

# WHAT'S NEW IN WASHINGTON



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## March 2018

Washington saw a flurry of bipartisan activity over the last few weeks. Most notably, Republican and Democratic negotiators reached a long-awaited deal on sequestration budget caps. The compromise, announced on February 7 as the Bipartisan Budget Act of 2018 (BBA), funds the government at current levels through March 23. The BBA also raises the spending caps for Fiscal Years (FY) 2018-2019 for both defense and nondefense spending programs. Following a brief government shutdown, Congress passed the legislation on February 9, and the President signed the bill on the same day.

The measure also included a host of other provisions that:

- provided additional relief for areas of the country hit by severe weather disasters in the latter half of 2017
- extended funding for the Children's Health Insurance Program through FY27
- raised the statutory limit on federal debt
- renewed expired health extenders, including ambulance add-on payments, the Medicare-dependent hospital program and the Medicare rural add-on for home health services
- renewed expired energy tax extenders, including tax credits for fuel cells, energy efficiency, combined heat and power, and nuclear power
- renewed several expired tax extenders, including the Indian employment tax credit, railroad track maintenance tax credit and the above-the-line deduction for qualified tuition expenses.

With a budget deal in place, the appropriators have been working to finalize an omnibus spending package to fund the government past March 23 and through the end of FY18 on September 30, 2018. The House set a target date of March 16 to wrap up its work on the omnibus, with text expected to be revealed shortly before that date. If the timeline holds, this would give the Senate the entire week of March 19 to approve the measure and send it to the President to sign before government funding lapses.

Two complicating factors could pose challenges for that timeline. The first is immigration. To recap:

- In September, President Trump announced the end of the Obama-era program and gave Congress until March 5 to pass a legislative solution to the Deferred Action on Childhood Arrivals (DACA).
- Legislators failed to reach a compromise, and the debate came to a head in January when, following Senate Democrats' objection to the lack of a DACA fix in a Continuing Resolution, the government shut down for several days.
- Since that time, the immigration issues have largely been decoupled from government- funding discussions. During an open Senate-floor debate earlier in February, no immigration proposal garnered the necessary 60 votes needed to move any measure forward. With the failure of the Senate to address the soon-to-expire DACA program, Democrats may once again push for a DACA fix to be included in the omnibus.

The issue of gun control could also create another complication in congressional consideration of omnibus legislation. Following the school shooting in Parkland, Florida, congressional Democrats have pushed for votes on legislation strengthening federal gun laws. These entreaties could become demands from Democrats to include gun provisions in the omnibus bill in exchange for Democratic support.

It remains to be seen if immigration, guns or other controversial issues could derail efforts to pass an FY18 omnibus spending package by March 23. As it stands, negotiators are focused on funding questions, and time will tell if Democrats will agree to address hot-button issues separate from the funding bill or if the omnibus will get caught in the current political crosswinds. Ultimately, it is unlikely that Democrats will seek to shut down the government over immigration or gun control on March 23.

Here are a few things that we believe are worth focusing on since our last issue:

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## Trump Administration Engaged on Trade Remedies

### Section 232

On March 1, 2018, President Trump informally announced his intention to impose tariffs of 25 percent on steel imports and 10 percent on aluminum. The President justified his announcement, invoked under Section 232 of the Trade Expansion Act of 1962, as an effort to protect both industries from unfairly traded imports that would pose a threat to national security. Many interest groups, including U.S. businesses, consumer groups, Democrats and Republican leaders (including some within his own administration), as well as many foreign governments, have urged the President to reverse course or, at least, to narrow the tariffs.

On March 8, 2018, President Trump formally signed a pair of orders that will officially establish tariffs of 25 percent on steel and 10 percent on aluminum in 15 days. The proclamations deem Canada and Mexico to be "special cases" and outlines that they will be exempted initially, but must "continue ongoing discussions." The proclamations also clarify that any country with which the United States has a "security relationship" may open a dialogue with the administration to discuss "alternative" ways to prevent a security threat caused by that country's shipments. The proclamations also require the Commerce Department to initiate a process for the consideration of requests from U.S. parties for the exclusion of particular aluminum or steel products that are not available in sufficient quantity or are not at the required quality from U.S. producers.

The President ordered the Commerce Department to initiate investigations last April. On February 16, the Commerce Department, under Secretary Wilbur Ross, released the findings of its investigations and made recommendations for both steel and aluminum imports. The President has ultimate discretion to determine the appropriate remedy, and the actual tariffs imposed by the President go beyond the recommendations in the reports.

The timing of these announcements coincides with the seventh round of talks to renegotiate NAFTA and has been met with resistance from major trading partners, such as Canada and Mexico.

