



AAU WEEKLY WRAP-UP

ASSOCIATION OF AMERICAN UNIVERSITIES
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Friday, April 3, 2009

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CONGRESSIONAL SCHEDULE *NEW*

The House and Senate did not meet today and will be out of session for the spring recess until the week of April 20. As discussed below, Democratic leaders hope to reach a conference agreement on and final approval of the FY10 budget resolution when Congress returns.

BUDGET & APPROPRIATIONS

HOUSE AND SENATE APPROVE FY10 BUDGET RESOLUTIONS *NEW*

The House and Senate last evening approved their respective versions of the FY10 budget resolution, setting up negotiations on a final package over the two-week recess that begins today. Democratic leaders hope to approve a final FY10 budget resolution during the week of April 20 when Congress returns. The House approved its version by a vote of 233 to 196, the Senate by a vote of 55 to 43. The budget resolution, which is not signed into law by the President, provides an overall guide for congressional spending and tax decisions, including a top-line number for appropriations.

CQToday reports that while both measures largely follow the President's priorities, they provide less discretionary spending and fewer tax changes than the President has requested. The House version provides \$7 billion less in FY10 for discretionary spending than the President's request; the Senate measure provides about \$15 billion less. CongressDaily reports that both resolutions include deficit-neutral reserve funds for health care, energy, and education legislation, all of which are priorities for the Obama Administration.

--House Measure Retains Reconciliation Instructions

The greatest difference between the two measures and the source of greatest contention is the reconciliation instructions included in the House version, which would allow fast-track consideration of the President's health care and student aid initiatives. Provisions considered under the reconciliation process are not subject to filibuster in the Senate and only require a simple majority vote to pass. CQToday reports that Senate Republicans "are taking it as a given" that reconciliation instructions will be in the conference agreement, while Democrats are saying they would not necessarily use the procedure but hope the threat of its use will pressure Republicans to negotiate.

During consideration of its FY10 budget resolution (S. Con. Res. 13) the Senate approved amendments dealing with charitable deductions and student loans, among others (see below). It is worth noting that while amendments serve to place the Senate on record in support of certain policies, they are non-binding.

--Senate Approves Two Amendments on Administration's Charitable Deduction Proposal

During consideration of its FY10 budget resolution, the Senate approved two amendments related to President Obama's proposal to reduce the value of itemized deductions, including charitable deductions, among the highest-income taxpayers.

Approved by a vote of 94 to 3 was an amendment offered by Senator John Thune (R-ND) that would allow a point of order against legislation that would raise revenue by reducing the tax deduction rate for charitable giving by high-income taxpayers. Adopted by unanimous consent was an amendment by Senator Robert Bennett (R-UT) to prevent any savings gained by limiting the charitable deduction from being used to support the reserve fund for health care reform legislation.

--Senate Approves Alexander Amendment on Student Loan Choice. As part of the manager's amendment, the Senate last night also approved an amendment by Senator Lamar Alexander (R-TN) aimed at preserving the Federal Family Education Loan (FFEL) program, which the Obama Administration has proposed to eliminate in favor of direct lending. The language states that institutions and students should have a choice in their student lending programs.

Additional information about the House and Senate budget resolutions is available from the House Budget [Committee](#) and the Senate Budget [Committee](#).

The Obama Administration issued an outline of its FY10 budget on February 26, with mainly top-line budget information for agencies of concern to research universities. (See the February 27 AAU Weekly [Wrap-up](#) for additional information.) Although earlier reports had indicated that the Administration would submit its complete budget plan in mid-to-late April, CQToday reports that the Administration's budget might not go forward until late April to early May.

HIGHER EDUCATION ASSOCIATIONS ENDORSE HOUSE FY10 BUDGET RESOLUTION

Ten higher education associations, including AAU, sent a [letter](#) to Members of the House of Representatives on April 1 expressing support for the House budget resolution (H. Con. Res. 85). The letter expresses appreciation that the resolution was designed to make it possible for

Congress to turn Pell grants into an entitlement program—which the associations support—and recognizes that Congress may also consider changes to federal student loan programs.

OMB REQUESTS COMMENTS ON PROPOSED RECOVERY ACT REPORTING REQUIREMENTS

The Office of Management and Budget published a notice in the April 1 [Federal Register](#) (74FR14824) requesting comments on the standard data elements that it proposes to require for reporting under the American Recovery and Reinvestment Act (ARRA) for grants, cooperative agreements, and loans. The deadline for comments is May 1, 2009.

As discussed previously, recipients of funding provided by federal agencies under the Recovery Act will be required to report back to their respective agencies every three months about their project or activity, particularly how many jobs it has created or sustained. AAU staff will work with the Council on Governmental Relations to assess and comment on the proposed standard data elements outlined in the notice.

