter to Senate Armed Services Committee Chairman John McCain (R-AZ) regarding his concerns with provisions in the Senate’s NDAA. Mattis identified “[t]he defense caps mandates in the Budget Control Act” as his “primary concern” because the “[c]urrent caps continue to unnecessarily defer critical maintenance, limit aviation availability, delay modernization, and strain our men and women in uniform.” He explained that “I am troubled by the conventional approach applied

to an unconventional problem in Senate Section 1621 dealing with military cyber organization and capabilities.” Mattis stated that “[t]he nature of cyber-attacks is ever evolving, and we need to maintain our ability to take decisive action against this increasingly dangerous threat.” He said that “Section 1621(f) is particularly concerning as it would require the U.S. to notify foreign governments before we take steps to defeat certain cyber threats.”

Mattis added that “an additional Base Realignment and Closure (BRAC) round” would be useful because “a new BRAC in 2021 would save \$2 billion or more annually.” He asserted that “the changes required by Senate Sections 901 and 902, related to the establishment of a Department of Defense Chief Management Officer and Chief Information Warfare Officer, are premature.” Mattis identified further areas of concern:

- **Space Corps:** “I oppose the creation of a new military service and additional organizational layers at a time when we are focused on reducing overhead and integrating joint warfighting functions.”
- **Military Health System:** “I oppose Senate and House language regarding Military Health System reform in order to allow time to implement reforms required by previous NDAs.”
- **TRICARE:** “I support the inclusion of reasonable pharmacy co-pays and the removal of grandfathering provisions on certain fees, as these provisions are estimated to generate approximately \$6 billion in required savings over the Future Years Defense Plan (FYDP).”
- **Relocation of Marines to Guam:** “I support the inclusion of language allowing additional H-2B workers to supplement the Guam or Commonwealth of the Northern Mariana Islands workforce on military

construction projects. I oppose the conveyance of non-excess Navy land in Guam necessary for ship repair, as it poses security concerns to nearby U.S. Navy vessels.”

- Military Construction: “I oppose non-waivable 10 percent cost increase caps on military construction projects, which will result in expensive delays and limit the Department’s flexibility to meet emergent warfighter and operational requirements.”

### BRAC Report Released

#### *Key Points:*

- *In a report mandated by Congress, the DOD finds it has 19 percent “excess capacity” and makes the case for another BRAC round to consolidate facilities to save money.*

This week, House Armed Services Committee Ranking Member Adam Smith (D-WA) released the [cover letter](#) and [report](#) from the Department of Defense (DOD) required by the FY 2016 National Defense Authorization Act (NDAA) showing that the Pentagon “has 19 percent excess capacity,” suggesting that another Base Realignment and Closure (BRAC) round is necessary. In his [press release](#), Smith asserted that “[t]his report shows that the case for authorizing a new Base Realignment and Closure (BRAC) process is extremely strong, even if we plan to substantially increase the size of the military.” He claimed that “[e]ven with higher force levels than we have today, 19 percent of the Defense Department’s infrastructure capacity would be excess to its requirement, including 29 percent excess capacity for the Army and 28 percent excess capacity for the Air Force.” Smith claimed that “[w]e are wasting taxpayer money to maintain buildings and facilities that the military does not need, while we drain away funds for

readiness and weaponry that could keep our service members safe and our country secure.”

In his cover letter, Secretary of Defense James Mattis explained that “[t]he report uses historic ratios of forces and infrastructure to identify types of facilities that may have excess capacity for FY 2012 force levels.” Noting the finding that the DOD has 19 percent excess capacity, Mattis said “I want to incorporate an updated national defense strategy into a more detailed installation by installation capacity analysis that can only occur within a congressionally authorized BRAC round.”

In the report titled “Department of Defense Infrastructure Capacity,” the DOD noted it “has not been authorized to undertake a BRAC analysis for over 14 years...[and] [i]n those years, the Department has undergone considerable changes that have impacted the force structure, mission requirements, and threats facing the United States.” The DOD stated that “budget constraints imposed by the Budget Control Act have further strained existing resources and forced the Department to trim costs of sustaining the infrastructure it does maintain...[which] underscores the fiscal reality that the Department cannot fully fund all sustainment requirements.” The DOD claimed that “[l]imited construction and maintenance funding is better used at enduring locations with the highest military value rather than keeping installations the Department does not need.” Using the metrics required by the FY 2016 NDAA, the DOD found it “has 19 percent infrastructure excess distributed as follows...Army – 29 percent excess; Navy – 6 percent; Air Force – 28 percent; and the Defense Logistics Agency (DLA) – 13 percent.”

