SQUIRE PATTON BOGGS

The Next 40 Days

What to Expect from President Trump and the 115th Congress

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Introduction

Last night, on his 40th day in office, President Donald J. Trump made his first appearance before a joint session of Congress. In his speech, he set forth his vision for what he expects to accomplish in the next 40 days and beyond.

The first time a newly elected president makes such a speech, it comes with all the trappings of a State of the Union Address, even though it formally does not qualify as one since the president has not been in office for a year and thus cannot look back, as envisioned in Article 2, Section 3, of the Constitution, to "give to Congress information of the State of the Union." But President Trump could and did look forward to "recommend for their Consideration such measures as he shall judge necessary and expedient."

In his remarks, President Trump called on Congress to "repeal and replace" the Affordable Care Act (ACA or "Obamacare"), to enact a trillion dollar infrastructure bill, to adopt comprehensive immigration reform legislation, and to adopt tax reform legislation that will make American companies more competitive and that will provide "massive tax relief for the middle class." Towards the end of the speech, he eloquently made the case for Democrats and Republicans to work together to address the needs of the American public, saying: "The time for small thinking is over. The time for trivial fights is behind us. We just need the courage to share the dreams that fill our hearts. The bravery to express the hopes that stir our souls. And the confidence to turn those hopes and dreams to action."

This was the most effective moment of President Trump's young presidency. He sought to project a more inclusive approach to governing, but in doing so he provided little detail on how Congress might achieve these ends. As a result, President Trump will likely see his personal approval ratings and perceptions of his job performance move up. (The Republican legislators in Congress who were looking to the president to use his address to break the GOP's growing intraparty logjams on health care, tax reform, and budgetary issues got little direct help from the chief executive last night.)

In the Democratic response, former Kentucky Governor Steve Beshear challenged the president and the 115th Congress in particular to address the needs of individuals who have health insurance today as a result of enactment of the Affordable Care Act. In encouraging the American public to speak out on the issue, he said: "[I]n 2010, this country made a commitment, that every American deserved health care they could afford and rely on, and we Democrats are going to do everything in our power to keep President Trump and the Republican Congress from reneging on that commitment."

As we look ahead to the next 40 days, we look back to our post-election analysis of November 10. In it, we said:

> *With the Trump victory, the only certainty about what lies ahead for the policy agenda in Washington DC is that there will be considerable uncertainty. President Trump will enter the White House as a true outsider, having never before held elected office, someone who repeatedly demonstrated an eagerness to challenge the established leadership of both political parties.*
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> *He will claim a mandate to tear up "Washington-made deals" and rules that have not yielded results for the American people. Many legislators will follow his lead. Many others will push back mightily.*
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> *We expect President Trump to approach the presidency with the same tenacity and audacity he brought to the presidential campaign. After repeatedly seeing President Trump defy expectations and prove conventional wisdom wrong, one cannot discount the possibility that the Trump approach, when applied to actual governing, could produce results.*
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> *It seems a reasonable possibility that the Trump presidency could eventually take on the now-familiar characteristics of a Trump political campaign: chaotic, messy, divisive, controversial, and often outrageous – but in the end, surprisingly effective.*

To date, it has been all of that and more, but we now move into a period in which the test of whether it has been "effective" will become apparent.

In his first 40 days in office, President Trump and Congressional Republicans already have accomplished some of the major regulatory reforms they sought through use of the Congressional Review Act (CRA). When an executive agency issues a new regulation late in a president's final year in office (a so-called "midnight" rule), Congress may disapprove it by adopting a joint resolution pursuant to the CRA. With the president's signature, the joint resolution prevents the regulation from taking effect. Prior to this year, it had been used only once. In 2001, President George W. Bush agreed with Congress to reject the ergonomics rule adopted by the Occupational Safety and Health Administration in the waning days of the Clinton Administration.

The 115th Congress already has passed, and the president has signed into law, joint resolutions overturning three rules: the Department of the Interior's Stream Protection Rule, the Security and Exchange Commission's "publish what you pay" rule, and a rule submitted by the Social Security Administration relating to the "Implementation of the NICS Improvement Amendments Act of 2007." The House has approved nearly a dozen additional joint resolutions, which are awaiting consideration by the Senate, including a Department of Labor rule relating to savings arrangements established by qualified state political subdivisions for non-governmental employees; a Department of Education rule relating to teacher preparation issues; and Bureau of Land Management regulations that establish the procedures used to prepare, revise, or amend land use plans pursuant to the *Federal Land Policy and Management Act of 1976*.

Congress will continue to consider additional joint resolutions in an effort to block other "midnight" rules adopted late in the Obama Administration. But over the next 40 days, the push will be toward enacting major health care reform, and then addressing fundamental tax reform for the first time since 1986, considering significant infrastructure spending, and potentially even embarking upon immigration reform (especially a version that begins where the Senate ended its efforts in 2007 and builds on the bipartisan work of the 113th Congress). Congress also will be waiting for the president's proposals to address trade on a bilateral basis.

But this push for legislation will bring with it renewed, even more intense partisan clashes, which already are evident as President Trump and Republicans in Congress seek to replace the Affordable Care Act and on key features of tax reform, such as the border adjustment provision embraced by the Republican House leadership. Intraparty feuding already has begun to emerge within the GOP on the health care repeal effort, and we expect to soon see intraparty and partisan fighting over government spending and the need to further increase the Treasury Department's borrowing authority when the current suspension of the nation's debt ceiling ends on March 15, 2017.

