

What's New in Washington

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The 116th Congress has officially reached the halfway point as members return this month after a productive December. For the first time since Fiscal Year (FY) 2016, Congress completed all 12 appropriations bills prior to the holiday recess, while racking up a number of other wins in the two minibuses, from the Setting Every Community Up for Retirement Enhancement (SECURE) Act to full repeal of several Affordable Care Act taxes. With a relatively clean slate, Congress now will turn to what is expected to be a somewhat less frantic legislative period given the presidential election year.

While the Senate had planned to start last week on the impeachment trial, Speaker Nancy Pelosi (D-CA) decided to hold onto the House-passed articles of impeachment while Senate Majority Leader Mitch McConnell (R-KY) and Senate Minority Leader Chuck Schumer (D-NY) continue to negotiate the initial process and procedure for the Senate trial. Ultimately, Speaker Pelosi and Sen. Schumer are demanding that certain documents and witnesses be included as part of the Senate trial, while Sen. McConnell argues that the Senate should follow the precedent of the Clinton impeachment trial and consider the question of potential witnesses and documents after the initial presentation by House managers and President Trump's defense team. However, the Senate is now likely to start the trial next week after the House appoints managers and transmits the articles of impeachment, which is expected to happen in the next day or two.

Thanks to a delay on impeachment proceedings, the Senate had the time to move ahead with a Senate Finance Committee markup of the House-passed United States-Mexico-Canada Agreement (USMCA). On January 7, the Committee favorably reported the legislation by a 25-3 vote. Senate Leadership is currently pushing to approve USMCA by Thursday of this week before the impeachment articles arrive from the House.

Once impeachment and USMCA are finished, Congress is likely to focus the spring months on the start of the FY 2021 budget and appropriations cycle (President Trump will submit his request on February 10) as well as the May 22, 2020, expiration of a number of health programs. That deadline was set by the FY 2020 minibus package with the intention of driving bipartisan, bicameral compromise on the issues of prescription drug pricing and surprise medical billing. Other deadlines for must-pass legislation this year center around the FY end date of September 30, 2020, with authorization of the FAST Act, National Flood Insurance Program, and a number of immigration programs set to expire at the same time as funding for the federal government.

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Health Care Outlook for 2020

Recent months have seen a flurry of activity in Congress to address rising consumer health care costs, including surprise medical bills and prescription drug prices. Legislative action on both issues stalled in late 2019 but is expected to resume this year, although the timing and outcome remain uncertain given the impeachment process and looming election.

None of the competing surprise billing or comprehensive drug pricing proposals crossed the finish line as part of the year-end packages to wrap up FY 2020 spending. However, the legislation did establish a new deadline of May 22, 2020, for Congress to again extend certain expiring health care provisions that it only renewed on a short-term basis. This new deadline provides a pre-election opportunity and legislative vehicle for members to address bipartisan, bicameral policy priorities, including surprise billing and drug pricing, along with a number of individual health care bills already moving forward through the legislative process to address distinct issues related to specific diseases/conditions and targeted health care benefits. The year-end appropriations legislation did include the CREATES Act, which aims to stop abuse of Risk Evaluation and Mitigation Strategies (REMS) that prevent manufacturers from obtaining samples of a brand drug to create a generic version.

Bipartisan leaders of the Energy & Commerce Committee and Senate Health, Education, Labor and Pensions (HELP) Committee Chair Lamar Alexander (R-TN) announced an agreement on surprise billing in early December that relies on a benchmark payment rate for out-of-network bills along with a “baseball-style” arbitration backstop. HELP Committee Ranking Member Patty Murray (D-WA) did not endorse this plan, however, and the bipartisan leaders of the House Ways and Means Committee subsequently announced they were developing their own proposal for a “robust reconciliation process.” The Ways and Means Committee is expected to release legislative text in the coming weeks and mark up its proposal in February with the goal of advancing the legislation as part of the health extenders package in May.

