

This month we are pleased provide you with a special edition of the Government Contracts Update. These articles originally appeared in Venable's Legislative Practice Group newsletter, Capitol View.

AUTUMN AGENDA

Court

On the first Monday in October, John Roberts assumed the center seat on the Supreme Court bench and joined a very select group. While there have been 43 Presidents of the United States, 1,884 United States Senators, and 9,869 Members of the House of Representatives, Justice Roberts became only the 17th Chief Justice in American history. He had been confirmed by the Senate on September 29 by a vote of 78-22, with 32 Democrats joining all 55 Republicans along with Senator James Jeffords, an Independent, in support of the nomination.

On October 31, President Bush nominated Judge Samuel A. Alito, Jr. of the United States Court of Appeals for the Third Circuit to be an Associate Justice on the Supreme Court. Judge Alito would replace Justice Sandra Day O'Connor who is retiring. Judge Alito's nomination takes the place of Harriet Miers whose earlier nomination was withdrawn. The schedule for the start of the Judiciary Committee hearings on Judge Alito is not certain since background checks and significant amounts of paperwork will have to be completed before they can begin. President Bush has stated he would like to see the full Senate vote on the Alito nomination by the end of the year. However, some Democratic Senators have already indicated they would prefer more time to consider the nomination.

Senate

While the First Session of the 109th Congress is tentatively scheduled to end by Thanksgiving, it appears likely that rather than adjourning by the holiday there will be a recess with adjournment sometime in December. The legislative session before the Thanksgiving Recess will see the Senate continue its efforts to pass a variety of appropriation conference reports. On October 27, the Senate passed its final appropriation bill, the Department of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act (H.R.3010) which provided \$604.4 billion in spending. However, only the Homeland Security (H.R.2360), Interior (H.R.2361) and Legislative Branch (H.R.2985) appropriation bills have actually been signed into law by the President. This leaves nine appropriation conference reports to be considered on the Senate Floor.

The Senate also intends to consider and pass a budget reconciliation package before the Thanksgiving Recess. The Senate Budget Committee held a markup session on October 26 to assemble the budgets of the various authorizing Committees into a single bill. Under the 2006 budget resolution (H.Con.Res.95) Senate and House authorizing committees are required to submit specific policy changes for programs under their jurisdiction in order to bring them into compliance with the overall Federal budget of \$1,859,892,000,000 for FY 2006. The reconciliation package includes billions of dollars impacting the Medicare and Medicaid programs adopted by

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the Finance Committee, as well as approval of oil and gas exploration in the Arctic National Wildlife Refuge (ANWR) by the Energy and Natural Resources Committee. The bill (S.1932) will be debated and voted on by the Senate in the first week of November.

On October 25 the Senate passed the Antitrust Criminal Investigative Improvement Act of 2005 (S.443). This bill would amend the Omnibus Crime Control and Safe Streets Act of 1968 to grant authority to the Justice Department to seek orders from Federal Courts for wiretaps to monitor communications between those suspected of engaging in illegal antitrust conspiracies. Under current law, criminal antitrust conspiracies are not among the over 150 predicate offenses for which the Justice Department may obtain a wiretap during the course of a criminal investigation. There has been no activity in the House on companion legislation.

Two important bills which had been tentatively scheduled for Senate Floor debate this year will most likely be held over until next year. Consideration of the medical malpractice reform bill, the Health Act of 2005 (S.354) and a bill to reform asbestos litigation, the Asbestos Injury Resolution Act of 2005 (S.852) was postponed primarily because of debates on the Supreme Court nominations and hurricane relief measures which consumed time on the Senate Floor.

House

While the House, of course, will not have to contend with a Supreme Court nominee before Thanksgiving, it will have to complete consideration of its own Budget Reconciliation Package. The full House will likely vote on this measure during the week of November 7. It includes opening ANWR to oil and gas exploration approved by the House Resources Committee and Federal Deposit Insurance Reform adopted by the House Financial Services Committee. In addition the House plans to complete consideration of the various appropriation conference reports.

The House passed several important bills during the Autumn legislative session. Even though President Bush just signed the massive 1,724 page Energy Policy Act of 2005 (P.L.109-58) into law on August 8, 2005, the House was compelled to take up additional energy legislation to address problems posed by rising gas prices and extensive damage on the domestic oil refining industry inflicted by Hurricanes Katrina and Rita. On October 7 the House passed the Gasoline for America's Security Act of 2005 (H.R.3893) by the razor thin margin of 212-210. The bill is designed to increase the refinery capacity for gasoline, heating oil, diesel fuel as well as jet fuel by providing for federal and state regulatory coordination, as well as financial incentives, to facilitate the siting and construction of refineries. A Senate version of a bill to encourage construction of new refineries (S.1772) was defeated by a tie vote of the Environment and Public Works Committee on October 26.