As will soon become apparent, simple majorities in the House and the Senate are not sufficient to make fundamental changes in laws that affect major sectors of the economy. As a tool, budget "reconciliation" offers strong procedural protections in moving legislation through the Senate by requiring only a simple majority vote. But the operation of the "Byrd rule" will place significant constraints on what a Republican Congress can do. In short, unless they can fashion policy proposals that will have the support of 60 Senators, President Trump and his allies on Capitol Hill will not be able to simply "repeal and replace" Obamacare and they will not be able to make permanent changes to the tax code. Nor will it be easy to reduce non-defense spending by $54 billion to fund increased military spending.

We thus will soon be reminded of a fundamental constraint built into the system by the framers of the Constitution. As George Washington is said to have reminded Thomas Jefferson, the framers created the Senate to "cool" House legislation just as a saucer is used to cool hot tea. In order to advance legislation through the Senate, with only 52 Republican Senators, President Trump and the Republican leadership will have to be willing to compromise in a body in which Democrats will have the ability to block controversial legislation with a filibuster or through points of order invoking the Byrd rule under budget reconciliation, both of which requires 60 votes to overcome.

Among President Trump's many striking characteristics is the agility he displays in continually redefining what "success" looks like with respect to his public policy aims. As perhaps the least ideological individual ever to occupy the Oval Office, he may need this flexibility as he navigates the churning legislative waters that lie ahead. But it will also continue to be a source of consternation for Republicans on Capitol Hill, who are destined to revert to intraparty squabbling on major issues in the absence of clear and specific guidance from the new leader of their party.

With this in mind, we discuss below four major areas of potential legislation: health care reform, comprehensive tax reform (including international tax reform), immigration reform, and infrastructure spending.

Health Care Policy

Republicans have railed against Obamacare since the law was enacted in 2010, fighting for legislative changes on Capitol Hill, filing legal challenges within the judicial system, and advocating its repeal on the campaign trail. When the GOP claimed the White House and maintained majorities of the House of Representatives and Senate in 2016, the call to abolish the ACA was solidified. President Trump labeled the ACA a "disaster" and symbolically signed an executive order on the day of his inauguration directing the Executive Branch to "minimiz[e] the economic burden of the Patient Protection and Affordable Care Act pending repeal."

Last night, President Trump specifically called on Congress "to repeal and replace Obamacare."

President Trump may seek to demolish the health reform law, but an overhaul will not be simple. With the slim Republican majority in the Senate, Democrats maintain enough seats to muster a filibuster to stop repeal efforts. Republicans are now focused on the option of utilizing the budget reconciliation process to address reforms on their own, but the provisions they could include would be limited to those with a budgetary impact. Moreover, Republican Party unity around a reform proposal – yet to be found – would also be essential.

The policy decisions behind a replacement plan are just as complicated as the procedural issues, with President Trump recently noting that health care is an "unbelievably complex subject." It has become apparent that President Trump and Republican leaders on Capitol Hill have no intention of repealing the ACA in full, despite continued advocacy by the conservative House Freedom Caucus. The ACA is a massive reform law with many interlocking parts, and there are numerous provisions that many Republicans tolerate or support, such as those that focus on guaranteed issue, preventing fraud and abuse, and young adult coverage. Additionally, the health care sector has spent years adjusting and implementing the law, and many aspects are now ingrained in the system.

Several lawmakers have proposed their own strategies for changing the health care law, including Senators Bill Cassidy (R-LA), Susan Collins (R-ME), and Rand Paul (R-KY), and former Representative Tom Price, prior to his nomination to become Secretary of the Department of Health and Human Services. However, the plan that has gained the most traction is the House Republicans' Blueprint, released on February 16, 2017. The Blueprint, presented by House Committee on Energy and Commerce Chairman Greg Walden (R-OR) and House Committee on Ways and Means Chairman Kevin Brady (R-TX), builds upon the House Republicans' Better Way White Paper from 2016. It states that the legislation will repeal the Medicaid expansion with a transition period, reform Medicaid with a per capita allotment, utilize state innovation grants to improve insurance markets, promote health savings accounts (HSAs), and provide a universal health care tax credit.

Reconciliation instructions in the Fiscal Year 2017 spending bill initiated a process in which the House and Senate committees with health care jurisdiction were to develop language to reduce the deficit. Draft House language from this effort was leaked on February 24, 2017.

The discussion document – dated February 10, 2017 – has been panned by groups of Republicans, and others have stressed that it is outdated and was not reviewed by key congressmen. Nevertheless, it may provide the best insight thus far into how House Republican leadership envisions health care reform.

The discussion document reiterates the Better Way White Paper's principles. It focuses heavily on Medicaid reforms, ending the expansion and abolishing the subsidies. It would put in place a per capita-based cap on Medicaid payments for medical assistance, and would provide financial assistance for states through a State Innovation Grants and Stability Program. The draft includes provisions to dismantle the individual mandate, replacing it with a penalty for individuals who do not maintain continuous insurance coverage. All of the ACA's taxes – mostly used to offset the costs of the most popular provisions, such as guaranteed issue – are scrapped; the replacement plan would instead be paid for through a limitation on employer-sponsored health coverage tax exclusions. Other provisions focus on permitting states to determine essential health benefits, ending cost-sharing reduction payments, establishing age-adjusted tax credits for health insurance, promoting the use of HSAs, and terminating the Prevention and Public Health Fund. Analysts question the cost of the leaked discussion document, as well as whether the provisions would survive Byrd rule challenges in the Senate if moved as part of a reconciliation bill.

Senate Committee on Health, Education, Labor, and Pensions (HELP) Chairman Lamar Alexander (R-TN) has reportedly taken a leadership role in Senate reform efforts and is holding discussions with fellow lawmakers and stakeholders to determine the best approach. Republican senators remain divided on how to restructure Medicaid for states that have and have not expanded the program under the ACA, and several governors have discussed the issue directly with the president. Senate Republican leadership continues to hold caucus meetings to discuss reform proposals and procedures, including the potential House Republican leadership plan.

