

The State of the Union in 2016

# What To Expect In President Obama's Final Year In Office



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**“[The President] shall from time to time give to the Congress information of the State of the Union,**

**And recommend to their Consideration such measures as he shall judge necessary and expedient;”**

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Article 2, Section 3

US Constitution

Last night, President Barack Obama delivered his seventh and final [State of the Union Address](#) before a joint session of the 114th Congress. In it, he departed from past form. Instead of laying out a laundry list of proposed legislative objectives, he spoke more philosophically about the state of the union and in particular the dismal state of US politics. He noted areas of potential cooperation, such as judicial sentencing reform. He put Vice President Joe Biden in charge of the “moonshot” of marshalling federal resources to find a cure for cancer. He looked back on his tenure, lamenting some things that might have been with a different approach. And like his predecessors, he sought to reassure the American public that a brighter future lies ahead if we collectively seize the initiative to address the multiple challenges we face at home and abroad.

Speaking on behalf of the Republican Party in the [GOP Response](#), Governor Nikki Haley (R-SC) echoed some of those same themes before laying out a vision for how the Republican Party would govern if successful in capturing the White House in the November elections. She indicated, for example, that “if we held the White House, taxes would be lower for working families, and we’d put the brakes on runaway spending and debt.” Like the President, she lamented the state of the current political discourse in Washington DC and on the campaign trail. As she put it, “[s]ome people think that you have to be the loudest voice in the room to make a difference. That is just not true. Often, the best thing we can do is turn down the volume. When the sound is quieter, you can actually hear what someone else is saying. And that can make a world of difference. Of course that doesn’t mean we won’t have strong disagreements. We will. And as we usher in this new era, Republicans will stand up for our beliefs.” She noted how the citizens of her state had come together after tragedy this past summer when nine individuals were killed by a gunman during a prayer service, inspiring the nation with their response to horror.

In this analysis, we explore what the President and Congress might be able to accomplish this year if they turned down the volume and spoke with – rather than past – each other about how best to advance the interests of the American public. Since this is the final year of the President’s tenure, we anticipate that he will focus much of his effort on legacy issues, seeking to accomplish goals through rules and regulations when Congress will not agree on legislation. In his address, he only hinted at what’s to come, noting that “there are outdated regulations that need to be changed, and there’s red tape that needs to be cut.” Naturally enough, he didn’t mention that the Office of Management and Budget now has nearly 4,000 proposed rules and regulations in the queue, which the President and his team will be determined to move to completion before he leaves office.

In our [State of the Union Analysis 2015](#), we predicted 2015 would be a year of surprising legislative accomplishment that could, in at least some notable ways, defy conventional wisdom about what could be accomplished in a modern-day divided federal government mired in gridlock. We saw mutual desire on the part of key administration officials and congressional leaders to “get some things done,” despite the well-documented tensions between President Obama and a Congress that would now be marked by Republican majorities in both chambers. Notwithstanding the challenges, we predicted agreement in three “Big T” areas: trade, taxes, and transportation.

In the end, significant bipartisan bills were enacted on all three subjects. Congress provided the President with Trade Promotion Authority, enacted a massive tax extenders bill, and for the first time in a decade adopted a major, long-term surface transportation bill. In addition, Congress and the Administration found common ground in other areas that few would have thought possible with a Democratic administration and a Republican-led Congress. Two significant entitlement reform measures were enacted in the form of bipartisan legislation to permanently replace the long-despised Medicare Structured Growth Rate formula and a bipartisan budget agreement shepherded by outgoing House Speaker John Boehner (R-OH) that swapped some of the crude spending cuts of sequestration for longer-term entitlement reforms that will actually address the drivers of the nation’s debt. Bipartisan legislation also was enacted to update federal elementary and secondary education programs for the first time since the No Child Left Behind Act was signed in 2002. Consequential new laws were also enacted in areas such as cybersecurity, where a new information-sharing measure became law, and energy policy, which saw the lifting of the decades-old ban on US crude oil exports and an extension of federal tax measures supporting investments in renewable energy.

