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# COALITIONS

## NAW's COALITION LEADERSHIP AND PARTICIPATION STRENGTH IN NUMBERS

One of the most effective ways to fight a legislative or regulatory battle in Washington is through coalitions in which organizations like NAW unite to achieve a common goal. Coalitions multiply the Washington-based and grassroots power of each organization's members, thereby making the whole stronger than the sum of its parts. By effectively mobilizing this political power, coalitions also become a much sought-after resource for legislators and public policy-makers.

For this reason, NAW serves its members by participating in a significant number of coalitions that deal with a wide range of issues important to wholesaler-distributors. NAW is frequently a founder of important business coalitions and just as frequently serves them in a managerial capacity. In recent years, industry goals such as the enactment of tax relief legislation, opposing parental leave and other government-mandated employee benefits, defeat of the so-called Employee Free Choice Act or card check legislation, advancing Federal legal reform measures, and opposition to repeal of LIFO – pocketbook issues affecting a wholesaler-distributor's bottom line -- all have been furthered by NAW coalition participation.

Each of the coalitions on the following pages has similarly served wholesale distribution more generally by enhancing NAW's legislative and information networks and by raising the industry's visibility in Washington. The coalitions to which NAW belongs are grouped under the following major categories:

- Budget/Tax/Regulation/General Government
- Labor, Health Care and Benefits
- Networking

## **LABOR, HEALTH CARE AND BENEFITS**

### The 50-100 Coalition

A coalition of 15 trade associations with substantial small business memberships organized to roll back the Affordable Care Act (ACA) mandate that state small group health insurance markets be expanded to include employers of up to 100 employees. Because small group and large group markets are served and regulated differently, employers now in the large group market and which will be forced into the small group market are confronted with the need to change health plans and with premium increases of up to an additional 18%.

### Coalition for a Democratic Workplace (CDW)

- Management Committee
- Steering Committee

A broad-based coalition of more than 600 business groups, trade associations and corporations originally organized to oppose Organized Labor's "Card Check" legislation which would make it easier for union organizing drives to succeed by denying workers the right to vote by secret ballot. When EFCA failed to pass, organized labor turned its attention to an aggressively pro-union regulatory agenda at the Department of Labor and the National Labor Relations Board; CDW responded by actively opposing promulgation and implementation of those costly regulations, by filing comments and amicus briefs and filing challenges to new rules in court.

### Coalition for Workplace Safety (CWS)

A coalition of national trade associations, professional organizations, and employers seeking to improve workplace safety by bringing more fairness and balance to the Occupational Safety & Health Act through greater emphasis on consultation and cooperation rather than enforcement and confrontation.

### Employers for Flexibility (E4F)

A coalition now in formation to advocate the adoption of a voluntary, credible, and comprehensive national workplace flexibility policy that embraces the realities of the 21<sup>st</sup> Century workplace and workforce.

### Employers' Health Care Clearinghouse

A group of leading employer trade associations active in the health policy space which meets monthly to discuss the status/progress of health care-related legislative and regulatory initiatives in which employers are major stakeholders.

### National Coalition on Benefits (NCB)

- Steering Committee

The National Coalition on Benefits (NCB) is a coalition of national businesses and trade associations established to support the employer-sponsored health care system and ensure that companies can continue to provide health benefits in a uniform manner nationwide. NCB works with Congress and the Administration to ensure that federal and state health reform initiatives preserve, rather than erode, protections guaranteed by the 1974 Employee Retirement Income Security Act (ERISA). NCB is the principal coalition advocating repeal of the 40% excise (“Cadillac”) tax on high-cost employer-sponsored health coverage enacted in the Affordable Care Act, and is the principal coalition advocating full retention of the current tax treatment of employer-provided coverage.

### National Coalition to Protect Family Leave (NCPFL)

A broad-based, non-partisan coalition of organizations, companies and associations dedicated to protecting the integrity of the Family and Medical Leave Act (FMLA).

## Partnership to Protect Workplace Opportunity

- Management Committee

The Wage and Hour Division of the Department of Labor announced in March, 2014, that it would issue new regulations under the Fair Labor Standard Act, specifically addressing the “white collar” exemptions from the overtime payment requirement. A final rule was released in 2016 mandating radical changes in the overtime regulations. The Partnership to Protect Workplace Opportunity was formed to oppose those new regulations. The 2016 rule was successfully challenged in court in a case in which NAW was a plaintiff, and PPWO is now participating in a Labor Department Request for Information (RFI) which will eventually lead to a new rule-making.

## Stop The Hit Coalition

A coalition organized to advocate repeal of the “hidden” health insurance tax on fully-insured health insurance plans enacted with the Affordable Care Act.

## **BUDGET / TAXATION / REGULATION / GENERAL GOVERNMENT**

### The Alliance for Energy and Economic Growth (AEEG)

The Alliance for Energy and Economic Growth is a broad-based coalition of more than 1,200 members that develop, deliver or consume energy from all sources. With members in every state, the Alliance represents consumers; energy companies involved in all phases of energy exploration, production and transmission; agricultural groups; and business and labor organizations—all united in support of a comprehensive national energy plan.

### Coalition for Affordable American Energy (CAAE)

- Founding Member
- Management Committee

CAAE is a coalition of business consumers of energy and was formed by NAW and several allied trade associations in 2008 in response to skyrocketing energy prices. CAAE advocates for the development of all available domestic energy sources including alternatives, renewables, coal, oil and gas.

### Coalition for Fair Effective Tax Rates (CFETR)

- Co-Founder
- Management Committee

CFETR was formed in 2013 to urge that any tax reform legislation be viewed through the lens of effective tax rates, the amount of taxes businesses actually pay, rather than statutory tax rates. The coalition advocates for tax reform that levels the playing field, broadens the tax base, and increases fairness in the tax code by basing reform on effective tax rates.

### Family Business Estate Tax Coalition

- Co-Director

A coalition of more than 100 national trade associations committed to permanent repeal of the estate “death” tax. FBETC lobbied for the compromise death tax provisions enacted in the 2013 Fiscal Cliff legislation – 35% rate with a \$5 million per spouse exemption – to prevent return of a 55% rate on estates over \$1 million. FBETC will continue to advocate for permanent full death tax repeal.

### The [Last-In, First-Out] LIFO Coalition

- Co-Founder
- Executive Secretariat
- Steering Committee

The LIFO Coalition, organized and led by NAW, was created in May 2006 in response to the Senate Republican Leadership's proposal to repeal the LIFO accounting method as part of their legislation to respond to high gas prices. President Obama proposed LIFO repeal in each of his budgets and repeal remains part of the discussion of both deficit reduction and tax reform. The Coalition's top priority today is persuading Congress not to include LIFO repeal in any tax reform proposal.

### Marketplace Fairness Coalition

- Management Committee
- Steering Committee

A coalition of national, state and local trade associations and companies advocating the enactment of Federal legislation to empower states to require remote sellers to collect and remit state sales and use taxes on on-line sales just as "brick and mortar" businesses do.

### Mobile Workforce Coalition

Complying with all of the various state requirements is a costly and onerous burden on employers and employees alike. A coalition of more than 400 business organizations is working with Congress to pass legislation to simplify and streamline inconsistent state laws applicable to the income tax treatment of employees working temporarily in a non-resident state, by setting a single and consistent standard for when non-resident income tax returns and withholding would be required.

### Parity for Main Street Employers

- Steering Committee

Parity for Main Street Employers was organized in 2016 in response to Congressional debate on tax reform. The mission of the Coalition is to educate Congress on the importance of pass-through businesses to the economy and the need to restore marginal rate parity as part of any tax reform effort.

### Prior Approval Reform Coalition

A coalition formed in 2015 to advocate for enactment of legislation to strike the Federal Election Campaign Act's requirement that trade association PACs must obtain separate and specific approval from their member corporations before soliciting the shareholders and executive or administrative personnel of such corporations.

