

April 3, 2009

Williams & Jensen, PLLC
The Washington Update

THIS WEEK

- **FY10 Budget Resolutions** – Both the House and Senate passed their respective versions of the non-binding **FY10 budget resolution** (H.Con.Res. 85 and S.Con.Res. 13) this week. The House defeated a variety of alternative amendments to the resolution setting annual top line spending levels before approving the Democratic leadership's plan, 233-196. Consideration in the Senate was considerably more convoluted as 50 hours of statutory debate ended in the customary "vote-a-rama", with dozens of amendments voted on in a series lasting more than 12 straight hours on Thursday. However, as in the House, the resolution was successfully passed late Thursday night on a 55-43 vote.
- **House** – Unlike the Senate, the House was able to take up a significant amount of non-budget related legislation, including **two bills related to TARP executive compensation**: (a) a Judiciary Committee-drafted measure to allow the government to initiate civil suits because of improper executive payments made by companies receiving federal funds that failed under suspension (H.R. 1575, 223-196; 2/3rds required); and (b) a Financial Services-reported bill that passed under a rule (H.R. 1664, 247-171, 1 member voting present). Also passed in the House was legislation to give the **FDA regulatory authority over tobacco products** (H.R. 1256, 298-112), a **Senate-amended national service programs authorization** (H.R. 1388, 275-149) and a variety of suspension bills including: a measure aimed at **pain care research and outreach** (H.R. 756, voice vote), **technical corrections to the Higher Education reauthorization** (H.R. 1777, voice vote) and a bill on **health insurance company disclosures to beneficiaries** (H.R. 1253, 422-3).
- **Senate** – Although the budget resolution completely dominated floor time in the Senate this week, several noncontroversial bills and nominations were approved by unanimous consent, including **Karen Mills as administrator of the Small Business Administration**.

UPCOMING

- **Spring Recess** – Next week, the House and Senate begin a two-week recess, returning on April 20.
- **House** – The House post-recess schedule is unclear, but more details should be available in the coming days.
- **Senate** – Upon its return, the Senate will vote on cloture for a bill to **combat financial fraud and to recover government assistance funds lost to fraud** (S. 386) as well as the nomination of **Christopher Hill to be ambassador of Afghanistan**.
- **Financial Services** – On April 8, the Securities and Exchange Commission is scheduled to hold an **open meeting on "whether to propose short sale price test rules."** On April 9, the SEC's Division of Trading and Markets Director Eric Sirri will **speak** before the National Economists Club on **"Securities Markets and Regulatory Reform"**. On April 15, the SEC is scheduled to convene an all day **roundtable to "Examine Oversight of Credit Rating Agencies"** with panelists from industry and academia. The roundtable is expected to cover: (1) "Current NRSRO Perspectives" (2) "Competition Issues" (3) "Users' Perspectives" and (4) "Approaches to Improve Credit Rating Agency Oversight."

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TAXES

Senate and House Pass Budget Resolutions

The Senate voted 55-43 late April 2nd to adopt a \$3.5 trillion non-binding budget blueprint for fiscal years 2010-2014, sending a debate to a conference committee with the House that will have to work out the broad tax outlines in the budget.

The budget resolution (S. Con. Res. 13) allows for up to \$825 billion in tax relief; extending alternative minimum tax relief; and making permanent the 10 percent income tax bracket, the child tax credit, and marriage penalty relief. It also assumes a permanent extension of the tax code Section 179 expensing rules and an expansion of net operating loss carryback provisions.

The underlying resolution would assume a freeze the estate tax at its current level, with an exemption amount of \$3.5 million and a maximum tax rate of 45 percent, but the Senate adopted two conflicting amendments, putting the chamber at odds with itself and with the House. The Senate first adopted a Lincoln (D-AR)/Kyl (R-AZ) amendment to increase the exemption amount to \$5 million while dropping the maximum rate to 35 percent but then later voted to create a point of order against any estate tax legislation beyond what is assumed in the underlying resolution unless it provides an equal amount of tax relief to taxpayers earning less than \$100,000. The House resolution (H. Con. Res. 85) contains language allowing the estate tax to be overhauled at a five-year cost of up to \$72 billion if the House also has considered legislation to reinstate statutory pay-as-you-go budgeting.

Another issue to be worked out in conference is how to deal with the AMT patch. The Senate plan assumes that an AMT patch would be enacted without offsets through 2012. Under the House plan, if that chamber does not pass statutory pay-as-you-go rules, a patch without offsets covering 2010 could not be voted on.

