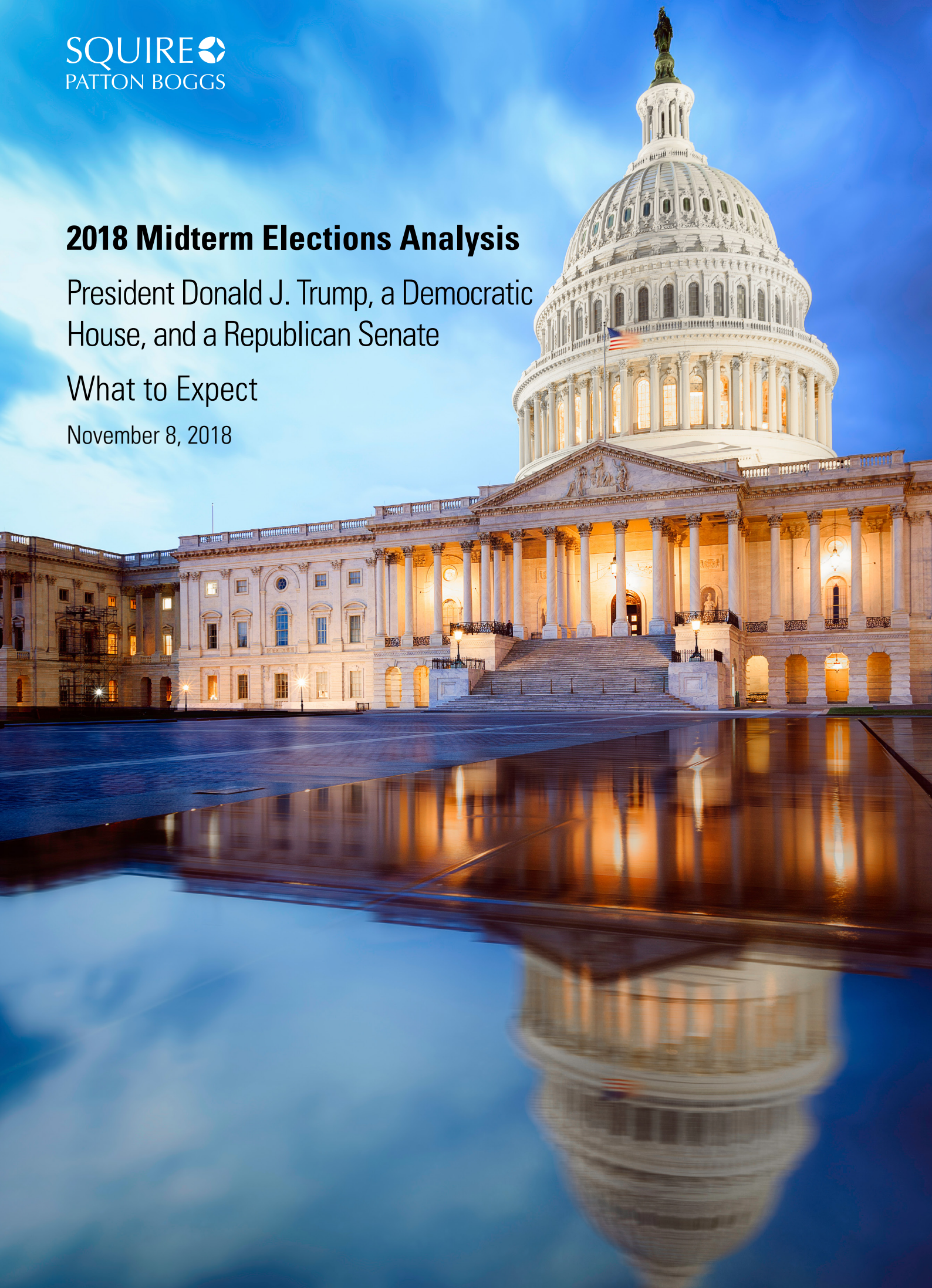


## **2018 Midterm Elections Analysis**

President Donald J. Trump, a Democratic House, and a Republican Senate

What to Expect

November 8, 2018



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## Introduction

On November 6, voters cast ballots in the midterm elections, the first major referendum since the election of President Donald J. Trump in 2016. As a result of the most expensive midterm elections in history (with roughly \$US4 billion spent on digital and traditional advertising alone), Democrats will be in charge of the House of Representatives and Republicans will not only continue to control the Senate when the 116th Congress convenes on January 3, 2019, but will do so with a greater margin than during the last two years.

For approximately 200 years, since the midterm elections of 1826 and with few exceptions since then, voters have punished the party that controls the White House at their first opportunity following a presidential election. In 1824, Andrew Jackson had won a plurality of the popular vote and a plurality – but not a majority – of the votes in the Electoral College. As a result, the election was decided in the House of Representatives, which chose John Quincy Adams to serve as President. In 1826, the midterm elections were a referendum on the 1824 presidential contest. There can be little doubt that the 2018 midterm elections similarly were a referendum on the 2016 presidential election – not least because President Trump made it one.

Over the past 21 midterm elections, the president's party has lost an average of 30 seats in the House and four seats in the Senate. But, in going to the polls on Tuesday, voters did something we have not seen since the midterm elections of 1962, following the election of President John F. Kennedy in 1960. Consistent with prior midterm elections, President Kennedy saw the Democratic Party lose ground in the House (four seats), but, simultaneously, Democrats increased their control in the Senate by four seats. Geography did not appear to have played much of a role then, but it certainly did on Tuesday, as voters in states with a higher rural population that supported President Trump in 2016 (Red States) largely supported him again, while voters in congressional districts with a more suburban and urban composition (Blue Districts) tended to cast their votes for Democrats, including in many districts that had supported President Trump in 2016.

The incoming class of House Democrats will be among the largest and most diverse in decades, including a record number of women. They will likely cause a significant shift in priorities, owing to their gender, generational status, racial composition, and ideological orientation. They will likely put enormous pressure on their leadership to pursue a more liberal policy agenda, one intended to take on President Trump and the Republican Party. Not surprisingly, to advance this agenda, senior House Democrats have indicated that they hope to adopt sweeping changes to campaign finance and ethics laws, to outlaw gerrymandering of congressional districts, and to restore what they consider to be key enforcement provisions of the Voting Rights Act within the first month of the 116th session alone. They will be seeking to advance this agenda in an environment in which Republicans have increased their seats in the Senate and with the 2020 presidential election contest already in full swing – a contest that formally began as the polls closed on Tuesday night on the West Coast.

With Democrats having taken control of the House, we expect that Representative Nancy Pelosi (D-CA) will again be elected Speaker of the House. As the Speaker who handed the gavel to our colleague, former Speaker John Boehner (R-OH), she would be the first Speaker since the legendary Sam Rayburn to hold the gavel during non-consecutive terms. House Speaker Paul Ryan (R-WI) will be retiring at the end of the year, opening the way for one of his colleagues to serve as House Minority Leader. Senator Mitch McConnell (R-KY) will continue to serve as Majority Leader of the Senate and Senator Chuck Schumer (D-NY) will return as the Minority Leader.

With this post-midterm election analysis, we try to make sense of what this means for our clients and prospective clients. We assess the impact of divided government on major issues, such as taxes, trade, and transportation. In our 2016 post-presidential election analysis, we had anticipated progress on three major issues: immigration reform, infrastructure spending, and tax reform, only one of which got done. We still see a path by which a major infrastructure spending bill could make its way to the White House. And we can see the possibility of a comprehensive immigration deal eventually emerging as well.

In addition to these subjects, we focus on one issue that will likely dominate the headlines for the next two years: congressional oversight and investigations not only of the Trump Administration, but also of the business community and in particular those companies and trade associations that are perceived to have benefited the most through reduced regulations and regulatory forbearance. Many rank-and-file Democrats may fervently want the Democratic House leadership to focus on impeachment, but our expectation is that House Democrats will devote substantial resources instead to investigating federal agencies and the companies and trade associations that engaged with them during the first two years of the Trump Administration.

## Major Challenges Ahead

Beyond funding a substantial portion of the government (further discussed in the following Appropriations/Budget section), the 116th Congress will face some major challenges that must be addressed and can only be resolved on a bipartisan basis: increasing the debt ceiling and addressing the impact of sequestration on defense and domestic spending.

The leaders of both chambers will likely have March 1, 2019 penciled in on their office calendars soon, with the most recent debt ceiling suspension expiring on that day. Failure to increase or suspend the debt limit would cause the government to default on its obligations, something the US has never done. The debt limit has been modified 18 times since 2002 and eight times since 2011. Congress does not need to act by March 1, but reduced tax receipts and expanded borrowing may force action sooner than many expect. The Treasury Department can use so-called "extraordinary measures" to give it time to deal with the problem, but only temporarily, perhaps into the summer or even into autumn depending on tax receipts and a variety of other factors.

As House Democrats, Senate Republicans, and the Trump Administration begin to focus on upcoming fiscal deadlines, they will also need to establish another two-year discretionary spending cap agreement in order to avoid dramatic reductions in spending – the dreaded thing known as “sequestration.” Intended as an incentive for Congress to develop a bipartisan deficit reduction plan, sequestration refers to discretionary spending caps established to achieve US\$1.2 trillion in deficit reduction over a 10-year period (through 2021). Without such a plan in 2013, sequestration cut defense discretionary funding by 8% and non-defense discretionary spending by 5%. The picture will be even uglier in 2019 if Congress fails to act. Without a new two-year bipartisan budget agreement, discretionary spending in Fiscal Year (FY) 2020 for defense appropriations would be decreased by US\$71 billion, or 11%, and non-defense appropriations would fall by US\$55 billion, or 9%, as compared to FY 2019 levels.

The debt limit and prospect of sequestration will provide an early test of the ability of House Democrats and Senate Republicans to forge bipartisan consensus on difficult issues. One potentially appealing scenario would be to once again combine federal debt limit discussions with negotiations to establish topline discretionary spending levels for FY 2020 and FY 2021. This would enable Congress to avoid tackling each budget issue separately and, once finalized, to take two complex budget challenges off the table early in the 116th Congress.

In the introduction, we noted the potential for a measure of unexpected common ground on some major issues, such as a major infrastructure spending bill. Republican orthodoxy on trade has not stopped President Trump from vigorously pursuing his trade agenda. We believe it would be a mistake to assume Republican orthodoxy on taxation will stand in the way of him vigorously pursuing his infrastructure agenda. As Vice President Mike Pence recently noted, the President is a “builder” who wants to rebuild America’s infrastructure. We have little doubt that President Trump will want to create construction jobs across the country in the run up to the 2020 presidential election. With Republicans already facing growing questions about their management of the budget deficit under President Trump and risking a backlash if they were to support further deficit spending, increased revenues might be the only way to fund a major infrastructure bill. We, thus, do not rule out the possibility of the President eventually supporting an increase in the gas tax or some combination of revenue measures in order to advance a signature component of his domestic policy agenda.

After two decades of legislative effort, might the stars align as well for a potential deal on comprehensive immigration reform? Much will depend on developments in the lame-duck session, but we can envision the possibility of a Democratic House, a Republican Senate, and President Trump eventually striking a deal that would give President Trump a win on the border wall and Democrats a win on DACA (formally known as the Deferred Action for Childhood Arrivals program). Other issues would surely be in the mix, but these two components could serve as the pillars to which other provisions might be anchored. In the first year of the 110th Congress (2007), the Senate made a great deal of progress but could not ultimately find common ground on a comprehensive bill. In the 113th Congress (2013-2014), the Senate approved a comprehensive bill that then died in the House. But a bipartisan group of House Members made a great deal of progress – largely operating under the radar with the full support of their respective leadership – on immigration reform principles that could be adopted individually and then packaged together with the Senate bill. Those efforts collapsed for political reasons, but not because members could not find common ground on some very important immigration reform principles. After two decades of debate and with much of the work completed by some senior legislators who will be returning in January, we can envision the possibility of a deal coming together, notwithstanding campaign rhetoric.

Next year also might be the year in which Congress finally adopts comprehensive privacy and cybersecurity legislation. Two decades ago, the privacy debate was largely about whether internet service providers (ISPs), such as AOL, should be required to let consumers “opt in” to sharing their personal data or whether ISPs could put the burden on consumers to “opt out.” In the aftermath of 9/11, legislators (and the public at large) were largely more concerned about security than privacy. As a result, the opt in/opt out debate ended. The pendulum has now swung back. With more and more companies facing data breaches and more personal information being stolen in the process, we think the likelihood that Congress will act has increased substantially. Moreover, with the European Union having adopted the General Data Protection Regulation and California having moved to adopt something quite similar, the logic of a single, national standard has become evident to many. Rather than face a patchwork of different, potentially conflicting state laws, we expect the technology industry to look for common ground on preemptive federal legislation that will address both privacy and cybersecurity.

## Lame-Duck Session

In the near term, Congress must complete action on some unfinished business. By December 7, when the current Continuing Resolution (CR) expires, Congress must agree to fund the agencies covered by this temporary funding mechanism, including the Department of Homeland Security. In addition to addressing must-pass bills, congressional leaders would like to complete action on other unfinished business, including the Coast Guard reauthorization bill, the 2018 Farm Bill, reauthorization of the National Flood Insurance Program, and tax extenders.

Particularly challenging, and presently the biggest obstacle to completing FY 2019 appropriations and avoiding a partial government shutdown in December, is reaching an agreement on President Trump's single highest domestic priority – funding for a border wall between the US and Mexico. With the House changing hands to Democratic control in January, the lame-duck session may be President Trump's last chance to fulfill one of his most important campaign promises. Throughout the year, the President threatened to shutter the federal government over funding for the wall. Both Speaker Ryan and Leader McConnell have indicated that there will be a "big fight" over border wall funding in the lame-duck session. Conservative Republicans remain committed to delivering on this top initiative of the President. House Democrats, however, emboldened by their recent electoral success, may be in no mood to negotiate over the President's immigration policies. A protracted impasse could lead to a partial government shutdown or a decision to extend current year funding into next year via a CR. The latter outcome could lay the foundation for another potential scenario – the completion of FY 2019 appropriations combined with a bipartisan compromise on immigration addressing the President's desire for border wall funding and an elusive solution to the longstanding DACA issue in the new Congress.