### Tax Relief Coalition

- Co-Founder
- Executive Secretariat
- Management Committee
- Steering Committee
- Legislative Working Group

A coalition of more than 1,000 organizations, representing 1.8 million businesses, which worked to help enact the 2001 and 2003 tax cuts. TRC was very active in support of extension of the 2001 and 2003 rates in the 111<sup>th</sup> Congress and will continue to advocate for enactment of comprehensive tax reform that encompasses both the corporate and individual tax rates, simplifies the law, and broadens the tax base to ensure a fair system.

## NETWORKING

### *Government Liaison:*

#### Powerscourt Group

A group of private sector government relations executives who meet regularly with Capitol Hill and Administration officials to discuss pending public policy issues.

### *Political:*

#### The Business-Industry Political Action Committee (BIPAC)

The Business-Industry Political Action Committee works to elect pro-business candidates to Congress. BIPAC is engaged in both political action and political analysis. In 1999, they formed Project 2000, which sought to encourage businessmen and women to register to vote, to secure absentee ballots when needed, and to vote on Election Day. Project 2000, renamed “The Prosperity Project,” substantially increased the number of organizations participating in the project in each subsequent election cycle. They now focus on early voting, have initiated state-specific Prosperity Fund programs in most states, and dramatically increased the number of contacts with likely pro-business voters.

# Government Relations

## ***A GOVERNMENT RELATIONS OVERVIEW: EIGHT MONTHS INTO THE REMARKBLE TRUMP PRESIDENCY [Updated September 2017]***

The presidential election of 2016 seems to be the election that just won't end. Eight months into his presidency, there are still anti-Trump demonstrations across the country. Cong. Brad Sherman (D-CA) has introduced articles of impeachment against the President, and told the LA Times in a recent interview that he would even oppose Mother's Day if Trump endorsed it, noting that "Trump Derangement Syndrome" was widespread in his district.

The President continues to talk about the election, reminding audiences (inaccurately) that he got the biggest Electoral College vote since Ronald Reagan and boasting about the large crowds he drew. And in her just-released book, *What Happened*, Hillary Clinton relives the controversial campaign by itemizing everything she believes caused her defeat, and saying her "skin crawled" during a debate because candidate Trump stood too close to her and that she was thinking "Back up, you creep. Get away from me."

Just as there was nothing normal about the election, there is nothing normal about the aftermath.

### ***So Welcome to the New Normal – How are Political Leaders Coping?***

The Democrats: Left-wing activists who form the base of the Democratic Party demand that Congressional Democrats strictly adhere to their liberal ideology and oppose President Trump on everything, without exception and without compromise. As the right-wing Tea Party threatened to find primary challengers to GOP members of Congress who did not adhere to their uncompromising ideology, the left-wing activists threaten the Democrats today.

As the *NY Times* described it: The Democrat Party is facing "an incensed army of liberals demanding no less than total war against President Trump. . . Spurred by explosive protests and a torrent of angry phone calls and emails from constituents. . . Democrats have all but cast aside any notion of conciliation with the White House."

After the inauguration, Senate Democrats continued their anti-Trump campaign by slow-walking virtually all of the President's cabinet nominees, using all of the floor time allotted for consideration of executive branch nominees and voting against most of them.

And despite their inability to find anything in his court record to justify opposition to him, Senate Democrats chose to filibuster the nomination of Neil Gorsuch to the Supreme Court. Only once in U.S. history, in 1968, has a Supreme Court nominee been defeated by even a

*bipartisan* filibuster, and there has *never* before been a strictly partisan Supreme Court filibuster. The Democratic filibuster of Judge Gorsuch forced the Senate GOP majority to change Senate precedents to prohibit filibusters of and provide for a 51-vote confirmation on Supreme Court nominations (as the Democratic majority did in 2013 for all other executive branch and judicial nominations).

Like the Tea Party, the Democrats' liberal support groups have not moderated their demands. If anything, their influence on the Democratic Party has grown ever stronger. For example, CNN's Chris Cillizza posted a story on September 12<sup>th</sup> with the headline: "*How Bernie Sanders is taking over the Democratic Party.*" The story described the significant increase in Senate Democrats' support for Senator Sander's once-way-too-far-left "single payer" health care proposal, with this conclusion: "*What does the Democratic change of heart tell us? That the energy in the Democratic Party is entirely within the liberal base. And that for that base, it's not possible for a candidate to be "too" liberal on, well, anything.*"

Looking to the critical 2018 mid-term elections, Democrat leaders must find a way to navigate the turbulent waters of the ideological battle in their party, balancing the demands of the left-wing tea-party-type absolutists against the moderate middle-class voters who have traditionally voted Democratic but switched to Trump last year, and against the electoral needs of more moderate Democratic elected officials – including 10 incumbent Democratic senators up for re-election in 2018 in states that Donald Trump carried.

It is a daunting task.

The Republicans: The GOP started the year with a major new challenge in addition to the on-going conflict between the House Freedom Caucus (HFC) conservatives and the establishment: they now also had to figure out how to deal with the unexpected presidency of Donald Trump. There was no strong relationship between President Trump and the GOP in Congress; in fact the Trump presidency more closely resembled a hostile takeover of the GOP than a friendly merger with it.

After a bumpy start, the White House and the Congressional GOP Leaders seemed to recognize their mutual need to work cooperatively. Senate Republicans aggressively pushed the confirmations of Trump Cabinet nominees, and made the confirmation of President Trump's nominee to the Supreme Court a top priority. House GOP leaders worked closely with the White House on their signature issue, legislation to repeal and replace Obamacare.

But the honeymoon was short-lived, and the relationship between the White House and Republicans in Congress grew more strained.

After supporting the House-passed health care reform bill, the President turned on the House GOP calling their bill "mean" and providing fuel to liberal/Democrat criticism of the legislation. When Senate GOP Leader Mitch McConnell commented that being new to Washington might have led the President to have "excessive expectations about how

quickly things happen in the democratic process” (more a comment on the unwieldy legislative sausage-making than a criticism of the President), President Trump responded with a series of extraordinary tweets attacking the Senator.

While Senator McConnell has been the most frequent target of Trump’s criticism, he is far from alone. The President has also publicly criticized the GOP Congress as a whole, and personally rebuked House Speaker Paul Ryan (R-WI) and GOP Senators Jeff Flake (AZ), Bob Corker (TN), Lisa Murkowski (AK), John McCain (AZ) and Lindsay Graham (SC). And most astonishingly, he attacked his own Attorney General Jeff Sessions, the first Senator to support his candidacy and his most enthusiastic backer throughout the campaign.

President Trump’s frequent attacks on fellow Republicans led to this telling headline in a *Washington Post* blog on August 25<sup>th</sup>: “*Trump attacks Republicans on Twitter, but Democrats? Not so much*”

As the President has continued to attack Congressional Republicans, they have in turn demonstrated less constraint in criticizing the President.

A number of GOP members of Congress publicly criticized the President for his failure to unqualifiedly condemn the Neo-Nazi/White Supremacist protestors in Charlottesville, Virginia. And when the President announced his intention to rescind President Obama’s Deferred Action for Childhood Arrivals (DACA) immigration program which defers deportation for illegal immigrants who came to the US as minors, numerous GOP members of Congress – including Speaker Ryan – argued against the decision.

The tension between Congressional Republicans and the President grew exponentially following a September 7<sup>th</sup> Oval Office meeting that included the President and both Democratic and Republican House and Senate leaders. The purpose of the meeting was to discuss the critical need to extend the country’s debt limit to avoid a fiscal crisis. The GOP leaders advocated a long-term 18-month extension of the debt ceiling, coupled with emergency funding for hurricane relief efforts. The Democrats proposed a short three-month extension, a proposal which GOP leaders had firmly rejected, noting that a three-month extension would bring the contentious issue back up in December, and would likely interfere with efforts to pass tax reform and other necessary legislation.

