

What's New in Washington

Akin Gump
STRAUSS HAUER & FELD LLP

October 2018

SHARE THIS



Throughout September, members in the House and the Senate worked to achieve a flurry of bipartisan accomplishments, including negotiating deals over the reauthorization of the Federal Aviation Administration (FAA) and a legislative package to combat the growing opioid epidemic. Most notably, however, was the bicameral, bipartisan cooperation on appropriations. Congress successfully passed appropriations for the Legislative Branch, the departments of Defense, Energy and Water, Labor, Health and Human Services and Military Construction and Veterans Affairs by September 30, representing roughly 75 percent of the annual appropriations budget and the most appropriations bills passed on time in over twenty years. Legislators attached a Continuing Resolution (CR) to the last appropriations package to fund the remaining portions of the government through December 7.

Looking forward, the House will be in pro forma session, but legislative work will not recommence until members return for the lame-duck session starting on November 13.

Unlike the House, the Senate will remain in session for several days in October to consider judicial and executive nominations. Most prominently, Senators will continue debating the Honorable Brett Kavanaugh's nomination to be an associate justice of the Supreme Court. The Kavanaugh nomination stalled weeks ago amid allegations of sexual misconduct. Following testimony by Judge Kavanaugh and Dr. Christine Blasey Ford, the Judiciary Committee agreed to allow for a limited Federal Bureau of Investigation (FBI) supplemental investigation into the allegations. Senate Majority Leader Mitch McConnell (R-KY) set in motion a procedural vote on the nomination on Friday, which was successful and sets up a final confirmation likely on Saturday. The vote margins for the nomination remain thin, but appear favorable for Kavanaugh based on the successful procedural vote.

In other news, the United States, Mexico and Canada agreed to a new free trade agreement (see [Big Three Reach Trade Agreement](#)) that would replace the current North American Free Trade Agreement (NAFTA). Members of Congress and their staffs will pour over the details in the coming months with a congressional vote on the agreement likely in 2019. Lawmakers were less productive on the Farm Bill this month, as the current law expired without legislators agreeing to a conference report or short-term extension. Negotiators will continue to attempt to bridge the gaps and broker a compromise over the coming months on the Farm Bill.

IN THIS ISSUE

- [An Unpredictable Lame Duck Agenda](#)
- [Congress Passes Opioid Response Package](#)
- [Big Three Reach Trade Agreement](#)
- [Japan and the U.S. Brace for TAG](#)
- [China Trade Friction Continues](#)

The outcome of the election on November 6 will play a major role in the legislative outlook for the lame duck, but there are some “must pass” items that Congress will be required to address before adjourning the 115th Congress.

Shortly after the election, each party will hold leadership elections. This process is likely to influence the lame duck agenda for House Republicans in particular, as conservative members push for leadership candidates to adhere to more fiscally responsible principles. If Democrats win the majority in the House, they will be less willing to compromise on end-of-year legislation given the ability to have a greater influence by punting key issues to the 116th Congress. At the same time, Democrats may be looking to clear the decks on some legislative issues to start 2019 with a clean slate and opportunity to move forward their own policy agenda.

Appropriations. Despite historic progress on appropriations before the September 30 deadline last month, the remaining spending fights in the lame duck will be contentious. One of the seven remaining appropriations bills provides funding for the Department of Homeland Security, which is expected to lead to a heated debate over President Trump’s insistence that Congress include funding for his proposed border wall, which Democrats oppose. The current CR provides funding for the remaining federal agencies through December 7. It is likely that another short-term CR will be needed in early December to allow more time for the funding debate to reach a conclusion. If members cannot agree on the remaining spending bills before the holidays, another CR may be needed to extend the debate into 2019.

Tax Policy. End-of-year is a common time period for pending tax items to see action. Since the Tax Cuts and Jobs Act was passed in December 2017, a number of technical fixes have surfaced that may be able to find a home in the lame duck if Republicans are willing to offer Democrats something in exchange. The Senate Finance and Ways and Means Committees have each worked on a package of fixes and improvements for retirement plans that may see conclusion in the lame duck. In addition, some of the provisions referred to as “tax extenders” technically expired on December 30, 2017, but Congress has a history of retroactively renewing tax extenders, so these provisions will be part of the larger negotiation on a possible tax package. However, with the passage of a long-term FAA authorization bill, that eliminates a “must pass” tax vehicle for the lame duck, slightly reducing the odds of a tax package coming together in December.

Reports from the Joint Select Committees. In February 2018, the Bipartisan Budget Act established two joint select committees on (1) Solvency of Multiemployer Pension Plans and (2) Budget and Appropriations Process Reform. The bipartisan, bicameral processes each include 16 members, evenly divided by House and Senate and Republicans and Democrats. The select committees were tasked with holding public hearings on their respective topics and providing a report on findings and recommendation as well as proposed legislative text by November 30, 2018. In order to gain approval by the select committee for consideration by the House and Senate, any report or recommendations must meet the high bar of support from a minimum of five Republicans and five Democrats. The select committee tasked with reforming multiemployer pension plans is less likely to reach an agreement on recommendations by the deadline, but may release a report on findings and possible solutions to give the issue a running start in the 116th Congress. Members of the budget and appropriations reform have floated possible areas of agreement, including moving to a biennial budgeting process.