Those with specific comments or concerns regarding the reporting requirements in the notice are asked to share them with Tobin Smith (toby_smith@aau.edu) of the AAU staff.

NIH ISSUES RFA FOR FACULTY RECRUITMENT USING RECOVERY ACT FUNDS

The National Institutes of Health (NIH) has issued a [request for applications](#) for a limited competition under its Recovery Act funding to support new faculty recruitment.

OTHER CONGRESSIONAL ISSUES

SENATE JUDICIARY COMMITTEE APPROVES PATENT REFORM BILL UPDATED

The Senate Judiciary Committee completed markup of the Patent Reform Act of 2009 (S. 515) on April 2, after first approving a comprehensive amendment that addresses the two primary concerns of the university community: the determination of damages and the scope of the *inter partes* reexamination procedure.

The amendment, which was developed by Chairman Patrick Leahy (D-VT), Ranking Member Arlen Specter (R-PA), and Committee member Dianne Feinstein (D-CA), was supported by the group of higher education associations that have been working together on patent reform. The group's letter endorsing the Leahy-Specter-Feinstein amendment is available [here](#). (The group also issued a [statement](#) on patent reform on March 25.)

On the two major concerns for universities, the amendment would provide the following.

- **Determination of Damages.** The agreement is for “gatekeeper” language only, providing clearer instructions to courts on the adjudication of damage cases and directing courts to use existing case law based on the facts of a given case. At the beginning of the patent reform effort, the higher education associations wanted no legislative provisions on damages, arguing that existing case law provides courts with sufficient flexibility to determine damage assessments appropriate to a specific case. This outcome is consistent

with that position and provides the added benefit of clear and consistent directions to courts on the procedures for handling damage assessments.

- *Inter Partes* Reexamination. The agreement would eliminate the problematic “in public use or on sale” language, which would have opened up the reexamination procedure to subjective evidence that would require costly and complicated discovery. Instead, the agreement would return to the version of a modified *inter partes* reexamination procedure endorsed by the higher education associations and included in H.R. 1908, the patent reform bill passed by the House in 2007. The reexamination procedure limits evidence to patents and printed publications—objective and verifiable evidence that obviates discovery. In addition, reexaminations would be conducted by administrative law judges rather than patent examiners.

The Leahy-Specter-Feinstein amendment also excludes any expansion of prior user rights, which some groups have been advocating. The proposed expansion of prior user rights would have greatly expanded the domain of trade secret methods and products immune from the assertion of patent rights, increasing patent uncertainty.

The amendment also includes positions on venue, best mode, willfulness, and interlocutory appeals that should be satisfactory for universities. The agreement on venue adopts an amendment by Senator John Cornyn (R-TX) that would essentially codify a recent court decision, *In re TS Tech* by the Court of Appeals for the Federal Circuit, calling for a “most clearly convenient” standard for granting venue, an outcome that should reduce forum shopping.

No provision on inequitable conduct was included in the Leahy-Specter-Feinstein amendment. Senator Orrin Hatch (R-UT), for whom reforming inequitable conduct is a top priority, submitted a new inequitable conduct proposal before the markup, but he and Chairman Leahy were unable to reach agreement. Senator Hatch ended up not supporting the amendment.

Also at the markup, Senator Jon Kyl (R-AZ) offered an amendment to raise the standard for initiating an *inter partes* reexamination, making a strong argument that his proposal would improve the reexamination procedure and make it easier for the U.S. Patent and Trademark Office (USPTO) to administer. The amendment was defeated, but Senator Kyl said and Chairman Leahy confirmed at the hearing, that the chairman had agreed to meet with USPTO officials during the spring recess to discuss the reexamination procedure.

HOUSE JUDICIARY COMMITTEE HOLDS HEARING ON FALSE CLAIMS ACT

The House Judiciary Committee held a hearing April 1 on seven measures that address mortgage, financial, and federal contracting fraud, including the "False Claims Corrections Act" (H.R. 1788).

Although modified from the last Congress, H.R. 1788 is closely modeled on the False Claims Reform Act of 2007 (H.R. 4854), and contains provisions that are of significant concern to universities, especially those with academic medical centers. H.R. 1788 was introduced on March 31.

The April 1 hearing was focused largely on mortgage and financial fraud. Although university concerns about H.R. 1788 were not addressed directly in the hearing, Ranking Member Lamar

Smith (R-TX) expressed concern that some provisions in the bill would subject nonprofit organizations such as universities to excessive litigation.

As in the last Congress, AAU has highlighted the unintended consequences of legislation that would significantly strengthen the ability of whistleblowers to litigate fraud claims on behalf of the government and make universities far more vulnerable to frivolous lawsuits.

Materials from the hearing are available on the House Judiciary Committee [website](#).

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