During the meeting, at which the GOP leaders as well as Treasury Secretary Mnuchin argued for a long-term extension, the President stunned everyone by agreeing to the Democrat’s proposal for a 3-month extension – an action that reportedly had not even been considered in prior White House discussions of their options. Most astonishingly, the “Art of the Deal” President accepted the Democratic proposal unconditionally and without asking for anything in return.

Republican House members vented their anger and frustration the following day at a meeting with Treasury Secretary Mnuchin, and the veneer of party unity was abandoned.

The GOP majority in Washington is facing daunting legislative and policy challenges: in the next three months they *have to* not only extend the debt limit – now at least twice – but also pass a budget, appropriations bills to fund the government, and critical program reauthorizations.

Getting even small things done would require cooperation between the White House and the Congress, but the failure to act would be inconsequential. Failure to act on these critical financial matters essential to the function of the government could be catastrophic. The President needs to work with his allies in Congress to get the job done. An end to the Twitter wars – or at least a truce – is in order.

(Note: The debt limit “deal” the President made with the Democrats is viewed by some Trump supporters as the beginning of bi-partisan cooperation in Washington, but the President gave the Democrats exactly what they asked for – a unilateral concession by the President that asked for no compromise from the Democrats. However, there are promising signs in recent days that some moderate Democrats may be willing to work with the President and their Republican colleagues on tax reform. Whether there is the potential for real bi-partisan cooperation and compromise remains to be seen.)

## ***CAN THE PRESIDENT GOVERN? WILL HIS OPPONENTS AND THE MEDIA LET HIM? [Updated September 2017]***

### ***The President’s Battle with Public Opinion Polls***

Donald Trump never had the support of the “establishment” and his unorthodox style and behavior have prevented any real détente between them, particularly the main-stream media and Democrats. But Trump was not elected by those constituencies, and the voters who did elect him remained intensely loyal during the early months of his Administration. That support was clearly demonstrated in an April 23<sup>rd</sup> *Washington Post* poll – 90 days into the Administration:

Approval with his voters: 94%  
Approval among Republicans: 84%  
Voters who regretted voting for him: 2%  
Voters who would vote for him again: 96%

In July, a Gallop poll showed that on day 177, Trump’s approval with GOP voters was still at 87 percent.

And in an August 10<sup>th</sup> poll, 47 percent of Republicans said they believe that Trump won the popular vote (he did not), and that “millions” of illegals voted. 52 percent of those polled said they would actually support postponing the 2020 election – which would be wildly unconstitutional – if President Trump said it should be postponed until they can solve the problem of illegals voting.

But there are some signs of cracking in the President's wall of support. Notably, among voters who affirmatively voted FOR Trump, his support remained at 95 percent. But among voters who voted for Trump in order to vote AGAINST Hillary Clinton, his support had dropped from 87 percent in February to 81 percent in June and is continuing to fall.

Similar results were reported on September 6<sup>th</sup> by the bi-partisan firm Democracy Fund Voter Study Group: A strong majority of 88 percent of *all* Trump voters continue to approve of the job he is doing, but among cross-over voters – in this case Obama voters in 2012 who voted for Trump in 2016 – that support has dropped to 70 percent, with a disapproval rating among those voters of 22 percent. And 16 percent of those voters say they regret their decision to vote for Trump.

Of particular note, and pointing out the President's risk: Voters who approve of Trump's handling of the economy are 40-50 percent more likely to approve his presidency overall. For these voters, the President's antics and outbursts don't matter, the economy does.

This recent analysis is consistent with previous assessments. Amy Walter, a political analyst with *Cook Political Report*, after reviewing a focus group conducted last December, said that Trump's supporters did not expect him to keep most of the promises he made during the campaign, but there was one promise they absolutely did expect him to keep: bringing back manufacturing jobs.

But can he keep that promise? According to the Bureau of Labor Statistics, manufacturing jobs were less than 9 percent of overall U.S. employment in 2015, and manufacturing wages rose less than the overall private sector. We can produce twice as much today with a third fewer workers. Robotics are replacing workers – and robots don't earn overtime or need health care, so that's a trend certain to continue.

That data poses a real challenge to President Trump: If the political analyses are correct, his promise to bring back manufacturing jobs is the one promise he cannot afford to break. As the outlier, outsider candidate, he has no enduring and long-standing base of support earned over years of public service and policy advancement; he has no room for error on this. As Amy Walter put it, he has no safety net.

While the President's hard-core base remains loyal so far, his standing among the public at large is at historic lows, with his approval consistently below 40%. In a May 18<sup>th</sup> Fox News poll, not only was his approval rating historically low, but only 28% said they had a great deal of confidence in the President while 42% had none at all; 44% said they believed he was doing what he was elected to do while 53% said "his presidency and agenda are coming apart." His approval ratings have not significantly changed since that poll, and given that grim data, he cannot afford to lose his base.

As an aside, the Democrat Party is in not much better shape: In a *Washington Post* poll in late April, only 28% said they thought the Democrat Party was in touch with concerns of the average person; 67% said it was not. Even among Democrat voters, only 52% thought their party was “in touch.” Democrat “in touch/out of touch” numbers were worse than those for either the GOP or Trump in the same poll.

### ***The President’s Battle with the Democrats***

If President Trump had been popular and successful in the early months of his presidency, moderates in the Democratic Party might have been willing – or felt the political need – to work with him. But the President’s low approval ratings have ensured that no moderate voices for compromise were even raised. Even Democratic candidates running for re-election in Republican states who might have worried that opposition to the President would hurt their chances for re-election felt no need to moderate their votes.

But the intense Democratic Party opposition to Trump (and as a result to the GOP-controlled Congress) could come back to hurt them if they are seen as being increasingly controlled by the Bernie Sanders/Elizabeth Warren wing of their Party.

Charlie Cook of the *Cook Political Report*, a very well-respected political analyst, summarized the dilemma for both political parties if they allow themselves to be controlled by their most radical elements. In his June 2<sup>nd</sup> *National Journal* column, headlined *The Political Risks of Loathing Trump*, Cook reminded his readers – and Democrats – of the damage done to the GOP by the rise of the intransigent Tea Party, and noted that Democrats are headed toward the same end:

When a party becomes consumed with hate and contempt, reason and moderation get thrown out of the window. Knee-jerk behavior replaces careful planning and execution. That’s what happened to Republicans. Are Democrats about to follow suit? At a time when Democrats could project themselves as the adults in the room, the clamor for “resistance” and militant rhetoric is growing louder and louder. There is a pressing need for pragmatic, moderate voices . . . but Democrats seem to be unhinged by their animus toward the leader of the opposition party.

The Sanders/Warren success in driving the Democrat Party ever further to the left is causing serious ruptures within the Party, and the ages and long tenure of many Democratic Leaders adds to their intra-party problems.

As a Democratic operative colorfully put it in a June story: “We no longer have a party caucus capable of riding this [anti-Trump] wave. We have 80-year-old leaders & 90-year-old ranking members. This isn’t a party. It’s a giant assisted living center. Complete with field trips, gym, dining room and attendants.”

While Republicans may get some “poetic justice” satisfaction in watching the Democrats struggle with the same unmanageable chaos that the GOP has lived with since the rise of the Tea Party, any such satisfaction is certain to be short-lived: a Democratic Party determined to see the Trump presidency fail has a very good chance of succeeding, and if Trump fails, it is hard to see how the GOP policy agenda can succeed.

### ***The President’s Battle with the Media***

It would be hard to argue that any elected official in recent memory has gotten such consistently negative, even hostile, press coverage. While there are certainly many reasons for the media’s negative coverage of President Trump, guilt about their saturation-coverage of candidate Trump during the campaign may be a factor.