## Upcoming Hearings and Events

### October 25

**Naval Forces:** The Senate Armed Services Committee's Seapower Subcommittee will hold a closed briefing on threats to the U.S. Navy.

For more information on defense issues you may [email](mailto:Michael.Kans@williamsandjensen.com) or call Michael Kans at 202-659-8201.

## HEALTH

### Senators Introduce Bipartisan Market Stabilization Bill

#### Key Points:

- *Senators Lamar Alexander (R-TN) and Patty Murray (D-WA) introduced a bipartisan bill which would continue the cost-sharing reduction payments through 2019 and provide additional flexibility to states seeking waivers.*
- *President Trump and House Speaker Paul Ryan (R-WI) have indicated they would not support the bill in its current form.*

On October 19, Senators Lamar Alexander (R-TN) and Patty Murray (D-WA) spoke on the Senate Floor to introduce their "Bipartisan Health Care Stabilization Act of 2017." The bill currently has 24 cosponsors, 12 Republicans and 12 Democrats.

The bill appropriates the cost-sharing reduction (CSR) payments for 2017, 2018, and 2019 and requires states to certify that issuers receiving the CSR payments will ensure consumers and the federal government receive a financial benefit. This is to prevent insurance companies from "double dipping." The bill also makes changes to the Section 1332 waiver process providing more state flexibility for variation in cost sharing and other health plan design elements. The bill would not diminish any existing Affordable Care Act (ACA) patient

protections including coverage for those with pre-existing conditions; guaranteed issue; and the prohibition on annual and life time limits. It makes "copper" plans available to anyone regardless of age or hardship status.

In a floor speech, Alexander stressed it was time for Republicans to work with Democrats to reform the ACA saying "we've had about 50 votes, maybe more, and we lost them all. And we made thousands of speeches and we lost them all." He asked "what's conservative about unaffordable premiums?"

Earlier in the week, President Trump expressed his support for the Alexander-Murray bill saying it is "a short-term solution so that we don't have this very dangerous little period." However, he later back-tracked, saying while he commends the process, Congress should instead find a solution to the ACA instead of bailing out insurance companies. House Speaker Paul Ryan's (R-WI) spokesman said "the speaker does not see anything that changes his view that the Senate should keep its focus on repeal and replace of Obamacare."

Senators Lindsay Graham (R-SC) and Bill Cassidy (R-LA) who had their own repeal-and-replace plan have signed on as co-sponsors to the bill. They say they are working with Senator Ron Johnson (R-WI) to make changes to the Alexander-Murray bill to make it more likely to succeed in the House.

Full text of the bill can be read [here](#) and a section-by-section summary [here](#).

## Upcoming Hearings and Events

### October 23-24

**Health Policy:** The Milken Institute will hold its Future of Health Summit.

**October 24**

**Opioids:** The Hill will hold a discussion on “America’s Opioid Epidemic: Aging and Addiction.”

**Treatment:** Health Affairs will hold a forum on “Choosing Wisely: Opportunities and Challenges in Curbing Medical Overuse.”

**Public Health:** The House Energy and Commerce Committee will hold a hearing on “Examining HHS’s Public Health Preparedness for and Response to the 2017 Hurricane Season.”

**Open Enrollment:** The Alliance for Health Policy will hold a webinar entitled “Marketplace Open Enrollment Preview.”

**October 25**

**Health Policy:** Washington Post Live will hold a discussion on “The Health 202” focusing on “the current status of health care reform efforts, the future of Medicare and Medicaid, and the state of the insurance marketplace.”

**Downs Syndrome:** The House Appropriations Committee will hold a hearing on “Down Syndrome: Update on the State of the Science and Potential for Discoveries Across Other Major Diseases.”

**Opioids:** The House Energy and Commerce Committee will hold a hearing on “Federal Efforts to Combat the Opioid Crisis: A Status Update on CARA (Comprehensive Addiction and Recovery Act) and Other Initiatives.”