The House approved the Protection of Lawful Commerce in Arms Act of 2005 (S.397) by a vote of 283-144 on October 20. This bill would protect gun manufacturers and dealers from liability arising from suits based on third parties' misuse of their firearms. The same version of S.397 passed the Senate on July 29 of this year by a vote of 65-31 and was signed by the President on October 26.

The House has also passed the Personal Responsibilities in Food Consumption Act (H.R.554) by a vote of 306-120. This legislation, known as the "Cheeseburger Bill", would prohibit lawsuits by plaintiffs claiming their unhealthy obesity was the fault of a food company's high caloric products. The Senate is not likely to take up the measure this year.

On October 27, the House passed the Lawsuit Abuse Reduction Act (H.R.420) by a vote of 228-184. This bill would amend Rule 11 of the Federal Rules of Civil Procedure to remove the "safe harbor" provisions that currently allow parties and their attorneys to avoid sanctions for making merit less claims by withdrawing them after a motion for sanctions has been filed. It would also impose a one year suspension on a lawyer when a Federal District Court finds that the lawyer has violated Rule 11 three or more times in that District Court. In 2004 the House passed a similar bill which was not acted upon by the Senate. It is likely to face a similar fate in this Congress.

Hurricanes

The Congress has also enacted, and the President has signed into law, various proposals to address problems resulting from the severe hurricane season. On September 23, 2005 the President signed the Katrina Emergency Tax Relief Act of 2005 (P.L.109-73) which contains various tax relief measures and credits designed to assist in the relief and rebuilding within the "Hurricane Katrina disaster area" as defined in the President's declaration of a major disaster. The President has also signed the Hurricane Katrina Unemployment Relief Act of 2005 (P.L.109-91) which provides additional funds for unemployment benefits in Alabama, Louisiana and Mississippi. In addition two Emergency Supplemental Appropriations bills have been enacted (P.L.109-61 and P.L.109-62) to provide over \$62 billion in additional assistance for hurricane relief over the next five years. The Senate Budget Committee estimates that the Congress has passed and the President has signed nine separate measures providing \$70.9 billion in spending related to Hurricanes Katrina and Rita.

It is possible that Congress will pass additional hurricane relief measures. On October 27, Representative Jim McCrery (R-LA) introduced the Gulf Opportunity Zone Act of 2005 (H.R.4155). This legislation would provide special tax benefits for business development in the areas damaged by Katrina and Rita. It is also intended to assist state and local governments in raising funds to repair their infrastructures and create jobs. The prototype for this Opportunity Zone legislation was first drafted and introduced in 1980 by Venable's Senior Legislative Advisor, former Representative Robert Garcia (D-NY) who served seven terms in the House of Representatives. Bob noted that he is "pleased to have had a hand in crafting legislation that will be helpful in restoring those areas of the country devastated by these hurricanes."

Shoeless Joe

Finally, the first Chicago White Sox World Series victory in 88 years has apparently prompted the Senate to revisit the infamous 1919 World Series scandal in which the legendary "Shoeless Joe" Jackson and seven other members of that White Sox team were accused of accepting bribes to lose the first and second games of the Series to the Cincinnati Reds. Although in 1920 a Chicago jury acquitted Shoeless Joe of any wrongdoing in the alleged scandal, Baseball Commissioner Judge Kennesaw Landis banned him from playing professional baseball for the rest of his life.

Senator Tom Harkin (D-IA) and Senator Jim DeMint (R-SC) introduced a Resolution expressing the sense of the Senate "that Joseph Jefferson 'Shoeless Joe' Jackson should be appropriately honored for his outstanding baseball accomplishments." The Resolution points out that Commissioner Landis issued the lifetime ban without conducting "any investigation of Jackson's alleged activities, issuing a summary punishment that fell far short of due process standards" and that Jackson's performance during the 1919 World Series was "outstanding" with a batting average of .375, 12 hits and no errors. The Senators hope is that Shoeless Joe can be reinstated to baseball and thereby pave the way for his eventual introduction into the Baseball Hall of Fame. Last week the Senate adopted the Resolution finally providing a response to the famous 1920 Chicago Daily News headline, "Say it ain't so, Joe."