Congressional leadership also voiced its concerns. Sen. Orrin Hatch (R-UT), chairman of the Senate Finance Committee, with jurisdiction over trade, labeled the President's action as one that the American people "can't afford." Sen. John Thune (R-SD), the No. 3 Republican in the Senate, stated that congressional leadership had "advised [President Trump] against it" and argued that such actions "would be very harmful to the economy." However, the announcement was cheered by others in Congress, including Sen. Sherrod Brown (D-OH), who labeled the move as a "long overdue" response to China.

The three major U.S. stock indexes closed higher on the day of the orders as market fears of a trade war were eased.

### Section 201

The announcement on steel and aluminum follows the President's January 22 decision to impose new "safeguard" tariffs on imports of solar panels and washing machines, pursuant to Section 201 of the Trade Act of 1974. The new duties went into effect on February 7.

Solar panel imports will be assessed new duties over a four-year period. A levy of 30 percent will be imposed in the first year of the order and will then fall by 5 percent increments in each of the next three years. The first 2.5 gigawatts of imported solar cells in each year will be exempt from the tariffs. Certain developing countries are exempt from the order. A process for considering certain product exclusions will also be available.

Imports of large residential washing machines will also be subject to a tariff-rate quota (TRQ), with degressive duty rates over three years. In the first year, an additional 20 percent in-quota duty will be imposed on the first 1.2 million machines imported, with all additional import volumes facing an over-quota duty of 50 percent. The in-quota and over-quota rates will fall to 18 percent and 45 percent, respectively, in the second year, and then fall again to 16 percent and 40 percent in the third year. Those tariff rates will also apply to washer parts through an annual TRQ, with the first 50,000 units exempt from the new rates in the first year, 70,000 units exempt in the second year and 90,000 units exempt in the third year. Canada, along with certain developing countries, is exempt from the order.

Notably, the tariff levels ordered by President Trump are below the maximum amounts that the President is authorized to impose under Section 201.

The announcement of these tariffs coincided with President Trump's speech four days later at the World Economic Forum in Davos, where he promoted the "America First" policies and economic growth under his administration.

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## **Legislative Outline for Rebuilding Infrastructure in America**

On February 12, 2018, the White House announced its much-anticipated Legislative Outline for Rebuilding Infrastructure in America (please see a summary [here](#)). While it is likely far from what any final bill might look like, the need for infrastructure development and streamlining has been recognized by those on both sides of the aisle. Unsurprisingly, it faces many challenges right out of the starting gate, featuring wide rifts on both its structure and financing provisions. For example, many believe that the President's plan goes too far and erodes environmental protections, while others believe that it still contains too many hurdles and allows the federal government too much time to review essential infrastructure improvements. There also is no consensus around how the bill should be funded. The streamlining provisions in the last couple of highway reauthorization bills have reduced delays in the environmental review and permitting processes for many transportation projects, thus demonstrating that a path forward exists for streamlining, with the right balance of cost and time savings versus environmental protections.

While the Trump administration has made infrastructure development a key priority, many legislators in Congress see long odds for passing an infrastructure package that will become law this year. Echoing these sentiments, Senate Majority Whip John Cornyn (R-TX) stated on February 27 that the crowded legislative agenda will make it increasingly difficult to draft, debate and pass an infrastructure bill in 2018.

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## **Petition Filed with the FCC for Control Spectrum for Drones**

On February 8, 2018, the Aerospace Industries Association (AIA) filed a petition for rulemaking with the Federal Communications Commission (FCC) seeking service rules for command and control links for Unmanned Aerial Systems (UAS or "drones") in the C-band, 5030-5091 MHz. This band was allocated for terrestrial line-of-sight UAS control links at the 2012 World Radiocommunication Conference, and the FCC formally adopted the allocation in March 2017. AIA now asks the FCC to establish service rules for the 5030-5091 MHz band keying off of the CNPC (control non-payload communications) standards developed by RTCA Special Committee 228 ("SC-228"). These standards are generally focused on control links for larger cargo and military drones, over 55 pounds, flying at higher altitudes. This "aviation-protected spectrum" may be desirable at some point for use by small UAS at low altitudes (think drones for delivery), but it is not necessary for deployment of small UAS. Small UAS are not required to utilize aviation-protected spectrum. It is commonly thought that command/control links for small UAS at low altitudes will be accomplished, in whole or in part, through use of networked cellular—the same spectrum that powers your mobile phone. See, [Commercial Wireless Networks, The Essential Foundation of the Drone Industry](#) (CTIA, 2017).