Action on the trio of Affordable Care Act health tax provisions – Cadillac tax, medical device tax, and the health insurance tax (HIT) – is possible in the lame-duck session, particularly given the time pressure associated with not acting soon on delaying the HIT. How lawmakers approach these three tax provisions in the lame-duck session will determine the likelihood of Congress seeking to further delay implementation of these taxes in the 116th Congress. Currently, the HIT will return in 2020, but insurers will be pricing in the tax to premium rates far in advance. After being further delayed for two years, the Cadillac tax is currently set to be implemented in 2022 and the medical device tax in 2020. These three tax provisions, however, have been dealt with together in the past, and it is likely that they will be again either in the lame-duck session or in the 116th Congress.

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Since publishing our 2016 post-presidential election analysis, we have substantially expanded our public policy capabilities abroad, with 47 offices in 20 countries, including Brussels, Sydney, and other world capitals. As we look ahead to the next two years, we look forward to helping our clients achieve their public policy-driven objectives in Washington DC, and across the globe. As you look to address these goals, we look forward to hearing from you.

## Contacts

To learn more about the depth and breadth of our Public Policy Practice, co-chaired by Senators John Breaux and Trent Lott, please see [our webpage](#).

If you would like to learn more about what we see in store for the next two years, please contact the principal authors of this section:

### Jeff Turner

Partner, Washington DC  
T +1 202 457 6434  
E [jeff.turner@squirepb.com](mailto:jeff.turner@squirepb.com)

### David Schnittger

Principal, Washington DC  
T +1 202 457 6514  
E [david.schnittger@squirepb.com](mailto:david.schnittger@squirepb.com)

## Appropriations/Budget

### Likely Major Policy Developments

Congressional action in the lame-duck session will center on efforts to complete the US\$1.244 trillion Fiscal Year (FY) 2019 appropriations process. This year, Congress vowed to return the work of the Appropriations Committee to “regular order,” with some success. Both chambers reported all 12 annual spending bills out of committee. To date, five of the bills (Energy and Water, Military Construction/VA, Legislative Branch, Department of Defense, and Labor-Education-HHS), representing approximately 75% of total discretionary spending, have been enacted. Federal government agencies that do not yet have full-year appropriations measures signed into law are funded through December 7, 2018 under a Continuing Resolution (CR).

Completing work on the remaining seven unfinished appropriations bills will greatly test appropriators and leaders of both parties in the lame-duck session. Additional emergency funding to address recent hurricane damage and other natural disasters is also possible. Negotiations on four of the yet-to-be-completed seven appropriations bills (Interior and Environment, Financial Services, Transportation-HUD, and Agriculture) were nearing completion prior to the House and Senate recessing for the midterm elections, with only a handful of policy issues left unsettled. The remaining three bills (Foreign Operations, Commerce, Justice, Science, and Homeland Security) will prove far more difficult.

As discussed in the introduction, the biggest obstacle to completing FY 2019 appropriations and avoiding a partial government shutdown in December is reaching an agreement on a border wall between the US and Mexico during the lame-duck session. Earlier this year, in a party-line vote, House Republican appropriators reported out of committee an FY 2019 Homeland Security funding bill that included the full US\$5 billion requested by President Trump for the southern border wall. In an effort to advance bipartisan bills in a timely fashion, Senate appropriators included only US\$1.6 billion. Border wall funding would be directed to construct physical barriers and associated detection technology, roads, and lighting along the southern border. The contrasting approaches taken by the House and Senate underscore the challenge of reconciling an emotional issue that divides both parties, Congress, and the country.

Most recently, House Majority Leader Kevin McCarthy (R-CA), as part of his outreach to conservative House Republicans as he seeks to lead House Republicans in the 116th Congress, introduced legislation to provide US\$23.4 billion to secure the border. Some Republicans have suggested bringing up the FY 2019 budget resolution, which passed the House Budget Committee in June but did not pass the full House, in order to use the reconciliation instructions to pass mandatory spending for the border wall in the lame-duck session. The reconciliation process is a powerful tool to expedite consideration of legislation, accomplish priority issues for the majority party, and overcome a potential Senate filibuster. It was used to pass the Affordable Care Act during the Obama Administration and allowed for the passage of the Tax Cuts and Jobs Act last year. This path may prove challenging, however, given a narrow margin for passage, particularly in the Senate.

As noted in the introduction, House Speaker Paul Ryan (R-WI) and Senate Majority Leader Mitch McConnell (R-KY) envision a major fight over border wall funding in the lame-duck session. Conservative Republicans remain committed to delivering on one of the President’s top initiatives. House Democrats, however, emboldened by their recent electoral success, may be in no mood to negotiate over the President’s immigration policies. A protracted impasse could lead to a partial government shutdown or a decision to extend current year funding into next year via another CR. The latter outcome could lay the foundation for another potential scenario – the completion of FY 2019 appropriations combined with a bipartisan compromise on immigration addressing the President’s desire for border wall funding and an elusive solution to the longstanding DACA issue.

While Republicans will continue to control both houses of Congress and the White House until January 2019, simple arithmetic dictates that Republicans in Congress will need Democrat votes to pass the remaining FY 2019 appropriations bills. The House Republican leadership will have to contend with the Freedom Caucus, a coalition of 40 conservative House Republicans, who are loathe to support any appropriations measures under any circumstances. Moreover, because Republicans will hold only a slim 51 to 49 margin in the Senate in the lame-duck session, they have little margin for error. This provides Democrats with the option of working with Republicans and the Trump Administration to negotiate on border wall funding and completing appropriations work, clearing the way for a new budget cycle next year, or drawing a hard line over the President’s immigration policies and pushing the remaining spending and immigration battles (including potentially a DACA fix) into 2019, when they will maintain even more leverage over the final outcome.

In 2019, House Democrats will be in a position to craft a budget resolution reflecting the spending priorities of their new majority. However, with the responsibility of governing comes this reality: like the Republican majority of the 115th Congress, a politically diverse collection of Democratic lawmakers in the 116th Congress will find it challenging to overcome internal divisions and coalesce around a common agenda. Centrist Democrats will see value in developing a budget plan that appeals to swing voters key to maintaining their new-found majority. Progressives will advocate a budget framework that appeals to base voters. Each group is likely to disagree over making steep cuts in defense spending and establishing a single-payer health care system, making it harder to define a common set of principles. Finding consensus internally, let alone with a Republican Senate, will prove difficult. Given this dynamic, it is less likely that the House and Senate will produce a budget resolution for the coming fiscal year. Other more immediate and pressing fiscal matters – lifting the debt ceiling and agreeing to another two-year discretionary spending cap agreement – will garner more attention.

As noted above, the debt limit is the total amount of money the US government is authorized to borrow to finance budget deficits and the national debt for all existing obligations, including Social Security and Medicare benefits, military salaries, interest on the national debt, and tax refunds. Failure to increase or suspend the debt limit would cause the government to default on its obligations, something the US has never done. The debt limit has been modified 18 times since 2002 and eight times since 2011. Addressing the statutory debt limit will be among the highest fiscal priorities of the new Congress. While the current debt ceiling suspension expires March 1, 2019, so-called “extraordinary measures” by the Treasury and an influx of tax receipts in April will push back the deadline – but only temporarily, probably into the summer or possibly into autumn.

As House Democrats, Senate Republicans, and the Trump Administration begin to focus on upcoming fiscal deadlines, they will also need to establish another two-year discretionary spending cap agreement in order to avoid dramatic reductions in spending – known as “sequestration” – included in the Budget Control Act of 2011 (Pub. L. 112-25, BCA). Intended as an incentive for Congress to develop a bipartisan deficit reduction plan, sequestration refers to discretionary spending caps established to achieve US\$1.2 trillion in deficit reduction over a 10-year period (through 2021). Without such a plan, sequestration was implemented in 2013, resulting in an 8% reduction in defense discretionary funding and a 5% reduction in non-defense discretionary spending.

Since that time, three bipartisan budget agreements alleviated sequestration from FY 2014 to FY 2019. The Bipartisan Budget Act of 2013 (Pub. L. 113-67) eliminated US\$63 billion of the sequester impact in FY 2014 and FY 2015 and extended the BCA spending caps through 2023. The Bipartisan Budget Act of 2015 (Pub. L. 114-74) provided an additional US\$50 billion above BCA discretionary spending caps for FY 2016 and US\$30 billion for FY 2017, divided equally between defense and non-defense spending. To partially offset the 2015 agreement and the repeal of a law that scaled back military cost-of-living benefits, the BCA budget caps were extended to 2025. The Bipartisan Budget Act of 2018 (Pub. L. 115-123) – which was signed into law after a nine-hour government shutdown in early February – increased the defense discretionary funding cap by US\$80 billion in FY 2018 and US\$85 billion in FY 2019. The non-defense domestic discretionary spending cap was increased by US\$63 billion in FY 2018 and US\$68 billion in FY 2019. The budget agreement also provided US\$90 billion in emergency supplemental appropriations for disaster relief efforts related to hurricanes in Puerto Rico, the US Virgin Islands, Florida, and Texas. Additionally, the legislation suspended the debt ceiling until March 1, 2019.

Notably, while the discretionary spending increases provided under the Bipartisan Budget Acts of 2013 and 2015 were mostly offset (i.e., spending cap relief was traded for reductions in mandatory programs and other adjustments), the spending increase provided for in the Bipartisan Budget Act of 2018 was not offset for the most part. In effect, this meant the discretionary spending increases set in motion by the 2018 legislation were, for the most part, added to the national debt.

As the 116th Congress gets underway, Democrats and Republicans will be highly incentivized to negotiate another funding agreement in order to protect their highest budget priorities. Under the terms of the BCA, absent a new two-year bipartisan budget agreement, discretionary spending in FY 2020 for defense appropriations would be US\$576 billion (a US\$71 billion, or 11%, reduction) and non-defense appropriations would be US\$542 billion (a US\$55 billion, or 9%, reduction) compared to FY 2019 levels. The threat sequestration poses to current levels of defense spending will bring congressional defense hawks to the negotiating table. Similarly, the prospect of dramatic cuts to non-defense discretionary spending will incentivize Democrats and moderate Republicans to work toward a budget compromise.

The debt limit and prospect of sequestration will provide an early test of the ability of House Democrats and Senate Republicans to forge bipartisan consensus on difficult issues. One potentially appealing scenario would be to once again combine federal debt limit discussions with negotiations to establish topline discretionary spending levels for FY 2020 and FY 2021. This would enable Congress to avoid tackling each budget issue separately and, once finalized, to take two complex budget challenges off the table early in the 116th Congress.

Another lame-duck deadline involves the Joint Select Committee on Budget and Appropriations Process Reform established by the Bipartisan Budget Act of 2018. The select committee is composed of 16 members, equally divided by party and chamber, tasked with recommending reforms to the budget and appropriations process by November 30, 2018. While some proposals, such as moving the federal fiscal year to a calendar year timeframe or changing the process to raise the debt limit, are unlikely to make the final report, there is an emerging agreement on transitioning the budget resolution (authorizing) process to a biennial, instead of an annual, process. If the select committee comes to consensus on recommendations, they could be brought up for votes this year or incorporated into other legislative vehicles in the 116th Congress.

## Anticipated Congressional Committee Developments

### Senate Committees of Jurisdiction

Senator Richard Shelby (R-AL) will continue serving as Chairman of the Appropriations Committee and Senator Patrick Leahy (D-VT) will maintain his position as Ranking Member. Both are credited with restoring bipartisan comity and some semblance of regular order to the appropriations process as the Senate Committee reported out all 12 FY 2019 spending measures, a marked improvement from recent years.

Likewise, Senator Mike Enzi (R-WY) will remain Chairman and Senator Bernie Sanders (I-VT) will return as Ranking Member of the Senate Budget Committee when the 116th Congress convenes in January.

### House Committees of Jurisdiction

Representative Nita Lowey (D-NY) will become the first woman in the committee's 153-year history to serve as Chairman of the powerful House Appropriations Committee. She will be supported by a deep bench of veteran Democratic appropriators. The current ranking members of the 12 appropriations subcommittees – each reelected – expect to be approved by the full Democratic Caucus and elevated to the so-called “College of Cardinals” to serve as subcommittee chairmen. Democratic House appropriators will be in a prime position to direct spending and policy decisions in the House for the first time since 2010. The total number of committee slots allotted to the majority and minority will be determined by House leadership, and is historically based on the ratio between the majority and minority in the full House.

Representative Lowey has indicated that domestic initiatives – including medical research, nutrition and education programs, and additional funding to address the opioid crisis – will be among her top priorities leading the committee. She also has expressed a desire to return the committee to a regular order process by adopting the recent Senate practice of eliminating partisan policy riders from spending bills and passing each of the appropriations bills as stand-alone measures, rather than packaging multiple bills together as “mini-buses,” as was done in the 115th Congress.

On the Republican side of the aisle, no fewer than five lawmakers are vying to serve as the Appropriations Committee's Ranking Member: Representative Robert Aderholt (R-AL), Representative Kay Granger (R-TX), Representative Mike Simpson (R-ID), Representative Tom Cole (R-OK), and Representative Tom Graves (R-GA). Each would bring considerable experience to the contest, having been influential in directing spending and shaping policy as powerful subcommittee chairmen in recent years. The selection will be determined, initially by a Republican Steering Committee composed of party leadership and a cross-section of rank-and-file members, before final approval by the full Republican Conference.

Given losses in the midterm elections (Representative John Culberson (R-TX), Representative Kevin Yoder (R-KS), Representative David Young (R-IA), and Representative Scott Taylor (R-VA)) and Republican retirements (former full committee Chairman Representative Rodney Frelinghuysen (R-NJ), Representative Tom Rooney (R-FL), and Representative Evan Jenkins (R-WV)), committee Republicans can expect some attrition among committee ranks befitting the party's new minority status. Additionally, with the defeat of senior appropriators who served as subcommittee chairmen in the 115th Congress (Representative John Culberson, Chairman of the Subcommittee on Commerce, Justice, Science and Related Agencies and Representative Kevin Yoder, Chairman of the Subcommittee on Homeland Security), the roster of Republican appropriators serving as subcommittee ranking members will change as more junior lawmakers climb the committee seniority ladder. Historically, House Democrats have not imposed term limits on members serving as full committee or subcommittee chairmen. House Republicans, on the other hand, have, with few exceptions, imposed six-year term limits on full committee and subcommittee chairs and ranking members.

