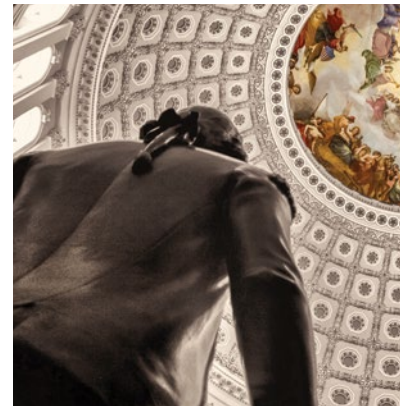


Trump Administration:

2017 Recap and 2018 Outlook



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Trump Administration: 2017 Recap and 2018 Outlook

On January 20, 2017, businessman Donald J. Trump was sworn in as the 45th President of the United States following a contentious and unconventional 2016 presidential election. Republicans also successfully maintained control of both the House and the Senate. Prior to 2017, the GOP had unified control of the legislative and executive branches for only six and a half of the past 64 years. Republican legislators, in close concert with the Trump administration, immediately set about using this historically rare opportunity to push forward long-held policy goals.

The Trump White House and congressional Republicans claimed several victories throughout the year, from passing the largest tax reform bill in more than 30 years to rolling back Obama-era regulations and successfully confirming a host of judicial nominees, including Neil Gorsuch to the Supreme Court and a first-year, recordbreaking 12 appellate court judges. Republicans also experienced a series of setbacks, despite having control of Congress and the administration. Most notably, the GOP failed in its long-term goal of repealing and replacing the Affordable Care Act (ACA). President Trump generated numerous controversies over 2017, through his statements and social media posts. All of these developments occurred as scrutiny intensified on Russian involvement in the 2016 presidential election, culminating in the naming of former Federal Bureau of Investigations Director Robert Mueller to lead a special investigation.

As we approach the first anniversary of President Trump's inauguration, this report summarizes administration and congressional activity over the past year, highlighting key regulatory and legislative developments across a range of policy areas. Further, this document previews the policy agenda for the coming year and concludes with a political update and analysis of the 2018 congressional midterm elections.

With this in mind, we have provided a lookback on policy and regulation changes and what to expect impacting:

- Agriculture
- Antitrust
- Communications and Information Technology
- Congressional Investigations
- Cybersecurity and Data Privacy
- Energy and the Environment
- Financial Services – Investment Management
- Foreign Investments
- Health Care, and Food and Drug Law
- Immigration
- International Trade
- Tax
- Transportation and Infrastructure.

Agriculture

President Trump rode to electoral victory on a wave of support from rural states. His campaign's emphasis on regulatory reform resonated among farmers and agribusinesses, despite his rhetoric on migrant labor and his criticism of free trade initiatives, which are important to the success of the agricultural economy. His performance on these issues, especially regulatory reform and trade, marked his first year in office.

Soon after taking office, his administration quickly followed through on a host of promises, including the elimination of several Obama-era regulatory measures, such as Waters of the United States. Many farm groups opposed the Obama administration's attempts to extend regulatory authority over minor water systems in rural areas, and were relieved to see the Trump Environmental Protection Agency (EPA) pull back.

But Trump also withdrew from the Trans-Pacific Partnership (TPP), a 12-country regional free trade agreement negotiated by President Obama that would have expanded market access for U.S. farm exports. The loss of preferential access to Japan was particularly concerning to the meat and grain sectors. He then launched a renegotiation of the North American Free Trade Agreement (NAFTA) with Canada and Mexico—the first and third largest export markets, respectively, for U.S. farm products—and initiated a series of executive actions aimed at the trading relationship with China, the second largest U.S. agriculture export market.

U.S. farm groups have urged the White House throughout the year to maintain the export access that they currently enjoy under NAFTA, distilling their concerns into a simple message of "do no harm."

Trump's selection of Georgia Gov. Sonny Perdue as Agriculture Secretary was welcomed in agriculture circles and brought into his cabinet an advocate familiar with the agriculture economy. Perdue's influence was

Key Highlights

- President Trump eliminated several Obama-era regulations affecting the agriculture sector, including the EPA's 2015 Waters of the United States rule.
- America's withdrawal from the TPP and renegotiation of the NAFTA generated concerns within the agriculture industry regarding potential loss of foreign market access. Industry is carefully monitoring the NAFTA renegotiation as discussions enter 2018.
- Congress will begin discussing a new Farm Bill, which will reauthorize major commodity, conservation, nutrition and other rural economy programs. Most of the 2014 Farm Bill provisions expire after September 30.
- The Trump administration could also take further action in 2018 on the Renewable Fuel Standard and crop protection products.

felt immediately, since he arrived just as the White House was considering a withdrawal from NAFTA. He reportedly used visual aids that compared a map of the electoral college, including the states won by Trump, with a similar map showing the farm states that would most negatively be affected by the withdrawal.

Like every Agriculture Secretary before him, Perdue was also confronted by natural disasters, notably hurricanes that devastated farming operations in Texas, Florida and Puerto Rico, and fires in California and Montana. As of this writing, Congress is preparing a supplemental disaster assistance package that would inject \$2.6 billion in federal assistance to farmers affected by these disasters.

Agriculture cont.

Looking ahead, U.S. farm groups are keeping their eyes on several key issues. First, farm groups are especially keen for a new Farm Bill, the legislative vehicle through which Congress reauthorizes major commodity and conservation policies, along with federal nutrition programs and a host of other rural economy measures. The current Farm Bill expires in late 2018. House and Senate leaders are already at work on a new bill. The House Agriculture Committee is expected to take up its version early in the year, with an eye to passage by March. The Senate Agriculture Committee will look to move its own version soon after the House, with a conference bill ideally ready for enactment by summer.

Key issues include potential revisions to the main row crop policies, the Price Loss Coverage and Agricultural Risk Coverage programs, as well as to the dairy safety net. Other priorities include agriculture research programs and, reductions to the Supplemental Nutrition Assistance Program. Adequate funding of federal nutrition programs, which constitute roughly two-thirds of Farm Bill dollars, is a key priority for suburban and urban Democrats, whose support is often needed to secure final passage of the Farm Bill.

Second, farm exporters continue to monitor the status of NAFTA negotiations closely. The United States already enjoys strong access to Canada and Mexico, and anxieties remain high over the threat of a U.S. withdrawal. Still, some offensive targets—particularly Canada's dairy supply management policies—are on the table, meaning that an even better deal is still possible.

If history is a guide, though, observers will not be shocked if the bill slips into 2019, requiring Congress to pass an extension of the current law.

Elsewhere in trade, farm groups are watching what their competitors in Asia, Latin America and Europe might be doing. The remaining TPP countries have reached a tentative deal to proceed without the United States. This would give farm exporters in countries such as Australia, Canada and Mexico a leg up in large and growing Asia markets, especially Japan.

Finally, farm groups also continue to monitor the administration's regulatory agenda. Key issues include administration of the Renewable Fuel Standard, as well as measures that could affect access to crop protection products already on the market and those ready for introduction.

Antitrust

Since President Trump's inauguration, antitrust has increasingly become a political issue. When a Republican president takes office, conventional wisdom is that the antitrust agencies are somewhat less likely to sue to block certain mergers. Not surprisingly then, the past year has been marked by a number of newly announced mergers in various sectors, such as CVS/Aetna, United Technologies/Rockwell Collins, Disney/21st Century Fox and Amazon/Whole Foods. Interestingly, however, antitrust has been in the news more than ever, and deals like AT&T/Time Warner are seeing challenges that were generally unexpected, especially after a Republican won the White House. Indeed, discussion of greater—not less—merger enforcement has come from Democrats and Republicans alike.

For instance, while the new leadership of the Antitrust Division of the Department of Justice (DOJ) recently spoke out about its efforts to “increase[e] the speed and reduc[e] the burden of merger reviews,”² DOJ took more than 13 months to review the proposed merger of AT&T and Time Warner and, after that review, decided in November 2017 to sue to block the deal even though it was similar to the 2011 vertical merger of Comcast and NBCUniversal approved under the Obama administration. On the eve of filing that suit, Assistant Attorney General Makan Delrahim talked about the potential negative effects on competition from vertical mergers and indicated that behavioral remedies were generally not acceptable ways to fix those negative effects. In other words, he seemed to be suggesting that greater enforcement was needed against vertical mergers, including bringing litigation to block such deals.

In parallel, and in seeming agreement, with DOJ's decision to sue to block the \$85 billion merger, Democrats in Congress revealed a new populist policy agenda, titled “A Better Deal: Better Jobs, Better Wages,

Key Highlights

- 2017 saw a wave of newly announced mergers across sectors, prompting some legislators in Congress to raise concerns over antitrust issues.
- Congressional Democrats have introduced several pieces of antitrust legislation. In the Senate, Sen. Amy Klobuchar (D-MN) put forward bills that would impose new legal standards for approval of large corporate mergers and additional changes to existing antitrust laws, including reorganizing the filing fee structure and other administrative changes.
- In the House, a group of Democratic members introduced a measure that would establish a new government entity tasked with investigating the impact of mergers and increasing market concentration.
- In the coming year, the government and public will continue to scrutinize pending mergers. Congressional Democrats are also expected to campaign on antitrust issues after including them in their policy document, titled A Better Deal.

Better Future” (hereinafter, “A Better Deal”), which focused, in part, on making sure that companies do not get too large. As part of A Better Deal, Sen. Amy Klobuchar (D-MN) introduced two bills related to antitrust issues.

The first—The Consolidation Prevention and Competition Promotion Act, S. 1812—proposes dramatically to change current antitrust law by proposing new legal standards for approval of larger corporate mergers—those greater than \$5 billion in value or involving a party with assets greater than \$10 billion. Most dramatically, the legislation would

2 Donald G. Kempf Jr., Merger Reviews: Do They Take Too Long? (November 17, 2017), <https://www.justice.gov/opa/speech/file/1012156/download>

Antitrust cont.

replace the well-established standard against mergers that would “substantially lessen” competition with a lower “materially likely” standard.

Sen. Klobuchar’s second bill—The Merger Enforcement Improvement Act, S. 1811—proposes additional, albeit more modest, changes to the current antitrust laws, including a change in the filing fee structure, requiring acquiring parties that enter into settlements with the Federal Trade Commission (FTC) or DOJ as a precondition to allowing the deal to proceed to supply significant information to the government each year for five years, and other administrative changes.

More recently, on December 19, 2017, Reps. Keith Ellison (D-MN), Pramila Jayapal (D-WA), Mark Pocan (D-WI) and David N. Cicilline (D-RI) introduced the 21st Century Competition Commission Act (H.R. 4686), which would fund the creation of a new body charged with investigating the impact of corporate mergers and increasing market concentration. The bill is purportedly designed to help existing regulatory and government agencies take stricter action to ensure market access.

Additionally, in early December, the Senate Committee on the Judiciary’s Antitrust, Competition and Consumer Rights Subcommittee held a hearing titled “The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?” The main topics were the practicality of applying a consumer welfare standard to antitrust analysis and enforcement of such a standard through executive agencies, legislation and judicial action. Several subject-matter experts testified, and both Subcommittee Chairman Mike Lee (R-UT) and Ranking Member Klobuchar actively participated in the debate.

Although it is not expected that any of the proposed legislation will move forward in the House or the Senate in 2018, the increased attention on these issues is notable. Moreover, the corporate world continues to watch both FTC and DOJ closely to see (1) who the new leadership at the FTC will be and when they will step into their roles and (2) whether DOJ will continue the aggressive enforcement record for which it has become known. With regard to the FTC, President Trump tweeted his likely initial nominees in October, but has not formally made the nominations. Even when he does, the two nominees would fill only two of three empty commissioner slots, and one or both of the current commissioners is likely to step down in the coming year. On the DOJ side, it is unclear whether there will be greater focus on vertical mergers and/or litigating horizontal mergers. The lawsuit to stop AT&T/Time Warner suggests both, but it is a very limited sample size.

Looking ahead to 2018, the outcome of several pending merger reviews, such as CVS/Aetna and Disney/21st Century Fox, and agency cases such as the FTC’s suit against Qualcomm, will likely reveal whether antitrust enforcement has largely become a non-partisan issue (despite rhetoric to the contrary) or whether there are distinct differences in how congressional Democrats and Trump antitrust appointees would enforce the antitrust laws.

Communications and Information Technology

Reversal of Net Neutrality Policy

Under the Obama administration, the Federal Communications Commission (FCC) had reclassified retail broadband Internet access service as a “telecommunications service,” which, in turn, enabled the FCC to adopt net neutrality rules that prohibited Internet providers from blocking or throttling lawful Internet traffic and from engaging in “paid prioritization” of some over others. In December, in a partisan 3-2 decision, the FCC reversed its prior action and reclassified broadband Internet access service once again as an “information” service. In so doing, the Republican-controlled FCC removed the prohibitions on blocking, throttling and paid prioritization, and retained and broadened certain disclosure requirements, requiring Internet service providers to disclose their practices related to blocking, throttling, paid prioritization and reasonable network management practices.

Sen. Ed Markey (D-MA) announced in December that he and a group of fellow senators would introduce a Congressional Review Act (CRA) resolution to undo the FCC’s decision. By mid-January, Sen. Markey secured over 40 co-sponsors for his resolution, including one Republican, Sen. Susan Collins of Maine. Senate rules require only 30 co-sponsors to bring a CRA resolution to the floor for a vote. It is possible that the measure could pass the Senate, but it would likely fail to move in the House or be signed into law by the President.

Relaxation of Media Ownership Rules

The Republican-controlled FCC took significant actions in 2017 to relax or eliminate restrictions on media ownership. In April 2017, the FCC, led by Chairman Ajit Pai, reinstated the ultra high frequency (UHF) discount (which had been eliminated under former FCC Chairman Tom Wheeler), thereby enabling television station groups to count only 50 percent of the population served by television stations using UHF channels when

Key Highlights

- In December, the FCC voted to repeal a 2015 decision to reclassify broadband Internet access as a “telecommunications service,” thereby allowing the FCC to adopt net neutrality rules.
- Throughout the year, the FCC took action to relax and rescind rules governing media ownership, including a vote to restore the UHF discount.
- The 600 MHz band incentive auctions closed in April, netting the federal government \$19.8 billion.

calculating their national ownership reach for purposes of determining a television group owner’s compliance with the FCC’s 39 percent of the population national ownership cap. In November, the FCC voted 3-2 to eliminate the newspaper/television and radio/television cross-ownership rules, as well as to relax the local television ownership rules to facilitate ownership of television duopolies in certain circumstances, finding that the media ownership rules in their current form are antiquated, given the number and variety of news sources in today’s media market. Finally, in December, the FCC initiated a rulemaking proceeding seeking comment on whether the FCC has authority to, and, if so, should modify or eliminate the 39 percent national television ownership cap (including the UHF discount).

Incentive Auction

The 600 MHz band incentive auction closed in April 2017, bringing in \$19.8 billion in gross revenue to the Federal Treasury for 70 MHz of valuable spectrum for broadband wireless use. In so doing, the FCC awarded more than \$10 billion to 175 broadcasters that voluntarily bid to relinquish their spectrum to enable the FCC to turn around and auction off 70 MHz of spectrum for

Communications and Information Technology cont.

mobile use. The auction was a first-of-its-kind opportunity for television broadcasters to sell spectrum back to the FCC. T-Mobile was the biggest winner from the auction, posting nearly \$8 billion in winning bids and acquiring an average of 31 MHz of 600 MHz spectrum nationwide. The close of the auction started a three-year process of moving nearly 1,000 television broadcast stations to new channel assignments and secondary users off of the repurposed spectrum. Congress has initially allocated \$1 billion to reimburse eligible broadcast stations for costs reasonably incurred to change channels as a result of the incentive auction.