On the drug pricing front, House Democrats voted in December to approve the Elijah E. Cummings Lower Drug Costs Now Act (H.R. 3), but Majority Leader Mitch McConnell indicated the Senate will not consider the bill, which relies on government price negotiation and international reference pricing. Leader McConnell also has not committed to bring the Senate Finance Committee-passed Prescription Drug Pricing Reduction Act (S. 2543) to the floor, given opposition from many Republican senators.

The administration also may release its much-awaited International Pricing Index (IPI) model proposed rule, which would tie reimbursement for certain Medicare Part B drugs to international prices. Strong congressional opposition to the proposal could result in legislative action to modify or overturn it, while prompting renewed consideration of alternatives to reduce drug prices. Additionally, the comment period will close in March on the administration’s proposed rule for importing prescription drugs. The rule may spur more states to consider drug importation legislation.

Congress also is sharpening its focus on foreign drug manufacturing, drug safety and the supply chain. The House Energy and Commerce Committee held several Subcommittee hearings in 2019, and these issues are a priority for Health Subcommittee Chair Anna Eshoo (D-CA) as well as Senate Finance Committee Chair Chuck Grassley (R-IA). Members of the Energy and Commerce and HELP Committees also have taken interest in the issue of drug shortages, which data show are on the rise.

Further, Reps. Fred Upton (R-MI) and Diana DeGette (D-CO) released a document in late November calling for action to build on the 21st Century Cures Act by advancing “Cures 2.0” legislation, which they describe as an attempt to “modernize coverage and access to life-savings cures in the United States and across the globe.” In December, stakeholders responded to a Request for Information to help develop Cures 2.0, and a legislative

proposal reflecting that input is in the works. Timing for consideration of the bill is unclear.

The Center for Medicare and Medicaid Innovation (CMMI) has a new leader, Brad Smith, who will oversee the finalization and implementation of key models focused on radiation oncology and kidney care, among other initiatives. In light of congressional concerns about these models and the forthcoming IPI model, bipartisan legislation is expected to be introduced soon to establish parameters for CMMI in developing new payment and delivery models.

Meanwhile, the future of the Affordable Care Act (ACA) could come down to a crucial Supreme Court decision in 2020. On December 18, 2019, the Fifth Circuit Court of Appeals ruled that the ACA's individual mandate is unconstitutional because it can no longer be considered a tax. With regard to the severability of the law, the Fifth Circuit remanded the case back to the district court. On January 3, 2020, the defendant states in *Texas v. United States* filed a petition to the Supreme Court seeking immediate review of the ruling. If expedited review is granted, the writ of certiorari could yield a final decision on the fate of the ACA before the end of the year and potentially prompt a legislative response by Congress.

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TRADE POLICY IN 2020: BATTLES AND DEALS AHEAD

Trade Policy in 2020: Battles and Deals Ahead

With three years behind President Donald Trump to launch, negotiate, and complete his most ambitious trade initiatives, 2020 will be a year of his trade worldview fully realized and a shift toward battles and deals on new fronts. In the opening weeks of 2020, the renegotiation of the North American Free Trade Agreement (NAFTA) will likely see final passage, the details of an interim deal with China will be fully revealed, a narrow agreement with Japan will be implemented, and the World Trade Organization Appellate Body (WTOAB) will remain incapable of issuing rulings. In short, the Trump administration will have implemented its vision of a weakened multi-lateral trading system and an emboldened United States acting unilaterally to remake bilateral trading relationships to its own advantage.

On the heels of these accomplishments, the President's trade policy is expected to turn to the trans-Atlantic relationship in 2020. The administration is on the verge of escalating trade tensions with the European Union (EU) while also urgently engaging in negotiations with the United Kingdom on a free trade agreement following the completion of Brexit by January 31, 2020. This trade record will be a cornerstone of his "Promise Made, Promises Kept" campaign message where trade will once again be a defining issue.