Senators also added a series of deficit-neutral reserve funds for a variety of tax-related policies including repealing the tax increase on Social Security benefits enacted into law in 1993; "enhancement" of the employer-provided child care credit and dependent-care credit; extension of the 33 percent and 35 percent tax brackets for individuals who receive more than 50 percent of their income from a small business; extension and expansion of the charitable IRA rollover; and permanent extension of the deduction for state and local sales taxes.

The House budget includes reconciliation instructions, that would speed consideration to prevent filibusters in the Senate by allowing the measure to pass with 51 votes. However, a number of key Senate Democrats have expressed concern that reconciliation could impair efforts to reach a bipartisan compromise on health care reform later this year. Many expect that reconciliation instructions will be included in the final joint budget resolution.

JCT Offers Score on Obama Budget Proposals

This week, the Joint Committee on Taxation produced a revenue estimate of the Obama Budget proposal for FY 2010. Normally, the estimate is accompanied by a long description of the proposals with a discussion of the arguments for and against a proposal. That discussion is likely forthcoming, so all the JCT

produced was a revenue table. However, there are some interesting points. First, the vague “Implement international enforcement, reform deferral, and other tax reform policies” proposal by the Obama Administration had no score assigned to it because no details were specified. Recall the Administration had assigned a \$210 billion revenue estimate to the proposal over ten years. Also scored are the costs of one year extensions for measures, several other offsets, and making the R&D credit permanent (\$68 billion). Below is the link to the revenue table from the JCT:

[JCT Revenue Estimate of Obama Budget](#)

House Panel Holds Hearing on Banking Secrecy and Tax Evasion

The Subcommittee on Select Revenue Measures of the House Ways and Means Committee convened a hearing this week to examine bank secrecy rules and tax evasion by wealthy individuals. The primary focus of the hearing was on the bank qualified intermediary (QI) program and how that could be improved, the improvement of information sharing, and whether or not countries should be “blacklisted.” Rep. Doggett (D-TX) referenced the Stop Tax Haven Abuse Act, a bill that he sponsored, and whether changing corporate tax rules to address tax havens would be a good way to address existing inequalities.

Member Statements and Testimony:

[Ranking Member Patrick Tiberi](#)
[The Honorable Douglas Shulman](#),
Commissioner, Internal Revenue Service
[Stephen E. Shay](#), Tax Partner, Ropes & Gray,
Boston, Massachusetts
[Reuven S. Avi-Yonah](#), Irwin I. Cohn Professor
of Law, University of Michigan Law School

[Peter H. Blessing](#), Partner, Shearman and Sterling, New York, New York

For more information about tax issues you may [email](#) or call Christopher Hatcher at 202-659-8201.

ENERGY

Waxman and Markey Unveil Climate Legislation

On Tuesday, House Energy and Commerce Committee Chairman Henry Waxman (D-CA) and Energy and Environment Subcommittee Chairman Ed Markey (D-MA), released a 648-page “discussion draft” of the “American Clean Energy and Security Act of 2009.” The legislation would: establish a cap-and-trade program to reduce greenhouse gas emissions by 83 percent below 2005 levels by 2050; impose regulations and provide incentives for expanding renewable energy and improving energy efficiency; and provide support for domestic workers and industries.

In a memo to Members of the Energy and Commerce Committee, Waxman and Markey said that the “draft draws heavily on the Dingell-Boucher draft from last year” and asked for recommendations “on how best to refine the legislation.”

Waxman and Markey also announced a schedule for action on the legislation:

- The week of April 20: Energy and Environment Subcommittee hearings;
- The week of April 27: Energy and Environment Subcommittee debate and votes; and
- The week of May 11: full Energy and Commerce Committee debate and votes.

The discussion draft includes:

- A renewable energy standard that requires retail electricity suppliers to provide 6 percent of power from renewable sources by 2012, increasing to 25 percent by 2025.
- Incentives for demonstration and deployment of carbon capture and storage (CCS) technology.
- Requirements for new coal-fired electric plants to reduce carbon dioxide emissions, limiting generating facilities permitted after January 1, 2015 to emitting no more than 1100 pounds of carbon dioxide per megawatt-hour (MWh) and facilities permitted after January 1, 2020 to emitting no more than 800 pounds of carbon dioxide per MWh. Facilities permitted between January 1, 2009 and January 1, 2015 must meet the 1100 pounds of carbon dioxide per MWh standard by 2025, or earlier based on national or worldwide deployment of CCS technology.
- A “Low Carbon Fuel Standard” (LCFS) that would require reduction of the average lifecycle GHG emissions of transportation fuels by 5 percent below 2005 levels by 2023 and 10 percent below 2005 levels by 2030.
- Incentives for states to implement advanced building efficiency codes.
- A provision that directs federal agencies to harmonize federal vehicle fuel economy standards with California standards.
- A requirement for states to establish GHG emissions reduction goals from transportation, including a requirement for metropolitan transportation organizations to submit plans to meet these goals.
- An “energy efficiency resource standard” that requires retail electricity and natural gas distributors to achieve reductions in “end-use electricity [and] natural gas consumption” through increased efficiency, with increased cumulative savings required from 2012 through 2020.
- Authorization of funding for retrofitting existing commercial and residential buildings for enhanced energy efficiency.
- A cap-and-trade program, covering utilities, refineries and industrial plants that emit more than 25 thousand tons of GHGs annually, that will reduce emissions from 2005 levels by: 3 percent in 2012; 20 percent in 2020; 42 percent in 2030; and 83 percent in 2050.
- Designation of the Federal Energy Regulatory Commission (FERC) as the agency to regulate the market for trading GHG emissions allowances.
- Exemption of GHG emissions from Clean Air Act regulation as “criteria pollutants” or “hazardous air pollutants” and exemption of GHG emissions sources from the “new source review program.”
- Provision of “rebates” for energy-intensive U.S. manufacturers to ensure continued competitiveness of these industries under the cap-and-trade program.
- Authorization of job training funding for “green jobs.”

Some key Members of the Committee have already released statements on the proposal. Full Commerce Ranking Member Joe Barton (R-TX) criticized the bill, saying it “marks a triumph of fear over good sense and science, and it couldn’t come at a worse time because it proposes to save the planet by sacrificing the economy.”

Former Energy and Environment Subcommittee Chairman Rick Boucher (D-VA) said that he is “reviewing the provisions of the draft and will be consulting with interested

parties, including colleagues on the committee, regarding changes which I will recommend for the purpose of assuring that the control program is economically sustainable and will not be economically disruptive.”

[Text of Discussion Draft.](#)

[Summary of Discussion Draft.](#)

[Congressman Boucher’s Press Release.](#)

[Ranking Member Barton’s Press Release.](#)

Senate Panel Approves Non-Controversial Energy Provisions

On March 31, the Senate Energy and Natural Resources Committee held a markup of provisions to be included in a comprehensive energy bill. The provisions considered in this markup were energy innovation and workforce development, energy and water efficiency, manufacturing energy efficiency and appliance energy efficiency. These provisions were relatively non-controversial and were agreed to by voice vote. Chairman Jeff Bingaman (D-NM) stated that the Committee will hold further markups following the Easter recess on broader energy legislation. He expressed his intent to have an original bill assembled by the end of April.

Committee Ranking Member Lisa Murkowski (R-AK) cautioned that the remainder of the package will require work and compromise, saying that “I’m committed to working on a comprehensive and bipartisan energy bill, but it takes time to negotiate controversial issues such as federal transmission siting authority and a renewable electricity mandate.”

[Committee Press Release and Summary of Legislation.](#)

[Senator Murkowski’s Press Release.](#)

Senate Hearing on RFS

On Wednesday, the Senate Environment and Public Works Subcommittee on Clean Air and Nuclear Safety held a hearing on implementation of the Renewable Fuel Standard (RFS). The Energy Policy Act of 2005 (P.L. 109-58) established the RFS, which requires an increasing amount of renewable fuels to be blended into gasoline each year. The Energy Independence and Security Act of 2007 (P.L. 110-140) extended and expanded the RFS, culminating with a 36 billion gallon requirement in 2022. For 2009, Congress mandated blending of 11.1 billion gallons of renewable fuels into gasoline.

Subcommittee Chairman Tom Carper (D-DE) posed some questions regarding the future of the program:

The lack of capital has made it difficult to make the investments needed for a new second generation biofuel market. Will we be able to meet our advanced biofuel marks in a capital-starved world? And EPA still has not proposed a rule on how to move forward on the environmental protections we put in place in 2007 – how is that impacting the market?

Charles Drevna, President of the National Petrochemical and Refiners Association, stressed the need to examine whether ethanol blends higher than E-10 (10 percent ethanol blended with conventional gasoline), such as E-12 or E-15, will work properly and safely with existing engines before introducing them into the fuel system. Drevna also called on

Congress to suspend the RFS standard for corn ethanol at the 2009 level.

