

Government Funding Showdown Has Attorneys On Edge

By **Michael Macagnone**

Law360, Washington (April 21, 2017, 5:39 PM EDT) -- With President Donald Trump taking an increasingly hard line on his budget demands, congressional Democrats and the administration are now on a collision course that could end in a government shutdown, leaving attorneys worried about delayed contract awards, agency work left undone and the government's ability to function.

The administration has started to push for a wall on the border with Mexico — a move that Senate Democrats have said they would oppose — throwing what had been weeks of behind-the-scenes negotiations into disarray before government funds run out on April 28. In the immediate term, that leaves attorneys concerned a shutdown will shutter key agencies, something that would toss project timetables, contract awards and performance, and day-to-day operations out the window.

The showdown comes at the close of the first 100 days of the Trump administration, which saw pitched partisan battles over the U.S. Supreme Court and President Barack Obama's administrative legacy.

Any funding deal will require at least eight Democrats in the Senate to avoid a filibuster and could need Democratic votes to pass the House. Observers like Rich Gold, head of the public policy and regulation group at Holland & Knight LLP, said that the next few days could test the relationship between the White House and Congress, as Republicans will need at least some support from Senate Minority Leader Chuck Schumer, D-N.Y., to get a funding package through Congress.

"This is really the first test of the ability of the president and Schumer to come together and cut a deal. Appropriations legislation will require bipartisan agreement," Gold said.

A failure to do so could have major consequences. During the last government shutdown in 2013, agencies were shuttered for 16 days as Congress and the White House wrestled over the future of the Affordable Care Act. Afterward, Standard & Poor's estimated that political brawl took about \$24 billion out of the economy.

But beyond the short term, another fiscal year is coming at the end of September, and acrimony over the continuing resolution will likely spill over into future funding fights, Gold said.

"If we end up in some form of disarray, some form of shutdown, it is hard to imagine fiscal year '18 being an improvement on that," Gold said.

In addition to setting a poor stage for 2018 funding discussions, uncertainties have tempered any

confidence people may have that the government will continue to update and reform, according to Crowell & Moring LLP partner J. Chris Haile.

“If there is an inability to move more easily a continuing resolution or a debt ceiling, then there may be a question as to whether there is going to be a change or whether it might just continue to be stalled and stagnant,” Haile said.

Any interruption of federal funds can have ripple effects throughout sectors that work with the government, Haile said. It can delay new contract awards, prevent performance or pay for work already done, and hurt companies that have to interact with agencies regularly but then have no one to speak to.

He gave the hypothetical example of a big construction project that requires a U.S. Environmental Protection Agency signoff to proceed. A government shutdown could throw tight timetables and delicate funding situations into chaos.

But beyond this particular “crisis point,” Haile said, short-term spending decisions make modernizing government more difficult. Agencies do not know when funding might be available or how much, and programs may continue unchanged for years even when they need reform.

Congress is working on a short timetable when it gets back, with only four days to put together a deal to fund the government. It only narrowly made a funding deadline in December, when congressional leaders were able to work out a temporary deal on miners’ health and pension benefits that averted a shutdown.

That issue, along with others such as a potential increase in defense spending, have carried over to the current funding discussions, according to those involved. The last time government funding was passed on time in “normal order” was 1996.

For months, Democrats have indicated there are a number of issues they would not accept Trump’s position on — Planned Parenthood funding, funding for a border wall, and more recently, cuts to Affordable Care Act payments that support premiums — including in a letter sent to Senate leaders in March.

Several people familiar with the discussions have said congressional Republicans and Democrats might have been in a good position to work out a deal if Trump had not insisted on funding for a border wall.

Multiple administration officials have done just that in recent days, including Trump’s budget director, Mick Mulvaney, who in an interview with the Associated Press said that “we want wall funding” in the catchall spending bill, and that “elections have consequences” in government. He also said the administration would be “open” to provisions that would preserve cost-sharing payments to insurers under the ACA.

“If Democrats are interested and serious about compromise and negotiation, the ball is in their court,” Mulvaney told the AP.

Trump himself has said he may push to withhold the cost-sharing payments under the ACA to try to bring Democrats to the table, telling the Wall Street Journal last week that “Democrats will start calling me” if the insurance industry erupts.

Attorney General Jeff Sessions similarly said Friday that "Congress will provide the necessary funds, and there will be ways to fund this wall, and I believe we have got to do it."

On Friday, Mulvaney also said he had floated the idea of \$1 in ACA funding for every \$1 that goes to the border wall to avoid a shutdown.

"That's the offer we've given to our Democratic colleagues. That should form the fundamental understanding that gets us to an agreement," Mulvaney said on Bloomberg Live.

Matt House, spokesman for Sen. Schumer, shot back Friday that funding for a border wall would be a deal breaker, as would the proposal to use ACA payments as a bargaining chip.

"The White House gambit to hold hostage health care for millions of Americans in order to force American taxpayers to foot the bill for a wall that the president said would be paid for by Mexico is a complete nonstarter. ... If the administration would drop their 11th-hour demand for a wall that Democrats and a good number of Republicans oppose, congressional leaders could quickly reach a deal," House said in a statement.

At the same time, Trump's administration is seeking to burnish its record for the first 100 days. During his trip to Wisconsin last Tuesday, Trump claimed that "no administration has accomplished more in the first 90 days," and his legislative director Marc Short has repeatedly sought to play up the administration's successes in Congress.

However, his promise to repeal and replace the ACA was stymied in the House, and aside from appointing Justice Neil Gorsuch and members of Trump's Cabinet, most victories have come in the form of repealing Obama-era rules. Trump also said Thursday that he would push for a vote on the American Health Care Act, the repeal bill for the ACA, at the same time as funding discussions next week.

"I think we want to keep the government open, don't you agree?" Trump said during a news conference. "So I think we'll get both."

Former Sen. Mark Pryor, D-Ark., now head of legislative and government affairs and state attorneys general at Venable LLP, said that eventually Trump is going to have to work with Democrats to pass legislation.

"The leadership for the country starts with the White House," Pryor said. "The question is, does President Trump want to govern, want to be efficient in getting his agenda passed or parts of his agenda passed."

Democrats are in this position after months of acrimony over the Gorsuch nomination, as well as years of Republican retrenchment and filibusters on a variety of Obama's initiatives, according to Pryor. Pryor said the partisan atmosphere "is not good for the system and is not good for government," and Senate Democrats face a choice in the next few weeks.

"So much of this depends on how the Democrats want to handle things," Pryor said. "If the Democrats want to take a page out of the Republican playbook out of the last few years and be obstructionist then very little will get done."

Gold said it's not certain that Democrats would bear responsibility for walking away from the table, as Republicans now control both chambers of Congress and the White House.

Pryor said that the new normal of delay, last-minute deals and "the fiscal cliff that we always seem to be butting up against," is not helping anyone. With government funding up in the air and the Trump administration still working through hundreds of appointees, Pryor said that bigger legislative priorities like tax reform become even harder to put through.

"The lack of continuity and lack of certainty is not healthy. It is hard to think about the big things when you can't get the little things done," Pryor said.

--Editing by Mark Lebetkin and Philip Shea.