Here is a review of 2019 trade policy and what to expect in the coming year:

- **United States-Mexico-Canada Agreement (USMCA).** After overwhelming bipartisan support in the House for passage of USMCA in the closing legislative days of 2019, the United States Senate is now poised to act. While the agreement is widely expected to pass in the Senate with significant bipartisan support as well, exactly when the full Senate vote will take place has been a moving target. On January 7, the Finance Committee approved the agreement with only three Senators opposed. In a procedural plot twist, the implementing bill was referred to seven committees instead of only one with the Senate Parliamentarian adhering to NAFTA-related precedent. This necessitated the six-additional committees to take action. But, the House's delay in transmitting the articles of impeachment to the Senate created a narrow window for the full Senate to vote on the agreement before the trial begins. As a result, Senate Majority Leader McConnell has scheduled a vote on USMCA on Thursday, January 16. Congress and the administration will then dedicate resources and attention to ensuring its proper implementation both domestically and by Canada and Mexico with the agreement entering into force likely at the end of the year or early next year.
- **China.** The President also reached an end-of-year agreement with China, stabilizing relations with the U.S.' largest bilateral trading partner after 18 months of tit-for-tat tariff escalation. President Trump's confrontation with China sought to secure structural reforms to its model of state capitalism and reduce the U.S. trade deficit with China. The

'phase one agreement announced in December is on track to be signed at the White House by high-level representatives from China on January 15. Although the full text of the deal has not yet been released, it included a commitment from the United States not to impose tariffs scheduled for December 15, 2019, and to cut tariffs imposed on Sept 1, 2019, from 15 percent to 7.5 percent. In return, China committed to, among other disciplines, curb its technology transfer practices, lift foreign ownership limits on financial services, and buy \$200 billion in additional American agriculture, energy, and manufactured goods. The administration has communicated to stakeholders that it does not plan to publish the commodity specific amounts of the planned purchases out of a concern that such an announcement could distort the market for those goods. While there is a public commitment from the President to immediately begin negotiations on a 'phase two' agreement with China, this year is expected to focus on monitoring China's implementation of phase one and testing its enforcement mechanisms.

- **Japan.** In the fall of 2019, the U.S. and Japan reached an agreement on digital trade and reciprocal market access for a limited number of each other's agricultural products and industrial goods, which led the President to hold back on levying tariffs against imports of Japanese autos. This deal, which opens the Japanese market to U.S. beef, pork and certain fruit, was implemented by both sides on January 1, 2020. The administration was careful to negotiate an agreement that would not require congressional approval, causing bipartisan concern about its narrow scope and lack of consultations. Both countries also pledged to continue negotiating toward a second phase of the agreement after four months of consultations on its scope. The intent is that the scope of the phase two talks beginning in May 2020 will be comprehensive, covering all issues traditionally included in a U.S. trade agreement. But it remains to be seen how serious these negotiations will be with a difficult political calendar in the U.S. and reluctance among the Japanese to continue negotiating on a bilateral basis—rather than recruiting the U.S. back into a revised Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).
- **U.K.** Following a decisive victory in the December 12, 2019, general election, Boris Johnson now enjoys the mandate to—as the campaign slogan went—“Get Brexit Done” by the January 31, 2020, deadline previously agreed to with the EU. However, the passage of the Brexit agreement through Parliament will mark the end of only one chapter of the Brexit story and kick off the so-called “Transition Period.” For the remainder of 2020, the U.K. will remain subject to the EU's rules and regulations but will not formally be a member of the economic bloc. During this time, Britain and the EU will negotiate the rules that will govern its trading relationship in 2021 and beyond. At the same time, Britain may begin formal negotiations with the U.S. on a free trade agreement, which both Prime Minister Johnson and President Trump have publicly committed to completing as quickly as possible. Although the new political context will give the talks great urgency and transform the previous informal consultations into formal talks, completing a comprehensive bilateral agreement between the U.S. and U.K. will be difficult before the U.S. elections in November. As a result, it is possible that the countries reach a narrow 'phase one' deal that harvests early 'wins' that the President can tout on the campaign trail similar to the approach taken last year with Japan. Access to the U.K. market for American poultry and to the National Health Service for American health care goods and services is already gaining attention as especially sensitive within the negotiations.
- **EU.** Tensions are set to rise between the U.S. and EU on trade in the year to come. After winning a long-running case at the World Trade Organization (WTO) against EU subsidies to aircraft manufacturer Airbus, the U.S. moved forward with tariffs against sensitive European exports and even threatened to raise those tariffs due to Europe's failure to comply with the ruling. The U.S. has also proposed tariffs of up to 100 percent on imports of sparkling wine, cheeses, handbags and other French products in retaliation for that country's Digital Services Tax. The U.S. argues that the tax discriminates against American tech companies. In its notification of the retaliation against France, the Office of the United States Trade Representative (USTR) noted that it is “exploring” whether to retaliate against similar tax measures proposed by Austria, Italy, and Turkey. Tired of President Trump's trade unilateralism and tariff threats, the EU is also set to become more confrontational in 2020. The European Commission (EC) will consider a proposal to update its enforcement regulation and impose tariffs against countries that violate WTO rules while at the same time preventing the WTO from