**Disabilities:** The Senate Special Aging Committee will hold a hearing on “Working and Aging with Disabilities.”

**October 27**

**Health Outcomes:** The Alliance for Health Policy will hold a briefing on “How to Improve

Health Outcomes for Americans while Managing the Cost of Care.”

*For more information about healthcare issues you may [email](#) or call Nicole Ruzinski Bertsch or George Olsen at 202-659-8201.*

**TRANSPORTATION****RIA On Electronically Controlled Pneumatic (ECP) Brakes Published***Key Points:*

- *The DOT releases a reassessment of the need for a rulemaking requiring new brakes for certain trains carrying hazardous materials.*
- *The Secretary could reverse the 2015 final rule by year’s end.*

On October 16, the Pipeline and Hazardous Materials Safety Administration (PHMSA) and the Federal Railroad Administration (FRA) published [notice](#) of the release of “a revised [Regulatory Impact Analysis \(RIA\)](#) updating the original RIA associated with the electronically controlled pneumatic (ECP) brake provision of PHMSA’s May 8, 2015, Final Rule titled “[Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains](#)” (Final Rule).” The agencies are requesting comment on the RIA, which could lead the Secretary of Transportation to “repeal the applicable ECP brake system requirements.” PHMSA and the FRA explained that they published “the updated RIA in response to the mandate of the “Fixing America’s Surface Transportation (FAST) Act” (P.L. 114-94). The agencies stated that “[t]he updated RIA incorporates new testing and analysis the National Academy of Sciences (NAS) reviewed, recommendations from two U.S. General Accountability Office (GAO) audits, and updates to the costs and benefits of the provision of the Final Rule based on current economic conditions.”

PHMSA and the FRA noted that the Final Rule “adopt[ed] requirements designed to reduce the consequences and, in some instances, reduce the probability of accidents involving trains transporting large quantities of flammable liquids.” Specifically, “[t]he Final Rule defined certain trains transporting large volumes of flammable liquids as high-hazard flammable trains (HHFT) and others as high-hazard flammable unit trains (HHFUT).” The agencies explained that “[t]he Final Rule required HHFUTs transporting at least one flammable liquid classified as a packing group I material be operated with an ECP braking system by January 1, 2021, and all other HHFUTs be operated with an ECP braking system by May 1, 2023.” However, in the FAST Act, Congress “established a process, including independent study and testing, for DOT to use in developing an updated RIA related to the Final Rule’s ECP brake provision.”

In the RIA explained that:

“[T]here were two major changes that resulted in significant changes between the 2015 Final Rule analysis and this updated RIA: the number of carloads of HHFUT that would need to be transported, and the use of dynamic brakes within the railroad industry. Due to the reduced number of HHFUT carloads that was forecasted in the revised RIA, both estimated safety benefits and business benefits have decreased. Also, railroads have not made commitments to install ECP on new locomotive orders. Therefore, DOT assumed that installing ECP on locomotives would be done solely through retrofitting which increased the costs while not adding any additional business or safety benefits. Additionally, the increased use of

dynamic braking within the railroad industry also decreased the business benefits that railroads could expect to see if ECP brakes were to be installed, especially when compared to the fuel savings and wheel savings that the original 2015 Final Rule analysis estimated.”

PHMSA and FRA concluded that “if the number of carloads were to increase, and come closer to the original forecasted carloads, then the safety benefits would increase greatly and it is likely that the total benefits would be greater than the total costs.” The agencies stated that “[a]s the number of carloads drives the calculations for most of the costs and benefits used within this analysis, any increase has the potential to significantly alter the costs and benefits and could bring the relative estimated costs and benefits analysis closer to the results presented in the 2015 Final Rule.”

### **DaFazio Decries DOT Decision To Make PHMSA The Lead U.S. Agency For ICAO’s Dangerous Goods Panel**

*Key Points:*

- *The top Democrat on the House Transportation and Infrastructure Committee questions the Secretary of Transportation’s decision to switch lead federal agencies on an international aviation organization.*
- *The move comes when the panel is considering a FAA proposal changing whether people may put electronics larger than smartphones in checked luggage due to concerns about the safety of lithium batteries.*

On October 19, House Transportation and Infrastructure Committee Ranking Member Peter DeFazio (D-OR) sent a [letter](#) to Secretary of Transportation Elaine Chao “blasting her for a decision to replace the Federal Aviation Administration (FAA) with the Pipeline and

Hazardous Materials Safety Administration (PHMSA) as the U.S. Department of Transportation (DOT) lead United States representative on the Dangerous Goods Panel (DGP) of the International Civil Aviation Organization (ICAO)” according to his [press release](#).