There were estimates during the campaign that candidate Trump got hundreds of millions – maybe even a billion – dollars’ worth of press coverage during the campaign; he was certainly the only candidate whose speeches were often broadcast live, in their entirety. Perhaps the ratings-driven establishment media has concluded that their 24/7 coverage helped elect Donald Trump, and they are now doing penance by participating in a campaign to drive him from office.

The media’s dislike of the President is also almost certainly exacerbated by his continued use of Twitter to tell his story without them, by his public contempt for them and constant accusations that their coverage is “fake news,” etc. But the intensity of their negative coverage goes well beyond the traditional GOP/conservative battle with a liberal-biased press corp.

The coverage of Trump’s accomplishments is virtually non-existent. That’s particularly true on the issue of the President’s regulatory agenda, which has been notably and significantly successful (see separate staff report), but about which the press has reported almost nothing.

On the other hand, coverage of the Russia collusion “scandal” is constant, despite no evidence of collusion having surfaced as yet.

There is no better proof of the militancy of the anti-Trump press than the news coverage the night of the May terrorist attack in Manchester, England.

News of the attack reached the US shortly after 6:30 p.m., and at 6:50 p.m. Fox News began its coverage of the attack. On MSNBC, Chris Matthews opened his show at the top of the hour giving the terrorist attack about 10 *seconds* of coverage, then pivoted to the Russia collusion story with “We begin tonight however with this shocking news in Washington.” Even worse, CNN led its 7:00 coverage with three separate Trump/Russia stories, *not even mentioning the terrorist attack in England.*

### *The President's Battle with ... Himself*

By any standard, this Administration has been more chaotic and undisciplined than any in recent history, and the President's lack of discipline and the turmoil in the White House are putting his policy agenda at risk. For example, the White House has been frustratingly slow in taking control of the departments and agencies which implement public policy. There are more than 1,200 position in the Federal government which require Senate confirmation, Cabinet secretaries and deputy secretaries at the top of the list. The last of President Trump's 15 Cabinet secretaries was not confirmed until April 27th, and as of that date there were only two deputy secretaries (the number two person in each agency) on the job. When Congress reconvened after Labor Day, there were still 147 Presidential nominations awaiting Senate action, and 354 of the 577 top jobs still have no nominees.

While some of the delay in getting Trump personnel confirmed can be blamed on Senate Democrats who oppose almost every nominee, the White House has been glacially slow at sending nominees to the Senate for confirmation. Some of the slow pace has been attributed to the inexperience of the anti-Washington White House staff; further slowing their approval of nominees is the continued screening of potential appointees to determine if they had ever posted anti-Trump comments on social media – a process in which the President reportedly personally participates.

Whatever the cause of the slow WH action, departments and agencies remain staffed with Obama appointees who are not interested in helping the new Administration implement its policies. In some instances, like the National Labor Relations Board (see separate staff report), the failure to name people to fill vacancies allowed a Democrat-controlled majority to continue to set policy for months into the new Administration.

But while personnel is policy and the slow pace of filling executive department positions is a serious issue, that is not the only problem in the Administration.

The lack of discipline in the White House has resulted in an Administration that frequently "steps on its own message." Jobs and the economy remain the top issues among most voters and the economy has done well since the election. And the Administration has achieved notable success in rolling back Obama-Administration regulations. But the President spends little time talking about these issues.

Unfortunately, he chooses instead to focus on side-show items – fake news, the Russia investigation, FBI Director Comey, the size of the crowds at his rallies – rather than focusing on a growing economy and his measurable accomplishments in advancing a deregulation agenda.

For example: in May the Administration announced that in June they would focus intensely on policy with each week dedicated to a different topic: infrastructure, the workforce, technology issues, and energy. If you did not know that, you are not alone. The media barely covered the policy events, because the President gave them other

material to cover – for example, his tweet of a video clip of himself punching out a CNN-masked man and his angry response to criticism on MSNBC’s “Morning Joe” news program to which he responded with a tweet commenting on Mika Brzezinski’s “bleeding face lift.”

The President put out 121 separate tweets in June – the month in which the focus was to turn to policy. Of those 121 tweets, just 3 were policy related.

The continued lack of message discipline in the White House is more than a frustration, or a distraction. It is putting the President’s agenda – and all of the pro-business policies he advocates – at risk.

Enactment of critically-needed legislation – tax reform the most significant now – will require strong leadership from the White House to unite the disparate factions of the GOP Congress and possibly garner some Democratic support. As this staff report goes to press, there are signs of presidential leadership on tax reform. Hopefully, it will continue.

## ***HEALTHCARE [Updated September 2017]***

Since the enactment of the *Affordable Care Act* (“ACA”) in 2010, the GOP has run four national campaigns with opposition to and repeal of what’s popularly known as *Obamacare* at the center of their platform. For their part, Congressional Republicans have waged an unrelenting seven-year battle to repeal/de-fund/delay/alter former President Obama’s signature domestic policy and legislative achievement.

The sweeping Republican victory in the 2016 elections appeared to secure the ACA’s position at the front of the line for the newly-elected 115<sup>th</sup> Congress’ attention with its repeal and replacement the legislative objective. The House Republican leadership and the Trump Administration outlined a repeal and replace agenda in three “buckets:” legislation proceeding under regular order (60 votes needed in the Senate); legislation proceeding under budget reconciliation rules (51 votes needed in the Senate); and regulatory action.

### ***Taking these phases in order...***

Activity on “ordinary” legislation: Legislation that will have to proceed under regular order (i.e., without privileged reconciliation status) is already underway in the House. One NAW-supported bill, the *Small Business Health Fairness Act* (HR 1101) authorizes the formation and multi-state operation of both self-funded and fully-insured association health plans (AHP). It passed the House in late March by a vote of 236 – 175, largely along party lines with just four Democrats joining the Republicans in approving the measure. In a similar vein, Senator Mike Enzi (R-WY), Chairman of the Senate Primary Health & Retirement Security Subcommittee, is at work on a re-draft of his bill authorizing the formation and multistate operation of small business health plans.

A second NAW-supported measure, the *Self-Insurance Protection Act* (HR 1304) shields stop-loss insurance from being regulated as health insurance, reaffirming long-standing policies to ensure employers can continue to offer workers flexible, more affordable health care plans through self-insurance. H.R. 1304 was passed by the House in early April.

Reconciliation: Prior to the President's Inauguration in January 2017, the House (by a 227 to 198 vote) and Senate (by a vote of 51 to 48) passed the fiscal year 2017 budget resolution (which does not require the President's signature) mandating deficit reduction targets on legislative committees of jurisdiction over the Affordable Care Act (ACA). On May 4<sup>th</sup>, the House passed H.R. 1628, the *American Health Care Act* ("AHCA") by a vote of 219 to 213 with 20 Republicans joining all 193 Democrats in opposition. Several issues long on the NAW agenda in this space were included in the NAW-supported House-Passed bill:

- Elimination of the employer mandate penalties applicable to employers with 50 or more full-time employees (smaller employers face no similar mandate).
- Extension of the delay in implementation of the 40% excise tax on high-cost employer-sponsored health plans (the "Cadillac Tax").
- Full repeal of the annual fee on health insurance providers (the "health insurance tax" or "HIT").
- Expanded use of health savings accounts (HSA) and flexible spending accounts (FSA).

Of critical importance was the absence of any limitation on the exclusion from income of the value of employer-sponsored health benefits.

Senate Republicans were not able to produce a bill capable of garnering the 51 votes needed for passage. Barely able to get on the bill – the vote on the motion to proceed required the Vice President's tie-breaking vote to pass – the vote on the repeal and replace package failed 43 to 57 on July 25<sup>th</sup>. Subsequent votes to partially repeal the ACA and to repeal the ACA with a two-year delay were unsuccessful, the former by a vote of 45 to 55; the latter by a 49 to 51 vote. On the final vote, 3 Republicans joined all 46 Democrats and 2 Independents in opposition.