The second session of the 114th Congress is likely to be much different from the first session. Here are some of the ways in which we expect it to differ significantly:

## **The period for lawmaking will be abbreviated.**

While a window for legislating does exist in 2016, it will mostly close by early summer, as the parties begin their conventions and the focus shifts almost entirely to the presidential election. The only thing Congress really has to do following the party conventions is to ensure that legislation has passed by September 30 (the end of the 2016 fiscal year) so that the federal government does not shut down beginning October 1. It is unlikely members of either party in Congress will be willing to risk shouldering the blame for a government shutdown in the final weeks before a major election, so there is little reason to doubt that this responsibility will be met. The only real question is whether it is met in the form of single large bill – a Continuing Resolution (CR) or an omnibus – or in the form of many bills passed and enacted individually in advance of the deadline, as is “regular order” and was once standard operating procedure. Outside of the appropriations process, there are a number of matters that could properly be classified as “unfinished business” from the first session and could be brought across the finish line in 2016, despite the potential complication of the looming election. (We discuss them separately on page 5.)

## **Debt limit will not be a factor.**

In contrast to 2015 and most previous years in recent memory, there are few “cliffs” to be encountered on the legislative calendar in 2016 of the sort that have driven most of the epic legislative wheeling-and-dealing that has marked the relationship between President Obama and Congress since the GOP assumed control of the House following the 2010 elections. Consequently, new House Speaker Paul Ryan (R-WI) has indicated the emphasis for his chamber in the year ahead will be on using the House infrastructure to advance new policy ideas, rather than actually voting on bills with the expectation that they will be enacted into law. Thanks to the bipartisan budget agreement negotiated by outgoing Speaker John Boehner last fall, Congress will not confront the matter of the next debt limit increase until at least early 2017, sparing President Obama and the leadership teams in both chambers from having to deal with what for years has been the most divisive and politically toxic “must-pass” legislation for either party.

## **Sequestration will not be a factor.**

The heart of the bipartisan budget pact enacted last fall was an agreement to swap billions of dollars in short-term discretionary spending cuts for longer-term entitlement reforms that will actually help to address the drivers of the nation’s debt. Consequently, the shadow of sequestration will not loom as large over this year’s budget discussions as it has for those of the past several years.

## **The presidential and congressional campaigns will be a dominant factor.**

When Americans go to the polls this November, they will elect a new president. Also on the nation’s collective ballot will be one-third of the seats in the Senate and all of the seats in the House of Representatives. As the election approaches, political considerations will increasingly freeze out most every other factor for both parties. Some important legislative business could be pushed to the lame duck session between the election and the end of 2016. But in recent years, congressional leaders have become increasingly reluctant to depend on the lame duck period for heavy-duty legislating.

## **The House will be operating under a new speaker, Paul Ryan.**

By Republicans’ own admission, much of the action in the House under Ryan this year will be aimed at promoting ideas, rather than voting on, passing, and enacting bills. That is not to say the action will not be consequential; much of this activity in 2016 could lay the groundwork for actual lawmaking in 2017, when the next Congress convenes and a new president takes the reins of the Executive Branch. As but one important example: fundamental tax reform. As the quip goes when talking about tax legislation, “if you aren’t at the table, you are likely to be on the menu.” This is a year for business to be part of an important discussion that will have long-term consequences.

Speaker Ryan has pledged to place a renewed emphasis on “regular order” in the chamber – meaning most key legislation would originate in committee and the House will be permitted more freedom to “work its will” with respect to changes and amendments. Ryan’s predecessor, John Boehner, made a similar vow and implemented similar changes upon taking the speaker’s gavel in 2011. Some of the changes Boehner instituted stuck; for example, many appropriations bills throughout Boehner’s tenure were considered under “open” or “modified open” rules allowing amendments to be offered and debated with minimal limitations. But the Republican majority in the House under Boehner was frequently forced to put bills on the floor that had not moved through the committee process, particularly when Congress was up against deadlines such as the expiration of the debt limit and debates were raging within the House Republican Conference on tactics for managing such realities. With Congress facing several critical deadlines this past December, Speaker Ryan himself had little choice but to bring to the floor late-inning agreements on appropriations and tax policy – agreements that were enacted without committee markups and mostly negotiated directly by House and Senate leaders and leadership aides. But the new speaker has promised a new way of doing business in 2016, and given the emphasis Ryan has placed on a revamped process since taking office, we believe the new speaker is likely to find ways to deliver at least partially on his pledge. As noted earlier, the debt limit will not need to be raised in 2016, sparing Ryan and his leadership team of at least one huge challenge facing his regular order vow.

We provide below an overview of some of the things we expect to be accomplished in 2016. In addition, we offer our projections for what else could be accomplished, if certain stars were to properly align in the months ahead.