In the letter, DeFazio stated “I find your decision inexplicable, and I strongly believe it has the potential to put the lives of airline passengers and crews at serious risk.” He claimed that “[t]he FAA—not PHMSA—is the world’s foremost expert in aviation safety.” DeFazio stated that the “FAA’s mission is, in fact, to provide the safest, most efficient aerospace system in the world...[but] I have no idea what PHMSA’s mission is, or whether its leaders do, because the agency is so dysfunctional that it cannot even finalize crucial safety rulemakings that Congress mandated more than five years ago.”

DeFazio asserted that “the FAA—not PHMSA—leads the world in testing packages and containers used for transporting dangerous goods on aircraft and evaluating the control of fires.” He claimed that “PHMSA, on the other hand, has repeatedly demonstrated its coziness to industry representatives that strongly oppose the regulation of lithium cells and batteries and other dangerous goods, and worked to combat FAA safety proposals at ICAO meetings and within the Department.” DeFazio contended that “it is suspect that the Department made this decision just days before the Montreal meeting during which the DGP will consider a Working Paper submitted by the FAA to ICAO proposing amendments to the *Technical Instructions for the Safe Transport of Dangerous Goods by Air* regarding portable electronic devices (PEDs) carried by passengers and crew.” He added that “PHMSA purportedly opposes these amendments.”

DeFazio’s letter coincides with the submission by the FAA of a proposal to the ICAO DGP of a [working paper](#) “to amend the list of dangerous goods permitted to be carried by passengers or crew...to address safety concerns with portable electronic devices (PEDs) [i.e. anything bigger than a smartphone] being stowed in checked baggage” on the basis of ten tests in which the lithium. Notably, the proposal would bar the packing of PEDs in checked baggage unless an airline permitted passengers to do so. The FAA noted its proposal is supported by the European Aviation Safety Agency (EASA); Airbus; International Coordinating Council of Aerospace Industries Association; and International Federation of Airline Pilots’ Association.”

The FAA explained that:

“As a result of recent security measures that prohibited the carriage of PEDs larger than a cell phone or smartphone in the cabin on flights from certain points of departure into the United States and the United Kingdom; one option on these flights was for passengers to place their large PEDs into their checked baggage if they wanted to transport them. This created an unexpected increase in the number of lithium battery-powered devices in the passenger aircraft cargo compartment transported as checked baggage. It was noted that there was little research data available on the behavior, effects and risks associated with PEDs being placed in a passenger’s checked baggage.”

The FAA explained that its “Fire Safety Branch has conducted 10 tests utilizing a fully charged laptop computer inside a suitcase,” one of which was “conducted with an eight-ounce aerosol can of dry shampoo strapped to the

laptop battery and added to the suitcase contents.” The FAA claimed that “[t]his test yielded the most troubling results...[because] [f]ire was observed almost immediately after thermal runaway was initiated.” The FAA added that “[t]he fire rapidly grew, and within 40 seconds, the aerosol can of shampoo exploded with the resulting fire rapidly consuming the bag and its contents.” The FAA asserted that “[t]he outcome of the testing indicates that large PEDs in checked baggage mixed with an aerosol can produce an explosion and fire that the aircraft cargo fire suppression system in Class C cargo compartments may not be able to safely manage.” The FAA contended that “[g]lobally, there are aircraft in the commercial fleet that do not have the same level of cargo fire suppression in the cargo hold, which places passengers in greater jeopardy if a PED catches fire in checked baggage.”

*For more information on transportation issues you may [email](#) or call Michael Kans at 202-659-8201.*

## **TECHNOLOGY**

### **Data Security Hearing**

#### *Key Points:*

- *The Senate Banking Committee had a follow up hearing on the Equifax breach that focused on credit reporting agencies more broadly.*

On October 17, the Senate Banking Committee held a [hearing](#) entitled “Consumer Data Security and the Credit Bureaus.” Topics discussed in the hearing included: (1) Social Security Numbers; (2) Data Protections; (3) Fiduciary Duty for Credit Reporting Bureaus; (4) Credit Freezes; (5) National Security; (6) Deletion of Information; (7) Error Rates; (8) Systemic Risk; (9) Mandatory Arbitration; (10) Notification Standards; (11) Alternative Credit Standards; (12) Veterans; (13) Data Purchased

by Federal Agencies; and (14) European Regulations.