It is not clear whether/when the Senate will resume consideration of ACA repeal/replace legislation. For the moment, the focus of activity in the health space has pivoted to legislation to stabilize the ACA exchanges.

## ***LABOR [Updated September 2017]***

### ***The Department of Labor:***

Changes at the Department of Labor got off to a very slow start this year because President Trump's first nominee for Secretary of Labor, Andrew Puzder, withdrew his name from consideration after weeks of controversy.

President Trump's second nominee for Secretary of Labor, former National Labor Relations Board member Alex Acosta, was a far less controversial candidate, and after an uneventful confirmation hearing, he was confirmed by the Senate in April.

Mr. Acosta is seen as both less controversial and more cautious than Mr. Puzder. Some analyses of his record at the NLRB suggest that he will not be as aggressive in taking the Department in a new direction as Mr. Puzder would have been. It's too early to know for sure, but the Department's handling of the Persuader Rule and the Overtime Rule suggest that concerns about an overly-cautious approach may be justified. *[See separate staff report on Regulatory Agenda]*

### ***The National Labor Relations Board (NLRB):***

The NLRB is a five-member independent agency, on which there must be at least three seated members for them to conduct business. There were only three seated Board members when President Trump took office – two Democrats and one Republican – leaving two vacancies for President Trump to fill. In addition, the powerful office of General Counsel will become vacant in October, giving the president the opportunity to further strengthen GOP control of the Board.

Early in the year, President Trump named Republican member Philip A. Miscimarra as Chairman of the Board, an action he could take unilaterally, but the two other seats remained vacant without nominees for months, leaving the Board with a working Democrat majority. In mid-June the President finally nominated two qualified individuals for the Board vacancies, long-time House Republican labor counsel Marvin Kaplan and business-friendly attorney with the Littler law firm in Los Angeles William Emanuel. Marvin Kaplan was confirmed on August 2<sup>nd</sup> before the Senate adjourned until after Labor Day, creating a 2-to-2 tie on the Board. We are hoping that Bill Emanuel will be confirmed quickly now that the Senate has reconvened.

Getting a GOP majority confirmed and working is a huge priority for the business community. In a recent column, former GOP Board member Brian Hayes cited a study that "has estimated that in the seven or so years of its existence, a majority on the Obama Board has collectively overturned more than 4,000 years of existing NLRB precedent." It will take a new GOP majority many months to reverse and unravel the amount of damage done by the Obama Boards.

## ***MARKETPLACE FAIRNESS [Updated September 2017]***

Twenty-five years ago in *Quill v. North Dakota*, the US Supreme Court ruled that the lack of a physical presence (“substantial nexus”) in a State by an out-of-state seller prevents that State from compelling the remote seller to collect and remit that State’s sales tax. While states may audit in-state purchasers who may be penalized for failing to remit their owed use taxes to their states, the enforcement of state sales/use tax laws has proven extremely difficult to achieve as states with sales/use tax laws are collectively foregoing an estimated \$26 billion in revenue annually. In its 1992 decision in *Quill*, the Court invited Congress to resolve this issue, stating, “The underlying issue here is one that Congress may be better qualified to resolve and one that it has the ultimate power to resolve.”

Since the Court’s disposal of *Quill*, the volume of e-commerce has exploded and continues to grow principally as a result of online sales via the internet. According to the 2013 NAW Institute for Distribution Excellence/IBM *Facing the Forces* study, in the same way that the shift toward e-commerce is “rapidly transforming the retail landscape ... e-commerce will now continue to transform wholesale distribution ... by 2017 ... the proportion (of online orders) is expected to surge ... by 130%.” The evolution of this marketplace dynamic places “brick and mortar” sellers which must collect and remit states’ sales taxes at the point of purchase, at a clear price-generated disadvantage with their remote online competitors.

The issue has been the subject of Congressional attention for several years. Most recently, the U.S. Senate in May 2013 passed the NAW-supported *Marketplace Fairness Act* (“MFA”) by a bipartisan vote of 69 – 27. However, House consideration of the MFA was successfully blocked due to the opposition of the Chairman of the Judiciary Committee, Rep. Bob Goodlatte (R-VA-6). A modified version of the MFA authored by Rep. Jason Chaffetz (R-UT-3) and supported by NAW (the *Remote Transactions Parity Act* (“RTPA”)) also failed to advance due to Chairman Goodlatte’s opposition. Chairman Goodlatte prefers an approach to this issue that would base the permissible sales tax treatment of remote online sales on the tax rate of the state in which the purchaser is located (the “destination” state) and the tax base of the state determined to be the location of the seller (the “origin” state). NAW cannot support an approach that includes an origin component because the necessity of achieving parity at the point of purchase is frustrated.

The MFA (S.976) and the RTPA (H.R. 2193) were introduced in the Senate and House respectively in April; however, the legislative path forward in the current 115<sup>th</sup> Congress has yet to clarify itself despite bipartisan support for both bills. Complicating the picture is the introduction of the NAW-opposed “No Regulation Without Representation Act,” (H.R. 2887) a bill that codifies *Quill*. Among the cosponsors: Rep. Bob Goodlatte. A hearing on H.R. 2887 in the House Judiciary Subcommittee on Regulatory Reform, Commercial & Antitrust Law was held on July 25<sup>th</sup>. The Judiciary Committee has yet to schedule any action in this Congress.

***Litigation:***

*South Dakota v. Wayfair*: At issue is the validity of a South Dakota statute requiring sellers with “economic nexus” to collect and remit state sales tax regardless of physical nexus. South Dakota acknowledges the statute in question runs afoul of the standard enunciated in *Quill*. (A parallel case challenges the validity of the South Dakota statute on the grounds that it violates the Federal Constitution’s Commerce Clause and due process guarantees.) In mid-January a Federal District Court rejected the companies’ request that the case be heard in Federal court, and in early March the State court ruled as expected against the South Dakota law on the basis of *Quill*. The case is on appeal to the South Dakota Supreme Court which heard oral arguments on August 29<sup>th</sup>, and appears headed for the US Supreme Court.

***Note:***

On April 1<sup>st</sup>, the online giant Amazon began collecting sales tax on purchases made by online consumers in Hawaii, Idaho, Maine and New Mexico. As a result, Amazon now collects sales taxes in every jurisdiction that has a sales tax (there are five states without a state sales tax: Alaska, Delaware, Montana, New Hampshire, and Oregon).

***REGULATORY AGENDA [Updated September 2017]***

During the campaign candidate Trump promised to roll back as many of the Obama Executive Orders and regulations as possible, as quickly as possible. It is a promise he is keeping.

Immediately after the inauguration the Trump Administration, Congressional Leaders and the business community all worked together to determine which Obama Executive Orders could simply be reversed by a Trump Executive Order; and which rules could be easily reversed by an agency, which could be repealed by an act of Congress, which could be unraveled by withdrawing the government from ongoing litigation, and which are deeply entrenched and would require more complicated responses.

Those efforts, and the determined actions of the Trump Administration and the GOP majority in Congress, have had measurable results. In addition to the Executive Orders issued by President Trump, Congress has pursued an aggressive and effective regulatory reform agenda that has largely gone unreported. Congress has both taken steps to reform the regulatory process and, using a rarely-used statute called the *Congressional Review Act*, completely repealed a number of Obama Administration regulations (see separate section below).

While these regulatory initiatives have gotten almost no mainstream media coverage, *Politico* has taken notice. And they understand the significance of what is occurring, as they reported in their May 26<sup>th</sup> edition:

The chaos of President Donald Trump's first four months as president has overshadowed a series of actions that could reshape American life for decades — efforts to rewrite or wipe out regulations affecting everything from student loans and restaurant menus to internet privacy, workplace injuries and climate change.