Many lawmakers and stakeholders have been anxious for the president to provide guidance on a repeal and replacement plan. President Trump did not deliver the desired details last night, though he did continue to set out general concepts for health care reform.

He began by forcefully coming out against the individual mandate, noting that "[m]andating every American buy government-approved health insurance was never the right solution for our country." While he did not endorse the continuous coverage policy that was in the discussion document, he did state that every American will have "access" to a plan.

President Trump also set out five broad principles, which largely stress keeping the most popular sections of the ACA and ridding the legislation of the unpopular offsets:

> *First, we should ensure that Americans with pre-existing conditions have access to coverage and that we have a stable transition for Americans currently enrolled in the health care exchanges.*
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> *Second, we should help Americans purchase their own coverage, through the use of tax credits and expanded health savings accounts, but it must be the plan they want, not the plan forced on them by our government.*
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> *Thirdly, we should give our state governors the resources and flexibility they need with Medicaid to make sure no one is left out.*
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> *Fourth, we should implement legal reforms that protect patients and doctors from unnecessary costs that drive up the price of insurance and work to bring down the artificially high price of drugs and bring them down immediately.*
>
> *And finally, the time has come to give Americans the freedom to purchase health insurance across state lines.*

Building off his desire to reduce the cost of prescription drugs, President Trump pivoted from an attack on the ACA to sketch a vision of America that includes "a much brighter future," sharing the story of rare disease patient Megan Crowley and her father, John. Noting that Mr. Crowley founded the company that discovered and developed the drug that saved Megan's life, President Trump underscored the importance of removing bureaucratic roadblocks to drug development and innovation across the federal government. With the understanding that the last Congress produced a bipartisan success with the passage of legislation seeking to expedite the discovery, development, and delivery of cures to patients, President Trump may seize on Democratic support for reducing drug prices to continue to pursue pharmaceutical policy reforms. However, the president has yet to name his nominee to head the Food and Drug Administration, and an agenda that seeks reforms in the often contentious worlds of drug pricing and innovation may be a tough road for a president focused on the big picture rather than details.

House Speaker Paul Ryan (R-WI) left the chamber praising the president's speech and leadership on health reform efforts; yet, like the president, he avoided questions on cost offsets. With continued debates on reform proposals both in and outside of the Republican Party, and procedural hurdles to overcome in the Senate under budget reconciliation, the enthusiasm for repeal and replacement efforts by the Republican Party is likely to shift. While the reconciliation process, as well as health-related reauthorizations, may offer opportunities to chip away at the ACA, a wholesale repeal and replace approach is not likely to occur. Rather, Congress will most likely only be able to repair and rebrand current law.

Immigration Reform

President Trump surprised some with the call in his address to Congress for bipartisan immigration reform. But we have maintained since our post-election analysis that Trump's presidency could eventually bring action on this long-stalled issue. After addressing the issue of border security forcefully in the early part of his speech to Congress, the president went on in a later portion of the speech to issue a soaring call for action on bipartisan immigration reform, declaring:

> *Nations around the world, like Canada, Australia and many others — have a merit-based immigration system. It is a basic principle that those seeking to enter a country ought to be able to support themselves financially. Yet, in America, we do not enforce this rule, straining the very public resources that our poorest citizens rely upon. According to the National Academy of Sciences, our current immigration system costs America's taxpayers many billions of dollars a year.*
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> *Switching away from this current system of lower-skilled immigration, and instead adopting a merit-based system, will have many benefits: it will save countless dollars, raise workers' wages, and help struggling families — including immigrant families — enter the middle class.*
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> *I believe that real and positive immigration reform is possible, as long as we focus on the following goals: to improve jobs and wages for Americans, to strengthen our nation's security, and to restore respect for our laws.*
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> *If we are guided by the well-being of American citizens then I believe Republicans and Democrats can work together to achieve an outcome that has eluded our country for decades.*

The credibility President Trump has established on the right with many voters, who did not believe President Obama would enforce any immigration reform law he signed, may eventually give him the running room he needs in order to pursue and sign into law a comprehensive reform bill.

Indeed, President Trump – through both his rhetoric and early actions as president – has earned the confidence of "America First" voters in a way no president before him ever has. President Obama was unable to secure the enactment of comprehensive immigration reform because Republican distrust of his willingness to enforce the law made it impossible for him to assemble the bipartisan coalition necessary to move legislation through both chambers of Congress. President George W. Bush confronted similar challenges, and was viewed skeptically by millions on the political right when he threw his weight behind a push for enactment of immigration reform.

With his unconventional manner and considerable credibility with such voter groups, President Trump could have some running room other presidents didn't to negotiate a "grand bargain" on immigration. If President Trump signals a desire to make the issue a priority and a willingness to work with moderate Democrats, puts the issue front and center, and personally engages "gettable" legislators on the Hill – in the way he's shown an eagerness to do during the opening weeks of his presidency – the issue could return in force at some point.

Efforts to pass bipartisan immigration reform legislation in the House during the 113th Congress were further along than many realize. While the House never took up the Senate-passed bill and also never took up any bill of its own, a bipartisan group of House negotiators that included some key House conservatives worked quietly but steadily on the issue during much of 2013 and 2014, keeping the leadership teams on both sides of the aisle apprised of their progress at all times. The negotiators involved in this effort were Representatives Xavier Becerra (D-CA), John Yarmuth (D-CA), Luis Gutierrez (D-NY), Zoe Lofgren (D-CA), Sam Johnson (R-TX), Raul Labrador (R-ID), Mario Diaz-Balart (R-FL), and John Carter (R-TX). The negotiations were supported by then-House Ways and Means Committee Chairman Paul Ryan (R-WI) and then-House Speaker John Boehner (R-OH). Speaker Boehner, in turn, discussed the House effort directly at times with President Obama, seeking assurances that the White House would not oppose a House-driven bipartisan immigration reform process even if it sought to enact reform in a step-by-step fashion, rather than as one single, massive bill.