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## **Congressional Review of the FCC's Restoring Internet Freedom Order Initiated**

On February 27, 2018, Sen. Ed Markey (D-MA) introduced a resolution of disapproval under the Congressional Review Act (CRA) of the FCC's [Restoring Internet Freedom Order](#) (the "Order"). The Order overturned the FCC's [Open Internet Order](#), which codified the agency's net neutrality rules and reclassified broadband Internet service providers as common carriers to address jurisdictional concerns raised in prior efforts by the FCC to enforce net neutrality rules. The CRA process was initiated based on the publication of the FCC's Order on February 22 in the *Federal Register*. The resolution of disapproval, introduced with 50 co-sponsors, now goes to the Senate Commerce, Science and Transportation Committee for consideration. If that committee fails to report the resolution out to the full Senate within 20 days, it can be discharged and called to the Senate floor for a vote with the support of 30 senators. Once there, a simple majority is needed to pass the resolution, which would then be referred to the House of Representatives. Based on the fact that there are 50 co-sponsors of the resolution of disapproval, passage in the Senate is a very real possibility. The resolution is far less certain to pass the House of Representatives, where it currently has 150 co-sponsors (218 votes would be needed for passage in the House).

In addition to the CRA process being initiated, the *Federal Register* publication starts the 30-day clock at the FCC for filing petitions for reconsideration of the Order and for the revised rules to become effective (April 23). It also addresses the FCC's argument before the 1st, 9th and D.C. Circuit Courts of Appeal asserting that lawsuits

filed by petitioners were premature because publication in the *Federal Register* had not occurred.

With the clock now officially started on the FCC's Order, we expect that action will come relatively swiftly on the CRA, with a likely vote on the floor of the Senate in the spring. Following that vote, there may be renewed interest in putting together bipartisan legislation that would re-establish core "rules of the road" to afford consumers statutory protection and to give providers a clear understanding of what the expectations are regarding their service offerings. While the odds are long on getting legislation completed before the November election, such efforts can set precedent for a future Congress.

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## **DHS to Kick Off Working Group Focused on Protecting Critical Infrastructure from UAS**

The Department of Homeland Security (DHS) is kicking off a UAS Critical Infrastructure Security Working Group on March 19, 2017. Participation is by invitation only, and Akin Gump will be participating. The group will study and make recommendations about UAS issues related to critical infrastructure, including an examination of how the Federal Aviation Administration will apply Section 2209 designations and 2210 authorities, which grant expanded UAS rights to owners of certain critical infrastructure. The voting members of the group will comprise one representative from government and one representative from industry across 16 critical infrastructure sectors. The group will examine both how critical infrastructure is using UAS and what needs to be done to protect critical infrastructure from UAS risks. The 16 critical infrastructure sectors are:

- Chemicals
- Commercial Facilities
- Communications
- Critical Manufacturing
- Dams
- Defense Industrial Base
- Emergency Services
- Energy
- Financial Services
- Food and Agriculture
- Government Facilities
- Health Care and Public Health
- Information Technology
- Nuclear Reactors, Materials and Waste
- Transportation Systems
- Water and Wastewater Systems

If your business is in one of these sectors, and you are unaware of the work of this group, please contact us. Preliminary topics of the working group include (i) the threats posed by UAS, (ii) the technology supporting UAS, and (iii) the legal and policy implications of UAS for critical infrastructure.

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## **Prescription Drug Pricing Seeing Momentum**

Recent developments in the political arena and the health care sector continue to drive congressional and administration interest in the issue of prescription drug pricing, which may drive significant legislative and/or regulatory action in a crucial election year. A provision of the BBA will close the Medicare Part D "donut hole" one year earlier in 2019 and significantly increase drugmakers' share of costs for patients in the coverage gap from 50 percent to 70 percent. The policy adopted in the BBA is projected to cost the pharmaceutical industry billions of dollars in additional discounts over the next 10 years. The industry is working with Congress to mitigate this cost, possibly through a change in the Omnibus.

The President's FY19 Budget also included a number of drug-pricing proposals. Notably, the administration proposes to change Medicare Part D plan formulary standards to require a minimum of only one drug per category rather than two, require Part D plans to share at the point of sale at least one-third of rebates received from manufacturers, exclude manufacturer discounts in the "donut hole" from the calculation of beneficiary out-of-pocket costs, and establish a five-state Medicaid demonstration that would allow participating states to determine their own formularies and negotiate drug prices directly with manufacturers. The Budget would also tweak reimbursement for Medicare Part B drugs and give the Health and Human Services (HHS) Secretary the authority to consolidate certain Part B drugs into Part D.

While most of the FY19 Budget proposals require statutory authorization and may not be taken up by Congress, they could serve as a blueprint for members seeking to advance drug-pricing legislation this year. In addition, HHS Secretary Alex Azar stated recently that the HHS is working on other drug-pricing proposals that would not require congressional approval.