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109th Congress Continues Focus on Global Trade Issues

From the adoption of a new regional trade-liberalizing agreement to the introduction of key pieces of legislation – issues of global commerce and trade were front and center during the First Session of the 109th Congress. Venable understands how important international commerce is to our clients' diversified domestic and foreign business operations and provides the following summary of noteworthy legislative developments.

CAFTA Gains Final Congressional Support

In July, the House of Representatives finally approved the controversial Central American Free Trade Agreement ("CAFTA") -- but only after last minute lobbying from the White House. The final vote on CAFTA was close, clearing the House by a 217-215 tally. Final passage also required invoking a procedural twist when Republican House leaders held open the roll call for more than an hour (as opposed to the typical 15 minute period). In the end, ratification of CAFTA arrived after a prolonged campaign by mostly pro-trade Republicans with the vote breaking down along party lines. CAFTA was approved by the Senate last June.

CAFTA supporters claim the new trade agreement will expand markets for U.S. exporters in five Central American countries and the Dominican Republic. The Bush Administration also claims CAFTA will assist in homeland security efforts by helping to foster a more politically stable environment among key Central American U.S. trading partners. Both President Bush and Vice President Cheney campaigned for CAFTA by going to Capitol Hill and arguing that U.S. national security was involved in the trade pact.

CAFTA will eliminate trade tariffs on 80% of U.S. exports to Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic.

House Ways and Means Committee Votes to Repeal Byrd Amendment

In late October, Congress revisited international trade concerns when the House Ways and Means Committee voted to repeal the Continued Dumping and Subsidy Offset Act (or the "Byrd Amendment") as part of larger measures to reduce the national budget deficit. In late 2000, Congress passed the Byrd Amendment to assist U.S. companies with the disbursement of antidumping and countervailing duties collected by U.S. Customs and Border Protection. The intention of this amendment was to off-set unfair import activities by foreign competitors who import similar products manufactured by U.S.-based companies.

In August 2005, the World Trade Organization (WTO) ruled that member nations trading with the U.S. may initiate respective retaliatory measures against U.S. imports in response to continued application of the Byrd amendment. The WTO in 2003 held the U.S. law incompatible with international trade obligations and rules. In addition to the WTO ruling, Canada, the European Union, Mexico and Japan have retaliated against continued enforcement of the Byrd Amendment.

In addition to the WTO criticism, the Government Accountability Office (GAO) recently examined the Byrd Amendment and concluded that it is an ineffective trade remedy. GAO found that approximately half of the \$1 billion disbursements to date under the Byrd Amendment have gone to only five companies. The GAO concluded that two-thirds of all payments have been dispersed to companies that manufacture bearings, candles, or steel. Rep. Bill Thomas (R-CA), chairman of the House Ways and Means Committee, noted that the Byrd Amendment "has provided windfall subsidies to a handful of large corporations, while other U.S. companies are paying the price."

This issue is still being debated. Interested parties should closely monitor congressional deliberations surrounding the Byrd Amendment. As of this writing, the Senate remains undecided on whether to repeal the Byrd Amendment.

Temporary Duty Suspension Bills Move Forward

The First Session of the 109th Congress also saw the introduction of numerous pieces of legislation that would temporarily suspend or eliminate the amount of trade duties paid by U.S. importers for an array of specifically enumerated products. As of October 2005, several hundred duty suspension bills were pending in Congress. The duty suspensions and reductions generally are limited to products unavailable or unavailable in sufficient supply in the United States. A business operated in the U.S. that is dependent on such a product, for example as a feedstock, and that is suffering competitive harm from the import duty, can seek to have the duty temporarily suspended or reduced as part of a miscellaneous trade bill.

In years past, various types of importers have used this process to suspend or reduce Customs duties. As an example, the chemical industry has taken advantage of duty suspension bills to eliminate or substantially reduce duties on certain chemical imports. Typically, the chemicals are not domestically produced and the duties do not protect any U.S. industry. The imported chemicals may be needed, however, for use in a product that is produced domestically. Imposing the Customs duties on the chemical component thus has the perverse effect of harming U.S. production.

The U.S. International Trade Commission will issue reports on the duty bills identifying whether enactment may adversely affect U.S. domestic industry, as well as discussing the possible revenue loss associated with lifting or reducing the duty. Final consideration of the duty suspension bills usually occurs during the latter part of the second session of a congress.

Interested companies should consider whether duty suspension legislation is of interest to their particular business needs. While there is still time to introduce legislation, the process should begin as early as possible after Congress reconvenes in January 2006. Venable's Legislative Group professionals are well situated to help importers pursue legislative action on duty suspension bills.

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