The House effort collapsed after rank-and-file House Republicans, who had gotten an earful from their constituents about President Obama's public vow to circumvent Congress and enact immigration reform unilaterally if needed, rejected a series of proposed immigration reform principles offered up for discussion by Speaker John Boehner during the annual House Republican Conference Member retreat in early 2014. But the vast majority of the objections from House Republican Members to the leadership's proposed reform principles concerned the timing of the initiative, and not the underlying policies. The substance of the proposed principles, which were intended to pave the way for step-by-step legislative action on the types of measures being contemplated by the bipartisan negotiating group, received relatively little pushback from House Republican Members.

Notwithstanding the rhetoric of the campaign and the fierce partisan reaction to the president's initial measure to restrict travel from seven countries, we see the possibility of at least a foundation being laid during the 115th Congress, with President Trump as a willing collaborator in drafting a comprehensive bill. In fact, if the White House and Congress were to look again at where the debate ended in 2007 and how much progress House negotiators made in the 113th Congress, they might find common ground later this year.

Tax Policy

Nearly three decades have passed since the last major overhaul of the U.S. tax code. Republican and Democratic policymakers agree (often for different reasons) that reform is desperately needed. Nevertheless, Congress has thus far been unable to overcome the partisan divide and come together on how to reform the nation's tax laws. *Will this Herculean task be achieved by President Trump and a Republican Congress?*

Comprehensive Tax Reform Efforts

As of the morning after the November elections, the so-called "Blueprint" issued by the House Republican leadership earlier in 2016 was the only comprehensive tax reform plan outstanding. In view of the general agreement that the election results materially increased the odds that tax reform legislation would be enacted, the Blueprint began to receive increasing attention. The advocates of reform drew comfort from the statements and proposals offered by "Candidate" Trump, which suggested that he was in general agreement with the overarching goals of the Blueprint to provide lower tax rates for individuals, a pro-competitive tax system for business, and repeal of the estate and gift taxes.

It is axiomatic that any successful effort at comprehensive tax reform requires the active and personal engagement of the president. For this reason, President Trump's speech to the joint session of the Congress last night was expected by many to contain a detailed tax reform proposal. It did not. Rather, the president merely said that his administration was in the process of "developing historic tax reform" that would help American companies be more competitive and that would provide "massive tax relief" for the middle class. Thus, while the president's commitment to tax reform appears unabated, and despite statements from Treasury Secretary Mnuchin about enacting tax reform by August, the specific plan the president must table in order to play the necessary leadership role remains over the horizon.

As a result, the focus will continue to be on the Blueprint, a narrative statement that leaves many questions unanswered while congressional staffers work to convert it into statutory language with an apparent June target date. The Blueprint's proposed reforms to the corporate income tax have attracted the most attention; that attention is well deserved because those changes are profound. In addition to dramatically lowering the corporate tax rate to 20 percent and moving toward a territorial system for taxing the business income earned abroad by U.S.-based multinationals, the Blueprint would (1) convert the income tax into a cash flow tax by allowing immediate write offs of most capital expenditures and disallowing deductions for net interest, and (2) make the new tax border adjustable so that exports would effectively be tax-exempt and imports would be subject to the new tax.It is an understatement to say that the border adjustability component of the Blueprint is controversial within the private sector. It is actively opposed by retailers and other industry groups and supported with equal enthusiasm by numerous U.S.-based exporters. For this reason, many expected that President Trump would use his speech to either support or oppose (and thus effectively bury) the border adjustment proposal. He did not. As a result, the debate over border adjustability will continue.

As of now, Congressional Democrats have remained on the sidelines, particularly in the House, where legislative action on tax reform is expected to begin following completion of action on health care.

With Republicans in control of Congress and the White House, the GOP is poised to move forward alone with comprehensive tax reform (*i.e.*, legislation the restructures both the individual and business income tax provisions of the tax code). The Republican leadership has indicated it is prepared to use a Fiscal Year 2018 budget resolution with reconciliation instructions in order to move a bill through the Senate on a straight party-line vote if necessary. But given the limits of reconciliation, including likely application of the Byrd rule, the Senate may not be able to make permanent changes to the tax code that would increase the deficit beyond the 10-year budget window. (The "Bush tax cuts" of 2001 and 2003 expired after ten years because they had been approved pursuant to reconciliation, and ultimately were largely extended permanently through the normal legislative process without the limits of reconciliation.) The potential sunset of key provisions of a comprehensive tax reform bill, as opposed to one such as the Bush rate reductions, will make the use of the reconciliation process even more problematic.

House Republicans expect to move forward with the Blueprint, but those proposals may be modified, or in some instances scrapped altogether, once President Trump tables his plan, now expected by the end of March. The Blueprint is ambitious and although the proposal appears comprehensive to the average reader, tax policymakers have acknowledged that many details need to be filled in with proposed statutory language (now expected in June) before they can move forward with the tax reform debate in earnest. Even then, they will face hundreds of decisions, on macro issues such as rates to more targeted issues such as extending the New Markets Tax Credit that expires in 2019, potentially putting a cap on the tax exemption for municipal bonds, and helping workers keep more of their earnings. As such, the question remains: can policymakers come together on tax reform? We believe it is more likely now with a unified government than if Secretary Hillary Clinton had won the election and confronted a Republican Congress. But the challenges will be significant.