[Hearing Statements and Testimony.](#)

For more information about energy issues you may [email](#) or call Frank Vlossak at 202-659-8201.

FINANCIAL SERVICES

House Passes Executive Compensation Legislation for TARP Recipients

Earlier this week, the House approved legislation (HR 1664) to restrict executive compensation for TARP recipient institutions. This comes two weeks after the House passed a TARP executive compensation excise tax bill (which then stalled in the Senate) responding to the furor over the bonuses paid to AIG employees.

The bill passed by the House this week (HR 1664) has not yet been considered by the Senate. The bill repeals the provision in the economic stimulus measure that exempts bonuses for TARP recipients due under contracts entered into on or before February 11, 2009.

It also prohibits a financial institution (regardless of when it entered into a compensation agreement) that has received direct capital investment under the TARP and has not yet repaid the investment (including Fannie Mae, Freddie Mac, and the Federal Home Loan Banks) from: (1) paying employee compensation that is “unreasonable or excessive”, as defined by the Treasury Secretary; or (2) paying any bonus or supplemental payment that is not directly based on performance-based standards.

The bill clarifies that an institution would not be subject to these compensation restrictions as a result of doing business with a TARP recipient.

In addition, the bill establishes a commission to study the executive compensation system for recipients of capital investments under TARP.

House, Senate Panels Approve Bills on Credit Card Practices

This week, the Senate Banking Committee and a House subcommittee advanced separate bills adding restrictions to various credit card practices.

The Senate Banking Committee approved, by a 12-11 vote, an amended version of [S. 414, Credit Card Accountability Responsibility and Disclosure Act of 2009](#). However, the closely divided vote in the committee likely means that it will face significant hurdles in the full Senate.

Among other provisions, the Senate bill would require prior notice on rate increases; prohibit double cycle billing; restrict over-the-limit fees; prohibit charging interest on fees; and limit other fees. The Senate Banking Committee adopted a manager’s amendment, which would (a) require parental approval prior to increasing the credit limit for cardholders under the age of 21; (b) regulate certain practices in prepaid gift cards; and (c) require issuance of guidelines for the establishment and maintenance by creditors of a toll-free telephone number for purposes of the disclosures required under the Truth in Lending Act. The committee also adopted an amendment offered by Senators Crapo (R-ID) and Corker (R-TN), which would increase the FDIC’s borrowing authority from \$30 billion to \$100 billion. The amendment provides for a

temporary increase (until December 31, 2010) in the FDIC's borrowing authority of up to \$500 billion if two-thirds of the FDIC board, two-thirds of the Federal Reserve Board, and the Secretary of the Treasury (in consultation with the President) determine that such additional amounts are "necessary".

Separately, the House Financial Services Subcommittee on Financial Institutions and Consumer Credit amended and approved [H.R. 627](#), Credit Cardholders' Bill of Rights Act of 2009. Only two amendments were adopted: (1) Chairman Gutierrez's (D-IL) amendment, which would change the implementation from 3 months after enactment to 12 months after enactment or by July 2010, whichever is sooner; and (2) Rep. Ackerman's (D-NY) amendment, which would ban the practice of companies offering different means of paying their bill, but fail to indicate that certain methods would incur a processing fee. The House Financial Services Committee is likely to consider the bill in the coming weeks.

Treasury Announces Extension of Temporary Guarantee Program for Money Market Funds; SEC Official Discusses Review of Money Market Fund Regulation

On March 31, the Treasury Department [announced](#) an extension of the temporary Money Market Funds Guarantee Program through September 18, 2009, beyond its previously scheduled end date of April 30, 2009. The [Extension Notice](#) provides procedures for funds to follow "to ensure continued participation in the Program".

Separately, in a [speech](#) on April 2, SEC Director Division of Investment Management Andrew Donohue stated that the "review of the money market fund model and its

regulatory regime is one of our top priorities in the Division of Investment Management this year" and that the division "will recommend that the Commission update those regulatory requirements where and as necessary." He added this endeavor could be expected to be "guided by the fundamental principle that the money market fund model and its regulation should be tailored to best meet the liquidity and capital preservation needs of fund investors."

Senate Includes in Budget Resolution Amendments on Federal Reserve

During Senate consideration of its non-binding budget resolution, two amendments seeking to increase Federal Reserve transparency were added.