Congressional Investigations

In the wake of the 2016 election, Republican leaders were presented with somewhat of a political contradiction: they sought to pursue aggressive deregulation and a “laissez-faire” approach toward the private sector on the one hand, and yet—from a practical, political standpoint—they needed to continue appealing to a growing “populist” conservative base that welcomes scrutiny of big business. At the beginning of 2017, it was difficult to predict just how these dueling demands would shape Congress’ investigative priorities in the 115th Congress, as well as the extent to which investigations regarding Russia would dominate the investigative landscape.

Indeed, in the first year of the Trump administration, much of the focus for Congress’ main oversight and investigative committees has concentrated on the White House and allegations regarding Russian interference in the 2016 election. Nonetheless, a number of congressional investigations in 2017 have both directly and indirectly implicated private business. For instance, Congress’ Russia investigations have triggered scrutiny of the technology sector, prompting legislators to call executives from Twitter, Google and Facebook to testify about the use of social media in the 2016 election and any resulting safeguards that have since been implemented.

Beyond the realm of the Russia investigations, investigative committees in both the House and the Senate have held a series of hearings to examine issues related to drug pricing and distribution, as well as other health policy issues and related oversight of the Food and Drug Administration (FDA) and Department of Health and Human Services (HHS). In particular, the Senate Health, Education, Labor and Pensions Committee alone has held three separate drug pricing hearings in 2017, including testimony from witnesses from various levels of the drug supply chain. Elsewhere, congressional investigative committees have held numerous hearings on other issues that directly pertain to private industry: consumer data

Key Highlights

- Committees in both chambers of Congress initiated investigations into Russian interference in the 2016 U.S. presidential election, which are expected to continue into 2018. The congressional inquiries have intensified scrutiny on President Trump’s campaign organization, as well as the technology sector.
- Lawmakers held investigative hearings on several other issues, including drug pricing, consumer data security and self-driving automobiles.
- Congressional committees are likely to continue investigating a range of issues in 2018, including the health care and pharmaceutical industries, consumer-facing financial services, government contracts and merger/antitrust matters.

security, the expansion of rural broadband, self-driving cars and intellectual property, to name a few.

Looking to 2018, current trends suggest that a few themes will continue to drive investigations and oversight through the rest of the 115th Congress. First, populist conservatives will be open to scrutinizing the private sector more than classical Republicans—especially when consumer interests are at stake. In particular, we anticipate additional investigations related to the health care/pharmaceutical industry, consumer-facing financial services, government contracts and corporate merger/antitrust issues. Second, classical conservatives will be open to scrutinizing the administration more than they typically would during a period of GOP control—a reality that may have real implications for the private sector, given the President’s (and the administration’s) extensive business ties. Finally—and no matter the political party wielding investigative subpoena power—one can safely expect that congressional investigations will also focus on hot-button policy issues, driven by both legislative priorities and the top stories driving the 2018 news cycle.

Cybersecurity and Data Privacy

Cyber breaches and threats continued to menace governmental agencies, businesses and consumers in 2017. From three billion Yahoo users whose accounts were breached, to the 145.5 million Equifax customers who had their credit files breached, risks materialized. Threats presented by ransomware, distributed denial of service (DDoS) attacks and industrial cyberattacks, in particular, continued to challenge industry and policy-makers. In May 2017, the Trump administration released an Executive Order (EO) that called on federal agencies to adopt the National Institute of Standards and Technology (NIST) Framework for Improving Critical Infrastructure Security. It also stated that the heads of agencies would be held accountable for managing cybersecurity risks.

In December, the House of Representatives moved forward the Cybersecurity and Infrastructure Security Act of 2017 (H.R. 3359), which would reorganize several divisions in the Department of Homeland Security (DHS) into one department focused on “protect[ing] and enhance[ing] the security and resilience of U.S. cybersecurity, emergency communications, and critical infrastructure.” The Senate may take up companion legislation in 2018. In recognition of the increasing role and threat posed by Internet of Things (IoT) devices, and the importance of ensuring that IoT devices purchased by the federal government provide minimum security risks, Sens. Mark Warner (D-VA), Cory Gardner (R-CO), Ron Wyden (D-OR) and Steve Daines (R-MT) introduced legislation to require vendors providing IoT devices to the federal government to, as the sponsors described it, “ensure that their devices are patchable, do not include hard-coded passwords that can’t be changed, and are free of known security vulnerabilities, among other basic requirements.”

Sens. Martin Heinrich (D-NM) and Susan Collins (R-NH) introduced legislation to provide a variety of reforms to enhance protections in the voting infrastructure, The

Key Highlights

- 2017 saw a series of corporate cybersecurity breaches. In May, President Trump signed an EO directing the federal government to adopt an enhanced framework to ensure tighter data protections.
- In Congress, lawmakers worked to increase funds for federal agencies’ cybersecurity programs, and legislators introduced legislation that would consolidate the DHS’s data security divisions into a single unit tasked with ensuring system integrity.
- In 2018, Congress is likely to continue efforts to enhance cybersecurity, including possible action on legislation to require additional safeguards in devices purchased by the federal government.

Securing America’s Voting Equipment Act. In addition, the Senate Appropriations Committee proposed funding for DHS cybersecurity efforts at levels that the appropriators themselves called “unprecedented.” The proposal would provide The National Protection and Programs Directorate with \$700 million for cybersecurity operations for 2018, or an additional \$27 million over proposed 2017 levels. There is also funding of \$3 million for pilot projects for state information-sharing efforts.

These efforts all represent loose ends that many are seeking to tie down in 2018, to not only put wins on the board, but also to promote a more secure, connected society.

Energy and the Environment

Environmental Regulation

Perhaps more than at any time in recent memory, the Trump administration made use of EOs and presidential memoranda to achieve many environmental policy goals. Through EOs, the President initiated withdrawal of the Climate Action Plan, disbanded the Interagency Working Group on Social Cost of Greenhouse Gases and withdrew the social cost of carbon metric. Subsequently, and most visibly, he announced that the United States would withdraw from the Paris Agreement, the global pact to combat climate change. He also took steps to clear the path for approval of both the Keystone XL Pipeline and the Dakota Access Pipeline, among other infrastructure projects. Most recently, the President scaled back the Bears Ears and Grand Staircase-Escalante national monuments in Utah.

Under the direction of its new administrator, Scott Pruitt, the EPA busily pursued regulatory reform, staying or rolling back more than a dozen rules, in large part targeting climate change programs. Specifically, EPA took steps to unwind the Clean Power Plan, the signature regulation in the Obama administration's attempt to reduce greenhouse gas (GHG) emissions and meet international climate commitments. The agency has stayed aspects of the Effluent Limitation Guidelines for the Steam Electric Power Generating Source Category to examine "economic achievability" of those standards. In conjunction with the National Highway Traffic Safety Administration, EPA announced that it will reconsider whether the GHG standards for model years 2022-2025 are appropriate under the Corporate Average Fuel Economy Standards. Additionally, EPA took prompt action in response to a petition from numerous industry groups to delay implementation of the Risk Management Plan Rule, promulgated at the tail end of the Obama administration. Department of Interior (DOI) Secretary Ryan Zinke took similar steps, including a lifting of the coal leasing moratorium put in place in January 2016.

Key Highlights

- In 2017, the Trump administration reversed several Obama-era decisions by withdrawing from the Paris Agreement and beginning the process of rescinding the EPA's Clean Power Plan.
- Senate confirmation of nominees provided FERC with a full complement of commissioners for the first time since 2015.
- FERC considered, but ultimately rejected, a proposed rule that would have provided revenue support for coal-fired and nuclear power stations.
- The State Department issued a crucial federal permit for the long-stalled Keystone XL Pipeline.
- Looking forward, the Trump administration is expected to continue to relax regulations on energy providers. Opponents of the President's energy agenda are likely to continue to pursue legal action against the administration.

Congress also played a role through the CRA. Although it has been used only once before, congressional Republicans used the CRA 14 times in the early days of the Trump administration to overturn agency rules, including several regulations impacting energy and environmental policy, like the DOI's Stream Protection Rule that impacted coal mining.

As the Trump administration enters its second year, energy officials across the executive branch are expected to continue to pursue regulatory relief for power producers using traditional energy sources. Opponents of the President's energy and environmental agenda will also push back. Democratic state attorneys general, as well as environmental and conservation activists, have already brought numerous legal challenges against the administration and will doubtless continue to do so in 2018.

Energy and the Environment cont.

Federal Energy Regulatory Commission

With the swearing-in of Republican Chairman Kevin McIntyre on December 7, 2017, the Federal Energy Regulatory Commission (FERC) is operating with its full complement of five commissioners for the first time since 2015. Earlier vacancies on the FERC panel have allowed President Trump to quickly reshape the agency. Chairman McIntyre, an energy lawyer, was the fourth confirmed FERC nominee from President Trump—an unusually high number of nominees for a president's first year. The other Trump-nominated commissioners include Commissioner (and, briefly, Chairman) Neil Chatterjee, a Republican and former advisor to Sen. Mitch McConnell (R-KY); Commissioner Robert Powelson, a Republican and former Chair of the Pennsylvania Public Utility Commission; and Commissioner Richard Glick, a Democrat and veteran of both Capitol Hill and industry. Cheryl LaFleur, a Democrat nominated by President Obama, rounds out the five-person panel.

FERC activity was somewhat limited during much of President Trump's first year. The agency lacked a quorum to act for roughly half of 2017 due to the resignation of former Chairman Norman Bay in February, the departure of former Commissioner Colette Honorable in June, and the slow pace of commissioner nominations and Senate confirmations that followed. The typically "under-the-radar" independent agency has not escaped public attention, however. In September, citing a relatively obscure provision of the Department of Energy Organization Act, Department of Energy (DOE) Secretary Rick Perry required FERC to consider a controversial new rule that would have reshaped power markets across the country. The proposed rule required ratepayers to provide significant revenue support to baseload generation—namely coal-fired and nuclear power stations—to recognize their value in supporting the resilience of the nation's electric grid.

Many stakeholders voiced opposition to the proposal. Opponents viewed the proposal as supporting the coal industry, which has struggled to compete in the power markets due to the relative affordability of natural gas as a fuel source for electricity generation and an expanding

market share for renewable resources (which have benefited from federal tax credits), among other factors. FERC ultimately sided with the proposal's opponents, issuing a unanimous order on January 8, 2018, finding that the DOE proposal was not legally justified. The agency will nevertheless continue to examine issues related to the resilience of the power grid and has required regional grid operators to submit reports on the topic in the coming months.

Oil and Natural Gas Pipelines

President Trump's State Department issued a crucial federal permit for the Keystone XL Pipeline in March, fulfilling one of President Trump's campaign pledges. The pipeline project, which became a rallying point for Native American tribes and environmental activists opposed to its construction, would be the fourth phase of a pipeline system carrying crude oil from Canada to the United States. More recently, the project's owner, TransCanada Corporation, received regulatory approval for Keystone XL from the Nebraska Public Service Commission, although the state commission approved a different route for the pipeline than the one preferred by the company. The future of the project remains uncertain.

Early signs suggest that the new FERC panel will continue to provide the necessary approvals for natural gas pipelines—even if doing so causes some friction with the states. FERC surprised some industry observers over the summer by determining that the State of New York had waived its authority under the Clean Water Act to issue a water quality certification for a pipeline project, which allowed the project to move forward without the state's blessing. FERC has been viewed as an advocate for pipeline infrastructure in the past. But these actions, which are the subject of ongoing litigation in federal court, suggest that FERC may become more aggressive at moving pipeline projects forward in the face of increasing resistance from environmental activists and, in some cases, unprecedented obstruction from states.

Financial Services – Investment Management

Legislative Activity

Republicans in the 115th Congress spent the year seeking to pass legislation reforming the U.S. financial system. On June 8, the House of Representatives passed the Financial Creating Hope and Opportunity for Investors, Consumers, and Entrepreneurs (CHOICE) Act, a measure that would roll back much of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). Among its key provisions, the legislation would:

- repeal the Orderly Liquidation Authority (OLA) and replace it with a new chapter of the bankruptcy code to handle the failure of large, complex financial institutions
- provide regulatory relief from Enhanced Prudential Standards (EPS) to banking organizations that maintain a minimum non-risk-weighted leverage of 10 percent
- restructure the Consumer Financial Protection Bureau (CFPB) into the Consumer Law Enforcement Agency (CLEA), subject to increased legislative oversight and congressional appropriations
- repeal the Volcker Rule
- repeal the Securities and Exchange Commission’s (SEC) power to abolish or limit securities arbitration
- repeal the Department of Labor’s (DOL) fiduciary rule.

The legislation, as passed by the House, was dead on arrival in the Senate, where the slim Republican majority and rules requiring Democratic votes to advance the measure ensured that the controversial bill would not move forward. Instead, Senate financial services began bipartisan negotiations on providing regulatory relief to smaller, community-based institutions. Senate Banking Committee Chairman Mike Crapo (R-ID) and Ranking Member Sherrod Brown (D-OH) negotiated through the fall, but talks broke down. However, Chairman Crapo ultimately introduced the Economic Growth, Regulatory

Key Highlights

- In June, the House passed the CHOICE Act, a bill that would roll back much of the 2010 Dodd-Frank Act that rewrote financial services law post-recession. The Senate is unlikely to pass the bill, pursuing smaller bipartisan reforms instead.
- Congress passed a CRA resolution that overturned the CFPB’s rule prohibiting mandatory arbitration clauses.
- The President directed the Treasury to review current financial services law and provide recommendations for improvement. Throughout the year, the Treasury released several reports detailing its findings, many of which were also included in the CHOICE Act.
- In the coming year, the Senate will fill vacancies at various financial services agencies, and Congress may send legislation to the President that would ease Dodd-Frank rules on smaller, less complex financial institutions.

Relief and Consumer Protection Act (S. 2155) in November, and the Senate Banking Committee backed the bill on December 5 on a bipartisan vote, including four Democrats on the panel voting in favor of the measure. Among other changes to current law, S. 2155 would exempt banking institutions with under \$250 billion in assets from the EPS regulatory regime. The full Senate has yet to take up the measure.

Congressional Republicans also secured a victory against the CFPB in the fall when lawmakers overturned the CFPB’s final rule banning the use of mandatory arbitration clauses using the CRA.

Financial Services – Investment Management cont.

Regulatory Reform and Executive Actions

During the 2016 U.S. presidential election, then-candidate Donald Trump frequently attacked Dodd-Frank and vowed to roll back its provisions. Following his inauguration, President Trump quickly took action on his campaign pledge. On February 3, 2017, President Trump signed an EO setting out a series of core principles for financial-sector regulation. The EO called for the Treasury to review existing laws to determine how closely they promote the stated core principles.

The Treasury delivered its first mandated report on June 12. In the document, the Treasury focuses its review on the depository system. Among its recommendations, the report called for raising asset thresholds at which institutions are subjected to EPS regulations, simplifying stress tests, reducing the number of institutions required to submit to stress tests and simplifying the Volcker Rule.

In October, the Treasury released two additional reports on the financial system. In the first report on capital markets, the Treasury notes the importance of sound capital markets and calls for streamlining disclosure requirements and tailoring those requirements to the size of the companies going public, harmonizing regulations between the SEC and the Commodity Futures Trading Commission (CFTC), and allowing rules permitting pooled investments in private and less-liquid offerings.

The second report focused on asset management and insurance markets. In the document, the Treasury recommends permitting activities-based analysis of systemic risk of asset management and insurance companies, consolidating the regulators applicable to private fund advisors, promoting the U.S. regulatory framework for asset management and insurance in international forums, limiting the restrictions on affiliates and simplifying the proprietary restrictions under the Volcker Rule, and fostering improved coordination among the Federal Insurance Office and state insurance regulatory authorities.