Many Members of Congress believe that any tax reform package must be structured so as not to increase the long-term budget deficit, a necessary condition if the reconciliation process is in fact used. If the border adjustability proposal in the Blueprint falls by the wayside, the Blueprint will not meet this standard, which could jeopardize the prospects for a comprehensive package that dramatically lowers tax rates for individuals and businesses, and is otherwise pro-competitive. In such a scenario, and unless a comparable substitute revenue raiser is found, the result might be a more modest package that achieves little at the macro level, as the comprehensive approach could not pass muster under the reconciliation rules and would be thus but a temporary fix to a long-term problem.

It remains the hope of more than a few Members of Congress, particularly in the Senate, that comprehensive tax reform can be enacted on a bipartisan basis. Whatever the Republican-controlled House ultimately passes, it will in the absence of the use of the reconciliation process and will have to be negotiated with the Senate, including with Minority Leader Chuck Schumer and his fellow Democrats. Their priorities differ significantly in focus from the Republican proposals. Their strong minority will, under Senate rules, make Democrats key players in developing any tax reform legislation that can pass the Senate outside of the budget reconciliation process.

Given the dramatic divergence between Democratic and Republican tax policy priorities on many issues (*e.g.,* Democrats have wanted to raise taxes on upper income taxpayers and Republicans have wanted across-the-board tax cuts for taxpayers at *all* income levels), it may be difficult to achieve bipartisan consensus on a comprehensive tax reform package that addresses both individual and business income taxes and wealth transfer taxes. This, plus the uncertain future of the revenue raising border adjustment proposal, has led some to wonder where Republicans and Democrats might reach consensus.

International Tax Reform

International tax reform is a prime example of an area where compromise may be possible. Any efforts to reform the U.S. system of international taxation will, at a minimum, involve a discussion and debate of more comprehensive reforms. But for several reasons, international tax reform efforts might not be susceptible to being held hostage by those pushing for those broader reforms. For example, as noted above, House Republicans included international tax reform in their Blueprint. Moreover, in the Senate, Minority Leader Chuck Schumer has worked closely with Senator Rob Portman (R-OH) in leading the Finance Committee's work on international tax reform. His understanding of and commitment to reforming the U.S. system of international taxation will be helpful in working to construct a deal between a Trump White House and congressional Democrats. Moreover, Candidate Trump proposed leveraging tax credits to spur private infrastructure spending. To pay for these tax credits, he will need a source of revenue; from where he sits, there is no easier way to fund infrastructure than by imposing a minimum tax on prior deferrals, a tax that many congressional Democrats and Republicans have agreed to previously, at least in principle (*e.g.*, 14 percent in President Obama's Budget Proposal, 8.75 percent in the Blueprint, and ten percent in Candidate Trump's Plan).

Still, while all policymakers acknowledge that there is a clear need to reform our international tax system, successful enactment of such reforms is by no means a foregone conclusion. For example, the House Republican Blueprint would tax old deferrals at a rate of 8.75 percent to the extent held in cash or cash equivalents (other such accumulated earnings would be taxed at a rate of 3.5 percent), while Candidate Trump opted for a rate of ten percent. Democrats, however, may prove likely to be more in line with President Obama, who had proposed taxing old deferrals a rate of 14 percent and new deferrals at a rate of 19 percent.

While each of these proposals differs somewhat, we have reason to believe – especially in light of the international developments noted above and a need to fund an overhaul of the nation's infrastructure – that lawmakers will find middle ground on the rate at which deferrals are taxed. Moreover, those policymakers seeking to move from a worldwide to a territorial system of taxation will also need to determine whether to tax future deferrals, though given that neither the Blueprint nor President Trump's tax plan calls for such a tax, it seems unlikely they will do so.

While the push for international tax reform was originally driven mostly by Republicans as one of the solutions to address the increasing number of corporate tax inversions (the other being lower corporate rates), there are also a number of international developments driving policymakers to move forward with international tax reform this year. Indeed, some have acknowledged that these international developments have now also garnered the attention of Democrats, who now in principle also favor action on international tax reform. First, as numerous countries around the world move forward with implementation of the Organisation for Economic Co-operation and Development's (OECD) Base Erosion and Profit Shifting (BEPS) Project, there will continue to be increased pressure on Congress to take action to protect the U.S. tax base and prevent the U.S. tax code from becoming even less competitive as other countries update their own tax laws to be in line with global tax policy norms. Moreover, the European Commission's most-recent decision in its State aid case against Apple (resulting in a U.S. $14.5 billion judgment against the company) will serve as yet another reminder to U.S. policymakers that tax reform is needed and the desire to make the tax code more competitive remains paramount. Until recently, tax-writers have assumed that offshore profits would eventually be taxed in the U.S. This State aid ruling significantly undermines that assumption, as U.S. multinationals may choose to repatriate their offshore U.S. cash but would now be able to use a foreign tax credit to offset a significant portion (if not all) of their tax liabilities.

It is not at all certain, however, that bipartisan unity could be achieved even in the international area as some Senate Democrats may view a package such as that described above as rewarding companies that offshore jobs and avoid taxes. For example, Senator Elizabeth Warren (D-MA) has urged Democrats to avoid any sort of compromise in tax reform negotiations, arguing that "[i]nstead of bailing out the tax dodgers under the guise of tax reform, Congress should seize this moment to repair our broken tax code." Proponents of this view will make it particularly difficult for Minority Leader Schumer to craft his party's tax reform position even on a narrow bill.