Chairman Mike Crapo (R-ID), in a [statement](#), explained that at the Committee’s hearing on the Equifax breach Members expressed interest in better understanding how credit bureaus are regulated, how they protect consumer data, and whether there are gaps that Congress needs to fill. He stated he has long been concerned about the ever-increasing amounts of “big data” collected by companies and the government. Crapo suggested it is critical that personal data is protected, consumer impact in the event of a breach is minimized, and consumers’ ability to access credit is not harmed. He noted that credit bureaus play a valuable role in the financial system by helping financial institutions assess a consumer’s ability to meet financial obligations and also facilitating access to beneficial financial products and services. He stated the inherent nature of the credit bureau business, as with most businesses in this digital age, requires utmost data security measures to ensure that sensitive consumer information is safeguarded. Crapo stated that two weeks ago, Equifax testified about the methods it uses to protect its consumer databases, such as encryption at rest and tokenization. Crapo stated that questions remain about the best ways to protect sensitive data, including: are there data security industry standards and best practices at credit bureaus; should tools like encryption at rest be employed to protect all data containing sensitive consumer information; what role do financial institutions and federal agencies play in data security at credit bureaus; and given that credit bureaus are financial institutions under the Gramm-Leach-Bliley Act, how does data security, testing and oversight by regulators compare to that of traditional financial institutions. Crapo stated that he looks forward to hearing what credit bureaus do to ensure security for the data they collect; who oversees

credit bureaus to ensure they have adequate security measures in place; and what improvements could be made to the oversight of data security at credit bureaus.

Ranking Member Sherrod Brown (D-OH), in a [statement](#), explained that under current law, companies like Equifax can collect vast troves of personal information. He noted that includes information “plucked” from work histories, social media profiles, from rewards cards that track purchases at the grocery store, and even information from cell phones tracking daily commutes. Brown stated generally, these companies are free to combine and sell that information to all sorts of financial institutions and other data mining firms who use it to make decisions about consumers. He noted corporations like Equifax rarely have to tell consumers exactly why or how those decisions are made, as they get to hide behind “proprietary models” and “trade secrets.” He suggested U.S. laws protect big corporations’ use of people’s data a lot better than they actually protect people. Brown stated that as the recent breach demonstrates, enhanced cybersecurity measures at companies like Equifax might work perfectly yet still do little to protect consumers’ data. He noted while 145 million people have had their private data exposed, it does not appear that any sensitive corporate data was accessed. He explained that because these businesses are not accountable to consumers, and because consumers have no choice over who is collecting their information, consumer protection is always an afterthought. Brown stated that as the Committee talks about the clearly inadequate protections for consumer data at Equifax, and those in place at the other consumer reporting agencies today, he hopes they do not forget that the real victims of this hack are the 145 million people. He suggested Congress also needs to explore how to restore people’s control over their own information and to examine whether the current credit

bureau model makes sense for American consumers. Brown stated that the credit bureaus have a long history of consumer complaints and inaccurate reporting that has long term effects on people’s ability to get a job or a house. He explained rather than addressing these problems, the credit bureaus have spent millions acquiring other data collection companies and branching out into new lines of business.

Covington & Burling Partner Andrew Smith (on behalf of the Consumer Data Industry Association), noted the important role of the credit monitoring system in the U.S. He explained the Fair Credit Reporting Act (FCRA) was passed to protect consumer privacy and maintain the vitality of the credit reporting system. Smith noted the Consumer Financial Protection Bureau (CFPB) has been tasked with supervision of the credit reporting system. He stated credit bureaus are subject to federal and state laws on protection of data security. Smith stated credit bureaus are required by the FCRA to credential who receives the data and they must continuously monitor customers. He stated the Federal Trade Commission’s (FTC) “Safeguards Rule” requires financial institutions to develop comprehensive data security programs and the states require reasonable procedures to safeguard data. Smith noted that because of their role in the banking system the credit bureaus are also required to comply with independent requirements from the banks. He noted audit requirements and bank reviews.