In addition to the Treasury reports mandated by the February 3 EO, on April 21, the White House released two presidential memoranda requiring the Treasury to review specific portions of Dodd-Frank. The first directed Treasury Secretary Steven Mnuchin to review the Financial Stability Oversight Council's (FSOC) authority to designate banks and nonbank financial firms as systemically important financial institutions (SIFI), with particular emphasis on the process that the FSOC uses in its determinations. The second memorandum calls for a review of the government's OLA by which the Federal Deposit and Insurance Corporation (FDIC) is able to carry out liquidation and wind-down financial institutions.

The Treasury released a report in November containing its analysis of FSOC's SIFI designation powers. Among its recommendations, the report calls for FSOC to conduct a cost-benefit analysis when making a determination and only designate an institution as systemically important if the benefits outweigh the costs.

Further Administration Activity

Also in 2017, the Trump administration delayed implementation of DOL's so-called fiduciary rule. Proposed by the Obama administration, the rule requires financial services professionals who advise consumers on retirement accounts to serve the "best interest" of their clients and disclose conflicts of interest. DOL initially announced a temporary 60-day delay to review the rule and eventually announced that it would delay implementation by 18 months, an action that the Office of Management and Budget (OMB) later approved.

Elsewhere on the regulatory front, the Federal Reserve Bank (the "Fed") raised the federal funds rate three separate times in 2017, with the rate ending the year at a range between 1.25 and 1.5 percent. The rate increases were a response to the improving economy and a drop in unemployment, as well as the inflation rate, which remains below the Fed's target.

Future Financial Services Issues

Looking forward, the Treasury is expected to release a fourth report containing reform recommendations for nonbank financial institutions. Moreover, the Treasury is due to release its report on OLA.

The Senate will likely take up S. 2155 early in 2018, since the measure as reported out of committee currently has sufficient support to secure a 60-vote margin.

The House would then have the opportunity to take up the bill. In a key development in 2017, the House Financial Services Committee moved a number of bills out of committee and, in some instances, through the chamber, such as a bill that would create a new office to examine banks and a bill to require the registration of proxy advisory firms. A number of such measures had significant bipartisan support. While it is too early to predict an ultimate outcome, particularly in an election year, the Houses and Senate bipartisan bills, will be worthy of attention in 2018.

Following the successful Senate confirmation of two nominees to fill the open seats at the SEC on December 21, the Senate will also continue to act on several pending nominations to posts at financial regulatory agencies. The Senate will vote, likely in January, on Jerome Powell to replace Janet Yellen as Chairman of the Fed. Powell has won bipartisan support, and his nomination was approved by the Senate Banking Committee on

December 5 on a near unanimous vote. In his role as Fed Chairman, Powell is expected to oversee several additional interest rate hikes in 2018. Other agenda items for the SEC in 2018 include the harmonization of certain rules relating to swaps with the CFTC's regulations, amendments to the Volcker Rule, amendments to its whistleblower rules and completion of its disclosure modification project.

The Senate in 2018 will also consider President Trump's yet-to-be-named nominee for CFPB director. The vacancy was created when Richard Cordray stepped down from the post in preparation for a gubernatorial run in Ohio. President Trump will select a nominee for director in 2018 for the Senate's consideration. If and when confirmed, the new director will have different priorities than former Director Cordray.

Finally, Congress will continue to focus on regulatory reform across agencies, including financial regulators. Housing finance reform will likely be considered by lawmakers, with particular attention paid to addressing the continuing conservatorship of mortgage lending giants Fannie Mae and Freddie Mac.

Foreign Investments

Foreign Investment in 2017: Heightened Scrutiny and Proposed CFIUS Reform Legislation

The Trump administration has ratcheted up scrutiny of foreign investment in the United States. Following a trend that began in the Obama administration, the Committee on Foreign Investment in the United States (CFIUS or the “Committee”) reviewed a record-breaking number of cases in 2017 and increasingly focused on Chinese investment. The Committee thwarted Chinese investments in the United States across a variety of industries and caused significant delays in other transactions that were subjected to extended reviews. Meanwhile, Congress proposed a bill with bipartisan sponsorship that would expand the scope of CFIUS jurisdiction, among other changes aimed at bolstering national security reviews of inbound deals and, significantly, outbound joint ventures of U.S. companies. The motivation for the proposed changes is largely to prevent transfers to China of emerging and other types of technologies of concern. The relevant House and Senate committees plan to hold hearings on the reform bill in early 2018. Unless something significant happens thereafter, legislative changes to CFIUS are a real possibility in 2018.

A Busy Year for CFIUS

CFIUS is an interagency committee that conducts national security reviews of mergers, acquisitions and takeovers of U.S. businesses by non-U.S. persons. The current regime provides CFIUS with jurisdiction to review “covered transactions,” which are investments that could result in foreign control of U.S. businesses. The Committee has the authority to initiate reviews of transactions, impose mitigation measures to address national security concerns and recommend that the President block pending transactions or unwind completed transactions. Parties may submit a voluntary notice to the Committee to obtain a safe-harbor clearance after the member agencies review the transaction.

Key Highlights

- CFIUS reviewed a record-breaking number of cases in 2017.
- CFIUS increasingly focused on Chinese investments, since that country continues to increase its transactions in the U.S.
- Lawmakers in both chambers introduced companion bills that would majorly reform the CFIUS process, including expanding the definition of “covered transactions” and lengthening the timeline for review.

In 2017, CFIUS received a record number of filings amid efforts to fill vacancies at both the political and career levels at the member agencies. While the number of CFIUS notices reviewed has grown steadily since 2009, CFIUS review surged by more than 20 percent from 2015 to 2016 (from 143 to 172 notices) and is believed to have reached approximately 240 notices in 2017, an increase of 40 percent. This increase in filings is attributable to a variety of factors, including an uptick in investment by foreign state-owned entities (particularly from China), sustained investment in certain sensitive sectors, the apparent rise in CFIUS scrutiny and monitoring of transactions, and uncertainty with the change in administrations. Along with staffing vacancies, these increased pressures on the Committee have caused backlogs in the review process, leading to costly and frustrating delays for parties to transactions under review.

Focus on Chinese Investment

As noted, the uptick of CFIUS scrutiny in 2017 was particularly pronounced for Chinese firms seeking to invest in the United States. China has consistently accounted for the most covered transactions by a foreign country in the CFIUS process since 2012. In addition to

the recent swell in Chinese investment, U.S. legislators and officials have expressed concern at stated Chinese national strategies, including the “Made in China 2025” and “One Belt, One Road” initiatives. This concern was reflected in trends observed with regard to CFIUS clearance of Chinese deals.

In the first half of the year, a number of transactions involving Chinese investors cleared CFIUS review. By contrast, the second half of the year was marked by a number of high-profile deals that were stalled, abandoned and even blocked. On September 13, 2017, President Trump issued an order blocking the proposed \$1.3 billion acquisition of Lattice Semiconductor Corporation by Canyon Bridge Capital Partners, a U.S.-headquartered private equity fund that reportedly received significant funding from Chinese state-owned entities. The order was only the fourth time that a president had exercised the official blocking action under the CFIUS statute. Other stalled or abandoned transactions include the attempted purchase of HERE Technologies by NavInfo, Tencent and GIC; TCL Industries’ proposed acquisition of Inseego subsidiary Novatel Wireless; Ant Financial’s abandoned attempt to acquire MoneyGram; and China Oceanwide’s continued effort to purchase Genworth.

Proposed CFIUS Reform Bill

On November 8, legislators led by Sen. John Cornyn (R-TX) pushed forward a major CFIUS reform bill, titled the Foreign Investment Risk Review Modernization Act (FIRRMA), which was followed by a companion bill introduced in the House by Rep. Robert Pittenger (R-NC). Both bills have bipartisan sponsorship and are slated for committee hearings in early 2018. The legislative proposal came after more than a year of efforts by Sen. Cornyn and others to develop CFIUS reform that would effectively address national security concerns without stifling foreign investment.

FIRRMA contains a number of provisions expanding the scope of CFIUS review and making changes to the existing CFIUS review process. Some of these noteworthy changes include:

- The definition of “covered transactions” is expanded to include:
 - the purchase or lease of real estate located in close proximity to a U.S. military installation, U.S. government facility or other property considered sensitive for national security reasons
 - noncontrolling investments in any U.S. “critical technology” business (defined broadly) or any U.S. business that is, owns, operates or primarily provides services to, an entity that operates within a “critical infrastructure” sector
 - joint ventures and other types of arrangements in which a U.S. critical technology company contributes both intellectual property and associated support to a non-U.S. person (which would cover joint ventures established outside the United States).
- Instead of a full voluntary notice, parties to a transaction may submit a short-form “declaration,” which is designed to give CFIUS enough information to decide whether further investigation is necessary. This declaration is mandatory for certain transactions, including those involving foreign state-owned entities investing above a 25 percent stake.
- The timeline for CFIUS review of a notice will be expanded to allow for an initial 45-day review period (extended from the original 30 days allotted for CFIUS review), and the Treasury Secretary will be authorized to extend the subsequent 45-day investigation period by 30 days under extraordinary circumstances (reducing the need for parties to withdraw and refile).

Foreign Investments cont.

- FIRRMA also introduces a filing fee that may not exceed an amount equal to the lesser of one percent of the value of the transaction or \$300,000, adjusted annually for inflation. This new fee will generate revenue for CFIUS for the first time, but it could discourage the voluntary submission of notices.

Secretaries Mnuchin and Mattis and Attorney General Sessions have all voiced support for the legislation. In addition, President Trump's National Security Strategy, released in December, promised that "this Administration will work with the Congress to strengthen [CFIUS] to ensure it addresses current and future national security risks." Consequently, the legislation appears to have broad support within the Trump administration.

Health Care

Legislative Efforts to Repeal and Replace the Affordable Care Act

Upon taking office, President Trump made clear that repealing the ACA would be a top priority of his administration. Republicans in the 115th Congress hoped quickly to deliver repeal and replace legislation to the President using budget reconciliation procedures that require only a 51-vote majority in the Senate. The GOP struggled to find consensus on health reform, however, failing to pass repeal legislation after numerous attempts and months of negotiations. The focus on ACA repeal also crowded out the congressional agenda, delaying consideration of other key health care priorities, such as reauthorization of the Children's Health Insurance Program (CHIP) and extension of expiring Medicare payment provisions.

The repeal effort began in January with the passage of a Fiscal Year (FY) 2017 Budget Resolution that included reconciliation instructions for ACA repeal. The House Ways and Means Committee and the House Energy and Commerce Committee subsequently released the American Health Care Act (AHCA), which would have effectively eliminated the ACA's mandates, rolled back the law's Medicaid expansion and created a system of age-based refundable tax credits for health insurance. After canceling a planned vote on the measure in late March, the House narrowly passed a revised version of the bill on May 4. The amended bill sought to win over conservatives with additional state flexibility on consumer protections and secured moderates' support with increasing funding to cover Americans with pre-existing conditions.

Following passage by the House, Senate Republicans worked to craft their own ACA repeal package, which they ultimately introduce on June 22 as the Better Care Reconciliation Act (BCRA). The bill included a number of

Key Highlights

- Despite a prolonged effort in 2017, Republicans were unable to repeal or replace the ACA in its entirety; however, repeal of the ACA's individual mandate was included in tax reform legislation enacted in late December.
- The White House made frequent use of executive authority to roll back and redirect aspects of ACA implementation.
- Heading into 2018, the health care agenda is crowded with unresolved action on FY 2018 funding, Medicare payment extenders and reauthorization of CHIP, as well as possible health insurance market-stabilization measures. Republicans also may seek to revive ACA repeal efforts and pursue broader entitlement reforms to Medicare and Medicaid through the budget reconciliation process.

significant, differences from the House-passed legislation including a slower phaseout of Medicaid expansion funding; retention of the ACA's existing premium subsidy framework; a stabilization fund to help states strengthen their individual insurance markets; and a long-term state innovation fund to help low-income individuals, who tend to be more costly to cover, purchase health insurance. Virtually immediately, a number of conservative and moderate senators expressed serious concerns with the bill. An updated draft was released on July 13, but this too failed to garner the support needed to proceed to a floor vote.

Senate leadership then shifted course and resolved to vote on a "skinny" repeal bill that would eliminate the individual and employer mandates, provide increased state flexibility surrounding Section 1332 State Innovation

Health Care cont.

Waivers, delay the medical device tax and increase contributions to health savings accounts (HSA). The skinny bill was intended to serve as a procedural means of advancing to House-Senate conference committee negotiations. The skinny repeal failed on a 49-51 vote in the early hours of July 28, with Republican Sens. John McCain (R-AZ), Susan Collins (R-ME) and Lisa Murkowski (R-AK) voting against the measure on both substantive and procedural grounds.

The Senate Parliamentarian ruled that the FY 2017 reconciliation instructions would expire on September 30, the end of the fiscal year. The White House urged congressional Republicans quickly to take up a new proposal from Sens. Lindsey Graham (R-SC) and Bill Cassidy (R-LA) that would have converted Medicaid and ACA exchange funding into block grants, while allowing states to opt out of many of the ACA's regulations. Senate leadership again came up short, canceling a planned vote on the Graham-Cassidy bill after three GOP senators—Rand Paul (R-KY), McCain and Collins—announced their opposition to the bill. The FY 2017 reconciliation instructions expired on September 30, and the GOP shifted its focus to taxes, passing an FY 2018 Budget Resolution as a vehicle for tax reform. House and Senate Republicans ultimately reached a consensus on tax reform legislation and secured the votes necessary to send a bill to the President for his signature. The final tax agreement repealed the ACA's individual mandate, but left its other provisions intact.

Executive Actions to Redirect ACA Implementation

Despite setbacks on repealing the ACA, the White House made frequent use of its executive authority to affect implementation of the ACA, rolling back or refocusing many of the law's programs and initiatives. These actions were consistent with the President's January 20 EO on "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal" (EO 13765).

In April, for example, HHS released its ACA Market Stabilization Final Rule, which made changes aimed at stabilizing the individual and small group markets.

Most notably, the Final Rule shortened the 2018 open enrollment period from three months to 45 days and "affirm[ed] the traditional role of States" in overseeing health insurance markets. During the summer, the White House also announced that it would be slashing the open enrollment advertising budget by 90 percent and cutting funding to ACA Navigators.

The Trump administration took a major and controversial action in October when it decided immediately to halt cost-sharing reduction (CSR) payments, which offset the cost to insurers of reducing deductibles and copayments for individuals who meet certain income thresholds. The administration stated that it could not continue the payments, with officials basing their decision on a legal opinion from Attorney General Jeff Sessions finding that funding for the payments had not been properly appropriated. The legal status of the CSR payments remain the subject of ongoing litigation.

Also in October, President Trump signed an EO on "Promoting Healthcare Choice and Competition Across the United States." Among other things, EO 13813 directs the Secretary of Labor to consider expanding access to association health plans (AHPs) by adopting a broader interpretation of the Employee Retirement Income Security Act (ERISA), potentially allowing more employers to form AHPs. It also would allow organizations to form AHPs for the explicit purpose of offering group coverage. In addition, the order directs agencies to consider changes to increase the usability of health reimbursement arrangements (HRAs) and to allow HRAs to be used in conjunction with nongroup coverage. These recommended changes, it should be noted, are subject to the agencies' lengthy rulemaking process and likely will not take effect before mid-2018 at the earliest. The administration has already acted early this year to issue proposed regulations to broaden access to AHPs, however.

Fall also saw the release of two Interim Final Rules from HHS that expand religious and moral exemptions for employers subject to the ACA's contraception coverage mandate, which requires employers to cover

contraception without co-pays or other out-of-pocket costs for women. Additionally, rather than abolish or cut funding for the ACA's Center for Medicare and Medicaid Innovation (CMMI), the administration announced a "new direction" for the CMMI, to include a focus on market-based innovation and state-based and local initiatives.