But Trump is going after even bigger targets, setting bureaucratic wheels in motion that could eventually ax or revise hundreds of regulations as agencies reorient themselves toward unwinding red tape and granting speedier approvals to projects. If successful, these efforts could represent the most far-reaching rollback of federal regulations since Ronald Reagan's presidency.

The goal of the effort is "systemic reform," said Andrew Bremberg, director of the White House's Domestic Policy Council — aiming for results that last well beyond Trump's presidency.

***Congressional Review Act (CRA):***

Under the CRA, Congress can pass legislation to reverse a specific regulation with an expedited floor procedure that is not subject to a Senate filibuster so it can pass with a simple majority vote. A CRA resolution must be introduced within 60 legislative days in the House/60 session days in the Senate (not calendar days) of Congress being notified of a new final regulation, and a successfully-passed CRA resolution must be signed by the president or his/her veto overridden.

The CRA was enacted in 1996, and until this year there had been only one successful effort to repeal a regulation using it: In 2001 Congress passed a CRA repeal of a Clinton Administration OSHA/ergonomics regulation, and then-newly-elected President George W. Bush signed that CRA into law.

With the election of President Trump last fall, the circumstances that facilitated the 2001 ergonomics CRA have reoccurred: CRAs passed by the GOP Congress will now be signed into law by newly-elected Republican President Trump rather than vetoed by a Democratic President. Given the opportunity to make real and permanent changes in the regulatory landscape, Congress immediately began compiling a list of the regulations issued late enough in President Obama's term to be subject to a CRA.

A CRA can repeal only one regulation at a time, and each CRA can take up to 10 hours of floor debate time. Because the Democratic minority is slow-walking everything in the Senate, often taking the maximum amount of debate time even on non-controversial Trump nominations subject to Senate confirmation, the regulations were prioritized so the most significant rules subject to CRA repeal could be moved as quickly as possible in the Senate.

The Congressional GOP Leaders' determined effort to roll back the Obama regulatory agenda produced significant – and historic – results. Before the clock ran out in mid-May

on Obama Administration rules subject to a CRA, 18 CRA resolutions were introduced in one or both houses of Congress and 14 CRA resolutions passed both houses of Congress and were signed into law by President Trump.

Along with several highly controversial environmental regulations that were among the first subject to CRA action, two workplace rules of particular significance to employers were repealed:

- The Labor Department’s “blacklisting” rule which would have required federal contractors to disclose to a contracting agency any citations for non-compliance with 14 separate statutes and executive orders, and
- The OSHA “Volks” rule – “Clarification of Employer’s Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness” – which would have allowed OSHA to cite employers for failure to make and maintain injury and illness records for up to 5 years rather than the previous 6-month statute of limitations

***Regulatory Reform legislation:***

In addition to the CRA resolutions repealing specific regulations, Congress is pursuing a number of bills that would reform and vastly improve the regulatory promulgation processes. Among the bills with the broadest impact and likelihood of enactment are:

Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017: The REINS Act would require that regulations with significant economic impact (more than \$100 million) be approved by Congress and signed by the President. The REINS Act has been passed by the House many times but has never passed the Senate. This year the bill has already again passed the House, and a bill has been favorably reported by a Senate Committee.

Regulatory Accountability Act: With even more sweeping impact, the Regulatory Accountability Act combines into one piece of legislation a number of previously-offered proposals that would significantly change the way regulations are developed and proposed by Federal agencies. The legislation has passed the House, and been favorably reported by a Senate committee.

It would modify the Administrative Procedures Act, the law which governs how executive branch agencies promulgate regulations, and the Regulatory Flexibility Act of 1980 (RFA) and the Small Business Regulatory Enforcement Act of 1996 (SBREFA), which deal with the impact of regulations on small business. It has six separate titles each dealing with a different part of the regulatory process.

***Other regulations of importance to employers:***

**The Persuader rule:** The Persuader rule – which would make it more difficult for an employer to obtain advice and/or legal counsel during a union organizing campaign – was enjoined last year by a federal court in Texas. The Obama Department of Labor (DoL) appealed that decision in January, which was a surprising move given the change in Administrations. And in fact the Trump Labor Department did ask the circuit court to stay DoL’s appeal.

In late May, DoL sent to the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA) a new proposed rulemaking rescinding the Persuader rule. Under the standard process, OIRA reviews a new rule and, assuming they approve it, the regulating agency then publishes the proposed rule in the Federal Register and opens it up for public comment.

OMB/OIRA completed its review of the Persuader rescission rule on June 6th, and on June 13th DoL’s Office of Labor-Management Statistics issued a new notice of proposed rulemaking (NPRM). The public comment period on the rescission rule ended on August 11th. NAW participated in this new rulemaking through the Coalition for a Democratic Workplace.

Two days after the NPRM was announced, the circuit court responded to DoL’s request and granted a 60-day stay of DoL’s appeal of the Persuader injunction while the rulemaking proceeds.

**The FLSA/Overtime Rule:** The Fair Labor Standards Act Overtime Rule has also been halted by the courts [*see separate Legal Update for details on the court actions*]. NAW will be participating in the Labor Department’s new Request for Information (RFI) through the Partnership to Protect Workplace Opportunity, the business coalition on the issue which we help manage; and we expect to submit comments when an expected new proposed rule is released.

**Joint Employer Standard:** Under previous Board precedent, employers can only be considered “joint employers” (for purposes of union organizing) if employers share direct control over the terms and conditions of employment, specifically ruling that “indirect control” was insufficient. In 2014 the NLRB changed the standard and determined that “indirect control” is sufficient for joint employer status (in which employees can be included in a collective bargaining unit without the consent of both employers). This issue is also in court in a case in which NAW joined an amicus brief; the case is on appeal in the DC Circuit.

**NLRB’s Ambush Election Rule:** This NLRB “Representation Case” Rule governing union certification elections was designed to mandate “quickie” or “ambush” elections to tip the scales in favor of the unions and increase the number of certification elections they would win. This is a final rule, and has been upheld by the courts, so it was not subject to a CRA.

A new GOP majority on the NLRB could re-visit the issue and begin a new rule-making, but it is not likely to be on the top of a priority list.

Protected concerted activity: The NLRB has broadly expanded its reach into both union and non-union workplaces by expanding the definition of “protected concerted activity” – activity in which the employees may engage and with which the employer may not interfere. The Board first focused on protecting employees’ rights to post comments critical of their employers on social media sites, but has since expanded the definition of “protected concerted activity” to confidentiality rules, use of company logos and trademarks, employees speaking to the media, taking photographs or videos on company property, anti-violence policies, dress codes, inappropriate behavior, etc. This is not a rule-making but a series of case decisions, so it will take a GOP-majority NLRB time to find opportunities to reverse the Board’s overreach in this area. [See separate Legal Update]

Micro Bargaining units: The NLRB continues to apply their “Specialty Healthcare” decision regarding what constitutes an appropriate collective bargaining unit to more companies and industries, facilitating the creation of multiple “micro-bargaining units” in a single workplace. Like concerted activity and joint employer, these NLRB actions were case decisions and not rule-makings so a new GOP Board will have to look for cases that allow them to redefine the “specialty” standard.

Use of employer email systems: Under previous Board rulings, employees had no statutory right to use their employer’s email system, but in a 2014 case, *Purple Communications*, the Board ruled that “[E]mployee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.” NAW joined other associations in filing an amicus brief in that case. In late March, 2017, the Board reaffirmed that decision, and we don’t know if Purple will appeal the Board’s decision; if they do, we will again join an amicus brief in the case.

## ***TAXES [Updated September 2017]***

The GOP Leadership in both houses of Congress, some key Democratic tax-writers, and the Trump Administration are all vocal advocates for some form of tax reform. It is conventional wisdom in Washington that the chances for meaningful tax reform are greater now than they have been in decades – most likely since the 1986 tax reform act.