operating—a definition squarely aimed at the U.S. It will take nine months for the proposal, which was informally referred to as a “bazooka” by EU leaders, to complete the EC’s legislative process. But, the proposal could lead to more tariffs between the U.S. and EU.

- **WTO.** To borrow a sports analogy, 2020 will be a “rebuilding year” for the WTOAB after the U.S.’ blockage of all nominees finally led to an insufficient number of panelists to make decisions on cases and issue rulings. Without a final binding dispute settlement mechanism, WTO members with disputes face several options, including simply accepting the initial panel’s rulings without appealing. However, the remaining players are not standing still. The EU proposed a temporary alternative appellate system to resolve disputes that would exclude the U.S., which is now supported by China, further isolating the U.S. in the WTO. The failure of the WTOAB injects greater urgency into the effort to reform its operations, but also invites other countries to move forward with WTO-inconsistent policies knowing that they may not be stopped.

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2020 CONGRESSIONAL PRIVACY OUTLOOK

2020 Congressional Privacy Outlook

With the California Consumer Privacy Act (CCPA) now in effect and a new ballot measure underway to expand the law, the renewed push for a federal privacy standard at the end of December will carry over into the Second Session of the 116th Congress.

Privacy negotiations within the Senate Commerce Committee remain ongoing following the release of the Consumer Online Privacy Rights Act from Ranking Member Maria Cantwell (D-WA) and the text of a privacy discussion draft from Chairman Roger Wicker (R-MS) in November, and the proposals’ sticking points—federal preemption and a private right of action—have remained the most contentious issues following the Committee’s hearing on December 4.

The implementation of the CCPA has caused lawmakers such as Sens. Mark Warner (D-VA) and Ed Markey (D-MA) to renew their calls for a comprehensive federal privacy standard, and we anticipate that increased awareness of California’s privacy law will keep momentum going at the federal level.

In the House, the staff of the Energy and Commerce Committee released a draft of a consumer privacy bill to the public on December 18. Committee staff will continue working on a bipartisan basis to develop the draft and seek stakeholder feedback. The draft does not contain legislative language on controversial provisions such as preemption and a private right of action, leaving these areas in brackets for stakeholder input. Staff has asked for preliminary feedback on the draft by January 24.

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FINANCIAL SERVICES UPDATE

Financial Services Update

The end of year spending package saw some major wins for the financial services community, including reauthorization of the Export Import (EXIM) Bank, the Terrorism Risk Insurance Program (TRIA), and the National Flood Insurance Program. After years of short-term, stopgap reauthorizations that hamstrung the EXIM Bank, Congress reauthorized the Bank for seven years – through December 31, 2026. The reauthorization also included several reforms to the agency process. It established procedures allowing for a temporary Board, while awaiting Senate-confirmed Directors, and created a program on China and Transformational Exports to help keep American exports competitive, while increasing supervision of transactions involving a state-owned enterprise. TRIA, which actually lapsed at the end of 2014 without Congressional reauthorization, was successfully reauthorized a full year before its next expiration. The program is now operational through December 2026 and includes a new study on vulnerabilities and costs associated with cyberterrorism.

Regarding the National Flood Insurance Program, a longer-term reauthorization remained elusive. While Congress did not allow the program to lapse, it was able to agree only on a reauthorization through the end of the current fiscal year. There will no doubt be a push before September to achieve a long-term extension of the program.