The changes at CMMI also align with a larger push at the Centers for Medicare and Medicaid Services (CMS) to provide additional state flexibility. In March, then-HHS Secretary Tom Price sent a letter encouraging governors to seek Section 1332 State Innovation Waivers to implement high-risk pools and reinsurance programs. On July 11, the administration approved its first 1332 waiver, which was submitted by Alaska to use federal pass-through dollars to help fund a reinsurance program. CMS later approved similar waivers for Minnesota and Oregon. CMS has encouraged all states to submit Section 1115 waivers to make Medicaid program changes, such as adding work requirements or adjusting premium/contribution requirements.

Deregulation and Government Downsizing

Consistent with a broader deregulatory focus under President Trump, the pace of regulations has slowed significantly over the past year. On January 30, the President signed EO 13771, which requires federal agencies to identify for elimination two prior regulations for every new regulation issued. CMS identified at least one rule in 2017 as an EO 13771 regulatory action and several more as deregulatory actions. The Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget OMB is expanding on the order, announcing recently that it plans to finalize three deregulatory actions for each new regulatory action in 2018.

In February, the White House issued EO 13777, which requires federal agencies to review all existing regulations and identify rules for repeal, revision or replacement. According to HHS, its regulatory reform task force has made several dozen recommendations for deregulatory actions, though these have not been made public. Meanwhile, CMS announced its own "Patients

over Paperwork" initiative to hear doctors' concerns about regulatory burdens.

The administration's deregulatory actions have been accompanied by a focus on government downsizing. The White House implemented a federal hiring freeze in January, and, while the government wide freeze was lifted in April, HHS opted to keep the restrictions in place. The freeze was later lifted at the FDA, but many positions at other agencies—such as the Centers for Disease Control and Prevention (CDC)—remain vacant. The President also has sought to shrink federal agencies through budget cuts. The President's FY 2018 Budget, released in May, proposed to cut HHS funding by 17 percent, including a 17.4 percent reduction for the National Institutes of Health (NIH). However, funding the government will require 60 votes in the Senate, so the ultimate funding package will necessarily be a bipartisan effort, unlikely to include deep cuts to HHS or NIH.

Opioid Abuse and Drug Pricing Initiatives

The White House has identified the opioid crisis as a top health care priority, and in March, the President signed an EO establishing the President's Commission on Combating Drug Addiction and the Opioid Crisis. Chaired by former New Jersey Gov. Chris Christie, the Commission released an interim report in July and a final report to the President on November 1. The final report offers dozens of recommendations to the administration, such as establishing drug courts in every judicial district and increasing access to addiction treatment programs and overdose treatments. While the report itself is largely silent on funding, former Rep. Patrick Kennedy (D-RI), a member of the Commission, estimated that Congress would need to appropriate \$200 billion over 10 years to implement the recommendations.

Following a recommendation in the Commission's interim report, President Trump and HHS Acting Secretary Eric Hargan declared a public health emergency over the opioid crisis on October 26. In his remarks, the President announced a television ad campaign to fight addiction and stated that the DOJ is considering additional lawsuits against individuals and companies responsible for the

Health Care cont.

crisis. Public health and addiction experts expressed disappointment with the announcement, however, noting that the President made no mention of additional funding in his speech or in a subsequent written memorandum to agency heads.

In November, CMS finalized the Medicare Hospital Outpatient Prospective Payment System (OPPS). The rule included a nearly 30 percent reduction in payments to hospitals under the 340B Drug Discount Program. Hospitals have filed suit over the cut and are supporting legislation to block its implementation.

The administration has yet to take action on drug pricing, a key issue during President Trump's 2016 campaign. While the President made statements critical of the pharmaceutical industry in the past, a leaked draft of an EO on drug pricing outlined policies that were mostly industry-friendly. It is unclear when the final EO will be released.

The White House also has not given any indication that it will advance policies to import drugs or to allow Medicare to negotiate drug prices, despite President Trump's support for both proposals during his 2016 campaign.

On the legislative front, committees have explored the issue of drug pricing, but no significant proposals have yet been passed.

Health Care Priorities for 2018

Looking ahead, several important health care issues remain on the agenda for possible action in 2018. Notably, Congress must complete work on the pending FY 2018 appropriations bills, which are expected to move as part of a broader budget deal in February. As previously noted, repeal or delay of ACA taxes also may be addressed in that context. This package is likely to include agreement on funding levels for FY 2018 and FY 2019.

Congress will also have to address reauthorizing the CHIP program, and Congress has not yet addressed Medicare payment extenders, many of which technically

expired at the end of 2017. Congress is expected to address these early in the year, likely as part of the omnibus appropriations package. Based on prior precedent, extension of these payments may have a retroactive effect.

While President Trump urged Congress to return to broader ACA repeal efforts early in the year and to use the FY 2019 budget resolution to pass a revived Graham-Cassidy bill through the budget reconciliation process, the path to 50 votes remains uncertain, especially in what is shaping up to be a hotly contested election year. Further, Republicans' decision to include a repeal of the individual mandate in their tax reform bill actually may complicate the ACA repeal effort. Indeed, Sens. Graham and Cassidy have said that their legislation would need to be revamped in order to adjust for the loss of savings from repealing the mandate.

Eliminating the mandate also is likely to strain insurance markets further, putting increased pressure on Congress to act before the midterm elections to stabilize the markets. This may include the passage of market stabilization legislation, such as a proposal from Sens. Lamar Alexander (R-TN) and Patty Murray (D-WA) to fund CSR payments, as well as potential funding for state reinsurance programs. However, as drafted, the Congressional Budget Office (CBO) has advised that passage of the Alexander-Murray plan alone would not offset the impact on insurance markets of repealing the ACA's individual mandate.

President Trump continues to rebuke the pharmaceutical industry over high drug prices, but it is unclear whether this presages forthcoming executive action. Some reports have suggested that the President could soon sign a final EO on drug pricing. Lawmakers in Congress have expressed growing frustration over prescription drug costs, and legislative proposals to address the issue could be advanced in 2018.

There is wide agreement that additional funding will be needed for the federal government to respond effectively to the opioid epidemic. The administration

did not announce any new funding when it declared a public health emergency. Instead, the administration has indicated that it will defer to Congress on additional appropriations. With concern mounting over the crisis, additional funding to fight opioid abuse may be included in a larger spending package.

The White House reportedly plans to release its proposed FY 2019 Budget in early February. Consistent with the President's FY 2018 Budget, it is expected to propose significant cuts to federal agencies in addition to the hiring restrictions that remain in place for most of HHS.

Health Care – Food and Drug Administration

New FDA Commissioner

On May 9, 2017, the Senate voted 57-42 to confirm Scott Gottlieb, President Trump's nominee for FDA Commissioner. Commissioner Gottlieb, a former deputy commissioner at FDA under President George W. Bush, has served as an advisor and consultant to a number of pharmaceutical companies. Commissioner Gottlieb, who took the reins at FDA amid concerns over inadequate staffing and funding, announced in late May that he was lifting the hiring freeze at the agency and moving forward with filling vacancies, and he was outspoken during the summer in calling for timely reauthorization of FDA user fees. His stated priorities for FDA include updating the agency's approach toward communications about medical products; addressing access to, and affordability of, medicines; and modernizing the agency's approach to evaluating the safety and effectiveness of innovative medical products.

FDA User Fee Reauthorization

On August 3, 2017, the Senate passed legislation to reauthorize FDA user fee programs for five years. President Trump signed the legislation, the FDA Reauthorization Act of 2017 (FDARA), on August 18. The package followed nearly two years of negotiations and hearings examining the Generic Drug User Fee Amendments (GDUFA), the Biosimilar User Fee Act (BsUFA), the Prescription Drug User Fee Act (PDUFA) and the Medical Device User Fee Amendments (MDUFA). These programs comprise a significant portion of FDA's overall premarket review budget. Notably, FDARA passed and was signed into law despite comments from the President that he would like to see user fees cover the full premarket review program budget.

FDARA also contained a number of new policy provisions, which come on the heels of a broad set of policy reforms implemented in the 21st Century Cures

Key Highlights

- Scott Gottlieb, a former deputy commissioner at FDA, was sworn in as Commissioner in May.
- Following two years of negotiations, Congress passed legislation to reauthorize FDA user fee programs for five years.
- FDA is taking steps under its Drug Competition Action Plan to accelerate the approval of generic drugs.
- FDA has begun implementing a number of reforms designed to facilitate medical product development, including initiatives mandated by the 21st Century Cures Act, and these efforts will continue in 2018.

Act last December. On generic drugs, for instance, the package included a provision that provides for expedited development and review of "competitive generic therapies," defined in the provision as drugs with inadequate generic competition. Another provision directs FDA to issue status updates on pending generic applications upon request by the applicant. The legislation also requires a Government Accountability Office (GAO) study on first-cycle generic drug approvals. Several other provisions are geared toward the development of pediatric therapies. Addressing drug pricing in general, FDARA includes a Sense of Congress provision that the HHS Secretary should commit to engaging with Congress on legislative action to lower prescription drug costs. Other FDARA provisions bring greater transparency and predictability to the inspection process for medical device establishments by reforming the inspections process, allowing FDA to apply a risk-based inspection schedule, and providing for informal agency feedback on inspection observations and planned corrective action. FDARA requires FDA to

conduct pilot projects relating to the use of real-world data to support postmarket device safety.

In addition to the FDARA legislation itself, FDA's Commitment Letters for the user fee packages contain a variety of agency pledges, including enhancing communication during drug development, gathering input on issues related to using real-world evidence (RWE) in regulatory decision making, and establishing a dedicated digital health unit within the Center for Devices and Radiological Health. Many of the details of these user fee commitments and the FDARA reforms will require implementation by FDA through guidance documents over the coming months and years.

Opioids

FDA, in May, established the Opioid Policy Steering Committee (OPSC) to examine and develop additional strategies to combat the opioid crisis. In September, FDA announced that it would be expanding Risk Evaluation and Mitigation Strategy (REMS) requirements to immediate-release opioids. The REMS requires that training on safe prescribing and nonopioid alternatives be made available to providers who prescribe immediate-release opioids. In November, FDA issued final guidance to industry on the development of generic abuse-deterrent formulations (ADFs) of opioid medications. Currently there are only brand-name ADF formulations.

Drug Pricing

In June, FDA announced the first steps taken under its new Drug Competition Action Plan. The agency published a list of off-patent, off-exclusivity branded drugs for which there are no approved generics. FDA will continue to update the list to provide greater transparency and encourage competition. The agency also implemented a new policy to speed the approval of generic drug

applications, announcing that it will expedite the review of generic drugs until there are three approved generics for a given product.

Innovation

During 2017, FDA initiated an ambitious set of proposals for revamping how the agency evaluates innovative medical products. Many of these initiatives are still in the formative stage, and it remains to be seen how quickly these reforms will occur and how seismic the changes will be. With regard to medical technology, FDA has proposed a framework for a "pre-certification" program for medical software, under which pre-certified companies would have reduced premarket regulatory burdens, and it has also clarified the types of software tools that would not be subject to device regulation at all. FDA also announced a new approach to regulation of next-generation sequencing (NGS) tests and direct-to-consumer genetic health testing. The agency also began implementing a number of reforms mandated in the 21st Century Cures Act, including a special approval pathway for breakthrough medical devices and a comprehensive framework for regenerative medicine. More broadly, FDA has undertaken multicenter efforts to leverage RWE and patient engagement in the development of medical products.

Inspections

In 2017, FDA completed implementation of its Program Alignment initiative, which reorganized the Office of Regulatory Affairs (ORA) to adapt to increased specialization and globalization across all of the commodities that FDA regulates. FDA's investigators, recall specialists and many of its compliance officers are part of the 5,000-person ORA. Prior to Program

Health Care – Food and Drug Administration cont.

Alignment, ORA was organized geographically, and some of its personnel were not specialized in one commodity. So, an investigator could inspect both food and drug facilities in his or her geographic district and report to a supervisor in that district who was a device specialist. After Program Alignment, which formally took effect in May, investigators, recall specialists and compliance officers all specialize in one commodity. This reorganization provides an opportunity for ORA personnel to increase their expertise and ensures that, when firms are inspected and face compliance actions, they can interact with specialists. Removing the link between investigators and geographic districts increases ORA's flexibility to assign investigators to conduct overseas inspections. Program Alignment also encourages increased interaction between ORA and subject-matter experts in FDA's centers.

Food Safety

With a few minor modifications, FDA has continued implementing the FDA Food Safety Modernization Act of 2011 (FSMA). FSMA shifted the emphasis of food safety regulation from detection of food safety risk followed by enforcement to more elaborate rules requiring firms to implement preventive systems, with FDA overseeing those systems. Prior to the change in administration,

FDA promulgated detailed rules establishing prevention standards in many areas, including imports, produce, and manufactured human and animal food. Commissioner Gottlieb signaled an openness to reevaluate some aspects of produce regulation, but, otherwise, FDA has continued with its implementation program. Over the coming years, FDA will increase its oversight over compliance with FSMA rules, making it essential that firms have effective compliance programs.

Immigration

Buy American/Hire American

President Trump signed the Buy American/Hire American (BAHA) EO on April 18, 2017. Among other things, the order requires a review of the H-1B visa program to prevent fraud and abuse of the program. No immediate changes have been made to the H-1B program (the most common work visa program in the United States), and no regulations have been proposed to date, but DHS has announced its intent to propose regulations to reform the H-1B visa selection to prioritize higher-paid positions over lower-paid positions. This preferential system would replace the current H-1B visa lottery, where the visa applications are randomly selected by a computer program. DHS also plans to implement closer review of H-1B petitions, higher filing fees and stricter enforcement of fraud by H-1B employers.

Increased Enforcement

The Trump administration has made public its plans for greater enforcement of I-9 regulations and harsher penalties for businesses that employ undocumented workers. DHS has also announced that it would be taking a “more targeted approach” in its site visits to H-1B employers and cautioned employers not to discriminate against U.S. workers. The administration also supports a national mandate for employers to use E-Verify, the electronic system that allows employers to verify employment eligibility of their employees. Employers should expect greater scrutiny in the administration’s adjudication of employer petitions and in its enforcement of regulations governing employment of foreign workers in the United States.

Proposed Reduction in Legal Immigration

President Trump supports the Reforming American Immigration for Strong Employment (RAISE) Act, proposed legislation that is aimed at reducing the levels of legal immigration by 50 percent in the next 10 years.

Key Highlights

- President Trump signed the Buy American/Hire American Executive Order on April 18, which, among other provisions, requires a review of the H-1B visa program.
- The administration announced in 2017 that it intends to increase enforcement of I-9 regulations with harsher penalties for businesses that employ undocumented workers, and it expressed support for a national mandate for employers to use E-Verify.
- President Trump announced his support for the RAISE Act in August. The legislation seeks to reduce legal immigration by 50 percent over 10 years. The bill would also eliminate family-based immigration for family members other than spouses and minor children and would institute a points system for obtaining green cards.
- In September, the administration announced that it would rescind the Obama-era DACA program. The President called on Congress to adopt legislation granting DACA recipients legal status before March 5, 2018.
- The President instituted three travel bans barring international arrivals from several countries. The bans have been challenged in court.

Under the RAISE Act, all family-based immigration categories other than spouses and minor children of U.S. citizens and permanent residents would be eliminated. The legislation would also eliminate the current employment-based system for obtaining permanent resident status and would instead distribute all green cards based on a points system: applicants would earn points for their level of education, work experience and

Immigration cont.

English language ability, among other factors, and the top point holders would be chosen to receive green cards each year, up to the statutory maximum. If adopted, the RAISE Act or similar legislation would constitute the most significant reform of the U.S. immigration system since the current system was adopted in 1952.