Electronic Privacy Information Center President Marc Rotenberg stated the Equifax data breach is one of the most serious in the history of the nation, on par with the Office of Personnel Management (OPM) breach. He stated the Equifax breach poses a challenge to the security of the nation. He suggested the Equifax breach is concerning because of its

scope and the delay in disclosure. Rotenberg stated the data breach included names, Social Security Numbers (SSN), and driver's license information. He stated Equifax is clearly responsible for this breach. He explained Equifax had been told of the need to enhance their security and Equifax chose to collect this data. He stated when credit card information is hacked the card can be closed but one cannot simply change their date of birth or their SSN. Rotenberg stated credit reporting agencies (CRA) are in urgent need of reform. He stated consumers need to be given greater control about what information is gathered that impacts their financial future. He suggested the need for a national credit freeze. He stated the consumer should be able to decide when it is in their best interest to disclose their credit score. He suggested credit monitoring should also be provided for free. Finally, Rotenberg stated consumers should have more ready access to the content of their credit reports.

Congressional Research Service Analyst in Cybersecurity Policy Chris Jaikaran stated today all companies are data companies. He stated this concept reflects the important role of data in business practices. He stated the reliance on data creates the need for data security and risk management. Jaikaran noted that absolute security is not possible but suggested that corporations need to manage their risks. He stated all staff has to be focused on managing data security risks and response planning. He noted there will be delays between the attack and the announcement of the attack because of the need for analysis of the attack. Jaikaran stated Congress could explicitly permit a federal agency to examine whether credit reporting agencies are following federal data security standards. He stated Congress could regulate the collection and use of data regardless of the use of that data. He noted requirements on collection and use could also be established and companies could be required

to disclose how they collect data, store it and use it.

### OMB Issues FY 2017-18 FISMA Guidance

#### Key Points:

- *The Trump Administration issued its first FISMA guidance to align agency information security practices with President Donald Trump's cybersecurity executive order.*
- *Nonetheless, much of the memorandum builds on and keeps Obama Administration initiatives.*

On October 16, the Office of Management and Budget (OMB) released a [memorandum](#) that "provides agencies with Fiscal Year (FY) 2017-2018 Federal Information Security Modernization Act of 2014 (FISMA) reporting guidance and deadlines." The memorandum "describes the processes for Federal agencies to report to OMB and, where applicable, the Department of Homeland Security (DHS)." This document is another means by which the Administration is moving to implement its cyber and information technology (IT) priorities per the ["Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure" Executive Order](#). OMB noted that "[t]his memorandum does not apply to national security systems or intelligence community systems."

Section I describes "Information Security Program Oversight and FISMA Reporting Requirements and includes deadlines for all Federal agencies' quarterly and annual FISMA metrics." The memorandum lays out the quarterly reporting schedule (see Appendix A) and establishes a new requirement per Executive Order 13800 making agency heads responsible for the cybersecurity of their agency or department. Agency heads must submit a signed letter as part of the agency's FISMA compliance submission that includes:

1. A detailed assessment of the adequacy and effectiveness of the agency's information security policies, procedures, and practices, including details on progress toward meeting FY 2017 government-wide targets in the Cybersecurity Cross-Agency Priority Goal metrics.
2. Details on the total number of incidents reported to the DHS United States Computer Emergency Readiness Team (US-CERT) through the DHS US-CERT Incident Reporting System. In the event of a major incident, the agency must provide: a description of each incident, system impact levels, types of incidents, and locations of affected information systems.
3. A description of each major incident, if applicable, with the following details:
  - Threats and threat actors, vulnerabilities, and impacts;
  - Risk assessments conducted on the information system before the date of the major incident;
  - The status of compliance of the affected information system with security requirements at the time of the major incident; and
  - The detection, response, and remediation actions the agency has completed.

OMB reminded agencies that their annual FISMA reports must also be submitted to the committees of jurisdiction and the Government Accountability Office (GAO). The due date for annual reports is March 1, 2018.

Section II spells out the "Incident Reporting Guidelines, including the requirements maintained from the rescinded M-15-01, M-16-

03, and M-17-05. This section uses the same definition of major incident and breach as Obama OMB memoranda and explicitly invokes [Presidential Policy Directive-41](#). OMB notes that per PPD-41, "if an incident is a major incident, it is also a "significant cyber incident"... [and] will also trigger the coordination mechanisms outlined in PPD-41 and potentially require participation and actions from a Cyber Unified Coordination Group." Thus it appears for the time being, at least, the Trump Administration will leave PPD-41 in place.