Next Steps

As of now, the outlook for comprehensive tax reform remains brighter than at any time in the recent past, but enactment is by no means certain and the situation will remain especially unclear until President Trump tables his plan. The need for reform is clear. For example, in the intervening years since the last comprehensive tax reform legislation was enacted, the corporate tax rate has become among the highest in the world and its global reach is at odds with the tax policies of most of America's trading partners. The individual income tax is equally in need of significant reforms. The question is not of need, but of the political will to accomplish comprehensive reform that promotes economic growth in a fiscally responsible manner that is also perceived to be fair. We remain hopeful that such an effort can succeed, but we do not underestimate the difficulty of the task.

Transportation and Infrastructure

The challenge of revitalizing and updating the nation's transportation and infrastructure will be a focus for the 115th Congress and the Trump Administration. In his speech last night, President Trump announced that he "will be asking the Congress to approve legislation that produces a $1 trillion investment in the infrastructure of the United States — financed through both public and private capital." The president indicated that this effort will be guided by two core principles: Buy American and Hire American.

President Trump's proposal could provide significant and long-awaited opportunities for private investment in major, high-cost, revenue-supported projects. However, the question of how to fund the routine capital improvements needed to maintain and upgrade our transportation and infrastructure systems remains, as does finding sustainable, long-term sources of funding to augment or replace declining Highway Trust Fund (HTF) revenues. Even though surface transportation authorizations are in place through Fiscal Year 2020, the 115th Congress may undertake the challenge of a permanent solution.

As a slogan, "Buy American" has great appeal. But the challenge will be to define it in a way that recognizes innovation and evolving production models and includes all U.S. companies and workers, rather than having the unintended consequence of favoring some companies and workers and potentially harming others.

With the current extension of Federal Aviation Administration (FAA) programs expiring in September 2017, Congress will either have to enact an FAA reauthorization or pass another extension. The key question will continue to be whether it is possible to achieve the needed improvements to modernize the nation's air traffic control (ATC) system without fundamental reform to the FAA structure and freedom from budgetary constraints.

Finally, the transportation technological revolution is here and will continue to accelerate. The challenge for the administration, Congress, and the industry will be to develop appropriate federal requirements to protect the public while not stifling innovation. Meanwhile, the emergence of shared mobility options, different patterns of car utilization and ownership, urban revitalization, and regionalism continue to provide new opportunities for the public and private sectors to work together to invest in infrastructure improvements and to advance new technologies.

The 115th Congress faces a new and changing transportation and infrastructure landscape. We believe the coming years will present opportunities for new public and private investment in the nation's infrastructure, as well as new challenges as the public and private sectors work to strike a balance between investment and innovation, and federal oversight and requirements.

Aviation

The current short-term extension of FAA programs expires September 30, 2017. The extension continued previous funding levels and included some policy changes related to safety, security, consumer protection, and unmanned aircraft systems (UAS). Congress will again consider long-term FAA reauthorization proposals in the current Congress and will have to pass either a long-term reauthorization or another extension. The Senate and House proposals were vastly different in the 114th Congress, with the Senate's *FAA Reauthorization Act* (S. 2658) generally maintaining the status quo with various policy changes and the House's *Aviation Innovation, Reform, and Reauthorization (AIRR) Act* (H.R. 4441) providing comprehensive reform to the ATC system.

The AIRR Act would have substantially reformed FAA, removing the ATC system from FAA and creating an independent, not-for-profit corporation. It would have established a board comprised of stakeholders and system users to govern the ATC Corporation and instituted a user-fee structure for commercial passenger and cargo airlines, while FAA would have retained responsibility for safety regulation. The ATC reform proposal faced significant opposition from Democrats, House and Senate appropriators, and some Republican members of the House Ways and Means Committee. Ultimately, Congress passed a short-term extension with few policy changes.

There are several FAA programs and policies that Members of Congress will likely address in a reauthorization proposal, including modernization of the ATC system, aviation funding and spending programs, safety, and integration of UAS into the National Airspace System (NAS). Transportation security has also been an ongoing issue, particularly concerning staffing levels for the Transportation Security Administration.

We anticipate few changes in the aviation reauthorization debate in the current Congress. There is widespread agreement that the ATC system needs significant improvement and modernization. For decades, FAA has been working to modernize the ATC system, which continues to operate with technologies dating back to the 1950s. Current modernization efforts are focused on the Next Generation Air Transportation System (NextGen), which includes moving from a land-based to a satellite-based ATC system. These new technologies will deliver significant benefits, including providing fuel and time efficiencies, while reducing flight delays. However, while FAA has been implementing NextGen for more than a decade, the agency has faced significant delays and cost overruns. Much of the blame for this has been placed on the federal budget and appropriations process and federal procurement requirements. One potential solution that has been advocated by some stakeholders and Members of Congress is to reform the ATC system and remove it from FAA, which is the basis for the AIRR Act's reform proposal.

House Transportation and Infrastructure Committee Chairman Bill Shuster (R-PA) is expected to continue working to build a coalition of support for the ATC reform proposal included in the AIRR Act. In the 114th Congress, Chairman Shuster worked with a variety of stakeholder groups and Members of Congress to find solutions to their concerns regarding his proposal. These efforts led to support from the National Air Traffic Controllers Association (NATCA), the union representing air traffic controllers, among other stakeholders. However, building enough support to pass ATC reform will remain a challenge, particularly as the Republicans have a narrower majority in both the House and Senate.

Chairman Shuster may find he has additional support in the current Congress from President Trump. Recently, President Trump met with representatives from the aviation industry and said the ATC system is "totally out of whack," characterizing the current NextGen modernization effort as billions of federal dollars spent without achieving significant results.