Representative John Yarmuth (D-KY) is poised to become the Chairman of the House Budget Committee. Representative Yarmuth has indicated he would like the Budget Committee to play a larger oversight role in reviewing the long-term budget implications of a variety of issues, including climate change, health care, and immigration. The outlook for leading the Budget Committee on the Republican side remains less certain. When Representative Steve Womack (R-AR) became Chairman of the House Budget Committee in 2018, he committed to serving in the position through the end of the 115th Congress. While in a position to continue serving as the senior Republican member of the Budget Committee, he will soon have to decide between serving as the committee's ranking member or leaving the Budget Committee to serve as the top Republican on one of the 12 appropriations subcommittees in the next Congress.



Senior House and Senate Democrats, including Representative Steny Hoyer (D-MD) (a former appropriator well positioned to become House Majority Leader in the 116th Congress) and Senate Appropriations Ranking Member Patrick Leahy (D-VT), have raised the prospect of restoring congressionally directed spending to the appropriations process, in the form of “earmarks.” Many lawmakers on both sides of the aisle, view the elimination of earmarks in 2011 as an abdication of Congress’ power of the purse – vested in Article 1, Section 9, Clause 7 of the US Constitution – that has led to a breakdown of regular order and increased gridlock in the legislative process. They argue that affixing member names to specific projects in spending bills and prohibiting earmarked funds benefiting for-profit businesses will prevent past abuses from reoccurring. Those positioned to benefit from this potential change include not-for-profit organizations and sponsors of water and transportation infrastructure projects at the state and local level. Still, other lawmakers dispute the claim that restoring earmarks will make it easier to pass appropriations bills, citing the Senate’s success in passing FY 2019 spending bills.

Strong pockets of opposition to earmarks remain within both parties in Congress, as some members continue to deride congressionally directed spending as wasteful and ripe for fraud and abuse. With the Democrats taking the majority in the House, the earmark ban will likely be revisited, if not repealed. If the House restores earmarks, the Senate will be hard-pressed not to follow suit, although potentially with additional restrictions.

## Contacts

If you would like to learn more, please contact the principal authors of this section:

### **David LesStrang**

Principal, Washington DC  
T +1 202 457 6025  
E david.lestrang@squirepb.com

### **Pamela Welsh**

Principal, Washington DC  
T +1 202 457 6493  
E pamela.welsh@squirepb.com

### **Vicki Cram**

Principal, Washington DC  
T +1 202 457 6547  
E victoria.cram@squirepb.com

## Financial Services

### Likely Major Policy Developments

With few legislative days and other higher-priority items to address before the 115th Congress comes to an end, it is unlikely that there will be any major financial services policy developments this session. That said, with the National Flood Insurance Programs (NFIP) authorization expiring on November 30, 2018, lawmakers can be expected to again pass a short-term extension of the program, further pushing a long-term extension and any respective policy changes to the 116th Congress.

With Democrats in control of the House in the next Congress, we expect to see increased congressional oversight, especially as President Trump continues to fill out financial services regulatory positions with his nominees. The Consumer Financial Protection Bureau (CFPB) is likely to receive a great deal of attention from House Democrats, as expected Chairman Maxine Waters (D-CA) is a particularly ardent opponent of what she believes to be the CFPB's regulatory rollback of consumer protections. Her legislation – [H.R. 6972, Consumers First Act](#) – serves as an outline of what to expect in terms of expected Chairman Waters' oversight of the CFPB. However, with a Republican Senate and White House, any substantive changes to the CFPB's role or jurisdiction are unlikely.

Despite split control of Congress, some potentially bipartisan financial services issues could advance. One such area is reform of the government-sponsored enterprises (GSE Reform). With GSEs now in their 10th year of conservatorship, there is a growing sense of urgency among both parties to enact GSE Reform legislation. Earlier this year, Federal Housing Finance Agency (FHFA) Director Mel Watt sent his views on GSE Reform to Senate Banking Committee Chairman Mike Crapo (R-ID) and Ranking Member Sherrod Brown (D-OH). The Senate Banking Committee held multiple hearings on GSE Reform this year, and Senators Bob Corker (R-TN) and Mark Warner (D-VA) continued to refine their bipartisan approach to reform. Despite Congress not taking any action, their legislation received buy-in from many key stakeholders and – despite Senator Corker's departure from the Senate – could serve as a starting point as lawmakers continue their GSE Reform efforts in the 116th Congress. On the House side, in September, House Financial Services Committee Chairman Jeb Hensarling (R-TX) introduced bipartisan GSE Reform legislation with Representative John Delaney (D-MD). While Chairman Hensarling is retiring, that legislation may be the basis of legislation in the House in the next Congress. This, coupled with the fact that the Trump Administration and Representative Waters have indicated that GSE Reform is a 2019 priority, implies that policymakers may finally be poised to overhaul the housing finance system in the 116th Congress.

We expect to see renewed activity regarding data privacy standards and breach notification requirements in both chambers. In September, the House Financial Services Committee approved [H.R. 6743, Consumer Information Notification Requirement Act](#). The legislation would put in place uniform consumer notification standards across all Gramm-Leach-Bliley Act (GLBA) regulatory agencies, and would preempt state and local data protection and consumer notification standards with respect to financial institutions subject to GLBA. While that legislation did not advance to the House floor, we expect the issue to be a priority for both the House Financial Services Committee and the Senate Banking Committee in the 116th Congress.

Given that at least one, and likely all, of the prudential banking agencies are considering significant modifications to the regulatory framework of the Community Reinvestment Act (CRA), we expect this activity will be the focus of House Financial Services Committee hearings. It is possible legislation will be introduced on the matter, but it is not likely to advance.

Another item likely to receive continued attention is Bank Secrecy Act/Anti-Money Laundering reform (BSA/AML Reform). Following-up on its work in the 114th Congress, the House Republican leadership formed a new House Financial Services Committee Subcommittee on Terrorism and Illicit Finance to help pursue BSA/AML Reform. Representative Steve Pearce (R-NM), who chaired the new subcommittee, earlier this year introduced [H.R. 6068, Counter Terrorism and Illicit Finance Act](#), which represents the culmination of the House's recent efforts to reform BSA/AML laws. The bill hit a roadblock over objections to the removal of its "beneficial ownership," which would have required corporations to disclose their owners. This opposition ultimately resulted in Representative Pearce reassessing the substance of the legislation and its ultimate path forward. It is unclear whether House Financial Services Committee Democrats will leverage the legwork already done by Representative Pearce and his fellow committee Republicans, but expected Chairman Waters – who has previously introduced BSA/AML Reform legislation – will likely work with her Senate counterparts in an effort to advance her legislation in the 116th Congress that includes a beneficial ownership provision and addresses the issue of anonymous shell companies.

Financial technology (FinTech) may also receive renewed attention next Congress, with Representative Patrick McHenry (R-NC) likely to take over as the Ranking Member of the House Financial Services Committee. Last Congress, Representative McHenry introduced [H.R. 6118, Financial Services Innovation Act of 2016](#), which would have created a regulatory "sandbox" approach for FinTech firms, allowing companies to work alongside regulators when testing products or services. While Representative McHenry did not reintroduce his bill this Congress, it is possible that a "2.0" version of the legislation could serve as the baseline for congressional action on FinTech legislation in the 116th Congress.

It is also important to note that with President Trump's continued attacks on the Chairman of the Board of Governors of the Federal Reserve, there has been renewed discussion about the need for reform. Most of the efforts this Congress have been by House Republicans, who are focused on increasing transparency in the Federal Reserve's monetary policy decision-making. Democrats have also expressed concerns about the Federal Reserve, suggesting that it needs to be more representative of the American people. As such, in the next Congress, expect that House Democrats will continue to raise the need for increasing diversity at the Federal Reserve, as well as look at ways to reform the 12 regional Federal Reserve Banks.

## Anticipated Congressional Committee Developments

### Senate Committees of Jurisdiction

Next Congress, with Republicans maintaining their Senate majority, committee leadership is expected to stay the same, with Senators Mike Crapo (R-ID) and Sherrod Brown (D-OH) again serving as Chairman and the ranking member, respectively, of the Senate Banking Committee. (If Senator Chuck Grassley (R-IA) elects to stay Chairman of the Senate Judiciary Committee, Senator Crapo could take the gavel of the Finance Committee.) With the committee's ratios expected to shift only slightly in favor of Republicans, it seems likely that the committee will largely look the same next Congress, with few new senators to fill the spots of those senators who will not be returning to the Senate.

### House Committees of Jurisdiction

The House Financial Services Committee will have a much different makeup next Congress. With Democrats in control of the House, current Ranking Member Maxine Waters (D-CA) is set to assume chairmanship of the committee. With current Chairman Hensarling not running for reelection, the position of the ranking member will be filled by a new Republican leader. It seems likely that Representative Patrick McHenry (R-NC) – who is largely viewed as able to work in a bipartisan manner with his Democratic colleagues on the committee – will be tapped as the ranking member. Others who could potentially fill the position include Representatives Blaine Luetkemeyer (R-MO), Bill Huizenga (R-MI), or Sean Duffy (R-WI). Committee ratios will also shift in favor of the Democrats, allowing them to add more lawmakers to their ranks on the committee and take control of the panel's agenda.

## Anticipated Agency Developments

As Congress begins its last several weeks of the legislative session for the 115th Congress, it is likely that the Senate will move forward on the confirmation of President Trump's nominees to lead various agencies, including financial services regulators. Notable nominees likely to receive a vote by the Senate in the lame-duck include CFPB Director nominee Kathy Kraninger (who will take over for current Acting Director Mick Mulvaney), Board of Governors of the Federal Reserve nominees Richard Clarida (who also was nominated to serve as vice-chairman) and Michelle Bowman, and Ginnie Mae President nominee Michael Bright.

Republican Senatorial control of the 116th Congress means that confirmation of President Trump's financial services regulators nominees is expected to continue, likely beginning with the nomination of Nellie Liang to the Board of Governors of the Federal Reserve. Additionally, with FHFA Director Mel Watt's term expiring in January, President Trump can soon be expected to nominate a successor to lead the agency – a nominee who is likely to receive particular scrutiny amidst efforts in Congress on GSE Reform. Notably, with the confirmation of a new FHFA Director, the Financial Stability Oversight Council (FSOC) will have no Democratic members and, as it has done already by having now de-designated all non-bank systematically important financial institutions (SIFIs), can be expected to look for additional ways to leverage its broad authority to continue deregulating the financial services industry.

In terms of priorities, financial services regulators will continue to focus on implementing [S. 2155, Economic Growth, Regulatory Relief, and Consumer Protection Act](#), which provides regulatory relief to regional and small banks from various requirements stemming from the Dodd-Frank Wall Street Reform and Consumer Protection Act. Although current House Financial Services Republicans had hoped to pursue further reforms this Congress, they were unable to find sufficient common ground with the Senate. Thus, with Democrats in control of the House, and Senate Republicans largely having passed what they view as sufficient reforms, it seems unlikely that regulators will be direct to take on any additional deregulatory actions next Congress beyond their current mandates.

That said, the Treasury Department has issued a number of reports setting forth its views about the current state of financial services regulation, which may prompt financial services regulators to pursue additional deregulation of the industry. One agency that has already released its plans for additional regulatory rollbacks – beyond what was required by this year’s regulatory relief bill – is the CFPB. Notably, after stating the “regulation by enforcement is done,” current Acting Director Mulvaney indicated that the CFPB is planning a rulemaking to define what types of practices qualify as “abusive” – part of unfair, deceptive or abusive acts or practices (UDAAP), which the CFPB has the ability to regulate – in order to provide more clarity to the industry. Additionally, the CFPB expects to issue proposed rules in January 2019 that “will reconsider the Bureau’s rule regarding Payday, Vehicle Title, and Certain High-Cost Installment Loans and address the rule’s compliance date.”

## Contacts

If you would like to learn more, please contact the principal authors of this section:

### **Matthew Cutts**

Partner, Washington DC  
T +1 202 457 6079  
E [matthew.cutts@squirepb.com](mailto:matthew.cutts@squirepb.com)

### **Jim Sivon**

Of Counsel, Washington DC  
T +1 202 262 4271  
E [james.sivon@squirepb.com](mailto:james.sivon@squirepb.com)

### **Katie Wechsler**

Of Counsel, Washington DC  
T +1 202 360 8895  
E [katie.wechsler@squirepb.com](mailto:katie.wechsler@squirepb.com)

### **Brandon Román**

Associate, Washington DC  
T +202 457 5330  
E [brandon.roman@squirepb.com](mailto:brandon.roman@squirepb.com)

## Health Care

### Likely Major Policy Developments

#### Preexisting Conditions

Democratic candidates overwhelmingly supported the right of individuals to obtain insurance coverage without regard to preexisting conditions. This issue has mostly received bipartisan support, with the exception of a handful of legislative proposals in the current Congress that sought to remove such protections as a cost-saving measure. A Democratic House is highly unlikely to make any changes to the Affordable Care Act (ACA) that would limit insurance coverage for individuals seeking treatment for a preexisting condition. In fact, they are likely to use the hearing process to bring additional attention to the issue to make it more difficult for Republicans to support efforts to repeal the ACA. Given the attention the issue received during the midterm elections, it is unlikely that President Trump and Republicans will propose changes to this aspect of the law. However, we expect other Republican-led efforts to make proposed changes to the ACA.

#### Medicare for All

House Democrats are likely to put forward multiple Medicare for All proposals next year. The Democratic caucus has traditionally been somewhat divided on this issue and, not surprisingly, the options discussed by Democrats in the campaign varied. But with House Minority Leader Nancy Pelosi (D-CA) having expressed her preference for a Medicare for All proposal with a public option, that approach is likely to garner the most support. In any event, whatever the House is able to agree upon is likely to stall in the Senate and be opposed by the Trump Administration.