DACA Rescission

On September 5, 2017, the Trump administration rescinded the June 15, 2012, memorandum that established The Deferred Action on Childhood Arrivals (DACA) program, under which undocumented immigrants who had entered the country as minors could apply for work authorization and were protected from deportation. The rescission came primarily as a response to the threat of litigation from Texas and several other states, which had prevailed in obtaining an injunction of an EO expanding DACA and providing similar protections to undocumented parents of U.S. citizens. The same states threatened to amend their suit to include a challenge to DACA if the Trump administration did not rescind it. On the date of the states' deadline, Attorney General Jeff Sessions issued a legal opinion recommending termination of DACA. The administration's rescission of DACA allowed those whose work permits expired prior to March 5, 2018, to renew them within a month of the rescission announcement, but no DACA renewals are accepted any longer. President Trump has called on Congress to adopt legislation granting DACA recipients legal immigration status prior to March 5, 2018. If no legislative solution is found by then, the rescission of DACA is likely to place a strain on the businesses that employ DACA recipients, since employers will need to separate those employees whose work permits expire. DACA recipients would also be subject to deportation if the Trump administration chooses to pursue enforcement action against them.

Ongoing negotiations by Congress related to DACA will likely be further complicated by the Trump administration's requests for additional border security funding, particularly funds for a border wall. Congress may consider DACA, border security and immigration enforcement in the same legislative package.

Contributors: Lars-Erik Hjelm, Hans Rickhoff, Maka Hutson

Travel Bans and Extreme Vetting of Visa Applicants

The Trump administration adopted three different travel suspensions in 2017, commonly referred to as "travel bans." Each travel ban superseded the previous one, and each was subject to temporary injunctions by various courts, but most of the provisions of the latest travel ban have been allowed to go forward.

Travel Ban I barred entry by citizens and nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen. It also lowered the 2017 cap for refugee admission from 110,000 to 50,000. Travel Ban II removed several of the original ban's provisions relating to Iraqi nationals and Syrian refugees, and it provided an exemption for lawful permanent residents and dual nationals, and those already in the United States and/or already in possession of a valid U.S. visa. Travel Ban II also expanded waiver provisions for individuals with significant contacts in the United States and waivers for "undue hardship" to prevent familial separation. It resulted in the Supreme Court decision to allow implementation to exclude certain refugees, but not extended family.

The latest travel ban extended the ban on issuance of new U.S. visas in most visa categories for all of the prior named countries, except Sudan; and added visa issuance restrictions on North Korea, Chad and several categories of persons from Venezuela. President Trump also issued a separate EO in October 2017, which resumed the refugee admissions program under enhanced vetting procedures that are subject to periodic agency review.

Apart from the specific consequences of the travel bans, the administration's policies have resulted in significant delays in visa issuance to many foreign applicants, including business travelers from countries other than those named in the travel bans. The administration has announced that it will continue to apply "enhanced/extreme vetting" procedures when considering visa applications. That is likely to cause further delays for visa applicants at U.S. embassies and consulates around the world.

International Trade

Trade Agreements

In compliance with the Trade Promotion Authority Act of 2015 (TPA) and repeated calls for more transparency in trade negotiations, more congressional hearings and updates to negotiating priorities as required by law are expected. Timing with respect to trade agreements is particularly important, since TPA is set to expire on July 1, 2018. To keep the “fast track” for trade deals, the President must request an extension from Congress by April 1. If extended, the fast-track authority continues until July 1, 2021.

TPP

One of Trump’s earliest kept campaign promises was removing the United States as a party of the TPP. With this decision, he also expressed that it was a bad deal for the United States and that it would be more beneficial to have bilateral partnerships with the 11 member nations. The remaining parties to the agreement, dubbed “TPP-11,” have continued with the agreement without the United States. The agreement has yet to be finalized, and, as late as November 2017, some members expressed frustration with the trade atmosphere in the United States, as Canada stalled on the agreement in the event that it would affect the ongoing NAFTA renegotiation processes. Some remaining members are now calling for Canada to leave the agreement. While it was unclear if Congress would have had the votes to ratify the agreement regardless of Trump’s decision to pull out, trade advocates are pressuring United States Trade Representative (USTR) Robert Lighthizer to use the already negotiated text from updated and new provisions, such as e-commerce, labor, environment and intellectual property rights, as starting points for any new agreements going forward. U.S. businesses and producers are also asking the administration for consideration of new trade agreements as soon as possible, since they fear that a loss of market access is already affecting their products.

Key Highlights

- President Trump withdrew from the TPP shortly after his inauguration and initiated a renegotiation of NAFTA in May. The administration has also taken steps to reopen KORUS.
- The Trump administration in 2017 indicated that it may press for reforms to the WTO.
- At the Department of Commerce, officials began antidumping and countervailing duty investigations on aluminum exports from China. Commerce is currently undertaking several investigations permitted under U.S. and international trade law, including Section 232, Section 201 and Section 301.
- Additional rounds of NAFTA renegotiations discussions are planned for 2018, and Commerce will continue its investigations into other nations’ trade practices.

NAFTA

President Trump campaigned with the promise of withdrawing from NAFTA, calling it “the worst deal ever.” As reported by the U.S. Chamber of Commerce, the top 12 states that would be most negatively affected by withdrawal all voted for Trump in the 2016 election. The Republican Party and the President’s base supporters have since urged against a withdrawal, citing predicted economic impact and touting the benefits of NAFTA. Despite opinions for or against the agreement, there is almost unanimous sentiment that the 24-year old agreement would benefit from modernization, especially with respect to the evolution of technology, including the Internet and e-commerce. The global community is also watching the NAFTA process closely, since it may be used as a model for the administration’s future trade agreements.

International Trade cont.

After serious consideration of withdrawal from the agreement at the end of April 2017, the decision was to revisit the agreement. Ambassador Lighthizer sent official letters notifying Congress of the intent to renegotiate NAFTA, as required by the TPA, on May 18, 2017. The response during the public comment period resulted in campaigns both for and against the decision, and the comment period had to be adjusted to accommodate the unprecedented 12,537 comments received. While the public hearing process on the comments is usually restricted to one hearing, the sheer volume of interest required the hearings to span over three days, with more than 130 panelists, for a total of 26 hours. The USTR released its negotiating priorities on July 17, 2017. The United States, Mexico and Canada met and agreed upon an aggressive negotiation schedule of seven rounds, starting in August and planned to end in mid-March 2018.

The first two rounds of NAFTA, negotiations in August and September, were considered largely administrative, but the third round, held in late September in Ottawa, Canada, proved to be a turning point, since U.S. negotiators seemingly took the partner countries by surprise when they proposed a five-year sunset provision in which the trade agreement would be revisited on a cyclical basis. Investors and stakeholders have noted that the uncertainty of the deal being renegotiated every five years could be a deterrent to investors.

Among the most contentious provisions so far have been Investor State Dispute Settlement (ISDS) and changing the rules of origin content requirements on autos. Under the current agreement, autos are required to be made with 62.5 percent NAFTA-sourced Regional Value Content. The United States proposed to increase the North American content requirement to 85 percent, and 50 percent of the 85 percent to be made in the United States holding true to the President's "America First" promise. These and other provisions, including government procurement, state-to-state dispute settlement, sunset provisions and seasonality on agriculture

products, have been called "poison pills" by the media, adding the thought that, if Canada and Mexico do not concede to the provisions, it would give President Trump the justification he needs to withdraw. There is a sentiment overall that the negotiations are not going well; Ambassador Lighthizer has called Canada and Mexico "difficult" in the later rounds.

The last two rounds of negotiation are slated for late January and February, and there is still much work to be done, amid growing skepticism as to whether the parties will reach an agreement. The earliest the deal can be completed is March 21, 2018, and the deadline to complete deal under TPA is April 1, 2018. Moreover, the Mexican presidential election takes place on July 1, 2018, and officials in that country hope to complete proceedings before the election.

KORUS

The Korea-U.S. Free Trade Agreement (KORUS) has also been targeted for withdrawal by President Trump. In July, the President and Ambassador Lighthizer called for a special session of the KORUS Joint Committee to discuss possibly amending or modifying the more than five-year old agreement. After two special sessions of the Joint Committee, South Korean Trade Minister Kim Hyun-chong did not agree to amend the free trade agreement and proposed a joint study on the bilateral trade deficit. Ambassador Lighthizer later announced that the two countries agreed to reopen the deal, and talks to hold amendment negotiations took place on January 5, 2018. Under the TPA, the administration does not need congressional approval on amendments and certain modifications. It is rumored that, with the growing tension of nuclear threat with North Korea, the administration's national security advisors have urged the President against withdrawal, since it would strain ties with our ally South Korea. With the completion of tax reform and the predicted turn of attention to trade, it is likely that the threats against KORUS will pick up as well.

WTO

With the recent conclusion of the Eleventh Ministerial Conference of the World Trade Organization (WTO) (“MC11”), the Trump administration raised questions about the WTO’s future as a negotiating body. Typically, the WTO ministerial conferences conclude with deliverables between the members. However, the U.S., led by Ambassador Lighthizer, refused to engage fully in MC11. He attended the conference, but left early without resolving any issues, and he made a statement that “many members recognized that the WTO must pursue a fresh start in key areas so that like-minded WTO members and their constituents are not held back by the few members that are not ready to act.” With the Trump administration refusing to engage in a system that does not put U.S. interests first, the future of the dispute-resolution side of the WTO has also been called into question. We can expect that the USTR will continue to act aggressively to investigate trade violations by U.S. trade partners.

Trade Remedies

The Department of Commerce, led by Secretary Wilbur Ross, has taken several forceful steps with President Trump in office. For the first time in 25 years, Commerce self-initiated antidumping and countervailing duty investigations on aluminum sheet from China. Commerce also issued a report as part of its antidumping investigation on aluminum foil from China, stating clearly that the United States still considers China a nonmarket economy for the purposes of U.S. antidumping law. We can expect that China, and aluminum products globally, will continue to be an area of interest, and a target for trade remedies and this administration, going forward.

Instruments and Investigations

Section 232

In the early days of his administration, President Trump tasked his cabinet secretaries to provide him with options that would crack down on what he views as unfair global trade practices that harm American interests. One of these options is the rarely used Section 232 of the 1962 Trade

Act. A Section 232 investigation is used to determine the effects of imports on national security. Currently, there are two cases—one on steel and the other on aluminum products. Commerce is tasked with the investigations and on January 11, remitted to the White House its Section 232 findings on steel, starting a 90-day period in which the President must decide whether to take action.

Section 201

Section 201 of the Trade Act of 1974 covers global safeguard investigations, which allow domestic industries that are seriously injured, or threatened with serious injury, by increased imports to petition the International Trade Commission (ITC) for import relief. There were two cases filed at the ITC in 2017—one on solar cells and modules and the other on washing machines. In early December 2017, the ITC issued its report in the solar cells and modules investigation, supporting alternative remedy proposals rather than the trade restrictions petitioned by U.S. companies. The solar industry is now bracing for final safeguard remedy determinations, likely to be made by President Trump by January 26, 2018. The statute grants significant discretion in determining remedies in a Section 201 proceeding. These remedies can consist of tariffs, tariff rate quotas or negotiations with importing countries, an option that the President has made clear he is not opposed to using. In 2018, we expect that remedies will be imposed in the two 201 cases.

Section 301

President Trump and his administration have reiterated throughout the year that the United States will take actions on China. One instrument that the administration has utilized is a Section 301 investigation on China’s intellectual property practices. A Section 301 investigation provides the administration with broad reach to discipline violations of international obligations by trading partners. The effects of these investigations will likely pave the way towards more scrutiny of foreign investment and a strengthened CFIUS. The administration is expected to release a report on its 301 investigation of China in the coming weeks.

International Trade cont.

Trade Legislation

While all of these investigations and threats have dominated the attention of the trade world, Congress has made movement on legislation, including updating the Generalized System of Preferences (GSP), which required authorization by December 31, 2017. Over the past year, Congress has also authored extensive Miscellaneous Tariff Bills (MTBs), in compliance with the American Manufacturing Competitiveness Act of 2016. The latest text was introduced in early November, and, while GSP has not historically been controversial and the revamped MTB process has made that bill noncontroversial, the White House and the USTR have refrained from taking a public position on either bill. It is likely that we will see these two pieces of legislation attached to a larger legislative vehicle sometime in the next few weeks.

Tax

Congress Passes Tax Reform

With Congress failing to repeal the ACA, pressure intensified on congressional Republicans to secure a major legislative victory in President Trump's first year in office. Consequently, GOP leaders pursued an expedited timeline to move tax reform quickly through the House and Senate using budget reconciliation. Building on months of behind-the-scenes discussions among the so-called "Big Six"—House Speaker Paul Ryan (R-WI), Senate Majority Leader Mitch McConnell (R-KY), Senate Finance Committee Chairman Orrin Hatch (R-UT), House Ways and Means Committee Chairman Kevin Brady (R-TX), Treasury Secretary Steven Mnuchin and National Economic Council Director Gary Cohn—and their joint statement in July 2017 identifying common goals, Republicans set about quickly advancing tax reform with a goal of getting a bill to the President's desk by year end.

The House and the Senate approved both of their versions of the Tax Cuts and Jobs Act (H.R. 1) on party-line votes in November, requiring a conference committee to resolve differences between the two bills. Republican conferees announced on December 12 that they had reached an agreement on a final tax reform bill. Among its many provisions, the agreed-upon legislation:

- lowers the corporate tax rate from 35 to 21 percent, effective January 1, 2018
- eliminates the corporate Alternative Minimum Tax
- allows for full and immediate expensing of the cost of certain capital expenditures (property with depreciable lives of 20 years or less, including most equipment, but not including most real property) acquired after September 27, 2017, and through 2022

Key Highlights

- On December 22, President Trump signed into law the most comprehensive tax code rewrite in more than 30 years. The law reshapes tax treatment for individuals and businesses, both foreign and domestic.
- Looking forward, Republican legislators are expected to push for technical corrections to the new tax law. This will require support from Democrats in the Senate, none of whom voted for the tax legislation.
- The Trump administration will begin to draft rules providing guidance for transitioning from the old to the new tax code.
- Congress may take up legislation to renew expired tax expenditures known as "tax extenders."
- limits the ability to deduct net interest expenses to 30 percent of the business's earnings before interest, taxes, depreciation and amortization (EBITDA) from 2018 to 2021, and then 30 percent of earnings before interest and taxes (EBIT) thereafter
- establishes a deemed repatriation rate on deferred foreign earnings of 15.5 percent on cash/cash equivalents and eight percent on noncash assets
- shifts the United States to a territorial tax system and imposes a global intangible low-taxed income (GILTI) tax and a base erosion and antiabuse tax (BEAT)
- establishes a 20 percent deduction for certain pass-through income
- maintains seven individual tax brackets with lower rates and adjusted thresholds, including a top individual rate of 37 percent

Tax cont.

- nearly doubles the standard deduction
- lowers the cap on the mortgage interest deduction from \$1 million to \$750,000
- allows up to \$10,000 in property and state/local income taxes to be deducted
- expands the Child Tax Credit.

The Senate passed the tax reform legislation on December 19, and the House followed on December 20. The President signed the legislation on December 22. Final action by the President was temporarily delayed until lawmakers passed a Continuing Resolution (CR) that included a waiver of statutory “pay-as-you-go” (or PAYGO) rules, which require automatic, across-the-board cuts to certain mandatory spending programs, including Medicare, if legislation is enacted that increases the deficit. The waiver included in the CR ensured that the cuts will not take effect.

Tax Issues Ahead

With H.R. 1 now signed into law, the next step will be for the administration to implement the changes. The bulk of the 2018 tax agenda for the Treasury and the Internal Revenue Service will focus on drafting and finalizing rules and guidance to transition the existing federal code to the new tax system created under H.R. 1, particularly for the more complex provisions of the tax law. The Treasury already released guidance on the law’s repatriation tax provisions (Section 965) and notice of regulations to come related to the application of the new provisions.