One amendment, offered by Senate Banking Committee Chairman Chris Dodd (D-CT) and Ranking Member Richard Shelby (R-AL), calls on the Federal Reserve to include:

- An evaluation of the appropriate number and associated costs of Federal reserve banks;
- Website publication of all lending and financial assistance facilities created by the Federal Reserve to address the financial crisis, including: (a) the "nature and amounts of collateral" the Federal Reserve is accepting; (b) the "extent to which changes in valuation of credit extensions to various special purpose vehicles, such as Maiden Lane I, Maiden Lane II, and Maiden Lane III, are a result of losses on collateral that will not be recovered"; (c) the number of borrowers participating in each of the programs and details of the credit extended; and (d) information on the extent to which the Federal Reserve is contracting for services for the "design,

pricing, management, and accounting” for its lending programs.

A separate amendment offered by Senator Bernie Sanders (I-VT) calls on the Federal Reserve to identify each financial firm that the Federal Reserve has provided loans or other financial assistance since March 24, 2005, the value of that assistance, and what the entity is doing with that financial assistance.

G20 Leaders Pledge to Strengthen Financial Regulation

On April 2, leaders of the G20 nations agreed to take steps on a number of financial regulatory reforms. The G20’s [Declaration on Strengthening the Financial System](#) calls for expanding the Financial Stability Forum (FSF), increasing the scope of regulation, changes to the regulation of pay and compensation for financial institutions, improved accounting standards, more oversight of credit rating agencies, and other reforms.

The G20 instructed the Financial Stability Board and the International Monetary Fund (IMF) to report on the progress at the next meeting of the Finance Ministers and central bank governors.

Among the reforms included in the declaration:

- Financial Stability Board – Expand and reform the Financial Stability Forum (FSF), increasing “capacity as the Financial Stability Board (FSB)” to, among other things: (a) assess and oversee actions to address risks to the financial system; (b) promote coordination among financial regulators; (c) advise on market developments and best practices for regulatory standards; and (d) “undertake

joint strategic reviews” of work of international standard setting bodies.

- Strengthen international cooperation.
- Prudential regulation – Strengthen regulation, including: (a) allowing capital requirements to decline during deteriorating economic conditions; (b) requiring capital levels and regulatory requirements to increase once economic recovery occurs; (c) addressing accounting standards to “mitigate procyclicality”; (d) comparable risk-based capital requirements, including accounting for off-balance sheet exposures; (e) improving incentives for risk management in securitization, such as requiring retention of some portion of the securitized product; (f) adoption of the Basel II capital framework; and (g) adoption of a global framework for liquidity requirements at financial institutions.
- Expand Scope of Regulation –
 - a) Require registration of hedge funds or their managers, with disclosure of leverage and other information to regulators, and oversight of their risk management.
 - b) Require institutions with hedge funds as counterparties to have in place mechanisms to monitor the funds’ leverage and limits for single counterparty exposure.
 - c) Promote standardization of the credit derivatives markets through establishment of central clearinghouse, with a call for industry to develop an action plan on standardization by the fall of 2009.
 - d) Ensure that regulatory systems take into account risks across the financing system, with large financial institutions

having more oversight “given their systemic importance”.

- Compensation – Endorse principles on pay and compensation in financial institutions, including requirements that: (a) compensation reflects the risk, timing and composition of payments “sensitive to the time horizon” of the risks; and (b) firms publicly disclose compensation information.
- Tax Havens – Calls on all countries “to adopt the international standard for information exchange... reflected in the UN Model Tax Convention.” Agreed that countries could “consider” a number of “counter measures” against jurisdictions that do not meet international tax transparency standards.
- Accounting Standards – Called on accounting standard setters to take action by the end of 2009 to reduce complexity of standards for financial instruments; address loan-loss accounting recognition to include more credit information; improve accounting for off-balance sheet exposures and “valuation uncertainty”; and make progress toward global accounting standards.
- Credit Rating Agencies – Agreed to: (a) require credit rating agencies whose ratings are used for regulatory purposes to be subject to regulatory oversight by the end of 2009; (b) require differentiation in ratings for structured financial products and require disclosure of the track record of their ratings; and (c) require the Basel Committee to review the role of ratings in prudential regulation and determine if there are incentives that should be addressed.

Upcoming Key Dates for TALF, CAP, and Stress Tests

Next subscription date for Term Asset Backed Securities Loan Facility (TALF): April 7, 2009

Last day for bank application for capital under Capital Assistance Program (CAP): May 25, 2009

Stress test completion date: End of April, no date certain announced.

For more information about financial services issues you may [email](#) or call Joel Oswald at 202-659-8201.