Chairwoman Maxine Waters (D-CA) announced the House Financial Services Committee's January schedule upon returning in 2020, with a focus on the affordable housing crisis, banking security, and the rise of mobile payments. The full committee schedule can be found [here](#).

Over in the Senate, Banking Committee Chairman Mike Crapo (R-ID) outlined in December significant reservations with the House passed Secure and Fair Enforcement (SAFE) Banking Act, which would allow banks and credit unions to serve the cannabis industry. The Chairman has stated he is looking to work towards a solution, but there have not been any hearings announced at this time. There remains the possibility that the Senate Banking Committee could consider the Illicit Cash Act in 2020.

Out on the campaign trail, 2020 Democratic candidates continue to keep the financial sector on its toes. Most recently, Sen. Elizabeth Warren (D-MA) unveiled a [plan](#) altering the way individuals file for bankruptcy. Interestingly, Sen. Warren's plan seeks to undo regulations put in place by rival candidate, former Vice President Joe Biden, during his time in the Senate. Worth noting, in the minutes for the December 2019 Federal Open Market Committee (FOMC) meeting, it was highlighted that the GDP forecast for 2020 was raised to 2.0%-2.2% from September's 1.8%-2.1%. Continued positive job creation reports, GDP growth, and a strong performing stock market may force candidates to convince voters how their plans will continue the trends set during the Trump administration.

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TAX UPDATE

Tax Update

Congress included the most meaningful piece of retirement legislation in a decade in the spending bill signed by President Trump in December. The SECURE Act, which had been in the works for nearly three years and saw broad bipartisan support in both chambers, reforms many areas of the retirement sphere, including removing the age limit restricting Individual Retirement Account (IRA) contributions, closing a loophole that allowed investors to stretch tax advantages of IRA across decades, raising the age individuals need to begin taking required minimum withdrawals, the "kiddie tax" fix and a host of other reforms. The tax extenders community also breathed a sigh of relief when over 30 tax extenders that expired in 2017, 2018 or were set to expire 2019 were largely renewed. Most of the provisions were extended through 2020, with the biodiesel tax credit and railroad maintenance credit being extended through 2022. Notably left out of the spending package was Democrats' push for an expansion of certain refundable tax credits, as well as technical corrections to the Tax Cuts and Jobs Act (TCJA), all of which will stay on the table as bargaining chips for possible tax action in the lame duck session.

While any legislation passing in 2020 will be a battle, there are tax areas that could see potential movement. Sens. Rob Portman (R-OH) and Ben Cardin's (D-MD) Retirement Security and Savings Act (S.1431), which was introduced in early 2019, could act as phase two of Congress' retirement reform action. Multiemployer pension plans will continue to plague lawmakers as House Democrats and Senate Republicans work towards a consensus on how to address the dozens of failing pension plans covering American workers. On the global scale, the United States will continue to respond to the digital services taxes (DST) imposed by trading partners. The French DST has already levied a 3 percent tax on revenues for providing "targeted advertising" and digital interface services, and the USTR responded with proposed tariffs on French goods imported to the United States. The Treasury Department will continue to explore if there is a potential solution through broad-scale international reform at the Organisation for Economic Co-operation and Development (OECD). Tax treaties, additional Treasury regulations for TCJA provisions and a potential green energy tax credit package from the House all could lead

to a busy 2020 for tax legislators.

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“ONAIR PODCAST EPISODE”: SPOTLIGHT ON PRIVACY LEGISLATION

[“OnAir Podcast Episode”: Spotlight on Privacy Legislation](#)

In this episode, Akin Gump public law and policy partner Ed Pagano and senior policy advisor Galen Roehl discuss privacy legislation being considered in the U.S. Congress.

Among the topics covered:

- Drivers for new legislation.
- The leading privacy bills.
- The impact of state privacy laws.
- The Trump administration’s view.
- Takeaways for business.

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2020 CONGRESSIONAL CALENDAR

2020 Congressional Calendar

Please click [here](#) for the 2020 Congressional Calendar, reflecting recent updates made to the House and Senate schedules.

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