### Trump Names FTC Nominees

#### *Key Points:*

- *The President names his FTC chairman-designate and a Democratic commissioner to the Commission which has only two Commissioners, one of whose terms has expired.*

On October 19, President Donald Trump [announced](#) that he was naming Joseph Simons and Rohit Chopra to be members of the Federal Trade Commission (FTC) with Simons to replace Acting Chairman Maureen Ohlhausen. As is the usual practice, one nominee is Republican and the other Democratic. Simons has experience serving the FTC as its Director of the Bureau of Competition during the George W. Bush Administration. Chopra was the Consumer Financial Protection Bureau's Assistant Director from 2010-2015.

Currently, the FTC has two commissioners, Ohlhausen and Terrell McSweeney whose term expired on September 27, but has agreed to stay on until more commissioners are nominated. Ohlhausen's term is set to end next year. It is not clear, at present, how quickly the Senate will act on these nominations.

In the White House's press release, the Administration provided biographies of the two nominees:

- **Joseph Simons of Virginia, for a seven-year term beginning September 26, 2017, and upon confirmation designate chair.** Mr. Simons is currently a partner and co-chair of the Antitrust Group at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP. He was previously in charge of antitrust enforcement at the Federal Trade Commission, serving as Director of the Bureau of Competition from 2001 until 2003. Among his accomplishments, Mr. Simons was responsible for overseeing the re-energization of the FTC's non-merger enforcement program. Under his leadership, the Bureau initiated over 100 investigations and produced more non-merger enforcement actions in one year than in any other year in the prior two decades or since. Mr. Simons is also a co-developer of "Critical Loss Analysis," a technique for market definition that has been incorporated into the Department of Justice and FTC Merger Guidelines, as well as applied in numerous court decisions. Mr. Simons received his A.B. in Economics and History from Cornell University in 1980 and his J.D., cum laude, from Georgetown University Law Center in 1983.
- **Rohit Chopra of New York, for the remainder of a seven-year term expiring September 25, 2019.** Mr. Chopra is currently a Senior Fellow at the Consumer Federation of America, where he focuses on consumer protection issues facing young people and military families. From 2010-2015, he served at the Consumer Financial Protection Bureau as Assistant

Director, where he oversaw the agency's work on student financial services issues. The Secretary of the Treasury also appointed him as the agency's student loan ombudsman. In 2016, Mr. Chopra served as Special Adviser to the Secretary of Education. Prior to his government service, he was an associate at McKinsey & Company, where he served clients in the financial services and consumer technology sectors. Mr. Chopra holds a bachelor's degree from Harvard University and a master's in business administration from the Wharton School at the University of Pennsylvania. He was also the recipient of a Fulbright Fellowship. He resides in New York.

## Upcoming Hearings and Events

### October 24

**Cyber Workforce:** The Homeland Security Committee's Cybersecurity, Infrastructure Protection, and Security Technologies Subcommittee and the House's Education and the Workforce Committee's Higher Education and Workforce Development Subcommittee will hold a joint [hearing](#) titled "Public-Private Solutions to Educating a Cyber Workforce."

**Quantum Technology:** The House Science, Space & Technology Committee's Research & Technology and Energy Subcommittees will hold a joint [hearing](#) titled "American Leadership in Quantum Technology."

### October 25

**Russian Election Interference:** The Senate Intelligence Committee will hold a hearing on Russian interference in the 2016 election.

**Commercial Satellites:** The Senate Commerce, Science & Transportation

Committee will hold a [hearing](#) titled “The Commercial Satellite Industry: What’s Up and What’s on the Horizon.”

**FCC Oversight:** The House Energy & Commerce Committee’s Communications and Technology Subcommittee will hold a [hearing](#) titled “Oversight of the Federal Communications Commission (FCC).”

**Federal Use of Kaspersky Lab:** The House Science, Space & Technology Committee’s Oversight Subcommittee will hold a [hearing](#) titled “Bolstering the Government’s Cybersecurity: Assessing the Risk of Kaspersky Lab Products to the Federal Government.”

