

## Lame Duck Preview

November 14, 2016

When federal lawmakers return to Washington, DC today, they will begin the Lame Duck session with an eye toward an incoming Administration led by a man that polling and conventional wisdom suggested would not be elected President. Republican Donald Trump's shock victory against Democratic former Secretary of State Hillary Clinton altered a Washington landscape that was prepared for a Clinton Administration. Moreover, House Republicans prevented significant losses to their numbers in the lower chamber, while in the Senate, Republicans defied the odds and a near-impossible map to retain their majority.

With Republicans taking control of the White House and holding both chambers of Congress in January, expectations for Lame Duck activity have shifted. While legislators will need to quickly address must pass items, like government funding and defense reauthorization, lawmakers may defer action on several issues until the 115<sup>th</sup> Congress convenes. However, there remains an outside chance that some of these non-urgent items could advance in the waning days of the Obama Presidency, particularly the 21<sup>st</sup> Century Cures bill.

One item that will not move during Lame Duck is the nomination of Judge Merrick Garland to fill the open seat on the Supreme Court, which was left vacant upon the death of Justice Antonin Scalia earlier this year. Senate Majority Leader McConnell (R-KY) and his fellow Republicans withstood calls to move the nomination forward, believing that the incoming President should fill the vacancy. That the incoming President is a Republican ensures that no action will be taken on the Garland nomination, and the Senate GOP will wait to confirm a forthcoming nominee from the Trump White House next year.

The Lame Duck session will take place against the backdrop of a transfer of power from the Obama Administration to the incoming Trump Administration. The Trump transition [team](#) is working hand-in-hand with Obama officials to make the transfer as smooth and efficient as possible. Over the coming days and weeks, the Trump team will begin releasing the names of individuals who will be nominated for key positions in the Trump Administration. The transition team has already announced that current Republican National Committee Chairman Reince Priebus will take on the role as Chief of Staff.

Steve Bannon, the Trump Campaign CEO, will serve as Chief Strategist. The transition team may also begin floating a narrower [list](#) of potential Supreme Court nominees.

One issue that Trump will want to quickly address in the opening months of his Administration is repeal of all or most of the Affordable Care Act (ACA). A long-standing priority for Republicans, full control of the federal government will provide the GOP with the opportunity to repeal and replace the ACA.

The easiest avenue for ACA repeal is through budget reconciliation, which allows the Senate to pass legislation with a simple majority. Reconciliation requires Congress to pass a budget resolution (which is non-binding and does not require the President's signature) with reconciliation instructions directing lawmakers to report statutory changes to spending, revenue, and/or debt limit levels.

The process has long been eyed by Republican leaders as the best way to avoid a Senate Democratic filibuster and pass a repeal bill. However, while budget resolutions do not require the President's signature, reconciliation packages do, which created a roadblock for Republicans in the 114<sup>th</sup> Congress with a Democrat in the White House.

Additionally, the Senate parliamentarian has previously ruled that a budget resolution can only include one set of instructions for spending, one for revenue, and one for the debt ceiling. Given that the GOP is eager to use reconciliation for both ACA repeal and tax reform, the Republican Congress may pursue a dual budget track. The plan would require legislators to adopt a budget resolution for Fiscal Year 2017 (FY17), which they failed to do earlier this year, with reconciliation instructions that would allow Republicans to undo the ACA early in Trump's Administration. This would then be followed by a budget resolution for FY18 with reconciliation instructions on tax reform.

The timeline for such a plan is murky. Congress could pass an FY17 budget resolution in the lame duck, but ambiguity remains on whether reconciliation instructions can carry over into a new Congress. More likely, Republicans will look to quickly pass an FY17 budget when the 115<sup>th</sup> Congress convenes in early January, beginning the reconciliation process and placing a reconciliation bill repealing most of the ACA on President Trump's desk soon after his inauguration. Subsequently, Congress would pass an FY18 budget resolution with tax reform reconciliation instructions that would likely be adopted in the normal budget timeframe of April 2017, allowing for a reconciliation package to advance later in the year.

## **MUST PASS**

Congress has two major time-sensitive items that they will need to advance before adjourning sine die: government funding and defense reauthorization.

### *Government funding*

The top priority for Congress in the Lame Duck session is to approve additional funding for the federal government, which is currently funded via a Continuing Resolution (CR) that expires on December 9. It is possible that lawmakers will ultimately need to advance another one week CR to give them additional time to broker a deal for the end of the year.

However, questions remain on what the funding package will look like. One solution is to do a straight CR through September 30, 2017, the end of the fiscal year. This would clear the decks for the new Administration and allow an immediate focus on tax and healthcare in 2017.

Another approach is for Congress to finish all of the appropriations bills and approve them in an omnibus spending package (or a series of minibuses, smaller packages of appropriations bills) to fund the government through the end of FY17. This action is opposed by some on the right flank of congressional Republicans, who would prefer to deny President Obama the ability to influence the funding priorities for the remainder of FY17. Instead, these members prefer a short-term CR that would fund the government to March 2017 and allow newly-inaugurated President Trump to approve more conservative funding bills.

At the moment, a more likely scenario is a hybrid approach where some of the more controversial appropriations are extended through a simple CR (through 3/31/17 or 9/30/17), while the less controversial appropriations bills are completed and passed through the end of FY 17.

### *NDAA*

Another must pass item is the FY17 National Defense Authorization Act (NDAA). The House passed its [version](#) of the NDAA in May, and the Senate followed suit with its [bill](#) in June. The main challenge facing negotiators is whether to accept the House-backed reallocation of \$18 billion from war funds to the Pentagon's base budget, a move Democrats oppose. The FY16 NDAA is set to lapse at the end of the year. The NDAA has been signed into law for 53 consecutive years without any lapses.

## MAY PASS

While Republicans may delay action on many legislative items until they can reintroduce more conservative versions with the backing of a Republican White House, one non-time sensitive initiative that could advance in the Lame Duck is the 21<sup>st</sup> Century Cures Act, an effort to modernize the Food and Drug Administration (FDA) and the National Institute for Health (NIH). The House passed its [version](#) of the bill in July 2015. The Senate moved at a slower pace and struggled in the fall months to approve a package similar to the House version of Cures. Senate Democrats stalled the legislation due to demands for more funding for the NIH and debate over how to pay for it, among other concerns. Leader McConnell has stated that he hopes to move Cures in the Lame Duck, and leaders on the issue are working to hammer out a deal before the 114<sup>th</sup> Congress ends.

## OTHER ITEMS

While the Cures bill is the most likely to advance during the Lame Duck, there are a handful of other items that could potentially see action. They include:

- Water Resources Development Act with aid for the Flint water crisis
- Repeal of Center for Medicare & Medicaid Innovation's Medicare Part B demo
- Pension/healthcare fix for soon-to-be-insolvent UMWA plan
- Criminal justice reform
- Energy bill
- Energy tax extenders