In addition to the items above, there are a number of other issues that may see action in the lame-duck session, including:

- flood insurance reauthorization
- Intelligence Authorization Act for Fiscal Years 2018 and 2019
- Farm Bill conference report
- JOBS and Investor Confidence Act (a.k.a. JOBS Act 3.0)
- Medicare Part D coverage gap fix for pharmaceutical companies.

Following months of negotiations, House and Senate lawmakers on September 25 released the text of a compromise opioid package (H.R. 6). The House approved the conference agreement on September 28, and the Senate passed the bill on October 3. President Trump has indicated he will sign the measure into law.

The package authorizes new funding and resources for health care providers and includes policies to improve substance use disorder prevention, treatment and recovery. One major proposal would partially repeal the decades-old Institutions for Mental Disease exclusion, which prohibits the use of federal Medicaid dollars for residential care at facilities with more than 16 beds. The limited repeal included in the bill would apply only to substance use disorder treatment and would expire after five years. The bill also includes provisions to crack down on the shipment of illicit drugs through the international mail and promote the development of non-opioid pain therapies.

Notably, the final bill does not include changes to 42 CFR Part 2 regulations regarding the confidentiality of substance use disorder patient records. Provisions to ease sharing of such records were included in the House's legislative effort on opioids, but did not make it into the Senate's legislation. Additionally, brand name drug manufacturers were unable to secure inclusion of language to reduce their share of financial liability for beneficiaries in the Medicare Part D coverage gap, also known as the donut hole. A provision that increased manufacturers' share from 50 percent to 70 percent was included in the Bipartisan Budget Act of 2018.

[Back to top](#)

BIG THREE REACH TRADE AGREEMENT

Just a few hours before the September 30 deadline to post the text of an agreement, the Trump administration announced that it had concluded negotiations with Canada and Mexico to update NAFTA. The new trade agreement, called the United States, Mexico and Canada Agreement (USMCA), generally keeps the existing framework intact, but includes several of the new provisions from the previous Trans-Pacific Partnership (TPP) exercise, while adding in a sprinkling of Trump-specific priorities. Some of the more significant changes include:

- modernizing NAFTA to take account of the digital economy that arose in the years since NAFTA entered into force in 1994, including providing 10 years of data protection for biologic medicines
- changing the "rules of origin" for automobiles to require that 75 percent of the content of an automobile must originate in North America, up from 62.5 percent, and that 40-45 percent of auto content must be made by workers earning at least \$16 per hour
- phasing out the "investor-state dispute settlement" or "ISDS" mechanism for Canada and limiting it for Mexico, except for five sectors that face high fixed costs and political sensitivity: the oil and gas, power generation, transportation, infrastructure and telecommunications sectors
- incorporating binding provisions against currency manipulation
- bringing labor obligations into the core of the agreement and making them fully enforceable, including requiring Mexico to take specific legislative actions to provide for the effective recognition of the right to collective bargaining
- improving dairy market access to Canada, a key outcome for the agriculture community.

Some of the most controversial provisions the Trump administration originally proposed did not make it into the final text, including a provision concerning seasonal produce, eliminating binding dispute settlement, a removal of the "Chapter 19" dispute settlement mechanism for trade remedy decisions and a hard expiration date or "sunset" for the agreement. The USMCA does include a modified sunset provision that provides that the agreement will terminate after sixteen years, unless six years after the agreement enters into force, the "head of government", in writing, affirms that it wishes to extend the

agreement for another sixteen years. These six-year reviews continue while the agreement remains in force.

President Trump and his Mexican and Canadian counterparts are expected to sign the USMCA on the margins of the G20 summit meeting in Buenos Aires scheduled to begin November 30. There has been some speculation that the lame duck Congress could try to consider USMCA in December after the signing, perhaps by adding it to a must-pass funding bill and abandoning the Trade Promotion Authority (TPA) procedures the administration has followed to date, in an attempt to avoid the political complications that would result in the event the Democrats take control of the House of Representatives and/or the Senate in 2019. We believe this is highly unlikely, however, and there is no realistic expectation that Congress will consider the USMCA until 2019.

President Trump has suggested he may withdraw from NAFTA in order to force Congress to pass USMCA. To withdraw from NAFTA, the President would provide formal notice to Congress of his intent to do so, and he would be empowered to withdraw the United States from NAFTA six months after that notice. What strategy the administration will use to pass USMCA in the 116th Congress remains to be seen, as the outcome of the midterm elections will no doubt have a profound impact on that strategy.

[Back to top](#)

JAPAN AND THE U.S. BRACE FOR TAG

President Trump and Prime Minister Abe issued a joint statement at a summit on the sidelines of the United Nations General Assembly on September 26, initiating talks for a limited trade agreement to cover goods, services and potentially other areas. Dubbed TAG—or the Trade Agreement on Goods—the effort dissolves the stalemate between Japan’s economic revitalization minister Toshimitsu Motegi and U.S. Trade Representative (USTR) Robert Lighthizer over pursuing trade negotiations in the TPP framework or bilaterally. The Trump administration continues to remain determined to reduce the U.S.’s nearly \$70 billion trade deficit with Japan.