### **October 26**

**Cyber Technology/Energy Infrastructure:** The Senate Energy & Natural Resources Committee will hold a [hearing](#) “to Examine Cyber Technology and Energy Infrastructure.”

*For more information on technology issues you may [email](#) or call Michael Kans at 202-659-8201.*

## **TRADE**

### **Controversial U.S. Proposals on NAFTA Met With Resistance**

#### *Key Points:*

- *The U.S. Trade Representative (USTR) tabled proposals on automobile rules of origin, investor-state dispute system (ISDS), and the sunset clause.*
- *Canadian and Mexican negotiators have expressed their strong disagreement with these proposals.*

The fourth round of talks to renegotiate NAFTA began in Washington D.C. on October 11 and ended October 17. The three parties agreed to delay the fifth round of negotiations until November 17 because of

“significant conceptual gaps” that controversial U.S. proposals have raised. The negotiators also agreed to extend talks into the first quarter of 2018, extending beyond the previous self-imposed deadline of December 2017. Negotiators have only finalized two chapters: small and medium-sized enterprises and competition.

At the fourth round, U.S. negotiators tabled controversial proposals on automobile rules of origin, ISDS, and the “sunset clause.” The proposal on automobile rules of origin would increase the NAFTA regional content requirement from 62.5 to 85 percent and require 50 percent U.S. content. The ISDS proposal would allow the countries to opt in to the dispute settlement system, effectively making it optional. The sunset clause would require the three countries to review and renew the deal every five years. All three of these proposals have been met with harsh criticism from U.S. business groups and Canadian and Mexican negotiators.

USTR Lighthizer responded strongly to U.S. business groups, saying, “[i]t’s always odd to me when the business people come around and say ‘oh, we just want our investments protected.’ I thought, ‘well so do I.’ I mean don’t we all? I would love to have my investments guaranteed. But unfortunately it doesn’t work that way in the market. It does work that way when you’re talking about special interests... When you say sunset... It’s not like it’s going to require a real hurdle. But the presumption is that it’s too risky because if we make an investment, it’s going to be obvious in five years that no sane person would keep it... So they’re telling me it’s a great agreement, and they’re telling me that ‘Jesus, no one would ever stay in this after five years.’ To me it’s completely crazy... We’re not taking anything away from anybody. No protectionism at all... Does anybody think it’s

protectionist to say you buy your own political risk insurance? I mean I can show you what protectionism is... But it certainly isn't this."

USTR Lighthizer also was very critical of Canadian and Mexican negotiators, saying, "[w]e have seen no indications that our partners are willing to make any changes that will result in a rebalancing and a reduction in these huge trade deficits... I would've thought by now we could've cleared chapters dealing with digital trade, telecommunication, anticorruption, and several of the sectoral annexes." Canadian Foreign Minister Chrystia Freeland called U.S. proposals on rules of origin and dispute settlement "unconventional" and said they would "run counter to WTO rules."

Mexican negotiators told a collection of U.S. companies that they are opposed to the USTR proposals on rules of origin and ISDS but are committed to completing renegotiations.

### USTR Blocks Peruvian Timber Imports

#### Key Points:

- *In a very rare move, the USTR used the environment chapter of the U.S. Peru Trade Promotion Agreement to block illegally-harvested timber imports.*

On Thursday, the USTR ordered Customs and Border Protection to block timber imports from a Peruvian company because of its illegal harvesting practices. The USTR used a timber verification provision included in the environment chapter of the U.S.-Peru Trade Promotion Agreement. USTR Lighthizer said, "[t]his unprecedented enforcement action demonstrates President Trump's strong commitment to enforcing trade agreements and ensuring that trade is fair to the American people."

This action follows a November meeting between Peru and the U.S. in which Peru said it was undertaking a "set of unilateral actions to address ongoing challenges including holding all of the relevant actors involved in the Oroza shipment accountable, amending export documentation requirements to improve traceability, enhancing timber inspections, and implementing a timber tracking system in the Amazon corridor." Lighthizer added that, "Illegal logging destroys the environment and undermines U.S. timber companies and American workers who are following the rules. We will continue to closely monitor Peru's compliance with its obligations under our trade agreement."

### Upcoming Hearings and Events

#### November 1

***Export-Import Bank Nominations:*** the Senate Banking, Housing & Urban Affairs Committee will hold a full committee hearing on nominations.

*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 Schnepf.*