#### Prescription Drug Issues

Even though Medicare is one of the largest drug purchasers in the country, it is restricted from negotiating with manufacturers over the price of drugs. Other government programs do not face such restrictions and have used their bargaining power to reduce drug prices at substantial savings.

On October 25, 2018, the Trump Administration launched a plan to reduce incentives that encourage physicians and hospitals to administer more expensive drugs, raising costs for taxpayers and seniors. Under the initiative, physicians and hospitals would receive the same reimbursement for similar drugs, eliminating an incentive to administer higher-cost drugs. The plan proposes an International Pricing Index (IPI) model to lower costs for high-cost drugs by resetting Medicare payments based on international prices. The plan also would allow private-sector vendors to negotiate prices for drugs and to compete for physician and hospital business. The Trump Administration estimates an overall savings for American taxpayers and patients at an estimated total of US\$17.2 billion over five years.

The likely next Speaker of the House, Representative Nancy Pelosi (D-CA), has signaled that Democrats will address drug pricing early next year. House Democrats will likely pass a bill that would allow Medicare to negotiate drug prices, but the bill will likely stall in the Senate, just as a similar bill passed in the House and died in the Senate in 2007. Both parties will introduce and support legislation to address Medicare drug pricing in different ways to make their views known in advance of the next presidential election. However, because President Trump has expressed interest in bringing down Medicare drug prices, there is a possibility that the Administration will work with House Democrats for a bill to create direct prescription drug negotiation authority for Medicare. The pitfalls will be maintaining a narrow enough scope that could reduce costs for Medicare beneficiaries and improving market transparency – a possible but difficult balance given other drug-related issues and stakeholders.

#### Expanded ACA Premium-related Tax Credits for Consumers

The ACA established the availability of tax credits for individuals purchasing health insurance through the Health Insurance Marketplace. An individual is eligible for a tax credit if his or her estimated income falls between 100% and 400% of the federal poverty level (FPL) for the household size. Although frequently criticized by Republicans, these tax credits are a hallmark of the ACA and make health insurance coverage affordable for those who would otherwise have no coverage. In March 2018, the three Democratic leaders of the committees with jurisdiction over health care introduced a bill that would remove the 400% FPL limitation on health insurance premium tax credits. The legislation would also make cost-sharing subsidies more generous for those below 250% of the FPL. A Democratic House is likely to act on legislation expanding the credits to increase incentives for individuals to buy health insurance.

#### Opioid Crisis

During the current Congress, lawmakers worked diligently to craft a bipartisan proposal that comprehensively addresses the US opioid epidemic. In late October, President Trump signed the resulting Substance Use Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act (H.R. 6) into law. The sweeping package, which incorporates prevention, treatment, research, recovery, and law enforcement initiatives, was enacted following eight House and five Senate committee hearings. It is highly likely bipartisan congressional efforts to address this crisis will continue with Trump Administration support next year.

## Anticipated Congressional Committee Developments

### House Committees of Jurisdiction

The current ranking member of the House Energy and Commerce Committee, Representative Frank Pallone (D-NJ), is expected to be the next chairman of the committee. He has served as the committee's ranking member since 2015 and was the top Democrat on the Subcommittee on Health from 2006 to 2014. Because he held the post of Health Subcommittee Chairman during the passage of the Affordable Care Act (ACA), he is expected to fight to uphold and strengthen the law. Current Full Committee Chairman Greg Walden (R-OR) will likely serve as the ranking member. Top contenders to chair the Subcommittee on Health are the third-most senior Democrat on the full committee, Representative Anna Eshoo (D-CA), and current Subcommittee on Oversight and Investigations Ranking Member Diana DeGette (D-CO). Current Health Subcommittee Chairman Representative Michael C. Burgess (R-TX) will likely serve as the ranking member of the subcommittee. In addition to reauthorizing various public health programs, the committee is likely to focus on lowering health care and prescription drug costs, health insurance market stabilization, and ACA oversight.

House Ways and Means Committee Ranking Member Richard Neal (D-MA) is likely to hold the chairman's gavel in the 116th Congress. Ranking Member Neal has been a member of the House Ways and Means Committee since 1993 and assumed the role of the ranking member in the 115th Congress. Chairman Kevin Brady (R-TX) will likely serve as the ranking member. With Subcommittee Ranking Member Sander Levin (D-MI) retiring at the end of the year, Representative Lloyd Doggett (D-TX), a strong critic of the rising cost of prescription drugs, will likely be named Health Subcommittee Chairman. Representative Devin Nunes (R-CA) or Representative Vern Buchanan (R-FL) will likely serve as the ranking member. Upholding the ACA and protecting Medicare and Medicaid have been priorities of Ranking Member Neal and are expected to be on the full committee's agenda.

### Senate Committees of Jurisdiction

Senator Lamar Alexander (R-TN) is likely to retain his position as Chairman of the Senate Health, Education, Labor, and Pensions (HELP) Committee. Similarly, Senator Patty Murray (D-WA) is likely to continue serving as the ranking member, a position she has held since 2015.

Senate Finance Committee Chairman Orrin Hatch (R-UT) is retiring at the end of 2018. With Republicans maintaining a majority in the Senate, the Finance Committee will have a new Republican at its helm. Senator Chuck Grassley (R-IA) is the next most senior member of the Finance Committee and is the most likely candidate to take the gavel. If Senator Grassley elects to stay Chairman of the Senate Judiciary Committee, Senator Mike Crapo (R-ID) could take the gavel instead. In either scenario, Senator Ron Wyden (D-OR) will most likely remain the ranking member. Senator Pat Toomey (R-PA) is expected to continue serving as Chairman of the Senate Finance Subcommittee on Health, and Senator Debbie Stabenow (D-MI) will likely remain as the ranking member of the subcommittee.

## Anticipated Agency Developments

### Promotion of Generic Drugs/Prescription Affordability

In advance of this year's midterm elections, Food and Drug Administration (FDA) Commissioner Dr. Scott Gottlieb relaunched the agency's Drug Competition Action Plan. The plan, originally announced in June 2017, focused on three key areas: (1) facilitating greater competition in the generic market by removing obstacles that made it difficult to win approval of generic versions of certain complex drugs, (2) promoting patient access to generic drugs by closing down loopholes that allowed branded companies in some cases to prolong drug monopolies, and (3) improving the economics of developing generic medicines by increasing the speed of generic approvals. The FDA's latest initiative is a proposal to the International Council for Harmonization of Technical Requirements for Pharmaceuticals for Human Use (ICH) designed to advance international harmonization of technical standards for generic drug development, thus, lowering the fixed costs of generic drug development and the ultimate cost to patients, by attracting more market entrants to wider and more harmonized international markets. The ICH Assembly is to be invited to endorse the FDA's proposal at its next meeting to take place later this month.

### Sustained Support for Short-term/Limited Duration and Association Health Plans

The Trump Administration has undertaken health reform efforts following a number of Republican ideas that provide limited benefits at a lower cost than commercial health insurance meeting the ACA requirements. Under a tri-agency final rule (Department of Health and Human Services, Internal Revenue Service, and Department of Labor) that became effective on October 2, 2018, individuals may purchase short-term plans that offer coverage up to a year, and can be extended and renewed up to three years, depending on state guidance. Previously, similar policies were limited to three months. These plans have limited coverage that includes major illness and injuries and services, such as emergency room, hospitalization, specialists, and labs. Notably, the plans are not required to comply with certain ACA requirements, such as coverage of essential health benefits and preexisting conditions. Many consumer advocate organizations and insurance groups oppose the rule.

A Democratic House it is likely to propose legislation limiting these plans because they are in contrast to the intent of many ACA provisions and would likely appeal to healthier individuals who would leave the traditional market and drive up costs and premiums for those remaining in that insurance pool.

## Continued Approval of State Waivers for Medicaid Work Requirements

In January 2018, the Trump Administration issued a policy allowing states to apply for waivers to add work requirements for Medicaid program eligibility. Thus far, 14 states have applied for Section 1115 work requirement waivers. Applications by Kentucky, Indiana, New Hampshire, and Arkansas have been approved. However, the Arkansas changes have been invalidated by a federal District Court. Members of the Medicaid and CHIP Payment Access Commission have raised concerns about the more than 8,000 individuals who have been removed from the Arkansas Medicaid rolls since the work requirement was instituted. The Commission intends to issue a letter to HHS requesting that the agency halt any further approval of these waivers until the impacts of the conditions are evaluated.

## Contacts

If you would like to learn more, please contact the principal authors of this section:

### **John E. Wyand**

Senior Partner, Washington DC

T +1 202 626 6676

E [john.wyand@squirepb.com](mailto:john.wyand@squirepb.com)

### **Douglas Anderson**

Of Counsel, Columbus

T +1 614 365 2717

E [doug.anderson@squirepb.com](mailto:doug.anderson@squirepb.com)

### **Meg Gilley**

Public Policy Advisor, Washington DC

T +1 202 457 6158

E [meg.gilley@squirepb.com](mailto:meg.gilley@squirepb.com)

### **Charles T. Brereton**

Public Policy Specialist, Washington DC

T +1 202 457 6085

E [charles.brereton@squirepb.com](mailto:charles.brereton@squirepb.com)

## Oversight and Investigations

### Likely Major Developments

With the House under Democratic control, the business community should begin preparing for multiple House committees to launch a series of investigations, likely focused initially on interactions between companies (and their trade associations) and the Trump Administration over the past two years. With Republicans having maintained control of the Senate, we see little likelihood of any comparable activity. We, thus, focus much of our attention here on what to expect in the House, starting on January 3, 2019.

Under Rule XI of the House, “[e]ach committee may conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities . . . .” That power includes the authority “to require, by subpoena or otherwise, the attendance and testimony of . . . witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.”

Although the US Constitution does not explicitly give Congress the authority to investigate the Executive Branch, that power is implicit in a variety of authorities assigned to Congress, such as the power to authorize and appropriate funds and to regulate interstate commerce. To the extent there had been doubt about the constitutionality of that authority, the Supreme Court of the US laid it to rest in 1927, when it held that Congress had the authority to investigate the administration of the Justice Department because it was considering a subject “on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.”

In 2007, when Democrats last took control of the House with a Republican in the White House, they focused their investigatory powers on the pharmaceutical, technology, and financial sectors. Through a little-noticed change at the time pursuant to the Rules of the House, the rules of the House Oversight and Government Reform Committee were modified to empower the chairman to “[a]uthorize and issue subpoenas . . . in the conduct of any investigation or activity or series of investigations or activities within the jurisdiction of the committee.” (Under the committee’s rules, the chairman could only order the taking of depositions under oath, “upon consultation with the ranking member,” but that was of little consequence to the minority, which no longer needed to be consulted if the chairman had decided to issue a subpoena.) Thanks to rule changes pushed through by Republicans in the House at the beginning of the 114th Congress to replicate this unilateral authority in other committees, many Democratic committee chairmen will be able to issue subpoenas without first getting a majority vote of committee members or even consulting with their ranking member.

House Democrats are about to demonstrate the breadth of that authority. And many corporate lawyers and their advisors who have not been through a congressional investigation are about to learn about the nature of these investigations, which are political in nature, but can have major legal ramifications in parallel civil litigation and government investigations – even many years later – necessitating a clear strategy during the investigation to manage and mitigate that future fallout. Thus, for example, they will learn that Congress does not respect the attorney-client privilege or the attorney work product doctrine and that requests to keep sensitive business information confidential are just that – requests, which individuals with a certificate of election can honor or not without sanction. And they will be reminded that no neutral arbiter, such as a judge or a magistrate, is there to referee disputes with the side requesting documents or seeking to compel testimony.

The applicable rules governing investigations vary by committee, but by and large empower the chairmen of 14 of the 21 standing committees to act unilaterally. With a further House rule change in January that would establish the parameters for the rules to be adopted by individual committees, Democrats could further strengthen their hand as they seek to use this power, and Republicans may regret having handed Democrats this authority with the 2015 rule change. Should they find that the President and Senate Republicans block their legislative agenda, House Democrats will be motivated more than ever to use their oversight and investigations powers to shape policy and public opinion heading into the 2020 presidential election.

### Anticipated Congressional Committee Developments

#### House Committees of Jurisdiction

Historically, two committees have been principally responsible for investigating the Executive Branch and the business community – the Oversight and Government Reform Committee and the Energy and Commerce Committee (through its Oversight and Investigations Subcommittee). Cognizant of the power to investigate, other House committees have created oversight and investigations subcommittees through which they have gained the power to check the agencies and their constituencies subject to their jurisdiction. As of today, in addition to the two main investigative committees, these additional committees have established a subcommittee with that power: Armed Services, Financial Services, Homeland Security, Natural Resources, Science, Space, and Technology, Small Business, Veterans’ Affairs, and Ways and Means. Many of the standing committees without an oversight subcommittee will likely establish one early next year.



We anticipate that Representative Elijah Cummings (D-MD) will chair the Oversight and Government Reform Committee. As a result of the retirement of Representative Trey Gowdy (R-SC), the current chairman, and Representative John Duncan (R-TN), the next in line in seniority, Representative Jim Jordan (R-OH), Representative Justin Amash (R-MI) or Representative Steve Russell (R-OK) likely will serve as ranking member. Following the 2006 midterm elections, incoming Chairman Henry Waxman (D-CA) was quoted as saying that “[t]he most difficult thing will be to pick and choose [what to investigate].” We sense history will repeat itself.

At the Oversight and Investigations Subcommittee of the Energy and Commerce Committee, Representative Diana DeGette (D-CO) is likely to serve as Chairman. With the retirement of the current Chairman, Gregg Harper (R-MS), either Representative Morgan Griffith (R-VA) or Representative Susan Brooks (R-IN) is likely to serve as the ranking member.

### Senate Committees of Jurisdiction

Historically, the Permanent Subcommittee on Investigations (of the Homeland Security and Governmental Affairs Committee) has been the principal investigative committee of the Senate. Senator Rob Portman (R-OH) will likely continue as Chairman and Senator Thomas R. Carper (D-DE) will likely continue as the ranking member. The subcommittee historically has operated on a bipartisan basis with a skilled staff. That will likely continue in the 116th Congress.