Momentum also appears to be building for reforms to the 340B Drug Pricing Program, which requires manufacturers to provide discounts on outpatient drugs to certain covered entities. In January, the House Energy and Commerce Committee released a report that proposed administrative actions by the Health Resources and Services Administration and legislative changes by Congress that aim to restrict growth of the program and reduce any misuse. Chairman Greg Walden (R-OR) has not yet endorsed a specific approach, but has committed

to considering legislation in early 2018.

Legislation advanced by the Energy and Commerce Committee likely would reflect the Committee's report and also could include some of the policies proposed in the President's FY 2019 Budget, such as requiring covered entities to report program savings. Reps. Chris Collins (R-NY) and Buddy Carter (R-GA) are also reportedly working on 340B legislation to "codify" congressional intent for the program, and Sen. Bill Cassidy (R-LA) has introduced a bill to pause new 340B registrations for two years.

Further, the Food and Drug Administration has taken a number of steps to expedite the approval of affordable generic medications, and additional drug-pricing initiatives are expected from the White House.

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## Significant Activity on Opioid Legislation

Congress is planning significant activity on the opioid crisis in the first half of this year, with a flurry of hearings and legislative activity already under way. On February 28, the House Energy and Commerce Committee held the first of three legislative hearings that it has planned on the opioid crisis. The hearing focused on the Controlled Substances Act and related enforcement issues, with members hearing from the Drug Enforcement Administration and an array of stakeholders on drug diversion, safe prescribing and medication-assisted treatment. Further hearings may stretch into April and will examine public health and reimbursement issues. Chairman Greg Walden (R-OR) suggested that the Committee will proceed under regular order, marking up legislation in April and moving a package to the floor by Memorial Day. Members hope to send a final package to the President's desk by the August recess.

The Senate is also moving forward on opioids; on February 27, the Health, Education, Labor and Pensions Committee held a hearing on the role of technology and data in combating the opioid epidemic. Chairman Lamar Alexander (R-TN) said that he expects the Committee to mark up opioid legislation at the end of March. Alexander also met with governors to discuss opioid-related issues, and the Committee will hold a hearing with a panel of governors on March 8 to hear their feedback.

Meanwhile, a group of senators led by Sens. Rob Portman (R-OH) and Sheldon Whitehouse (D-RI) have that proposed a discussion draft to build on the Comprehensive Addiction and Recovery Act of 2016 (CARA). The bill, dubbed CARA 2.0, would authorize \$1 billion in funding for evidence-based prevention, enforcement, treatment and recovery programs. It also makes a number of policy changes, including limiting initial opioid prescriptions for acute pain to three days. The senators noted in a news release that the bill would increase funding authorization levels to coincide with the recent bipartisan budget deal, which included an agreement to boost opioid spending by \$3 billion in FY18 and another \$3 billion in FY19.

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## Financial Services Legislation Moves Forward

Legislators in both chambers in February and early March advanced several bills to streamline regulations on banks and other financial services firms. On February 27, the House passed a bill introduced by House Financial Institutions and Consumer Credit Committee Chairman Blaine Luetkemeyer (R-MO) that would allow financial institutions to rely on forward-looking estimates rather than historical data when determining their operating risks, which have a significant impact on their capital requirements.

Passage of the bill follows a recent trend among House Republicans toward advancing targeted financial services measures and is a sharp departure from their actions in 2017, when the chamber approved the wide-sweeping Financial CHOICE Act that would roll back much of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). House Financial Services Committee Chairman Jeb Hensarling (R-TX) has indicated a willingness to work with his Senate counterparts on smaller proposals that have the chance of passing the Senate. On March 8, he released a list of 29 bipartisan bills he will want added to any final version of a bill.

In the Senate, a bill from Senate Banking Committee Chairman Mike Crapo (R-ID) that would, among other changes, raise from \$50 billion to \$250 billion the asset threshold at which enhanced prudential standards, established under Dodd-Frank, apply to financial institutions. The proposal, which the Senate Banking Committee approved in December, is a bipartisan effort to provide relief to small and midsize banks. The bill has been on the Senate floor this week, and, with 13 Democratic co-sponsors, is likely to avoid any Democratic-led filibuster.

On March 7, Chairman Crapo released the text of a substitute amendment to make changes to the underlying bill to ease concerns over several provisions, including the treatment of foreign banks operating in the U.S. Senators introduced a flood of amendments, some of which could receive votes. Looking forward, Chairman Crapo expressed hope that the Senate would complete consideration of the bill by March 9, but delays in consideration of the bill mean that a vote on final passage in the Senate will come next week. It remains to be seen whether the

House will pass the Senate bill or amend it; nevertheless, it is clear that Congress will pass the Senate bill or a slightly modified version in the coming weeks, sending the legislation to the President's desk.

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