In Congress, lawmakers are expected to begin considering technical corrections to H.R. 1, although timing is unclear. Rules governing legislation to make technical corrections are very tight, potentially setting up conflicts between the two parties. Senate Republicans are also likely to need at least nine Senate Democrats to help pass a technical corrections package. Beyond corrections that are truly technical in nature, there will also likely be

discussions around more policy-oriented fixes that may be needed, particularly to address any unintended or unanticipated consequences of tax reform, given how quickly it moved through the legislative process.

In addition to continued regulatory and congressional action on tax reform, lawmakers will also consider whether to renew a package of expired tax provisions, known as “tax extenders.” These include extenders that were in the Protecting Americans from Tax Hikes (PATH) Act, but expired at the end of 2016, as well as several tax extenders for certain renewable energy sources (often referred to as “orphaned technologies” in the extenders context) that were not included in the PATH Act. Chairman Hatch released legislation to extend these provisions on December 20, but, in the House, Chairman Brady expressed some resistance to taking up a tax extenders package. Nevertheless, Chairman Brady indicated that his committee would further discuss how to move forward on tax extenders in January. Congress may also consider using the tax extenders vehicle to move forward provisions from H.R. 1 that were ultimately removed from the tax reform bill for violating Senate reconciliation rules.

Transportation and Infrastructure

Infrastructure Legislation

President Trump said during his campaign, and since taking office, that modernizing the nation's infrastructure is one of his administration's key priorities. There is broad consensus regarding the need for greater infrastructure investment. According to the World Economic Forum, the United States ranks 12th out of 138 countries in overall infrastructure quality, and the American Civil Society of Engineers gave the United States a grade of D+ on infrastructure in its 2017 Infrastructure Report Card. The question, however, is how to pay for additional spending.

The White House released a fact sheet in May that outlines its infrastructure proposal. The administration proposes to spend \$200 billion over 10 years, which it says will leverage \$1 trillion in total spending. The proposal includes \$15 billion for transformational projects, \$100 billion for locally prioritized projects and \$25 billion for rural projects. The administration would prioritize projects that leverage substantial nonfederal funds from either private investment or state and local revenues (including gas and sales tax measures), except in rural areas, where such leverage is not possible. The administration also would expand low-cost financing options, including under the Department of Transportation (DOT) and EPA. The proposal also would expedite projects by streamlining the environmental review and permitting process.

Although the White House previously said that it would release its comprehensive infrastructure proposal in 2017, it now has said that it will do so in January 2018. It is expected to be about 70 pages long and have a significant focus on environmental streamlining and reducing regulatory red tape, but it also will include a more robust discussion of funding and financing proposals. The White House is not expected to identify new revenues to pay for additional infrastructure investment. Instead, it continues to propose that Congress

Key Highlights

- President Trump is expected to make transportation and infrastructure development a key agenda item in his second year, and the administration is slated to release an outline of its infrastructure proposals in early 2018.
- In 2017, lawmakers probed autonomous vehicle issues, and both chambers took action on legislation establishing testing and deployment guidelines for such vehicles. Congress is expected to take further action on this legislation in 2018.
- In September, legislators provided a short-term reauthorization of the FAA until March 31, 2018. Transportation leaders in Congress will spend the next few months negotiating a long-term FAA authorization bill, though lawmakers will need to reach a consensus on controversial issues, such as ATC privatization, that have thus far stymied efforts to secure a long-term deal.

fund its infrastructure proposal by cutting funding for other programs. Republicans and Democrats in Congress have resisted such efforts. While there is bipartisan support for infrastructure investment in both houses of Congress, the question remains whether Congress can achieve consensus on an approach to raise new revenues. It is not clear whether House Transportation and Infrastructure Committee Chairman Bill Shuster's (R-PA) retirement announcement will affect efforts to pass infrastructure legislation. Chairman Shuster has said that he will focus on passing infrastructure legislation in his final months in office; he has been a vocal supporter of increased spending on infrastructure. Movement on an infrastructure bill is expected, but it is not yet clear whether Congress can pass infrastructure legislation that includes new revenue this year.

Transportation and Infrastructure cont.

Autonomous Vehicles

A broad range of stakeholders with interests in autonomous vehicles spent much of 2017 working on advancing legislation that would establish a process for testing and deploying these vehicles on public roads. In September, the House passed its version of autonomous vehicle legislation, the Safely Ensuring Lives Future Deployment and Research in Vehicle Evolution Act (SELF DRIVE Act, H.R. 3388). The Senate Commerce Committee introduced its version, the American Vision for Safer Transportation through Advancement of Revolutionary Technologies Act (AV START Act, S. 1885), in September and passed it out of committee in November. That vote, however, was conditioned on an agreement among senators to continue to work on addressing concerns regarding federal oversight, the process for ensuring vehicle safety, privacy and cybersecurity, and other concerns. The GAO, in a report released in December, noted some of these concerns and found that DOT's lack of a comprehensive plan and an appropriately skilled workforce presented challenges for the safe introduction of autonomous vehicles.

There is bipartisan support and broad consensus among stakeholders that autonomous vehicles offer life-saving and other transformative opportunities, and all parties are expected to continue to work together to forge a path forward in 2018 to advance autonomous vehicle legislation.

Federal Aviation Administration Reauthorization

The current Federal Aviation Administration (FAA) authorization was slated to expire on September 30, 2017. Congress was not able to pass a new reauthorization package in advance of the deadline, so it was forced to pass a six-month extension of the current authorization with H.R. 3823, the Disaster Tax Relief and Airway Extension Act of 2017.

Neither the Senate bill, titled the FAA Reauthorization Act of 2017 (S. 1405), nor the House bill, titled the 21st

Century Aviation Innovation, Reform, and Reauthorization (AIRR) Act (H.R. 2997), have advanced from their respective committees to a floor vote. The Senate bill has largely been held up because Minority Leader Chuck Schumer (D-NY) objected to a provision included in the bill by Senate Commerce, Science and Transportation Committee Chairman John Thune (R-SD) that would provide flexibility from the current requirement that pilots receive 1,500 hours of flight time before qualifying as commercial pilots. Chairman Thune sought to provide opportunities for pilots to qualify, in addition to flight time, including credit for classroom time and time in a simulator, in an effort to address the pilot shortage. The 1,500-hour requirement arose after the 2009 Colgan Air plane crash in Buffalo, New York, and Sen. Schumer, who represents New York, is opposed to any relief from the provision. Recently, Chairman Thune said that he may consider dropping the pilot training provision so that he can advance the bill, especially if Transportation Secretary Elaine Chao follows through on addressing the issue through regulation.

The House bill has not been brought to the floor for a vote because of a lack of consensus regarding Chairman Shuster's proposal to transfer the Air Traffic Control (ATC) system to a private, nonprofit corporation. While many members support the proposal as an opportunity to expedite ATC modernization, others are concerned regarding the function of the corporation and the fees that will be charged to system users. Long a passion of Chairman Shuster, the plan gained momentum when President Trump publicly endorsed ATC privatization. If Chairman Shuster is able to secure enough votes to pass the bill with ATC reform and the Senate passes its bill, the House and Senate would have to reconcile the bills before March 31. Since some members of the Senate are opposed to ATC reform, it is not clear how the bills would be reconciled. It also remains unclear whether and when Chairman Shuster would pivot from the plan for ATC reform if he cannot secure the votes. For these reasons, Congress may be forced to extend current law, either temporarily or until the next Congress.

2017 Congressional Statistics

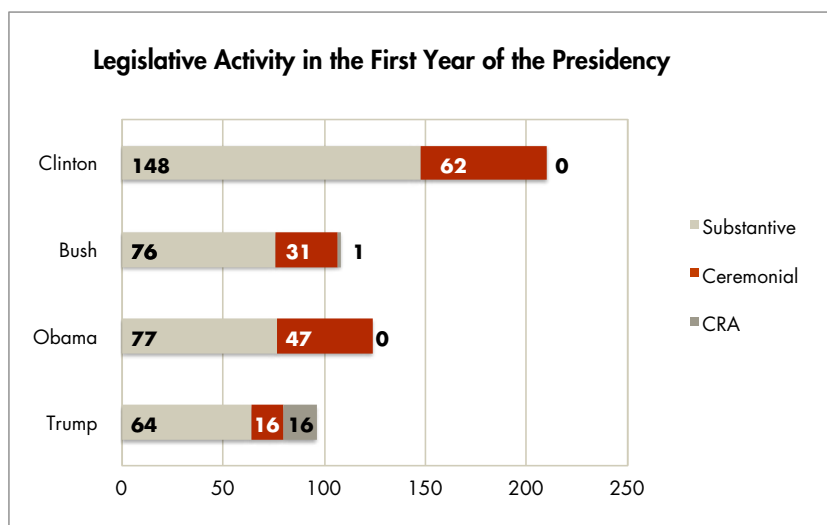
Introduction

Like most everything else in politics last year, Congress' accomplishments defy easy characterization. In the final days of the first session of the 115th Congress, House and Senate Republicans passed the most significant legislation of the year, narrowly avoiding closing out 2017 with few significant legislative achievements to its record. Yet, all year the Senate was busy reversing Obama-era regulations and confirming President Trump's judicial nominees, though it lagged in receiving and confirming nominations to serve in the President's administration. Ultimately, Congress' legislative activity in 2017 was notable for its once-in-a-generation tax reform, repeal of the Affordable Care Act's individual mandate, opening of the Arctic National Wildlife Refuge (ANWR) for new energy sources, an unprecedented rollback of Obama-era federal regulations, the confirmation of Neil Gorsuch to the Supreme Court and a record number of circuit court judicial confirmations.

Across each of these achievements the tax reform legislation, regulatory rollback, and judicial confirmations is a consistent theme. All of these activities required only a simple majority for passage. The tax reform legislation passed using budget reconciliation, the regulatory rollback ushered through the procedures of the CRA and the judicial confirmations took advantage of a 2013 rule change implemented by then-Majority Leader Harry Reid (D-NV) to eliminate the 60-vote filibuster for votes confirming judges, except for Supreme Court Justices. In 2017, Senate Republicans cited the Reid precedent in voting to expand the 2013 majority rule for district and circuit court nominations to apply to Supreme Court nominations.

Legislative Output

Measuring the productivity of a Congress by the sheer number of laws that it passes is one, albeit imprecise, way to quantify its success. By this rough assessment, President Trump lags behind his most recent predecessors, who all signed more bills into law in the first year of their presidencies. Once the ceremonial bills², such as those naming post offices; authorizing commemorative coins; designating honorific days, weeks or months; and other similar acts, are subtracted from these totals, President Trump's first year is on par with the first years of Presidents Barack Obama and George W. Bush. Each signed into law approximately 80 nonceremonial, substantive bills.



² As determined by Akin Gump

2017 Congressional Statistics cont.

However, one can break down this subset of substantive bills even further. The 115th Congress made unprecedented use of the CRA to undo regulations promulgated by President Obama. Only one joint resolution of disapproval had previously been signed into law. In 2001, President Bush used the CRA to overturn a DOL rule published by the previous Clinton administration relating to ergonomics. In 2017, congressional Republicans passed, and President Trump signed into law, 15 CRA disapproval resolutions plus an additional bill repealing a rule issued jointly by the Federal Highway Administration and Federal Transit Administration. Due to the CRA, the regulatory rollback touted by President Trump is not only an achievement of executive actions taken by his administration, but also the Republican majority in Congress.

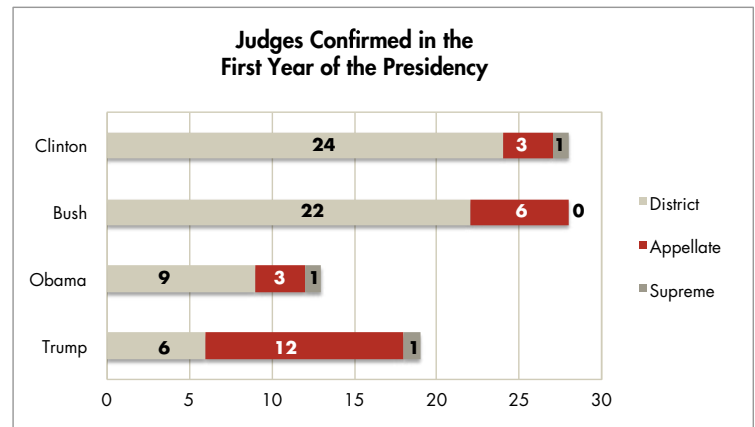
While the use of the CRA was a consequential part of the 2017 legislative accomplishments, if the 16 successful CRA resolutions are subtracted from President Trump's first year total, he signed only 64 non-ceremonial, non-deregulatory bills in his first year, placing him well under the levels of his recent predecessors.

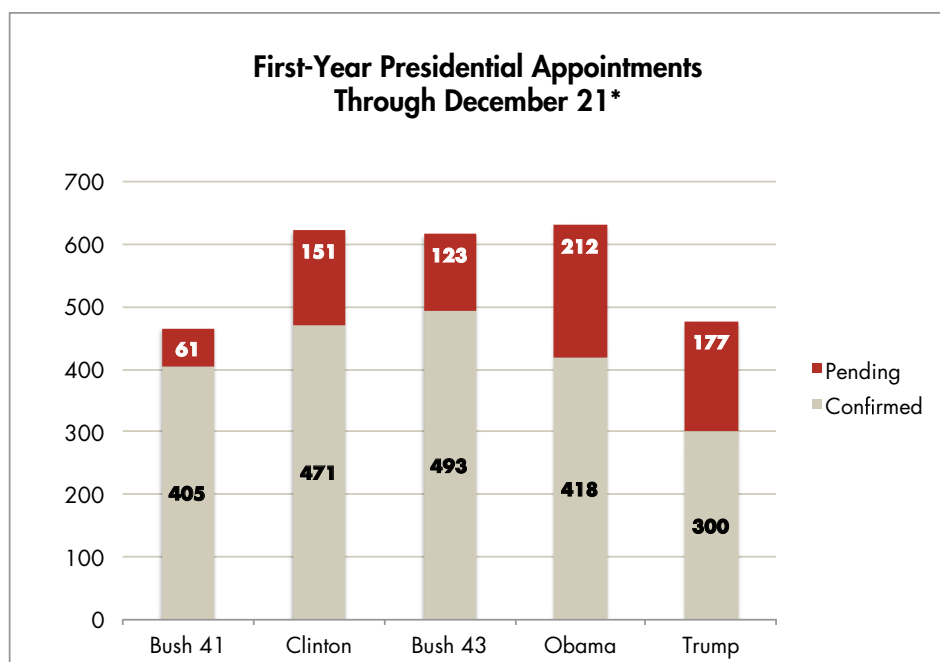
Critics argue that prior to the passage of the Tax Cuts and Jobs Act, the 115th Congress had passed into law only two other bills implementing new policy in 2017, while the remaining substantive bills either funded government operations or extended existing laws. Republicans counter by arguing that the number of separate legislative bills being signed into law is less relevant than the actual long sought-after policy achievements that made it to the President's desk in 2017, like comprehensive tax reform and opening ANWR for energy exploration.

Judicial Appointments

An area of significant achievement for the President and congressional Republicans last year is the number of judges confirmed to the federal bench. While Presidents Bill Clinton and George W. Bush each saw confirmed almost four times as many district court judges in their respective first years, last year the Senate confirmed 12 appellate court judges, a record for the number of such judges confirmed in a single year. Although only four of President Trump's 18 appellate and district court judges replaced judges appointed by Democratic Presidents, these new judges—with lifetime appointments at relatively young ages—are certain to have an impact long after the Trump presidency.

Moreover, judicial appointments will be a continued focus for the Republican majority in the Senate in 2018. There are currently 160 judicial vacancies, including 22 on the appeals courts, with 50 nominees awaiting action and many more expected to be sent up by President Trump in 2018.