### Anticipated Agency Developments

In short, the White House and every major agency should expect the many House committees to use their power to compel agency heads and other senior officials to testify under oath and to produce documents by the truckload. For example, as incoming Chairman of the House Ways and Means Committee, we expect Representative Richard Neal (D-MA) to use a tax code provision (Section 6103) to inspect President Trump’s tax returns and possibly make some or all of the returns public. Given the focus of House Democrats and some of their core constituencies that opposed the President’s environmental and energy policies, we anticipate that the Environmental Protection Agency (EPA) and the Department of the Interior will likely be among their initial targets. As the incoming Chairman of the House Energy and Commerce Committee, Representative Frank Pallone (D-NJ), put it last week, “We . . . have serious concerns with how Trump’s EPA has consistently sided with the special interests over people’s health and the environment, and we will look to restore the environmental protections that have been gutted over the last two years.” To address the concerns of other constituencies, we expect House Democrats to put the Department of Homeland Security and the Consumer Financial Protection Bureau under the microscope as well. Finally, both the Commerce Department and the Office of the US Trade Representative also may come under scrutiny for their handling of industry tariff relief requests.

### The Wheel of Misfortune

In our experience, issues that start with one congressional committee or one agency risk going “full circle” around the Wheel of Misfortune. An issue that draws congressional scrutiny by definition is high profile, and in many instances inevitably ends up drawing investigatory attention from other branches and agencies of the federal government, from State Attorneys General, and from plaintiffs’ lawyers who leverage their claims off government action. Strategies for managing multiple government inquiries and investigations and copycat litigation, therefore, need to be holistic and integrated. Anything short of that can cause unintended consequences because steps designed simply to resolve one agency’s concerns can cause an equal and opposite reaction with another one.

Our goal is to help clients avoid finding themselves stuck on this Wheel of Misfortune:



## Contacts

If you would like to learn more about the power of Congress to investigate or how the Wheel of Misfortune is likely to spin in the 116th Congress, please contact the principal authors of this section:

**Jeff Turner**

Partner, Washington DC  
T +1 202 457 6434  
E [jeff.turner@squirepb.com](mailto:jeff.turner@squirepb.com)

**Mitch Berger**

Partner, Washington DC  
T +1 202 457 5601  
E [mitchell.berger@squirepb.com](mailto:mitchell.berger@squirepb.com)

Our premier Public Policy Practice and our deep litigation bench of former prosecutors and enforcement staff brings unique strengths to defending companies under government investigation. And those investigations are often the leading edge – and the most public one – business risks that lead to litigation. We can provide a well-structured defense team that integrates government investigations expertise with traditional litigation strength. With ever-increasing government involvement in the economy and now House Democrats likely to focus much of their investigatory fire power on the Trump Administration and the business community, risk management requires synergies between expertise in government investigations and conventional litigation – not the last-minute add on of a government investigations specialist.

# Tax Policy

## Introduction

In 2017, President Trump and congressional Republicans enacted the most comprehensive tax reform in over three decades. While lawmakers passed the Tax Cuts and Jobs Act (TCJA) on a partisan basis without any Democratic support, House Democrats will now have some opportunities to alter the tax policy environment and bring a greater focus on how the Trump Administration continues to implement the new law through regulations. The Democrats' opposition to several elements of the tax reform law will likely be priority areas for legislative action in the House, but – given the divided Congress – they are unlikely to succeed in undoing central elements of President Trump's main legislative achievement to date.

Looking ahead, we expect that three overarching factors will drive the tax policy agenda in the 116th Congress: (1) what happens in the lame-duck session, (2) changes in the composition of congressional leadership and tax-writing committees resulting from the election, and (3) whether President Trump and congressional Democrats are able to find ways to work together on legislative priorities. Below, we discuss those factors along with our expectations for relevant agencies and likely major tax policy developments.

## Lame-Duck Session: Tax Extenders and Other Unfinished Tax Business

As mentioned in the introduction, Democrats likely will not relent in their opposition to funding President Trump's proposed border wall. A border wall funding fight could lead to at least a partial government shutdown during the lame-duck session, adding to the uncertainty of what will happen in the next two months. Below we outline our expectations for tax policy in the lame-duck session – though it is important to note that the struggle over funding the government will alter the substance and timing of each item.

### Tax Extenders

While the elections are now over, the 115th Congress still has a number of tax issues that remain a priority to finish this year. The TCJA dealt with tax "extenders" (i.e., tax provisions that are regularly set to expire but lawmakers have extended on multiple occasions) retroactively for 2017, but these provisions have expired for 2018.

In particular, the Republican-controlled House has lamented the tax extenders process for some time and is likely to resist a renewal of all of the expired provisions. In March 2018, the Ways and Means Committee held a hearing to examine the role of these tax provisions in a post-tax reform world to demonstrate how tax reform had made many of these extenders duplicative or in some instances, not as generous. For example, of the 33 tax extenders that expired on December 31, 2017, there are seven cost recovery provisions in the tax reform law that provide similar or better treatment.

Lawmakers in both chambers will have to assess how to deal with those provisions and the other 26 tax extenders for 2018 – and possibly additional years. (Currently, neither chamber has a committee marked-up package ready to go.) It is also possible Congress could choose to defer any action on tax extenders to the early part of next year because, in either instance, these provisions would be reinstated retroactively to the start of 2018.

### Technical Corrections

Even prior to enactment of tax reform, lawmakers and the Administration had been working on finalizing a set of technical tax corrections. Additional work is necessary to conform those technical corrections to modifications made to the Internal Revenue Code by TCJA. Lawmakers could seek to move these technical corrections on a bipartisan basis in the lame-duck session. What remains less clear is whether congressional Democrats will entertain additional technical corrections necessitated by errors in the tax reform law that Republicans passed without Democratic support. So far, there has not appeared to be many Democrats willing to bail out the Republicans for their "self-inflicted" wounds. If lawmakers choose to pass technical corrections to the TCJA, the most high-profile correction would be to clarify whether qualified improvement property (QIP) is eligible for a 100% bonus depreciation.

### Tax Reform 2.0, RESA, and Tax Reform 3.0

In September, the House passed a trio of bills that comprised what outgoing Ways and Means Committee Chairman Kevin Brady (R-TX) called "Tax Reform 2.0." Collectively, these bills: (1) make permanent the tax relief for individuals and pass through entities enacted as part of the tax reform law, (2) promote and expand retirement savings options, including open multiple employer plans (MEPs) and the creation of a new universal savings account, and (3) encourage start-up businesses. Taken together, the Senate has not expressed much interest in taking up the Tax Reform 2.0 package to date, and that is unlikely to change after the elections, with the exception of finding common ground with the House on a retirement savings bill the Senate passed earlier this year.

In fact, the retirement legislation the Senate passed by unanimous consent earlier this year, the Retirement Enhancement and Savings Act (RESA), enjoys broad support. RESA shares many of the policy goals included in the retirement portion of the Tax Reform 2.0 package, including modifications to 401(k) plan safe harbor rules, and amendments to multiple employer plan rules to facilitate employers to join together to offer a shared retirement plan for their employees. The latter proposal on multiple employer plans has also been an area of interest for the Trump Administration. In particular, the Department of Labor issued a proposed rule to achieve a similar result on October 22, 2018. It is possible – despite the Department of Labor's proposed rule – that lawmakers will seek to enact RESA in a lame-duck session and possibly consider a newspaper pension relief bill that the Ways and Means Committee approved in July 2018. This could be one area where both parties would prefer to clear the decks before the 116th Congress begins.

Recently, President Trump surprised even the tax-writing committees in Congress when he announced that there would be an additional round of tax relief before the elections, specifically a resolution to provide a 10% tax cut for the middle class. Although Chairman Brady confirmed days later he was working with the President on the proposal, this potential “Tax Reform 3.0” certainly faces the longest odds of becoming law in the lame-duck session.

## Anticipated Congressional Committee Developments

Looking behind the dais, the Senate Finance and House Ways and Means Committees will both have new chairmen next Congress. In the upper chamber, Senate Finance Committee Chairman Orrin Hatch (R-UT) is retiring at the end of 2018. With Republicans maintaining a majority in the Senate, the Finance Committee will have a new Republican at its helm. Senator Chuck Grassley (R-IA) is the next most senior member of the Finance Committee and is the most likely candidate to take the gavel. If Senator Grassley elects to stay Chairman of the Senate Judiciary Committee, Senator Mike Crapo (R-ID) could take the gavel instead. In either scenario, Senator Ron Wyden (D-OR) will most likely remain the ranking member.

At the Ways and Means Committee, a Democrat-controlled House will mean that Ranking Member Richard Neal (D-MA) will likely take the reins as the chairman of the powerful tax-writing committee. Meanwhile, outgoing Chairman Brady will likely become ranking member next year. Of course, the chairs and ranking members are not the only factors to consider. Given the new makeup of both chambers, both Finance and Ways and Means will likely have a new ratio of Republicans and Democrats, in addition to new membership.

## Anticipated Agency Developments

### TCJA Regulations

While a divided Congress will likely limit legislative action on Capitol Hill, Treasury officials plan to issue proposed regulations on several priority guidance projects by the end of 2018 and into next year, as well as welcome comments from industry and interested parties. Despite the political stalemate expected in the 116th Congress, Treasury and the Internal Revenue Service (IRS) are showing no signs of slowing down on tax reform implementation.

According to a [regulatory plan](#) released in October 2018, Treasury has identified 17 regulations implementing the TCJA at the top of its action list for FY 2019. Notably, the list includes high-profile rules on the new 20% deduction for pass-through businesses, interest deductibility, bonus depreciation, foreign tax credits, and the one-time tax on offshore earnings.

Outside of these top priorities, Treasury and the Office of Management and Budget (OMB) have marked 56 regulations as “significant,” which increases the chances that a rule will be subject to an additional layer of review by OMB’s Office of Information and Regulatory Affairs (OIRA). Looking ahead, while the impact of OIRA’s involvement is uncertain for any given rule, it is another voice in the implementation process and is no doubt an area worth monitoring as Treasury and the IRS continue to issue proposed regulations.

### International Developments

Many of Treasury’s to-be-issued regulations will relate to the new international tax regime. In particular, we expect Treasury and the IRS to address the following issues in the next two months: (1) the foreign tax credit, (2) interest deductibility, (3) the base-erosion and anti-abuse tax (BEAT), (4) hybrid entities and transactions, (5) foreign-derived intangible income (FDII), and (6) distributions or other transactions by a controlled foreign corporation (CFC) involving earnings and profits (E&P) that have been included in the income of a US shareholder (i.e., previously taxed income, or PTI). It is important to emphasize that these proposed regulations will be proposals, meaning companies will have an opportunity to influence them before Treasury and the IRS make them final in 2019.

Looking further into the regulatory pipeline, we expect Treasury and the IRS to send proposed regulations on the foreign tax credit, BEAT, and hybrids to OIRA in the near-term, with the FDII and PTI rules to follow.

In the midst of this regulatory process in the US, many open questions linger abroad as to how other nations will respond to the TCJA’s international tax framework. Specifically, it is unclear whether other countries with relatively high corporate tax rates will seek to mirror the TCJA’s international provisions, such as FDII, BEAT, and the new minimum tax on global low-taxed intangible income (GILTI). Moreover, other nations may challenge the FDII provisions in particular as a violation of World Trade Organization (WTO) rules that prohibit tax subsidies for exports. As the implementation process marches forward in the US, it will be important to track how other nations respond to the TCJA, which could alter the scope and substance of the new US international tax framework.

### Taxation of the Digital Economy

Staying on the international stage, tax authorities around the world – especially in the European Union (EU) – are grappling with novel and important issues about how to tax the digital economy. The tax policy choices that EU officials make will affect where multinational companies pay tax and how much tax they pay. Further, these choices will affect how multinationals interact with their customers, structure their supply chains, organize their businesses, and plan future transactions.

As EU officials consider the path forward, US technology companies, lawmakers, and administration officials alike are expressing concerns about proposed taxes on digital services. In a rare showing of bipartisanship on Capitol Hill, outgoing Senate Finance Committee Chairman Orrin Hatch (R-UT) and Ranking Member Ron Wyden (D-OR) sent a letter in October 2018 urging the European Commission to abandon a proposed tax on revenues stemming from digital commerce, arguing that it would create a significant trade issue between the US and the EU. The Trump Administration has echoed these concerns. Looking ahead, we expect this bipartisan agreement to continue into 2019 as US companies and officials ramp up their efforts to dissuade the European Commission from imposing a digital services tax.

## Likely Major Policy Developments

### Offensive Measures Against Trump Administration

Undoubtedly, progressive House Democrats will be calling for their newfound majority to conduct zealous oversight of the Trump Administration with investigations into dozens of corners of the Executive Branch. On the tax policy front, Democrats could begin their tenure with an investigation into a frequent topic of debate: President Trump's tax returns. This action could diminish President Trump's desire to work with House Democrats on legislative matters. Balancing these competing interests will be an early test for the typically more pragmatic approach of likely Chairman Neal.

Below, we further explore the policy dynamics of examining President Trump's tax returns and other offensive measures House Democrats may take against the Trump Administration.

#### Trump's Tax Returns

Assuming Representative Neal takes the gavel at Ways and Means, he will be asked to use his authority under Section 6103 of the Internal Revenue Code to inspect President Trump's tax returns and possibly take action in committee and the House to make some or all of the returns public. While releasing President Trump's tax returns has been an ongoing Democratic demand since before he entered the Oval Office, the issue picked up steam when *The New York Times* published an investigative article in October 2018 alleging President Trump of participation in "dubious tax schemes" decades ago. Although not every Democrat appears sold on publicly releasing Trump's returns, pressure from the party's base may be difficult to resist – and the issue may well draw the most headlines in the first few months of House Democratic control.