While there were early predictions that a tax reform proposal could be considered by this summer, those predictions were overly optimistic, and the collapse of the Health Care/Obamacare Repeal bill in the House of Representatives at least temporarily stalled movement on tax reform. But whether it is done later this year or in the first half of 2018 (which some suggest is a more realistic time table), there is no doubt that tax reform has moved from a back-burner wish-list to the top of the agenda. How and whether it will be done and the policy specifics remain uncertain, but some things are taking shape.

Over the last several months, a group of six major players on tax reform – the Big Six – took the lead on developing a tax proposal. The six key players: House Ways and Means Committee Chair Kevin Brady (R-TX), Speaker of the House Paul Ryan (R-WI), Senate Finance Committee Chair Orrin Hatch (R-UT), Senate Majority Leader Mitch McConnell (R-KY), President Trump’s Treasury Secretary Steven Mnuchin and National Economic Council Director Gary Cohn.

As of this writing, the Big Six continue to meet, with the President in some instances, to attempt to reach consensus on a proposal. No details of a plan have emerged, and it remains uncertain whether they will succeed in getting an agreement quickly enough for a tax reform bill to be considered by both houses of Congress in the next few months. As this staff report goes to press, it is being reported that a broad outline of a tax reform plan will be released the week of September 25<sup>th</sup>, but no details on the specifics of that plan are yet available.

### ***The process – bi-partisanship or reconciliation?***

Democratic leaders have called for bipartisanship on tax reform, yet all but 3 Democratic senators signed an August 1<sup>st</sup> letter to President Trump and Congressional GOP leaders laying out conditions for their participation in tax reform debate, some of which conditions they knew to be unacceptable to the GOP majority.

Although some Republican tax-writers have indicated their willingness to begin consideration of tax reform on a bipartisan basis, most believe that the Senate Democratic minority will obstruct passage of a tax reform bill that does not include significant tax increases that Republicans are unwilling to impose. With only 52 GOP votes in the Senate and the unlikelihood that 8 Democrat senators will break ranks with their Leadership to support a GOP bill, plans are being made to consider tax reform under a filibuster-proof reconciliation bill.

### ***The players and the policy:***

The House Ways and Means Committee: The GOP released a broad and well-developed “Blueprint” on tax reform in June, 2016. While that proposal proved too controversial to proceed (more on the Blueprint below), any tax reform legislation will ultimately have to originate in the House.

The Senate Finance Committee: Chairman Orrin Hatch (R-UT) had been working on a “corporate integration” bill for a couple years, which will now take a backseat to a more comprehensive approach; Ranking Democrat Ron Wyden (D-OR) has released two previous broad tax reform bills, and could prove to be a willing partner should a bipartisan approach be taken.

The White House: Candidate Trump released a tax reform proposal during the campaign which was widely criticized as being too generous to upper-income earners and dramatically adding to the Federal debt. Administration officials are now participating as

part of the Bix Six in discussions with House and Senate GOP leaders on a tax reform proposal.

“The Swamp”: No issue attracts more advocates and interest groups than tax reform, and despite Trump’s vow to “drain the swamp,” the taxpayers and those who speak for them in Washington will – and should – be involved in the tax reform debate.

***The primary issues to watch for:***

Corporate-only tax reform vs pass-thru rate parity: While there is still an occasional call for corporate-only reform that would reduce the tax rate only for the 1.6 million C Corporations and not for the more-than-30-million pass-through businesses subject to the top individual rate, that approach would be aggressively opposed by those pass-through businesses, which would doom tax reform politically. There is much stronger support today for business tax reform that would lower the tax rate for all businesses, regardless of how they are structured, to reach or get close to parity in tax rates for C Corporations and pass-through entities.

Related to the issue of rate parity for pass-through entities is the concern expressed by tax writers on the Hill that a significantly reduced rate for pass-through businesses would open the door to tax avoidance as individual taxpayers shift their income to a business entity to avoid the higher individual rate. Those concerns will almost certainly result in some legislative language to prevent that tax avoidance; the exact language will be of major concern to S-corporations and their advocates.

Effective vs marginal rates: The issue of effective tax rates – the taxes that companies actually pay – has increased in intensity in the last few years as a result of news reports about multi-national corporations taking advantage of the many complex provisions in the tax code that enable them to pay effective rates much lower than the statutory 35% rate. Most wholesaler-distributors are high effective rate payers and they are bearing an unfair and disproportionate share of the corporate income tax burden.

International-only tax reform: In recent years some Congressional tax writers discussed reform that would deal only with our international tax law, without reducing corporate or individual tax rates. Under current law, U.S. corporations are taxed on profits earned abroad as well as those earned at home, but taxes on their foreign income are deferred until that income is “repatriated” back to the U.S. As a result of the high U.S. corporate income tax rate of 35%, our multi-national corporations often decline to bring their foreign earnings back to the States. International tax reform was seen as a way to make the U.S. tax code more competitive with our trading partners and to encourage companies to remain headquartered here and to repatriate their foreign earnings. With the increased impetus for comprehensive tax reform, the push for international-only reform has diminished.

Repatriation and “deemed” repatriation: In 2004 a repatriation bill was passed that allowed companies to repatriate foreign earnings with a “tax holiday” rate of only 5.25 percent, and it is generally assumed that multi-national corporations will not bring their foreign earnings

back to the U.S. until a similar tax rate reduction is offered. To get around this stalemate and generate the revenue that would result from a broad repatriation, several recent tax reform proposals have proposed imposing a “deemed repatriation” tax on those foreign earnings – a one-time tax on corporations’ foreign-held earnings as if they had been repatriated back to the U.S. Repatriation and deemed repatriation remain a part of the tax debate today, with a push from some legislators to use repatriation revenue to fund an infrastructure/highway bill. How repatriation is handled is of interest to all tax reform watchers, since if repatriation is used for infrastructure, tax writers will inevitably look for other sources of new tax revenue to “pay for” tax rate reductions.

The House GOP Tax Blueprint: The House Blueprint is the only fully-developed tax reform plan to date, and it proposed dramatic structural changes in the tax code, rather than just tinkering with the existing law. By far the most controversial provision in the House Blueprint was the border adjustable tax proposal. Under the BAT regime, importers would no longer be allowed to deduct the cost of the goods they import (effectively a 20 percent tax on imports), and exporters would no longer pay tax on the revenue generated by goods they export. The BAT proved wildly controversial, however, with the domestic retail industry organizing an effective army in opposition to it. The BAT would have produced a trillion dollars in new revenue, and without that revenue source, the Blueprint could not stand and is no longer being considered.

#### ***NAW Tax Coalitions:***

NAW helped form and helps manage the Coalition for Fair Effective Tax rates, which is actively involved in the tax reform debate, urging that reform be seen through the lens of effective, not just statutory, tax rates.

NAW also serves on the Steering Committee of Parity for Main Street Employers, which leads the fight for tax rate parity between C corporations and pass-through businesses.

#### ***LIFO:***

In 2006 NAW organized, and today continues to manage, the LIFO Coalition. NAW member companies and the members of the LIFO Coalition have been aggressive and effective in making the case for LIFO to critical members of the House and Senate, and we believe they are largely responsible for the fact that no action has been taken on repeal legislation to date. The success in preventing action on repeal is a text-book case of what business can achieve when it fully engages in the legislative process.

LIFO repeal is very much on the table in the current tax debate as the tax writers intensify their search for “pay-fors” – provisions that raise revenue that is needed to offset the revenue loss that would result from a significant reduction in business and individual tax rates. We continue to make the case in meetings on the Hill and at the White House and Treasury Department that LIFO should not be repealed, but it is going to again require the active participation of a significant number of LIFO-users in the business community to persuade members of the House and Senate to reject calls for repeal.