Executive Branch Appointments

Unlike his success in confirming judges and Supreme Court Justice Neil Gorsuch, the President has had less success in nominating and confirming appointees to staff his administration. Out of the 1,200 positions requiring Senate confirmation, the Senate has confirmed only 300 nominees to serve in the Trump administration. By the end of their first years in office, Presidents Obama and Bush had 418 and 493 appointees confirmed, respectively.

In other words, the current administration is only now at a point in confirming its executive branch nominees that President Obama reached by the first week of August of his first year and that President George W. Bush reached by mid-September of his first year. There are two reasons for the delay. First, Senate Democrats have forced far more roll-call votes on Trump nominees than were required for Obama or Bush nominees. Second, the Trump administration sent far fewer nominees to

the Senate for confirmation. According to the White House Transition Project run by the Rice University Baker Institute for Public Policy, "President Trump has the fewest nominations and fewest confirmations in 40 years."

The consequences of slowly filling political appointments could reverberate throughout 2018. Career officials currently serving in political appointee roles in an acting capacity may have to step back from taking certain "nondelegable" functions or have their regulatory actions vulnerable to legal challenges. Moreover, it is expected and anticipated that, as a result of natural turnover in high-pressure positions, some staff appointed in 2017 will leave the administration in 2018. It is possible that the administration will be faced with filling new, as well as existing, vacancies. These continued vacancies could hinder the ability of the administration to develop and implement new policies.

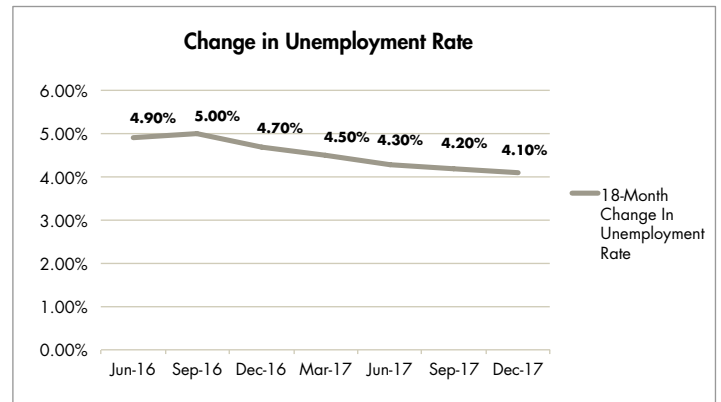
2017 Summary of Economic Activity

The President's first year in office saw continued economic growth from 2016 and, as evidenced by several indicators, the rate of growth accelerated in 2017. Unemployment continued to tick downward overall and in key subcategories. Gross domestic product growth also picked up steam. The second and third quarters of 2017 saw quarter-over-quarter growth of three percent or higher for the first time in three years. Despite the overall economic gains, wage growth was sporadic over the year when adjusted for changes in consumer prices.

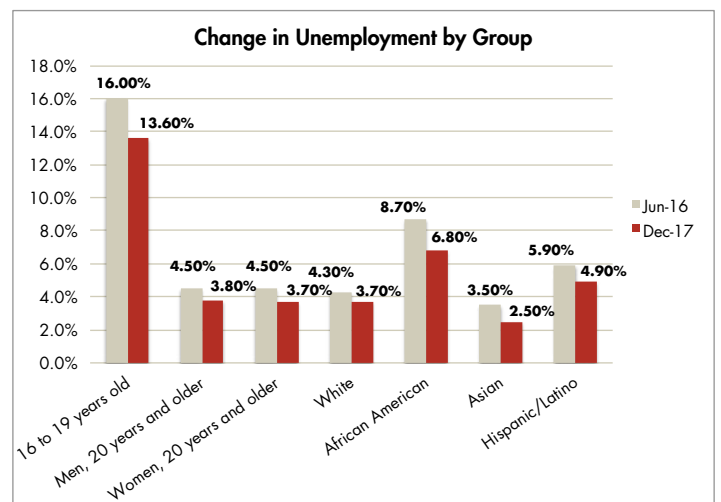
The stock market has also seen substantial gains in 2017. President Trump oversaw the largest growth in the Dow Jones Industrial Average in a president's first year in office since 1945. The Dow was around 19,900 points when the President was sworn into office and ended the year at approximately 24,700 points, with the Dow breaking through 25,000 before the end of the President's first 12 months in office.

One economic indicator to watch in 2018 is the direction of federal interest rates. The Fed is likely to continue to incrementally raise rates, with potential impacts on inflation and the rate of economic growth.

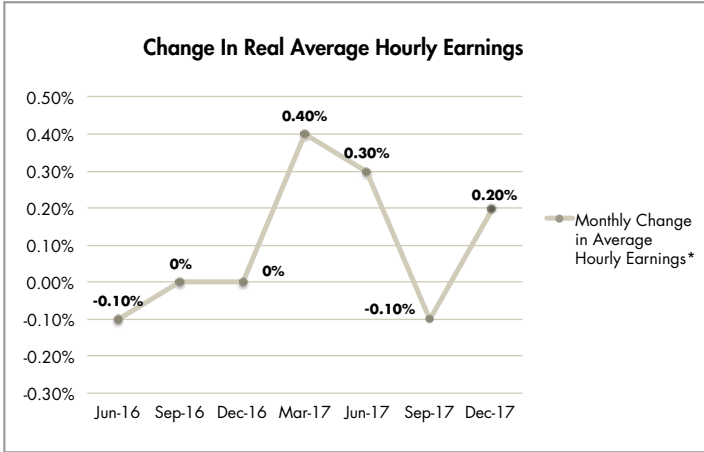
While both parties have hailed the economic success, they have attributed it to different factors. Democrats point to President Obama's economic reforms post-recession as the source of the sustained economic growth. Republicans, however, assert that the growth of the economy and stock market is a result of the successful GOP efforts to reduce regulatory burdens on businesses and the market's expectation of comprehensive tax reform. Congressional Republicans are hopeful that additional regulatory relief and the first effects of the new tax code will generate further growth as 2018 progresses and improve their odds of staving off heavy losses in a fiercely competitive midterm election.



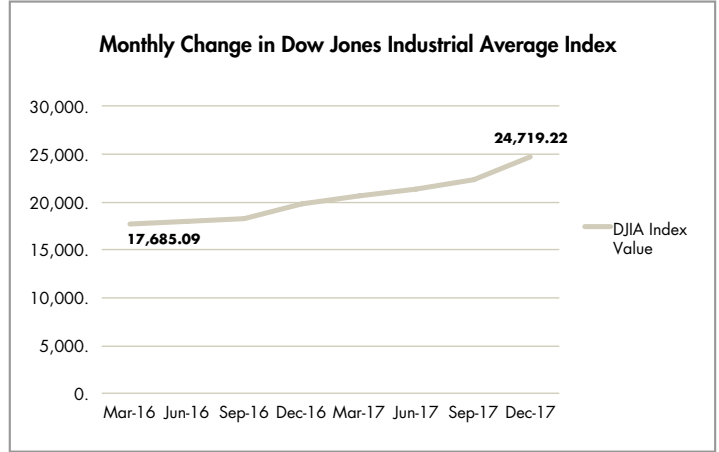
Data Source: Bureau of Labor Statistics



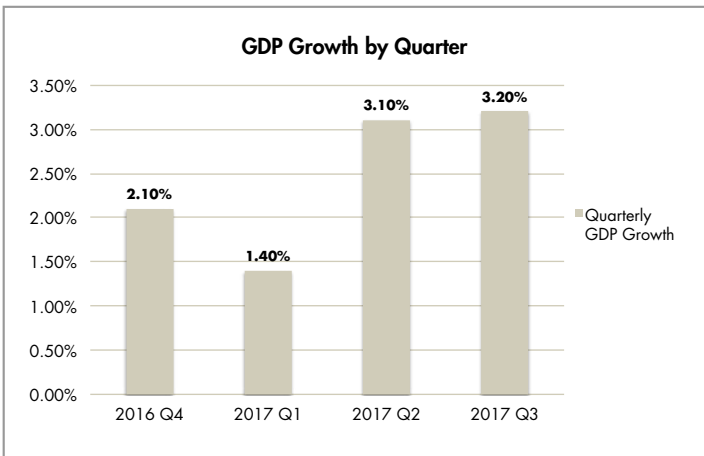
Data Source: Bureau of Labor Statistics



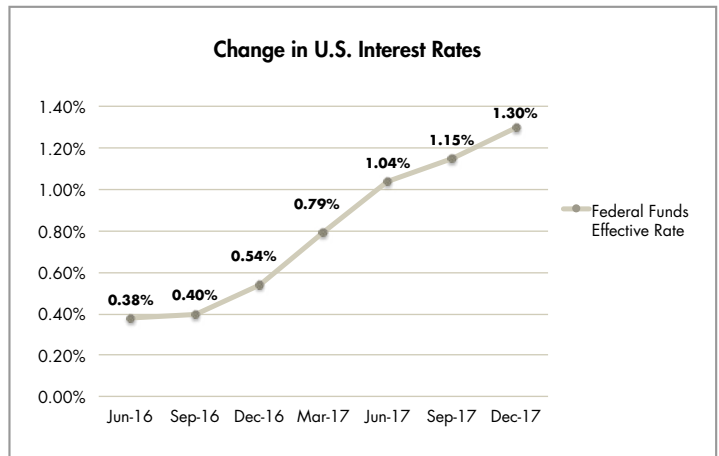
*Adjusted to reflect changes in Consumer Price Index for All Urban Consumers (CPI-U)
Data Source: Bureau of Labor Statistics



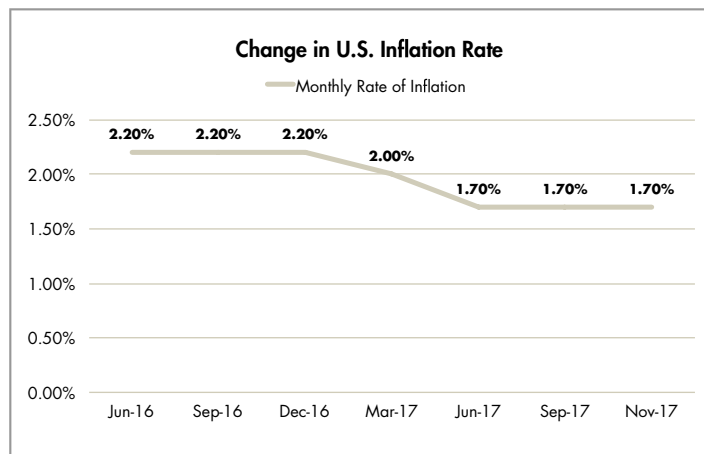
Data Source: Yahoo Finance



Data Source: Bureau of Economic Analysis



Data Source: The U.S. Federal Reserve



Data Source: Bureau of Labor Statistics

2018 Midterm Elections Preview

Introduction

With the Trump presidency approaching the end of its first year, attention will increasingly turn to the 2018 midterm congressional elections. Following President Trump's unconventional, and at times highly controversial first year, political prognosticators continue to forecast an election environment favoring the Democrats. Moreover, with all 435 House seats in cycle and a very thin Republican majority in the Senate, there remains a credible path for Democrats to retake control of one or both chambers. Based on the current numbers (including vacancies), in order to achieve their goal, Democrats will need to pick up at least 24 seats in the House and two seats in the Senate.

Congressional Approval

Reflecting trends, Congressional approval ratings remain dismally low. Gallup recently found on December 11 that 17 percent of Americans approve of the current Congress. This figure corresponds closely with the RealClearPolitics average of 16 percent. Congress' approval rating in the latest Gallup poll currently ties its rate in 2010, when President Obama watched Democrats lose a fourth of their members in the House and a filibuster-proof majority in the Senate. As Table 1 shows, every president in the last 40 years has suffered congressional party losses. The exception is 2002, when relative national unity following the September 11 attacks saw Republicans make gains under first-term GOP President George W. Bush.

Table 1: Congressional Approval Ratings

President	Midterm Election	Congressional Approval Rating on Election Day	Net House	Net Senate
Carter	1978	29% (Sep. 1978)	-15 Dem	-3 Democrats
Reagan	1982	29% (Jun. 1982)	-26 GOP	+1 GOP
Bush 41	1990	26%	-8 GOP	-1 GOP
Clinton	1994	23%	-52 Dem	-8 Dem
Bush 43	2002	47%	+8 GOP	+2 GOP
Obama	2010	17%	-63 Dem	-6 Dem
Trump	2018	17% (Dec. 2017)	TBD	TBD

Data Source: Gallup

Presidential Approval

In modern elections, several historical trends have emerged that may offer hints on what to expect next November.

The first of these trends is the likelihood of the incumbent president's party to experience losses in midterm elections. As seen in Table 2, five of the last six presidents have seen their parties lose seats in one or both chambers in their first midterm elections.

President Trump is currently polling below the level his predecessors were polling on Election Day, and, if his numbers remain low, they could drag down congressional Republicans' chances of retaining their majorities. In fact, in the 18 midterm elections since World War II, the president's party has lost an average of 25 House seats. However, in the half of those campaigns in which the president's approval rating was below 50 percent on Election Day, the average loss was 36 House seats.

Table 2: Presidential Approval Ratings

President	Midterm Election	Presidential Approval Rating on Election Day	Net House	Net Senate
Carter	1978	52%	-15 Dem	-3 Democrats
Reagan	1982	43%	-26 GOP	+1 GOP
Bush 41	1990	58%	-8 GOP	-1 GOP
Clinton	1994	46%	-52 Dem	-8 Dem
Bush 43	2002	63%	+8 GOP	+2 GOP
Obama	2010	45%	-63 Dem	-6 Dem
Trump	2018	38% (1/14/18)	TBD	TBD

Data Source: Gallup

2018 Midterm Elections Preview cont.

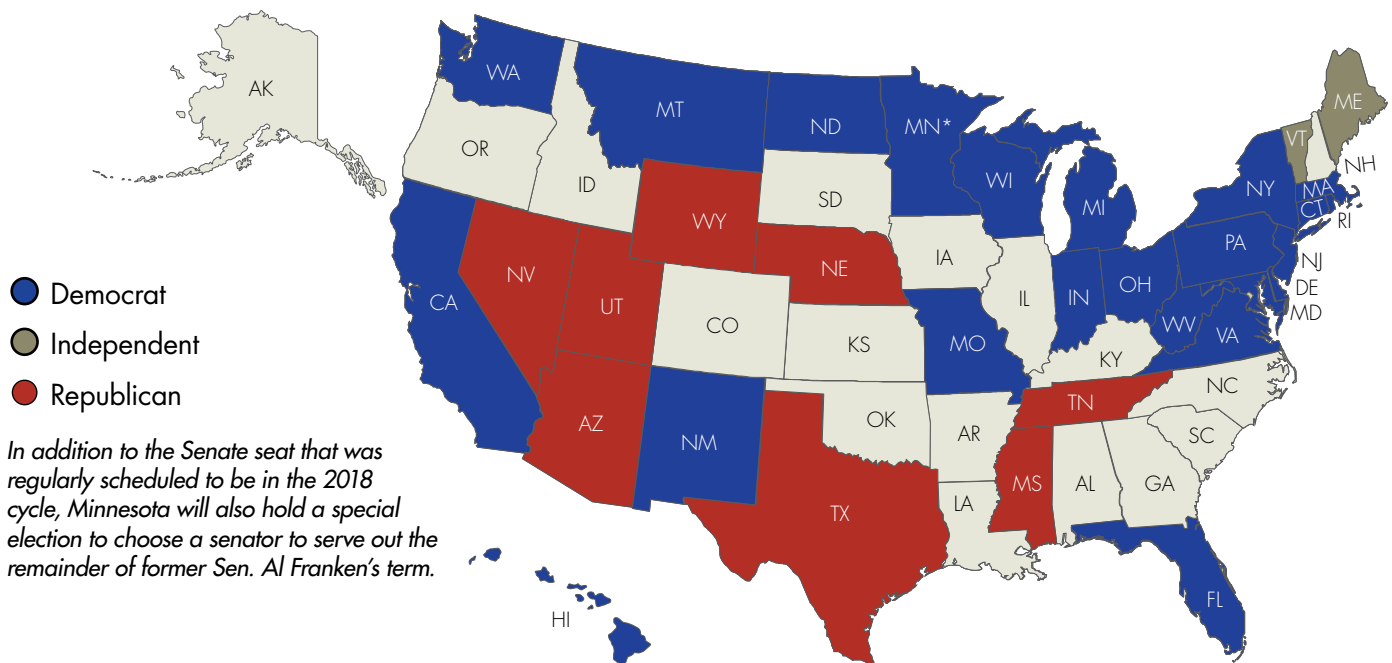
House (435 Races) and Senate (34 Races)

The differing constitutional provisions governing elections in the House and the Senate will also have an impact on which party will secure majorities in the 116th Congress. In the Senate, Democrats' path to regaining control is narrowed by two factors. First, there are only 34 Senate seats in cycle (including a special election in Minnesota), limiting the opportunities for Senate Democrats to add to their ranks. Second, as seen in the image below, there are far more seats in cycle that are currently held by Democrats or independents who caucus with Democrats (26 seats) than Republicans (eight seats), a result of Democrats' own success the last time the seats were up for reelection in 2012. Moreover, 10 Democrats are running in states that President Trump won in the 2016 election, while only one Republican is running in a state that Clinton carried in 2016 (Sen. Dean Heller in Nevada). However, with the Alabama special election victory for new Democratic Senator Doug Jones, Democrats now need to pick up only two seats to take the Senate majority, which they can achieve by winning swing

aces in Arizona and Nevada, while also preventing any pickups for Republicans.