#### Non-profit Donor Disclosure Requirements

In addition to President Trump's tax returns, House Democrats appear poised to take aim at a Treasury policy change to 501(c)(4) donor disclosure requirements. In July 2018, Treasury announced that non-profits that spend money to influence elections – but are not required to disclose donors to the public – no longer need to share their donors' names or addresses in their tax filings. Democrats have warned the new rule would make it easier for foreign actors to funnel money into the US political system, creating another layer of transparency for "dark money" groups to influence US elections. It is uncertain how Democrats will address the rule, but we expect them to consider holding hearings on the issue and using their subpoena power to conduct investigations.

#### Johnson Amendment

On the legislative front, Democrats may push to protect the Johnson Amendment from Republican attempts to repeal it. The Johnson Amendment is a provision in the tax code that forbids non-profits, such as religious groups, from endorsing or opposing political candidates. President Trump has called for its repeal, though Senate Finance Committee Ranking Member Ron Wyden (D-OR) appears intent to ensure the IRS continues its enforcement of the law.

#### Stock Buyback Oversight

Democrats also might call attention to how the Securities and Exchange Commission (SEC) conducts oversight of stock buybacks. Democrats have frequently criticized stock buybacks since the TCJA became law, arguing that increased buybacks merely benefit large publicly traded companies. Further, Democrats have contended that corporate insiders may be exploiting buybacks to sell shares received as executive pay at inflated prices. Now in control of the House, Democrats may shine the spotlight on SEC rules that provide safe harbor protection from securities laws when repurchasing shares.

#### Deficit Result of the TCJA

In addition to stock buybacks, Democrats have criticized the TCJA for adding to the federal deficit. In fact, Treasury reported in October 2018 that the federal budget deficit increased by 17%, or US\$113 billion, from FY 2017 to FY 2018. House Democrats will likely use their new position in power to highlight the increased deficit stemming from the TCJA.

## Proactive Messaging Efforts

While House Democrats will likely spend much of their time holding hearings and conducting oversight of the Trump Administration, any legislative efforts to change tax policy will likely end up as messaging exercises that stand little chance of becoming law in a divided Congress. Specifically, and early on in the 116th Congress, Ways and Means will likely conduct a series of hearings, focusing on the efficacy of the newly constructed tax code and especially on middle class tax cuts. Below, we discuss other specific topics that will likely be the focus of the committee.

### Reversing Elements of the TCJA

Although any legislation would likely die in the Senate, House Democrats may work to reverse key elements of the TCJA, such as (1) reinstating the top income tax rate of 39.6%, (2) increasing the corporate tax rate, and (3) restoring the estate tax exemption at US\$11 million for couples. Democrats could then work to use that revenue to help pay for an infrastructure package or other priorities – though chances of such a proposal becoming law would almost certainly fizzle in the Republican-majority Senate.

### Carried Interest

In addition to reversing elements of the TCJA, Democrats may also work to highlight the inequity they see in the so-called carried interest loophole, which stayed intact (although a three-year holding period was added) after tax reform and allows some investment managers to pay a lower tax rate than most individuals. Democrats have long criticized the preferential tax treatment as a “giveaway” to the wealthy, and could focus their attention on addressing carried interest through legislation.

### BEAT/GILTI Rates

As previously discussed, the TCJA included a substantial overhaul of the international tax system, with provisions including a tax on global intangible low-taxed income (GILTI) and the base erosion and anti-abuse tax (BEAT). Some corporations have been critical of the new tax provisions, arguing that they may have unintended consequences that negatively affect US-based multinational companies. While Treasury and the IRS might solve some of the issues through regulatory interpretation, other issues may require new legislation. In so doing, Democrats could try to increase the tax rates included in the GILTI and BEAT provisions, to raise revenue for other legislative initiatives such as infrastructure.

### SALT Reversal

Representatives from high-tax states may be especially motivated to undo the TCJA's State and Local Tax (SALT) deduction cap. The tax reform law capped the amount of state and local taxes an individual can write off at US\$10,000. The SALT cap hit residents of high-tax states like New York, New Jersey, and California (all Democrat-leaning states) particularly hard, though undoing the limit may end up disproportionately benefit high-income earners.

## Acts of Governing/Legislating Efforts

Although a divided Congress will likely bring a screeching halt to major legislating efforts, there are some areas where we expect at least a meaningful chance of bipartisan agreement. We discuss a few possible legislative efforts that could take shape over the course of 2019 below.

### Tax Extenders

As part of the budget deal in February 2018, lawmakers agreed to renew about 30 tax preferences (commonly referred to as “extenders”) that expired at the end of 2016, allowing taxpayers to claim them on the 2017 returns. The extenders include a wide variety of tax preferences relating to (among other things) renewable energy, motorsports, and racehorses. Generally, the Senate has expressed support for the extenders while House Republicans have vowed to do away with them. Given the bipartisan agreement on extenders in the 2018 budget deal, these tax preferences could find new life again next Congress, if not dealt with in the lame-duck session.

### Infrastructure Package/Gas Tax Increase

While the Transportation and Infrastructure section of this analysis covers the dynamics of a possible infrastructure package more fully, tax policy could certainly intersect with a potential infrastructure spending deal. Although the federal tax on gas has remained unchanged for over two decades, House Democrats could try to increase the gas tax as a way to fund a major infrastructure deal and might find a willing partner in President Trump if it would mean enactment of one of his highest domestic priorities.

### Middle Class Tax Package

Given President Trump's outspoken support of middle class tax cuts, House Democrats might be able to find some bipartisan agreement on this issue. One option would be to follow the lead of potential 2020 presidential candidate Senator Kamala Harris (D-CA), who recently proposed a new refundable tax credit for families making under US\$100,000. Under her proposal, eligible families could receive up to US\$6,000 from the tax credit, which would phase out as income increases. That said, House Democrats could certainly develop their own plan, and may find some willing participants across the aisle.

### Tax Provisions in a Budget Deal

Another area of possible legislating that could affect tax policy is the budget deal in the new Congress. While the Bipartisan Budget Act of 2018 raised the statutory caps on discretionary spending by a total of US\$296 billion, both sides of the aisle could use budget negotiations to strike deals on tax issues.

## Debt Limit

Similarly, the debt limit may prove to be fertile ground for reaching a compromise. Since the 2018 budget deal suspended the debt limit through March 1, 2019, the 116th Congress will face a challenging test in its first year. Absent further congressional action when the suspension expires, Treasury will once again find itself up against the debt limit and implementing so-called "extraordinary measures" that prevent default for a limited time. Negotiations on the debt ceiling could include areas for agreement on certain tax policy issues.

## Recession Stimulus

Though predicting the economic cycle always presents a difficult challenge, a downturn in the economy may lead to the development of a stimulus package. While it is too early to tell what such a package could look like, this is another area where legislating would have consequences for the tax policy community.

## Other Expirations/Cliffs

In addition to tax extenders, several other provisions need a congressional stamp of approval to keep going. For example, the New Markets Tax Credit (NMTC), a federal tax credit that aims to help stimulate economic growth in distressed communities, will expire at the end of 2019, if Congress fails to act. Other provisions expiring at the end of 2019 without congressional renewal include: (1) the Work Opportunity Tax Credit (WOTC), (2) the final possible date to begin construction on wind renewable power facilities eligible for the electricity production or investment credits, (3) the look-through tax treatment of payments between related controlled foreign corporations (CFCs), (4) employer credit for paid family and medical leave, and (5) several provisions that lower alcohol tax rates. With certain members seeking to protect constituent interests, these expiring provisions could align lawmakers more by geography than party, creating an opportunity for bipartisan legislating.

## Retirement Package

Expected Ways and Means Chairman Neal (D-MA) has been a longtime proponent (and sponsor) of measures to help Americans save more for retirement. In particular, he has previously introduced legislation to require employers that do not currently sponsor a retirement plan to offer their employees an opportunity to save for retirement. He has also offered proposals to provide troubled multiemployer pension plans with low interest rate loans to pay retirees' pensions. We expect Representative Neal to continue his work on retirement and savings proposals as chairman.

## Contacts

If you would like to learn more, please contact the principal authors of this section:

### Matthew Cutts

Partner, Washington DC  
T +1 202 457 6079  
E [matthew.cutts@squirepb.com](mailto:matthew.cutts@squirepb.com)

### Jeff VanderWolk

Partner, Washington DC  
T +1 202 457 6081  
E [jeff.vanderwolk@squirepb.com](mailto:jeff.vanderwolk@squirepb.com)

### David Stewart

Principal, Washington DC  
T +1 202 457 6054  
E [david.stewart@squirepb.com](mailto:david.stewart@squirepb.com)

### Patrick Kirby

Associate, Washington DC  
T +1 202 457 5294  
E [patrick.kirby@squirepb.com](mailto:patrick.kirby@squirepb.com)

## Trade Policy

### Likely Major Policy Developments

The last two years have been marked by the elevation of US trade policy as a central pillar in the Trump Administration's re-formulation of national priorities. President Trump entered office in 2017 pledging "fair trade" policies and scrutiny of existing trade relationships that he argued have not benefited Americans. This pace will continue in the coming year, especially as several key policy and legal deadlines ripen in the coming months.

In early 2019, the Trump Administration plans to submit legislation that would implement the modernized US-Mexico-Canada Agreement (USMCA), which – if approved by the 116th Congress – would replace the North American Free Trade Agreement (NAFTA). The Administration also has set the stage for an ambitious trade negotiation schedule in 2019, announcing its intention in October to seek new trade agreements with Japan, the European Union (EU), and the UK. Meanwhile, the Administration will continue consultations with Congress, business community stakeholders, and the interested public over the coming weeks as it develops negotiating objectives for each potential pact. It will likely begin formal talks with Japan and the EU soon after the consultation period ends on January 14, 2019. Formal talks with the UK cannot begin until after the country's withdrawal from the EU on March 29, 2019. In the past two weeks, the Administration has also signaled an interest in completing a bilateral trade agreement with Brazil, but has not shared details on the scope or timing of what it envisions, and remains committed to a model trade agreement with an African nation. We would not be surprised to see the President identify other countries, especially in South America, with which he would like to conclude an agreement.

Efforts to address China's alleged unfair trade practices will continue to drive many trade and foreign policy decisions, notably via Section 232 national security investigations, the Section 301 intellectual property policies and practices investigation, related 232 and 301 tariffs, and law and regulations governing investments in the US. US businesses will continue to push for exclusion from the Section 301 tariffs. Exclusion requests for the second tranche of products are due December 18, 2018, while the third set of tariffs are slated to increase from 10% to 25% on January 1, 2019, if the US and China have not found common ground to address the issues that motivated the President to impose the tariffs in the first place. The Commerce Department must also transmit its recommendations in the Section 232 investigation into auto/auto part imports by February 17, 2019 – though, it could be released at any time before then – teeing up a political debate before the President announces any final decision.

Despite continued domestic concerns with these tariffs, Democrats and Republicans will continue their broad support for the Trump Administration's prioritization of China-related trade issues, but may seek to mitigate the impacts of any trade war. As the effects of these tariffs expand, Republicans may seek increased transparency into ongoing bilateral trade talks with China. Lawmakers from both sides of the aisle may also seek to reassert control over the trade enforcement mechanisms extensively used by the President in his first two years.

### Modernizing NAFTA

One of the biggest trade matters facing the 116th Congress will be debating the USMCA. Trump Administration officials began negotiating this follow-on to NAFTA in August 2017, pledging swift conclusion of the deal. Talks lingered as the three parties struggled to reach agreement on some of the Trump Administration's most controversial proposals, including calls for a "sunset" clause that would have required the parties to recommit to the deal every five years. In August 2018, the US and Mexico announced a breakthrough, unveiling a preliminary bilateral agreement despite calls from Congress and the business community for preservation of the trilateral deal. The Trump Administration gave Canada until the end of September to join, as negotiators from all three countries redoubled efforts to secure a final three-way deal. On September 30, 2018, the US, Mexico, and Canada announced the conclusion of USMCA. Tellingly, and unlike NAFTA, USMCA's title does not include a reference to "free trade," confirming the Trump Administration's continued focus on "fair trade" in negotiations with foreign economies.

President Trump, Canadian Prime Minister Justin Trudeau, and outgoing Mexican President Enrique Peña Nieto hope to sign the agreement on November 30, 2018, at which point it must be approved under each party's domestic procedures. (The Mexican government has recently threatened not to sign the agreement then if the US still has in place tariffs on Mexican steel exports.) In the US, Congress will ultimately decide USMCA's fate. Trade agreements are not treaties under US law and, therefore, are not "self-executing." Instead, trade agreements must be approved by both chambers of Congress and signed into law by the President through implementing legislation under a process known as Trade Promotion Authority (TPA).



The Trump Administration plans to submit USMCA implementing legislation to Congress in early 2019, putting the fate of the deal in the hands of the new Congress. Ultimately, North American trade relations are critical to businesses, which built up their supply chains around NAFTA. The business community will lobby hard for the deal, even one with problematic provisions, in an effort to preserve the movement of goods and services across North American borders. Despite the Administration's eagerness to see the President's trade deal enacted into law, House Democrats will closely scrutinize the deal, and potentially call for new side letters or agreements to address their concerns, particularly focusing on the agreement's labor and environment chapters. Getting the deal through the House will require significant advocacy from the Administration and private stakeholders. Neither Congress nor private companies will respond positively if President Trump initiates withdrawal from the original NAFTA deal in an effort to hasten congressional approval of the replacement deal.

## New and Updated Trade Agreements

On September 24, 2018, President Trump and South Korean President Moon Jae-in signed the revised Korea-US Trade Agreement (KORUS). Because the agreement does not require amending existing US law, the revised trade pact does not have to undergo US congressional approval. However, the new language does have to undergo domestic approval in South Korea. Notably, the Trump Administration and the South Korean government are reportedly still working to conclude a side letter to the agreement that focuses on currency manipulation, a topic that many US lawmakers believe should be a standalone chapter in all new trade agreements. Meanwhile, members of Congress – particularly those with auto and pharmaceutical stakeholders in their district/states – will be monitoring implementation of the revised KORUS to ensure it addresses concerns from their constituents on the deal's implementation to date.