One perennial issue Congress faces during reauthorization is aviation system funding. The aviation system collects revenue through aviation fuel taxes, ticket taxes, segment fees, and international aviation taxes. Funding is provided to airports through the Airport Improvement Program (AIP) and Passenger Facility Charges (PFCs). PFCs, which are collected by airports, are currently capped at $4.50 per ticket. While Congress has not increased the PFC cap since 2000, despite airports advocating for an increase during each recent reauthorization, the issue is likely to be debated again in the current Congress. The Senate's bipartisan FAA reauthorization bill from the 114th Congress would have increased AIP funding by $400 million per year, while the House bill included a smaller increase. An effort to increase AIP funding will likely occur again in the current Congress. President Trump has said that American airports are similar to those of "a third-world country," and specifically mentioned fixing airports as a part of his $1 trillion infrastructure proposal.

Other issues that may arise during consideration of FAA reauthorization include provisions affecting safety, the Contract Tower Program, and UAS integration. Additionally, while some safety provisions were included in the current short-term extension, such as strengthening mental health screening for pilots and requiring pilots to be trained on manual flying skills, new safety provisions will likely be considered as Congress seeks to deal with aviation incidents around the world.

The House Transportation and Infrastructure Committee has recently begun examining FAA reauthorization, holding the first two of five expected hearings on the issue. The first hearing focused on aviation manufacturing, while the second, held the day after President Trump's joint address, focused on the condition of American airports. In his address, President Trump said the nation's crumbling infrastructure would be "replaced with new roads, bridges, tunnels, airports, and railways" across the country.

Surface Transportation

Declaring that "the time has come for a new program of national rebuilding" akin to President Eisenhower's Interstate construction program, President Trump used the occasion of his first address to a joint session of Congress to call for a $1 trillion investment in the nation's crumbling transportation systems. It is important to note that the president did *not* pledge $1 trillion in direct federal funding or finance tools (such as federal loans), but instead called for support for legislation that "produces" a $1 trillion investment, showing that he apparently intends to leverage limited federal funds to attract both non-federal public funding and private investment.

One question that remains unanswered is how this infrastructure package will be paid for. The two largest revenue sources that have been identified as possibilities by some Congressional Republicans – a tax on earnings held overseas by U.S. companies and the "border adjustment tax" on imports – have both been viewed by Congressional tax-writers as ways to pay for lower tax rates – *not* infrastructure spending.

Another outstanding issue is the timing for moving infrastructure legislation. Amid struggles by Republicans in both the House and Senate to craft legislation to repeal the Affordable Care Act, reform the tax code, and pass spending bills for the remainder of FY 2017 and FY 2018, the timing of action on any large infrastructure spending bill remains uncertain.

As details about President Trump's proposal remain unclear, Senate Democrats have released their own 10-year, $1 trillion infrastructure proposal that includes significant increases in Federal grants, but without specifying how they will be funded. The Senate Democratic proposal – based on Senator Sanders' infrastructure plan offered during his Presidential campaign – has little chance of becoming law as proposed, but it will be an important messaging document as negotiations over an infrastructure proposal progress throughout the year.

The Fixing America's Surface Transportation Act (FAST Act) reaffirmed Congress's commitment to a strong federal role in surface transportation, but lawmakers did not solve the HTF's chronic revenue shortfall, instead relying on a General Fund transfer to the HTF that was offset by a patchwork of spending cuts and revenue increases, mainly unrelated to transportation. Any infrastructure bill advanced by President Trump will face this same challenge: how do you pay for it? Proposals that rely on business tax reform have not constituted a long-term revenue solution, but rather a means to pay for a bill. Transportation stakeholders – along with a few key policymakers – could use this infrastructure debate to advocate once again for a long-term revenue solution. All viable HTF revenue solutions are well known, their advantages and disadvantages long debated. So this is a question of political will. Is the political equation finally right for a genuine, long-term revenue solution, or, with an authorization bill in place for another three years, does the next Congress lack the impetus to make the politically difficult decision to increase transportation revenues?

To incentivize greater private sector investment in infrastructure, the Ross-Navarro plan that President Trump has supported offers an 82 percent tax credit designed to attract greater private equity investment in infrastructure projects and reduce project finance costs. The proposal relies on increased tax revenues from two revenue streams generated from the new infrastructure projects to offset the tax expenditure: additional wage income from construction workers and contractor profits. In some respects, the proposal reflects bipartisan priorities. President Trump's plan includes support for Build America Bonds, which are tax credit bonds that both the Obama Administration and Democrats in Congress have long supported, and which, as taxable debt, would open infrastructure projects to a broader pool of investors.

President Trump's plan also seeks to lower project costs by cutting regulatory red tape and the burdens of federal project delivery requirements. President Trump has committed to advancing infrastructure projects more quickly by streamlining federal permitting processes. President Trump recently ordered all federal agencies to identify for elimination or revision those agency rules that stifle U.S. jobs and economic growth. The president made clear he supported environmental protection and safety, but was concerned with regulations that burden U.S. competitiveness. For surface transportation projects, each of the last three major authorization bills has made incremental improvements in approval processes – without changing substantive environmental laws. So at this stage, the most meaningful improvements could require rolling back federal environmental requirements, which would likely be met with strong resistance from Congressional Democrats.

In the FAST Act, both political parties rejected the notion of refocusing federal interests to align with limited HTF revenues. Instead, the bill sought to ensure federal transportation spending is more efficient, via increased focus on project finance, tolling, and P3s; innovation; and continued project delivery reforms. The FAST Act's new formula and discretionary funding for freight projects reflect Congress's commitment, after decades of diffuse decision-making at the state and local level, to craft a nation-wide solution for critical freight and trade corridors.