While Prime Minister Abe insisted in public statements that the agreement would completely differ from a comprehensive Free Trade Agreement, USTR Lighthizer stated in interviews the end goal was to reach a full trade deal requiring congressional approval under the TPA. This difference is primarily an issue of optics, especially for domestic consumption where Japan has avoided entering bilateral trade talks for nearly two years, while the U.S. administration has pushed for them.

Both the United States and Japan can claim wins. The U.S. gets what it wants by virtue of Japan caving to bilateral talks. Japan gets what it wants by having the U.S. agree to respect Japan’s position that “with regard to agricultural, forestry, and fishery products, outcomes related to market access as reflected in Japan’s previous economic partnership agreements constitute the maximum level.” Any further agriculture concessions would have made TAG an all but impossible political sell in Japan. In a relief to the Japanese automobile industry, at least for the time being, Japan was also able to achieve its objective of avoiding the Section 232 tariffs on autos and auto parts. It remains to be seen what direction Japan-U.S. trade talks will take—and the particular timeline—but movement after nearly two years of deadlock seems to be a step in the right direction.

House Ways and Means Committee chairman Kevin Brady (R-TX), Senate Finance Committee chairman Orrin Hatch (R-UT) and Senate Agriculture chairman Pat Roberts (R-KS) were among the first to welcome the announcement. As Japan is the fourth largest export market for American farmers, a number of agriculture groups, such as the National Pork Producers Council, U.S. Grains Council, U.S. Wheat Associates, National Cattlemen’s Beef Association and American Feed Industry Association expressed optimism for a deal providing market access up to the level that would have been provided by the TPP. Meanwhile, industry groups such as the American Automotive Policy Council would like for currency to be addressed as part of any U.S.-Japan trade deal, a longstanding issue of contention.

[Back to top](#)

On Monday, September 24, the United States pressed ahead with another \$200 billion in tariffs under Section 301 of the Trade Act of 1974 in the third round of action in the escalating trade war. In response, China imposed \$60 billion in retaliatory tariffs on agriculture and other industries on the United States.

According to Joshua Bolten of the Business Roundtable, a survey of 141 Chief Executive Officers between August 27 and September 12 showed close to two-thirds believe recently enacted tariffs and pending trade policies will have a “moderate or significant negative effect” on their capital spending decisions in the coming months.

Important deadlines approaching include an **October 9** deadline for filing exclusion requests related to tariff List 1 and **December 18** for requests related to List 2. Starting **January 1, 2019**, the tariff rate for List 3 will increase from 10 to 25 percent if China and U.S. fail to reach an agreement.

On September 23, the Chinese government-run *China Daily* took out a four-page paid advertisement in the *Des Moines Register* criticizing U.S. actions on trade and drawing widespread ire in the process. Iowa farmers are disproportionately affected by the trade tensions with China due to retaliatory tariffs on corn and soy. President Trump tweeted: “China is actually placing propaganda ads in the Des Moines Register and other papers, made to look like news. That’s because we are beating them on Trade, opening markets, and the farmers will make a fortune when this is over!” U.S. Ambassador to China and former Iowa Governor Terry Branstad wrote an Op-ed to the *Register* days later, entitled “China uses U.S. free press to bully American workers, farmers.” He wrote, “it is simply unsustainable for the world’s second largest economy to ignore or dismiss fundamental precepts of free and fair trade [while] the rest of the world [is] forced to pay...”

Trump’s recently touted trade victories with respect to Korea, Japan, Mexico and Canada, suggest the administration can now turn more of its attention to China. Nonetheless, no talks with China are currently scheduled, and there is little prospect of a restart in talks anytime soon. The past month of trade developments, however, is a sure reminder that things can change rather quickly.

[Back to top](#)

For more information, please contact your regular Akin Gump lawyer or advisor, or:

[G. Hunter Bates](#)
[Brian A. Pomper](#)
[Hal S. Shapiro](#)

akingump.com



© 2019 Akin Gump Strauss Hauer & Feld LLP. All rights reserved. Attorney advertising. This document is distributed for informational use only; it does not constitute legal advice and should not be used as such. Prior results do not guarantee a similar outcome. Akin Gump Strauss Hauer & Feld is the practicing name of Akin Gump LLP, a New York limited liability partnership authorized and regulated by the Solicitors Regulation Authority under number 267321. A list of the partners is available for inspection at Eighth Floor, Ten Bishops Square, London E1 6EG. For more information about Akin Gump LLP, Akin Gump Strauss Hauer & Feld LLP and other associated entities under which the Akin Gump network operates worldwide, please see our [Legal Notices page](#).

[Update your preferences](#) | [Subscribe](#) | [Unsubscribe](#) | [Forward to a friend](#) | [Legal Notices](#) | [Akin Gump Website](#)

This email was sent by: 2001 K Street, N.W., Washington, DC 20006-1037