Members of Congress have already indicated that the talks with Japan and the EU should include a focus on agriculture and services, beyond regulatory harmonization and customs facilitation matters. There is pressure to conclude a deal with Japan quickly, and to allow increased market access for US agricultural exports that have faced retaliation in 2018, particularly as trade relations with China worsened. US business stakeholders are eager to cement ties with the Japanese economy as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) enters into force without the US. Talks with the EU will be more complex, especially since the US does not approve of the EU's positions on issues such as "geographical indicators." Moreover, the EU has already made clear that any deal should focus on industrial goods and not include agricultural products or services, a move that Congress may question, as lawmakers have set out detailed negotiating priorities for these areas within TPA.

Talks with the UK will have to await its formal exit from the EU (Brexit) on March 29, 2019. In the interim, high-level working groups have been meeting to discuss the UK's WTO obligations post-Brexit, as well as its potential customs arrangement with the EU. Congress is keen to sustain the historic "special relationship" with the UK, including completing a bilateral deal soon after Brexit with its trusted trading partner.

## China – Trade War Escalation?

China's tit-for-tat response to the Trump Administration's Section 301 tariffs – applied after the Office of the US Trade Representative (USTR) concluded an investigation into China's intellectual property policies and practices – has led to increased global trade uncertainty, especially as the two countries engage in what appears to be an escalating trade war. We expect to see continued pressure on USTR to include a product exclusion process for "List 3" of the Section 301 duties. Lawmakers and industry representatives are pushing hard for USTR to add such a process for "List 3" goods from China, which currently face the prospect of increasing from 10% to a 25% duty on January 1, 2019. President Trump and Chinese President Xi Jinping are scheduled to meet on the margins of the upcoming G-20 Summit in Argentina at the end of November 2018. Just before the elections, President Trump said that the two sides have made progress in their trade discussions, and expressed optimism that they would conclude a deal. The Trump Administration is reportedly considering whether to implement tariffs on all remaining Chinese imports ("List 4") by early December should the G-20 meeting not bear fruit.

## National Security and Trade

The Trump Administration has launched four separate investigations under Section 232 of the Trade Expansion Act of 1962 – more in the last two years than the two preceding decades. Section 232 investigations assess the national security implications of imports, a guide that the Executive Branch has interpreted broadly to touch many parts of the US economy. The Trump Administration has faced significant opposition from business stakeholders and Congress as it implemented steel and aluminum tariffs following conclusion of those Section 232 investigations. While US officials have negotiated bilateral quota agreements with certain trading partners aimed at avoiding the duties, there is no end in sight for the action.

Commerce Department officials are leading ongoing investigations into auto/auto part and uranium imports, both of which will conclude in the first half of 2019. Notably, the Commerce Department must transmit its report on the auto investigation to the White House by February 17, 2019, though action could come sooner. Lawmakers have closely scrutinized the steel and aluminum tariffs and product exclusion process, urging against unintended consequences, and will continue to do so as ongoing and new investigations proceed. Lawmakers have introduced several proposals aimed at curbing the President's broad Section 232 authority. With their control over the House, Democrats may seek to return some oversight over the 232 process back to lawmakers.

## Investment Review

The Trump Administration also will continue implementation of the Foreign Investment Risk Review Modernization Act (FIRRMA), which overhauls the Committee on Foreign Investment in the United States' (CFIUS) review of foreign investments for national security implications. While some of FIRRMA's requirements took effect immediately, other changes will require regulatory changes to implement. On October 10, 2018, CFIUS announced an interim rule, creating a "Pilot Program" to implement new mandatory filing requirements. The interim rule will take effect on November 10, 2018. Congress will continue to closely scrutinize the CFIUS review process, including FIRRMA implementation, as part of its general focus on China trade matters and general oversight responsibilities. Lawmaker oversight also might focus on the CFIUS backlog and ensuring the Treasury Department has sufficient resources to process proposed investments in the US economy.

## Commercial Diplomacy

Continuing to formulate foreign policy via the lens of trade, the Trump Administration may be looking to define a more robust commercial diplomacy effort, particularly with respect to deepening US business ties to the African continent. More broadly, a recalibrated commercial diplomacy strategy could further US business ties to other regions, such as the Western Hemisphere. President Trump will travel to Latin America later this month to participate in the G-20 Summit in Argentina. On November 2, 2018, National Security Adviser John Bolton described a new "Troika of Tyranny," made up of the regimes of Cuba, Venezuela, and Nicaragua, as a new focus for the Administration's Latin America policy. Increased investments in US LNG export infrastructure could help wean parts of the Western Hemisphere off Venezuelan oil, putting further pressure on the government and its domestic economy. Meanwhile, the Administration will emphasize the need for rule of law, transparency, recourse for investors, and a level playing field for American companies. More broadly, the Administration's transactional approach to bilateral relationships – including examining trade deficits – is expected to continue in 2019. The Administration has already signaled an interest in concluding a bilateral trade agreement with Brazil, with potentially more bilateral trade talks in the wings as well.

## Anticipated Congressional Committee Developments

### Senate and House Committees of Jurisdiction

Looking behind the dais, the Senate Finance and House Ways and Means Committees will both have new chairmen next year. In the upper chamber, Senate Finance Committee Chairman Orrin Hatch (R-UT) is retiring at the end of 2018. With Republicans maintaining a majority in the Senate, the Finance Committee will have a new Republican at its helm. Senator Chuck Grassley (R-IA) is the next most senior member of the Finance Committee and is the most likely candidate to take the gavel. If Senator Grassley elects to stay Chairman of the Senate Judiciary Committee, Senator Mike Crapo (R-ID) could take the gavel instead. In either scenario, Senator Ron Wyden (D-OR) will most likely remain the ranking member.

At the Ways and Means Committee, a Democrat-controlled House will mean that the current Ranking Member Richard Neal (D-MA) will likely take the reins as the chairman of the powerful tax-writing committee. Meanwhile, outgoing Chairman Kevin Brady (R-TX) will likely become the ranking member next year. Representative Bill Pascrell (D-NJ) will likely serve as Chairman of the Trade Subcommittee, while Representative Vern Buchanan (R-FL) might serve as the top Republican following the retirement of Representative Dave Reichert (R-WA) at the end of 2018.

Of course, the chairs and ranking members are not the only factors to consider. Given the new makeup of both chambers, both Finance and Ways and Means will likely have a new ratio of Republicans and Democrats, in addition to new membership.

## Anticipated Agency Developments

On October 5, 2018, President Trump signed into law H.R. 302, enacting the Better Utilization of Investments Leading to Development (BUILD) Act. The BUILD Act provides financing to increase US investment in infrastructure in less-developed countries, an effort to keep pace with other countries' infrastructure investments abroad. The law consolidates the Overseas Private Investment Corporation (OPIC) and some development finance functions of the US Agency for International Development (USAID) into a new governmental corporation, the US International Development Finance Corporation (IDFC). IDFC will provide loans and loan guarantees to US infrastructure companies investing in developing countries and will have the authority to take minority equity positions in investments. IDFC can also conduct feasibility studies on proposed investment projects and provide technical assistance. While critical to the Trump Administration's broader foreign policy initiatives, the BUILD Act is a central part of its Indo-Pacific Economic Vision, especially.

Upon enactment, OPIC entered into a transition period but remains operational until the IDFC is fully functioning. During this months-long transition period, the Administration is expected to put forward a reorganization plan (likely in 2019) to transfer agencies, personnel, assets, and obligations to the IDFC.

For three years, the US Export-Import Bank (Ex-Im) has been unable to approve transactions in excess of US\$10 million dollars due to the lack of a quorum. During the lame-duck session of Congress, the Senate could advance the President's nominee to lead the agency, Kimberly Freer. But, with key Senate Republicans having pledged to oppose high-level Ex-Im confirmations, the board might not be fully operational any time soon.

With USTR and Commerce's resources stretched thin with the ongoing Sections 232 and 301 product exclusion processes, as well as three new trade agreement negotiations expected in 2019, they will likely need additional resources to carry out their mandate. Since President Trump has announced his intent to cut agency budgets across the board by 5%, their allies on Capitol Hill may need to step in to make sure they have the resources they need to do the job.

## Contacts

If you would like to learn more, please contact the principal authors of this section:

### **Frank Samolis**

Partner, Washington DC  
T +1 202 457 5244  
E [frank.samolis@squirepb.com](mailto:frank.samolis@squirepb.com)

### **Stacy Swanson**

Public Policy Advisor, Washington DC  
T +1 202 457 5627  
E [stacy.swanson@squirepb.com](mailto:stacy.swanson@squirepb.com)

### **Ludmilla Kasulke**

Associate, Washington DC  
T +1 202 457 5125  
E [ludmilla.kasulke@squirepb.com](mailto:ludmilla.kasulke@squirepb.com)

# Transportation and Infrastructure

## Likely Major Policy Developments

Both the President and Democratic congressional leaders have identified transportation and infrastructure as areas of focus and potential bipartisan agreement. The next Congress is likely to consider a large-scale, broad infrastructure package. The Fixing America's Surface Transportation (FAST) Act – authorizing highway, transit, rail, and vehicle safety programs – expires in September 2020 and must be reauthorized. The biennial Water Resources Development Act (WRDA) is likely to be reauthorized in 2020 as well. The timing of FAST Act reauthorization suggests that it could be merged with, or perhaps even be the basis of, a broader infrastructure package. Transportation and infrastructure have historically been areas of bipartisan and bicameral agreement. The expected focus on infrastructure investment presents significant opportunities for transportation stakeholders to advance their initiatives.

Democrats have identified infrastructure investment as a top priority as they take back control of the House for the first time in eight years. We believe the President will be motivated to work with Democrats on an infrastructure package to make good on his longstanding pledge to fund significant investments in the nation's infrastructure. However, the question of how to pay for a major infrastructure spending bill remains, as does the larger question of finding sustainable, long-term revenue sources to shore up the Highway Trust Fund (HTF).

We know from the recent tax reform efforts that the President was willing to reduce revenues to realize his tax priorities, so it is possible that both congressional Democrats and President Trump would be willing to fund a large-scale infrastructure package through deficit spending. We have little doubt that the President will want to create construction jobs across the country in the run up to the 2020 presidential election. But with Republicans already facing growing questions about their management of the budget deficit under President Trump and risking a backlash if they were to support further deficit spending, increased revenues may be the only way to fund a major infrastructure bill. We, thus, do not rule out the possibility of the President eventually supporting an increase in the gas tax or some combination of revenue measures in order to advance a signature component of his domestic policy agenda.

Another major outstanding question is whether Congress will reestablish congressionally directed spending – earmarks – particularly for transportation and infrastructure projects. Earmarks create a powerful incentive for Congress to advance an infrastructure package and to secure revenues necessary to fund it.

## Infrastructure Proposals

Over the past two years, both the Trump Administration and transportation proponents in Congress have released numerous infrastructure proposals. Some proposals address the HTF revenue shortfall, while others are more akin to messaging bills, focused exclusively on program and policy changes.

HTF spending has annually exceeded Trust Fund revenues for several years, requiring general fund transfers since 2008 to close the gap. It is not for a lack of viable solutions that this problem remains. Rather, broad, bipartisan political support has yet to emerge to adopt one or more long-term revenue options that would either supplement or replace current federal gasoline and diesel fuel taxes.

A vehicle-miles-traveled (VMT) tax is generally viewed as the closest – and fairest – indicator of actual highway use. However, privacy and cybersecurity concerns must be addressed before many consumers would accept full-scale implementation of a VMT fee nationwide. This summer, retiring House Transportation and Infrastructure Committee Chairman Bill Shuster (R-PA) released an infrastructure proposal that would hasten the introduction of a VMT fee system through a series of actions. The draft would increase the gas tax for a limited period of time to provide a short-term revenue increase while establishing a national VMT pilot program and a commission to evaluate and recommend a long-term revenue solution, which his proposal states cannot be raising the gas tax.

Chairman Shuster's plan also would broaden the current HTF revenue base by eliminating the diesel tax refund for public transportation vehicles and imposing taxes on electric vehicle batteries and bicycle tires. Senate Environment and Public Works Committee Chairman John Barrasso (R-WV), who opposes a gas tax increase, recently offered a plan to eliminate the tax credit for electric vehicles (EVs) and establish annual fees on EVs that would be deposited in the HTF.

Democrats generally have been more willing than Republicans to advocate for increasing the gas tax. House Transportation and Infrastructure Committee Ranking Member, and likely chairman in the next Congress, Peter DeFazio (D-OR) introduced legislation that would increase the gas tax by approximately one cent per year by indexing it to inflation. His bill would allow the federal government to bond against the future proceeds of the increased gas tax to raise US\$500 billion through FY 2030 – a more costly approach than directly increasing revenues by the same amount. Representative Earl Blumenauer (D-OR), a strong supporter of infrastructure investment on the Ways and Means Committee, continues to advocate for an increase in the gas tax by 15 cents over three years, indexed to inflation.

Beyond the DeFazio and Blumenauer bills, the broad infrastructure proposals put forth by House and Senate Democrats in the 115th Congress did not identify revenues to support their unprecedented US\$1 trillion dollar investment levels, nor did they offer a revenue solution for the HTF's funding gap that would grow wider under their plans. While President Trump proposed US\$200 billion of federal spending in his infrastructure proposal, he offered only unidentified spending cuts to offset that spending.

There are no signs that building sufficient congressional support to pass a gas tax increase or VMT tax in the next Congress will be any easier than it has been in the past. Yet many members of Congress who oppose a tax increase still want robust infrastructure spending. And if the President were to support an increase in the gas tax, they could get a major infrastructure bill, potentially one with earmarks, to tout as they run for reelection in 2020.

Beyond perennial funding challenges, recent infrastructure proposals have focused on policies to make current funding go farther, including ways to attract new, non-federal resources to infrastructure projects and to expedite project delivery. Many of these policy changes hew to party lines.

Democrats continue to propose significant increases in direct federal spending. Republican proposals focus on attracting additional private sector investment in infrastructure with limited direct federal spending. The President's proposal offered a number of approaches to leverage limited federal funds to attract additional, new non-federal funding to infrastructure, including value capture and asset recycling – the sale of public assets to private operators - to better support private infrastructure investment.