States and municipalities across the country have not waited for the federal government to act. They have increasingly relied on local ballot initiatives and state-wide tax measures to raise their own revenues for transportation projects. The number of transportation ballot measures – and the revenues derived therefrom – grows each year, and this trend shows no sign of ending.

As required under the FAST Act, the U.S. Department of Transportation (DOT) this summer stood up its integrated project finance office – the Build America Bureau – to streamline federal approval of Transportation Infrastructure Finance and Innovation Act (TIFIA), Railroad Rehabilitation and Improvement Financing (RRIF) loans, and private activity bond allocations while providing technical assistance and sharing best practices in project delivery and finance. But the FAST Act recognized that finance tools are only part of the solution; even though HTF revenues are insufficient, grant funding remains essential.

Viewing states as the incubators for real-world methods to restore HTF solvency, Congress established a program to fund state efforts to test the design, implementation, and acceptance of user-based alternative revenue mechanisms. In August 2016, DOT awarded more than $14 million under this program to eight projects testing new ways to fund highway projects.

Innovation has also been the focus of recent efforts to develop and deploy autonomous vehicles (AVs). Many transportation stakeholders claim that AVs will transform the transportation system by mitigating the impacts of driver error and dramatically reducing automobile accidents, reducing traffic congestion, and expanding mobility for seniors and individuals with disabilities. Various elements of the National Highway Traffic Safety Administration's voluntary AV guidelines, which established a framework for state and federal oversight of AV development, testing, and deployment, have faced criticism from industry stakeholders and advocacy groups. Secretary of Transportation Elaine Chao has pledged to review the AV guidelines, noting the administration wants to be a catalyst for safe, efficient technologies and not an impediment. However, she noted that the AV guidelines must strike the right balance and address the legitimate public concerns about safety and privacy. AVs are certain to be a part of any larger transportation and infrastructure discussion this year. Importantly, House Transportation and Infrastructure Committee Chairman Shuster has been a strong supporter of the autonomous driving lab at Carnegie Mellon University.

The proliferation of transportation-related technologies has done more than create a new culture of shared mobility. Such innovations have made transportation – vehicles, infrastructure, and logistics – more efficient and affordable, with the promise to significantly alter transportation planning and design choices and even land use decision-making in future years.

With reauthorization of the FAST Act still a few years away, President Trump's proposal is likely to be seen by many transportation stakeholders as a key opportunity to advance their particular interests. Both Republican leaders in Congress and the Trump White House view the notion of rebuilding America's crumbling infrastructure as an area of common ground with Democrats and one with strong popular support. As a result, all parties may have little interest in taking on difficult collateral policy issues, instead focusing on ideas that can draw bipartisan support.

Water Infrastructure

President Trump's call to rebuild the nation's crumbling infrastructure undoubtedly includes the growing need for new investments in water infrastructure across the country. While crafting any infrastructure package, Congress is likely to include opportunities for investment in the country's water infrastructure, as they were recently successful in passing a bipartisan bill that addressed these very needs. In December 2016, Congress passed the bipartisan *Water Infrastructure Improvements for the Nation* (*WIIN*) *Act* (S. 612). The bill provides funding for water infrastructure projects throughout the U.S. and contains new measures to improve drinking water safety, storage, and delivery. In addition to authorizing 30 new U.S. Army Corps of Engineers projects, WIIN also contains measures to deepen U.S. ports, provide protection from flood waters, and authorize funding for rehabilitation of deteriorating infrastructure.

WIIN also contains the *Water and Waste Act of 2016*, which establishes new grant programs, financing opportunities, and technical assistance programs to support communities, particularly economically distressed ones, to pursue better-quality drinking water and improved water infrastructure. Specifically, the legislation authorizes $170 million to support Flint, MI and other communities affected by lead in their drinking water systems, of which $20 million was directed to fund the Water Infrastructure Finance and Innovation Act (WIFIA) loan program.

The legislation also establishes grant programs for testing and reducing lead contaminants from drinking water and establishes a registry for lead exposure. Among other things, WIIN authorizes a $60 million annual grant program for replacement of lead service lines, testing, planning, corrosion control, and education for communities affected by lead in their drinking water systems. Additionally, it amends the State Revolving Loan Program under the *Safe Drinking Water Act* to render planning, design, and associated preconstruction activities eligible for assistance, and reaffirmed the use of State Revolving Loan funds as security for state bonds.

The president's call for an increase in financing opportunities for infrastructure investment presents a strong pathway for the further growth of the new WIFIA loan program. Focused on major water infrastructure projects over $20 million and providing long-term, low interest loans, WIFIA can significantly begin to address the longstanding underinvestment in the nation's water infrastructure systems, while providing new, major opportunities for public private partnerships. The creation of the WIFIA program was driven by support from utilities and local governments seeking cost-effective approaches to advancing large water infrastructure projects.

Shortly following the passage of WIIN last December, Congress appropriated the full $20 million authorized in the bill to support WIFIA loans. Each dollar of WIFIA loan subsidy funding will be leveraged to support $60 in drinking water and waste water infrastructure investment. Additionally, we expect Congress to provide additional funds for the WIFIA program in the full-year funding bill for Fiscal Year 2017 as the program is authorized at $35 million this year.

The U.S. Environmental Protection Agency (EPA) published its WIFIA Notice of Funding Availability (NOFA) in January, soliciting letters of interest from prospective borrowers seeking credit assistance from the program. EPA has been conducting WIFIA information webinars to educate potential borrowers on the process of project selection, project approval, and letter of interest submissions. Given WIFIA's capacity to accelerate much-needed investment in water infrastructure by providing attractive loan terms, interest in the program from potential project sponsors is high.

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