A favorable map is the best hope for Senate Republicans. To maintain the majority, the GOP has several different paths. Their ideal scenario is to retain their competitive seats in Arizona and Nevada while topping up their majority with seats won from Democrats. Senate Republicans can also afford to lose one of their competitive seats and still retain the majority with 50 seats, relying on Vice President Pence to break tie votes. Finally, Republicans could lose Arizona and Nevada but hold the majority if they pick up at least one seat from Democrats, again bringing the chamber to a 50-50 split. In essence, the Senate GOP only has to win one of the top dozen most competitive seats in cycle to hold onto control of the Senate.

Unlike in the Senate, where only a third of seats are in cycle, House Democrats have the opportunity to contest every House seat. Democrats are hoping



for a wave election to sweep them back into the majority. They may be aided by the high number of Republicans who have announced their retirements (see the “Retirements, Resignations, and Other Vacancies in the 115th Congress” section). Currently 31 House Republicans have announced that they will not seek reelection in November compared to 15 Democrats that have announced the same. Many of the 31 Republican seats are in competitive districts, putting the GOP on defense and widening the path for Democrats to reach a majority. Moreover, the number of seats that Democrats need to win in the fall may be further reduced if they are successful in several upcoming special elections.

Polling trends may also help predict the House result in 2018. The generic ballot is seen as a good barometer of the possibility of a wave election in the House. As seen in Table 3, when the generic ballot margin is heavily tilted toward the minority party, it can forecast success for that party at the ballot box. Conversely, if the margin is small or heavily tilted in favor of the majority party, it can result in a status quo result.

Currently, the average of generic ballot polling is leaning heavily toward Democrats, a leading indicator for success for gaining control of the House, and possibly the Senate, from Republicans.

Table 3: Generic Ballot

Election	Generic Ballot on Election Day	Outcome in the House	Seat Changes in the House
2006	Democrats +11.5	Democratic Takeover	+31 Dem
2008	Democrats +9.0	Democratic Hold	+21 Dem
2010	Republican +9.4	Republican Takeover	-63 Dem
2012	Republican +0.2	Republican Hold	-6 GOP
2014	Republican +2.4	Republican Hold	-13 GOP
2016	Democrats +0.6	Republican Hold	-6 GOP
2018	Democrats +11.2 (1/11/18)	TBD	TBD

Data Source: RealClearPolitics Polling Average

Conclusion

To reiterate, the election is a lifetime away in political terms. At this point in 2016, Republican officials viewed Donald Trump as a passing fad, and Hillary Clinton’s path to the Democratic nomination looked to be smooth and free from serious challenge. Within a year, conventional politics seemed to evaporate as Donald Trump defied the odds and won the presidency.

With this in mind, however, midterm elections are unique from presidential cycles. President Trump will not be on the ballot to energize his base, and many Democratic and left-leaning voters will mobilize to send the White House a message. History shows that Republicans face tough odds in defending their majorities, but only time will tell if old trend lines hold or give way to a new political reality ushered in by President Trump.

Executive Branch Nominations

Department/Agency	Position	Nominee	Status
Cabinet-Level and Deputies			
Department of Agriculture	Secretary	Sonny Perdue	Confirmed, Apr. 24
	Deputy Secretary	Stephen Censky	Confirmed, Oct. 3
Department of Commerce	Secretary	Wilbur Ross	Confirmed, Feb. 27
	Deputy Secretary	Pending	Pending
Department of Defense	Secretary	Jim Mattis	Confirmed, Jan. 20
	Deputy Secretary	Patrick Shanahan	Confirmed, Jul. 18
Department of Education	Secretary	Betsy DeVos	Confirmed, Feb. 7
	Deputy Secretary	Mitchell Zais	Pending
Department of Energy	Secretary	Rick Perry	Confirmed, Mar. 2
	Deputy Secretary	Dan Brouillette	Confirmed, Aug. 3
Department of Health and Human Services	Secretary	Tom Price*	Confirmed, Feb. 10
	Secretary	Alex Azar	Pending
	Deputy Secretary	Eric Hargan	Confirmed, Oct. 4
Department of Homeland Security	Secretary	John Kelly**	Confirmed, Jan. 20
	Secretary	Kirstjen Nielsen	Confirmed, Dec. 5
	Deputy Secretary	Elaine Duke	Confirmed, Apr. 4
Department of Housing and Urban Development	Secretary	Ben Carson	Confirmed, Mar. 2
	Deputy Secretary	Pamela Hughes Patenaude	Confirmed, Sep. 14
Department of the Interior	Secretary	Ryan Zinke	Confirmed, Mar. 1
	Deputy Secretary	David Bernhardt	Confirmed, Jul. 25
Department of Justice	Attorney General	Jeff Sessions	Confirmed, Feb. 8
	Deputy Attorney General	Rod Rosenstein	Confirmed Apr. 25
Department of Labor	Secretary	Andrew Puzder	Withdrawn, Feb. 28
	Secretary	Alexander Acosta	Confirmed, Apr. 27
	Deputy Secretary	Patrick Pizzella	Pending
Department of State	Secretary	Rex Tillerson	Confirmed, Feb. 1
	Deputy Secretary	John Sullivan	Confirmed, May 24
Department of Transportation	Secretary	Elaine Chao	Confirmed, Jan. 31
	Deputy Secretary	Jeffrey Rosen	Confirmed, May 16
Department of the Treasury	Secretary	Steve Mnuchin	Confirmed, Feb. 13
	Deputy Secretary	Pending	Pending
Department of Veterans Affairs	Secretary	David Shulkin	Confirmed, Feb. 13
	Deputy Secretary	Thomas Bowman	Confirmed Aug. 3
Central Intelligence Agency	Director	Mike Pompeo	Confirmed, Jan. 23
Environmental Protection Agency	Administrator	Scott Pruitt	Confirmed, Feb. 17
	Deputy Administrator	Andrew Wheeler	Pending
Office of Director of National Intelligence	Director	Dan Coats	Confirmed, Mar. 15
	Principal Deputy Director	Susan Gordon	Confirmed, Aug. 3

Department/Agency	Position	Nominee	Status
Office of Management and Budget	Director	Mick Mulvaney	Confirmed, Feb. 16
	Deputy Director	Russell Vought	Confirmed, Jun. 21
	Deputy Director (Management)	Margaret Weichert	Pending
Office of the U.S. Trade Representative	Representative	Robert Lighthizer	Confirmed, May 11
	Deputy Representative	Jeffrey Gerrish	Pending
	Deputy Representative	Dennis Shea	Pending
	Deputy Representative	C.J. Mahoney	Pending
Small Business Administration	Administrator	Linda McMahon	Confirmed, Feb. 14
	Deputy Administrator	Althea Coetzee	Confirmed, Aug. 3
United Nations	Representative	Nikki Haley	Confirmed, Jan. 24
	Deputy Representative	Pending	Pending

Sub-Cabinet Level

Consumer Financial Protection Bureau	Director	Pending	Pending
Federal Communications Commission	Chairman	Ajit Pai	Confirmed, Oct. 2
	Commissioner	Jessica Rosenworcel	Confirmed, Aug. 3
	Commissioner	Brendan Carr	Confirmed, Aug. 3
Federal Energy Regulatory Commission	Chairman	Kevin McIntyre	Confirmed, Nov. 2
	Commissioner	Neil Chatterjee	Confirmed, Aug. 3
	Commissioner	Robert Powelson	Confirmed, Aug. 3
	Commissioner	Richard Glick	Confirmed, Nov. 2
Federal Reserve Board of Governors	Chairman	Jerome Powell	Pending
	Governor	Randy Quarles	Confirmed Oct. 5
	Governor	Marvin Goodfriend	Pending
Food and Drug Administration	Commissioner	Scott Gottlieb	Confirmed, May 19
Office of the Comptroller of the Currency	Comptroller	Joseph Otting	Confirmed, Nov. 16
Office of the Surgeon General	Surgeon General	Jerome Adams	Confirmed, Aug. 3
Securities and Exchange Commission	Chairman	Jay Clayton	Confirmed, May 2
	Commissioner	Hester Peirce	Confirmed, Dec. 21
	Commissioner	Robert Jackson	Confirmed, Dec. 21
U.S. Customs and Border Protection	Commissioner	Kevin McAleenan	Pending
White House Council of Economic Advisors	Chairman	Kevin Hassett	Confirmed, Sep. 12

*Resigned on Sept. 29

**Resigned on July 31 to become White House Chief of Staff

Retirements, Resignations and Other Vacancies in the 115th Congress

Chamber	Member	Party	Terms Served	Age	Explanation	Cook Political Rating*
House	Conyers Jr., John (MI-13)	Dem	27th term	88	Resigned on Dec. 5, 2017	D+32
House	Delaney, John (MD-06)	Dem	3rd term	54	Seeking other office-President	D +6
House	Green, Gene (TX-29)	Dem	13th term	70	Retiring	D+19
House	Gutiérrez, Luis (IL-04)	Dem	13th term	64	Retiring	D+33
House	Hanabusa, Colleen (HI-01)	Dem	3rd term	66	Seeking other office-Governor	D+17
House	Kihuen, Ruben (NV-04)	Dem	1st term	37	Retiring	D+3
House	Levin, Sander (MI-09)	Dem	18th term	86	Retiring	D+4
House	Lujan Grisham, Michelle (NM-01)	Dem	3rd term	58	Seeking other office-Governor	D+7
House	O'Rourke, Beto (TX-16)	Dem	3rd term	45	Seeking other office-Senate	D+17
House	Polis, Jared (CO-02)	Dem	5th term	42	Seeking other office-Governor	D+9
House	Rosen, Jacky (NV-03)	Dem	1st term	60	Seeking other office-Senate	R+2
House	Shea-Porter, Carol (NH-01)	Dem	4th term	65	Retiring	R+2
House	Sinema, Kyrsten (AZ-09)	Dem	3rd term	41	Seeking other office-Senate	D+4
House	Tsongas, Niki (MA-03)	Dem	6th term	71	Retiring	D+9
House	Walz, Tim (MN-01)	Dem	6th term	53	Seeking other office-Governor	R+5

Total House Democrats: 15

House	Barletta, Lou (PA-11)	GOP	4th term	61	Seeking other office-Senate	R+10
House	Barton, Joe (TX-06)	GOP	17th term	68	Retiring	R+9
House	Black, Diane (TN-06)	GOP	4th term	66	Seeking other office-Governor	R+24
House	Blackburn, Marsha (TN-07)	GOP	8th term	65	Seeking other office-Senate	R+20
House	Bridenstine, Jim (OK-01)**	GOP	3rd term	42	NASA Administrator nominee	R+17
House	Dent, Charlie (PA-15)	GOP	7th term	57	Retiring	R+4
House	DeSantis, Ron (FL-06)	GOP	3rd term	39	Seeking other office-Governor	R+7
House	Duncan Jr., John (TN-02)	GOP	15th term	70	Retiring	R+20
House	Farenthold, Blake (TX-27)	GOP	4th term	56	Retiring	R+13
House	Franks, Trent (AZ-08)***	GOP	8th term	60	Resigned on Dec. 8, 2017	R+13
House	Goodlatte, Bob (VA-06)	GOP	13th term	65	Retiring	R+13
House	Harper, Gregg (MS-03)	GOP	5th term	61	Retiring	R+13
House	Hensarling, Jeb (TX-05)	GOP	8th term	60	Retiring	R+16
House	Issa, Darrell (CA-49)	GOP	9th term	64	Retiring	R+1
House	Jenkins, Evan (WV-03)	GOP	2nd term	57	Seeking other office-Senate	R+23
House	Jenkins, Lynn (KS-02)	GOP	5th term	54	Retiring	R+10
House	Johnson, Sam (TX-03)	GOP	13th term	87	Retiring	R+13
House	Labrador, Raúl (ID-01)	GOP	4th term	50	Seeking other office-Governor	R+21
House	LoBiondo, Frank (NJ-02)	GOP	12th Term	71	Retiring	R+1
House	McSally, Martha (AZ-02)	GOP	2nd term	51	Seeking other office-Senate	R+1
House	Messer, Luke (IN-06)	GOP	3rd term	48	Seeking other office-Senate	R+18
House	Murphy, Tim (PA-18)****	GOP	8th term	65	Resigned on Oct. 21, 2017	R+11

Chamber	Member	Party	Terms Served	Age	Explanation	Cook Political Rating*
House	Noem, Kristi (SD-At Large)	GOP	4th term	46	Seeking other office-Governor	R+14
House	Pearce, Steve (NM-02)	GOP	7th term	70	Seeking other office-Governor	R+6
House	Poe, Ted (TX-02)	GOP	7th term	69	Retiring	R+11
House	Reichert, Dave (WA-08)	GOP	7th term	67	Retiring	Even
House	Renacci, Jim (OH-16)	GOP	4th term	59	Seeking other office-Senate	R+8
House	Rokita, Todd (IN-04)	GOP	4th term	47	Seeking other office-Senate	R+17
House	Ros-Lehtinen, Ileana (FL-27)	GOP	14th term	65	Retiring	D+5
House	Royce, Ed (CA-39)	GOP	13th term	66	Retiring	Even
House	Shuster, Bill (PA-09)	GOP	9th term	56	Retiring	R+19
House	Smith, Lamar (TX-21)	GOP	16th term	70	Retiring	R+10
House	Tiberi, Pat (OH-12)*****	GOP	9th term	55	Resigning effective Jan. 15, 2018	R+7
House	Trott, Dave (MI-11)	GOP	2nd term	57	Retiring	R+4

Total House Republicans: 34

Senate	Corker, Bob (TN)	GOP	2nd term	65	Retiring	Toss Up
Senate	Flake, Jeff (AZ)	GOP	1st term	55	Retiring	Toss Up
Senate	Hatch, Orrin (UT)	GOP	7th term	83	Retiring	Solid R

Total Senate Republicans: 3

*Cook Political Report Ratings as of December 15, 2017.

**Nominated to be the next NASA Administrator; previously said he would not seek re-election in 2018.

***Resigned on December 8, 2017 and special election set for April 24, 2018.

****Resigned on October 21, 2017 and special election set for March 13, 2018.

*****Resigning effective Jan. 15, 2018 and special election set for August 7, 2018.

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