While both Democrats and Republicans support delivering projects more quickly through streamlining federal permitting and approvals, Democrats would maintain stronger environmental protections. The President's infrastructure proposal included several project streamlining measures; this is one area in which the White House has not waited for Congress to act. Through Executive Orders, the Trump Administration has established a target to complete all necessary federal approvals and environmental reviews for major projects within 24 months.

Another broad policy issue awaiting the 116th Congress is whether to reestablish earmarks. House Republican leaders in the 115th Congress strongly opposed earmarks. Many Democrats and some Republicans have voiced support for earmarks for transportation and infrastructure projects, as long as measures are in place to increase the transparency and accountability of such spending. Supporters point to Congress' constitutional "power of the purse," and express concern that, under the earmark ban, Congress has ceded to the Executive Branch its own authority to determine how limited transportation and infrastructure dollars are spent. However, strong pockets of opposition to earmarks remain within both parties in Congress, as some members continue to deride congressionally directed spending as wasteful and ripe for fraud and abuse. With the Democrats taking the majority in the House, the earmark ban will likely be revisited, if not repealed. If the House restores earmarks, the Senate will be hard-pressed not to follow suit, although potentially with additional restrictions.

## Emerging Technologies

The next Congress will certainly face other transportation issues, including integrating emerging technologies, such as automated vehicles (AVs), into the national transportation system.

The Department of Transportation (DOT) has released three iterations of its AV policy guidance, with the just-released 3.0 version addressing all modes of surface transportation. To date, President Trump's DOT has taken a permissive approach to AV guidance, letting the industry innovate without a heavy hand. However, Transportation Secretary Elaine Chao has made it clear that she will increase oversight if she believes safety is threatened, knowing that safe operation is key to public acceptance of AV technologies. DOT's third iteration of AV guidance examined the department's role in fostering automation beyond solely passenger vehicles, such as commercial trucking, and addressed the complicated matters of privacy and cybersecurity. However, the AV guidance does not require companies testing safety-compliant vehicles on public roads to report to DOT on such testing, and compliance with the AV guidance remains voluntary.

At the same time, the National Highway Traffic Safety Administration (NHTSA) and the Federal Motor Carrier Safety Administration (FMCSA) have started a number of rulemakings to facilitate safe testing of AVs and to identify and remove hurdles to innovation found in current DOT regulations. Secretary Chao has also spoken about DOT's concern with AV technologies' effects on the workforce, noting that DOT is currently involved in a joint agency evaluation of these workforce implications.

The House has passed, but the Senate has not yet considered on the floor, legislation that would increase federal oversight of AV testing and deployment. Efforts will likely continue to pass a bill during the lame-duck session. With Democratic control of the House, any new AV legislation advanced in the House over the next two years would be expected to address Democratic calls for stronger consumer protections and safety oversight of AV testing and deployment on public roads.

## Lame-Duck Session

Action on transportation during the lame-duck session is expected to be limited to finalizing the FY 2019 Transportation-HUD appropriations bill and potentially passing long-awaited AV legislation. The 2019 spending bill is expected to honor the higher funding levels agreed to in the two-year budget deal. While safety advocates continue to push for stronger federal oversight of AV testing than provided in the Senate's American Vision for Safer Transportation through Advancement of Revolutionary Technologies (AV START) Act, bipartisan support for the promise AVs hold to address the 94% of crashes due to human behavior remains strong. The Senate is expected to try to pass AV START in the lame-duck session and send it to the House, where action before the end of the session is by no means assured.

## The 116th Congress

Congress will have several opportunities to consider infrastructure policy and funding over the next two years, and while much of this effort may focus on a large-scale infrastructure package, Congress will also consider bills to reauthorize the FAST Act and WRDA.

Yet House Democratic efforts to build bipartisan agreement with President Trump and the Republican-led Senate on infrastructure could be undermined by an aggressive agenda to investigate the actions and officials of the Trump Administration. Because the biggest challenge facing federal surface transportation programs now, and in the foreseeable future, is lack of a reliable long-term revenue source – a challenge for members of *both* political parties – we do not view a politically divided Congress as an impediment to advancing infrastructure legislation generally.

### Infrastructure Bill

After transportation stakeholders both in and out of government have spent more than a year discussing broad infrastructure spending, the next two years afford Congress the opportunity to act on legislation to fund infrastructure investment. While often touted as a tool for economic recovery and development, investing in transportation and infrastructure continues to enjoy strong public support in the current robust economy. Such support is driven in part by a President seeking to deliver on his promise to rebuild the country's infrastructure, and an incoming House Democratic majority that has identified infrastructure as one of its early priorities.

Now in control of the House, Democrats will be responsible for proposing transportation and infrastructure legislation that can secure 218 votes, rather than simply offering high-level messaging proposals without identified funding sources. House Democrats may negotiate the provisions of any infrastructure bill directly with the Trump Administration, increasing the likelihood of Senate agreement. In anticipation of his assuming the chairmanship of the Transportation and Infrastructure Committee, Ranking Member DeFazio has met with congressional liaisons at the White House to discuss an infrastructure bill and has also begun discussing potential revenue options with his Democratic colleagues on the Ways and Means Committee.

The House and Senate Democratic infrastructure proposals in the 115th Congress included large investments not just for highways and public transit, but also for railroads, ports, airports, schools, broadband access, water infrastructure, and energy projects. Once in charge, House Democrats might adopt a similar broad approach. Despite the costs of a large bill, which some Republicans might object to, significant federal funding over such a broad range of infrastructure would bring projects to every state and congressional district.

The larger the bill, the larger the spending, so identifying revenues will likely continue to be the biggest impediment to moving a broad infrastructure bill. House Democrats might be willing to pay for an infrastructure package through deficit spending, notwithstanding indications that they intend to bring back pay-as-you-go (PAYGO) discipline and the President may agree in order to realize his legislative priorities. However, Senate Republicans could object to deficit spending for infrastructure, which could force congressional Democrats and the Administration to accept a smaller bill or to adopt a gas tax or some other revenue increases. But a broad infrastructure bill – of any size – is not a certainty.

While funding levels and revenue sources will always play a role in policy decisions, we can also anticipate a number of issues transportation authorizers may face in moving the bill. In aviation, there may be efforts to address matters not fully resolved by this fall's Federal Aviation Administration (FAA) bill. With surface transportation, authorizers must decide which issues to address in the broader bill and which to save for reauthorization – or even whether the two bills can be joined. Democrats may use an infrastructure bill to reorient DOT's priorities in administering large transportation grant programs, including the Capital Investment Grant (CIG) program and the Better Utilizing Investment to Leverage Development (BUILD) grant program. A robustly funded infrastructure bill would also attract other legislation – related and unrelated – including an AV bill, should Congress not complete work on current AV legislation during the lame-duck.

### Surface Transportation Reauthorization

This Congress will also be the first time House Democrats are responsible for moving a multi-year surface transportation reauthorization in a generation, since the Intermodal Surface Transportation Efficiency Act (ISTEA) in 1991. While any large infrastructure proposal from House Democrats could rely to a large extent on deficit spending, Congress has been unwilling, in the two bills and 10 years since annual HTF spending has exceeded annual revenues, to reauthorize surface transportation programs without paying for them. There is a real possibility that Democrats will propose increasing the gas tax to fund a multi-year surface transportation bill, but it remains to be seen whether the President and Republican-controlled Senate would seriously consider such a proposal. Senator Barrasso, the chairman of the committee with jurisdiction over highway programs, has voiced significant opposition to raising the gas tax, as has Majority Leader Mitch McConnell (R-KY), who made clear he was not willing to raise the gas tax during consideration of the FAST Act. While many House Republicans support fixing the HTF revenue shortfall, they would rather establish a national VMT fee than increase the gas tax. Outgoing Chairman Shuster's proposed legislation could provide the basis for a bipartisan agreement to raise the gas tax in the short-term and transition to a VMT fee in the future.

Without a revenue solution, Congress may again be required to identify spending offsets to pay for general fund transfers for transportation programs or dramatically scale back highway trust-funded programs to align with current revenues. The FAST Act, a five-year reauthorization (which was the lengthiest in two decades), required US\$70 billion in general fund transfers, and the Congressional Budget Office estimates that the HTF shortfall will continue to grow and will average US\$20.1 billion annually between FY 2021 and FY 2026. If Congress is unable to increase HTF revenues, any surface transportation reauthorization effort would likely result in a short-term extension or a reauthorization of limited length.

Any policy changes in surface transportation reauthorization legislation may also be limited in scope. The FAST Act was largely a bipartisan effort that included both Republican and Democratic priorities. The next surface reauthorization could include changes in emphasis, such as a stronger focus on public transit and intercity passenger rail infrastructure, without major changes to the FAST Act's provisions on freight infrastructure and streamlining of project approvals. Transportation stakeholders have already made clear they will advocate that the billions of dollars in transportation program funding increases above FAST Act authorized levels provided in FY 2018 and FY 2019 should be the new baseline level of funding for the next surface transportation bill. Sustaining these higher funding levels without increased HTF revenues would widen the HTF revenue shortfall and increase the funding required to pay for a long-term reauthorization.

## Water Infrastructure

The new Congress will likely also consider the biennial WRDA reauthorization bill in the 116th Congress, providing another opportunity to enhance investment in water infrastructure across the country. Congress recently passed the 2018 WRDA reauthorization, providing federal investment for US Army Corps of Engineers water infrastructure projects, including ports, harbors, inland waterways, locks, and dams. The legislation also reauthorized the Water Infrastructure Finance and Innovation Act (WIFIA) program, which provides low-interest loans for billions of dollars in water infrastructure projects.

## Anticipated Congressional Committee Developments

### House Transportation and Infrastructure Committee

With the Democratic takeover of the House, Representative DeFazio is expected to serve as the House Transportation and Infrastructure Committee Chairman and Representative Sam Graves (R-MO) is expected to serve as the committee's ranking member. Representative Eleanor Holmes Norton (D-DC) is likely to chair the Highways and Transit Subcommittee and Representative Rick Crawford (R-AR) is expected to serve as the ranking member. Representative Grace Napolitano (D-CA) is expected to assume the position of Chairman of the Water Resources and Environment Subcommittee and Representative Garret Graves (R-LA) is expected to serve as the subcommittee's ranking member.

### Senate Environment and Public Works Committee

Senator Barrasso is expected to continue to serve as Chairman of the Senate Environment and Public Works Committee, which has jurisdiction over both highways and water infrastructure. Senator Thomas Carper (D-DE) is expected to continue to serve as the ranking member.

### Senate Banking, Housing, and Urban Affairs Committee

Whether Senator Michael Crapo (R-ID) continues to serve as Chairman of the Senate Banking Committee, which has jurisdiction over transit issues, will depend on whether he takes the gavel at the Senate Finance Committee, which would occur if Senator Grassley decides to stay as the Chairman of the Judiciary Committee. Senator Sherrod Brown (D-OH) is expected to retain his current position as the ranking member.

## Senate Commerce, Science, and Technology Committee

Senator John Thune (R-SD), current Chairman of the Senate Commerce Committee, is widely considered a favorite to replace outgoing Senate Majority Whip John Cornyn (R-TX). Should he move into this leadership position, Senator Roger Wicker (R-MS) is expected to assume the position of Chairman of the Commerce Committee, which has jurisdiction over aviation, rail, motor carrier and automotive safety, hazardous materials, and maritime issues. With Senator Bill Nelson's (D-FL) race having gone to a recount, the committee might have a new ranking member.

## Anticipated Agency Developments

There are numerous areas in which the Trump Administration can act independently from Congress to advance its transportation and infrastructure priorities, including in distributing discretionary grant awards, streamlining the federal permitting process, and revising federal regulations.

The Trump Administration has taken advantage of the wide latitude afforded DOT in awarding unprecedented amounts of funding under discretionary grant programs, i.e., the BUILD grant program (formerly TIGER), the Infrastructure for Rebuilding America (INFRA) grant program (formerly FASTLANE), and the Capital Investment Grants (CIG) program. Like preceding Administrations, the Trump DOT directs the billions of dollars provided for these discretionary grant programs each year to its priorities, which include a dramatic increase in discretionary funding awards for rural projects.

At the same time, the Administration may continue proposing reduced federal discretionary funding for multimodal and public transportation grants – particularly the CIG program – in its annual budget, as it perceives many of these projects to be of local concern with a limited federal nexus. The Republican-led Congress has rejected these proposals to date, instead providing the largest-ever federal funding for surface transportation programs in FY 2018 and mandating prompt action to advance CIG projects through the pipeline and to award grants.

Citing inefficient environmental review and permitting processes as driving up project costs and delaying much-needed infrastructure investment, the Trump Administration has made reforming such processes a cornerstone of its infrastructure efforts over the past two years. While changes to substantive environmental permitting requirements would require congressional action, there are many areas in which the Administration can implement its priorities within its executive discretion.

Acting through Executive Orders and rulemakings, the Administration has established stronger coordination among federal agencies via its One Federal Decision policy, with the aim of completing all federal environmental reviews and permit approvals within two years. This includes establishing a Memorandum of Understanding between 11 federal agencies and the Federal Permitting Improvement Steering Council to streamline the environmental review process for major infrastructure projects. Additionally, the Council on Environmental Quality has issued an advance notice of proposed rulemaking to update the procedural provisions of the National Environmental Policy Act. We expect the Administration will continue to implement the One Federal Decision policy and take further actions to streamline the federal permitting process in the coming years.

Early in her tenure, Secretary Chao expressed how burdensome federal permitting processes added unnecessarily to project costs and timelines and, thus, were a bigger hurdle to project advancement than funding constraints. Her Deputy, Jeffrey Rosen – a noted advocate for rolling back federal regulations – has taken up the mantle of regulatory reform at DOT, including by advancing the joint DOT/EPA repeal of stricter fuel efficiency standards put in place in the Obama Administration.

## Contacts

If you would like to learn more, please contact the principal authors of this section:

### **Carolina Mederos**

Principal, Washington DC  
T +1 202 457 5623  
E carolina.mederos@sqirepb.com

### **Patricia Doersch**

Partner, Washington DC  
T +1 202 457 6029  
E patricia.doersch@sqirepb.com

### **Timothy Drake**

Associate, Washington DC  
T +1 202 457 6113  
E timothy.drake@sqirepb.com



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