# Legal Update

## **Federal Court Permanently Enjoins Enforcement of the Obama-Era Overtime Pay Rule**

On August 31, 2017, a Texas federal district court issued a nationwide permanent injunction barring implementation and enforcement of the Obama-Era overtime pay exemption rule in its entirety. That Department of Labor rule would have more than doubled the minimum salary threshold for exemption from overtime pay (from the current \$23,660 annually to \$47,476 annually) for executive, administrative and professional employees. Judge Amos Mazzant granted summary judgment in favor the plaintiffs in two consolidated cases challenging the DOL overtime rule (*Nevada, et al. v. U.S. Department of Labor* and *Plano Chamber of Commerce*, E.D. Tex. No. 4:16-CV-731).

The updated salary-level test would have made an estimated 4.2 million workers eligible for overtime pay, even though they perform bona fide executive, administrative and professional duties as recognized in the Fair Labor Standards Act (FLSA).

Judge Mazzant previously issued a nationwide preliminary injunction in this case that prevented the overtime rule from going into effect, pending his decision on the merits of the case. The Labor Department, under the prior Administration, appealed this ruling to the Fifth Circuit Court of Appeals. However, on September 6, 2017 the federal appeals court dismissed the appeal at the request of the Labor Department.

The overtime rule has never gone into effect, thanks to suits brought by sixteen states and a coalition of business groups – including NAW. Further, it seems unlikely the Administration will appeal Judge Mazzant’s August 31<sup>st</sup> decision.

Shifting to the Executive Branch, on July 26, 2017, the Labor Department published a Request for Information (82 Fed. Reg. 34616) concerning the FLSA minimum wage and overtime pay requirements for executive, administrative, professional, outside sales and computer employees. The information gathered will aid the agency in formulating a proposal to revise the regulations applicable to these job categories. Comments are due by September 25, 2017.

## **Use of Revised EEO-1 Report Form Suspended by EEOC**

In September 2016, the Equal Employment Opportunity Commission (EEOC) issued regulations that amended the EEO-1 Report form to include employee pay and hours worked data by race, ethnicity and gender, grouped by occupational categories. This mandate affected every US business with 100 or more employees, and federal contractors with 50 or more employees and \$50,000 or more in contracts. It was scheduled to go into effect for forms due for filing by March 31, 2018.

On August 29, 2017, the Office of Management and Budget (OMB) directed the EEOC to immediately suspend the required use of the revised EEO-1 Report. Businesses will now use the previously approved EEO-1 Report to comply with reporting obligations until further notice. In its announcement OMB found good cause to stay the revised EEO-1 Report based on the agency's concern that some aspects of the new "collection of information lacked practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues."

OMB's decision was made in consultation with the EEOC. EEOC advises that:

- The deadline for filing 2017 EEO-1 Report is March 31, 2018.
- Filers may use the same form used in 2016; no wage or hours work data is required.
- The Report must be based on a payroll period in October, November or December 2017.

### **NLRB Scrutiny of Employee Handbook Restrictions Continues**

Section 7 of the National Labor Relations Act grants employees the right to discuss or criticize management, their wages, hours and other working conditions. An employer's interference with these so-called section 7 rights can result in an unfair labor practice charge for adjudication by the National Labor Relations Board. The Act applies to employers, whether or not your employees are represented by a labor union.

A favorite target for employee or union complaints has been the employee handbook and restrictive company policies applicable to employee conduct – such as social media, use of email, workplace recordings, confidentiality and conflict of interests.

Even where a policy does not expressly prohibit an employee from exercising these rights, they can be viewed as "overly broad" and therefore unlawful because the text could reasonably be understood by a worker to interfere with those rights. (Example: "Be respectful of others and the Company" is an illegal rule according to the NLRB because an employee might refrain from criticizing a supervisor, co-worker or the employer.)

As the case below illustrates, the NLRB can now pluck a sentence, or a phrase, out of a comprehensive handbook or policy and declare that the offending text violates employees' section 7 rights.

#### *No-Recording Policy Found Unlawful*

Whole Foods Market adopted a workplace no-recording policy that stated:

"It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership."

In explaining its purpose, the policy continued:

“The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.”

A union organizing committee complained to the NLRB that the policy was overbroad. The NLRB agreed (3-1 vote) and found the policy illegal because “employees could reasonably construe the language to prohibit” workplace recordings protected by section 7 (e.g., recording evidence for use in employment-related judicial proceedings, documenting unsafe working conditions, recording evidence of unfair labor practice). On appeal, the U.S. Court of Appeals for the 2<sup>nd</sup> Circuit agreed with the NLRB. (*Whole Foods Market Group, Inc. v. NLRB*, No. 16-0002).

It seems any employer policy or rule faces legal challenge if it could conceivably be construed by an employee to limit his or her exercise of section 7 rights, without proof that an employee’s rights have been violated by the rule, or even if the rule has never been applied to restrict those rights. One must wonder what workplace rule that is limiting or restrictive in any way is capable of surviving an unfair labor charge.

# Legislative E-Alert Program

The E-Alert Program is NAW's fundamental, internet-based grassroots lobbying program. E-Alert enables us to provide NAW Direct Members and the members of cosponsoring member associations with accurate, up-to-the-minute information regarding legislative issues of importance to them, and gives them the ability to easily and conveniently identify and engage their Federal legislators on a timely basis.

Member association co-sponsorship of the Legislative E-Alert Program is the central element in providing the critical mass upon which all successful grassroots advocacy programs and campaigns rely. Currently, 40 member associations cosponsor the Legislative E-Alert Program. A substantial increase in association co-sponsorship is needed for this essential grassroots advocacy program to meet its full potential, and all NAW member associations are urged to participate.

# Washington Action Network

The Washington Action Network (WAN), NAW's signature grassroots communications program and the cornerstone of NAW's grassroots lobbying capability, is cosponsored by 52 member associations and has in its database more than 4,000 personal contacts in the U.S. Senate and House of Representatives.

The strength of the WAN program – its ability to generate constituent communications with Federal lawmakers from wholesaler-distributors who enjoy personal relationships with them – has been widely recognized and provides NAW a uniquely valuable, effective tool in achieving results for industry firms on Capitol Hill.

Wholesaler-distributor grassroots activism has been crucial in the past as it will be in the future to delivering positive results for wholesaler-distributors on the wide array of issues and objectives that comprise NAW's legislative agenda. Consequently, all NAW member associations are urged to co-sponsor the WAN program.

# NAW Political Action Committee

The newly re-named NAW Political Action Committee (NAW PAC), cosponsored by 43 member associations, is NAW's political arm. It is through NAW-PAC that our association engages the political process and provides executives throughout the industry with an important avenue for political action on behalf of business-friendly candidates for Federal office.

Closely related to NAW-PAC is NAW's Election Tools program, also available to member associations on a co-sponsorship basis. A total of 51 member associations currently partner with NAW in Election Tools, which is designed to maximize wholesaler-distributor voter registration and turnout. Candidate information (including incumbent voting records), voter registration deadlines, obtaining absentee ballots and early voting opportunities (where available) are staples of the information/education "diet" the NAW Election Tools program provides to industry executives.

On the fundraising side, NAW-PAC maintains both a Political Action Fund (PAF) and a Corporate Political Education Fund (CPEF). The corporate contributions that CPEF raises enable us to contribute to Federal candidates every "hard dollar" (personal money) that PAF raises. NAW-PAC's PAF turned in record breaking fundraising performances in the 2014 mid-term and 2016 presidential election cycles.

Campaigns for 34 seats in the Senate (9 Republican and 25 Democratic) and all 435 seats in the House of Representatives are on tap in the 2018 mid-term congressional election cycle. As always, 100 cents of every dollar personally contributed to NAW-PAC's Political Action Fund will be used to directly support pro-business, NAW-PAC-endorsed candidates for Federal office.

NAW-PAC's principal goal remains unchanged: the election of U.S. Senators and Representatives who embrace pro-business policies.