## Prospects for Success

We believe it is likely that legislation will be sent to the President and signed into law in the following areas in 2016:

- **TSCA modernization.** A long-anticipated modernization of the 1976 Toxic Substances Control Act is widely expected to make it to the President's desk, with both the House and Senate having passed versions of a TSCA overhaul during 2015 with widespread bipartisan support.
- **FAA reauthorization.** Having agreed to major surface transportation legislation last year, Congress will turn its attention this year to modernizing our air transportation infrastructure. Reauthorization of the Federal Aviation Administration is an important matter of unfinished business, and is expected to begin moving in the House Committee on Transportation and Infrastructure early this year, with Senate committee leaders closely monitoring progress in the House and preparing to follow up once House action has occurred.
- **Judicial Redress Act.** Legislation demanded by the tech community – particularly after last year's EU ruling against the US-EU "safe harbor" agreement that had given protection to US tech companies operating in Europe – passed the House overwhelmingly last fall and is under consideration by the Senate Judiciary Committee. Given the importance of the measure to Silicon Valley and its relatively noncontroversial nature in Congress, it seems likely that some form of the Judicial Redress Act will eventually be signed into law.
- **Customs legislation.** Customs legislation is another key item of unfinished business from the first session of the 114th Congress. A conference report was completed during the final weeks of 2015 and had been widely expected to go to the President before the end of the year, but a controversial maneuver spearheaded by Senate Finance Committee Ranking Member Ron Wyden (D-OR) involving the addition of seemingly unrelated legislation to permanently ban taxation of the Internet – without corresponding legislation to provide states and retailers with parity in the rules governing the taxation of online transactions – resulted in the measure being delayed.
- **Puerto Rico debt relief.** The debt crisis in Puerto Rico has worsened to the point where Congress now seems compelled to take action. Speaker Paul Ryan has directed the committees of jurisdiction in the House to develop a response for the chamber's consideration by early spring. The matter could end up being a divisive one within the House Republican Conference, but Ryan appears to have made the judgment that inaction is not an option. It seems likely that some measure of emergency debt relief for Puerto Rico will eventually advance.

- **Appropriations.** As noted above, the only thing Congress really must do following the party conventions this summer is to ensure that legislation has passed by September 30 (the end of the 2016 fiscal year) so that the federal government does not shut down beginning October 1. It is unlikely members of either party in Congress will be willing to risk shouldering the blame for a government shutdown in the final weeks before a major election, so there is little reason to doubt that this responsibility will be met. The only real question is whether it is met in the form of single large bill – a Continuing Resolution (CR) or omnibus – or in the form of many bills passed and enacted individually in advance of the deadline, as is "regular order" and was once standard operating procedure. The leaders of both parties in Congress have signaled a desire to return to regular order and complete the appropriations process this year, but whether this goal is actually achievable in the truncated year ahead will remain to be seen.

## What Else Could Be Accomplished in 2016?

There are also many other areas in which legislation could move to the President's desk and be signed into law this year if the stars were to align properly:

- **Permanent Internet tax moratorium + online sales tax parity.** Proponents of enacting a permanent moratorium on Internet access taxes locked arms with supporters of the Remote Transactions Parity Act (RTPA) in 2015 in an effort to create maximum leverage in support of both long-sought policy goals. A late-year surprise maneuver by Senator Ron Wyden (D-OR) saw the permanent moratorium attached to the customs conference report in an effort to divide the coalition and outflank RTPA backers. But the maneuver may have backfired, as the ensuing controversy prevented the customs bill from achieving final passage in the Senate before the end of the year. House and Senate leaders must now decide how to untangle the customs bill from the trap in which it has at least temporarily become ensnared. Senate leaders may decide to take their chances and plow ahead. But they may find themselves unable to do so, and thus might send the customs bill back to conference to either remove the permanent Internet tax moratorium or add RTPA to it. Whatever the outcome, RTPA backers have demonstrated their muscle by forcing the delay, and 2016 could end up being the year Congress is forced to finally act to provide the guidance it has been so reluctant to give states and retailers on the matter of taxation of Internet sales.

- Cures/FDA reform.** The House overwhelmingly approved the 21st Century Cures Act last summer, the culmination of years of bipartisan work by House Energy and Commerce Committee Chairman Fred Upton (R-MI) and Representative Diana DeGette (D-CO). The Senate, however, failed to take up the bill, with Senate Health, Education, Labor and Pensions (HELP) Committee Chairman Lamar Alexander (R-TN) vowing his committee would instead offer and pass its own version of the legislation. The year ended without a bill being unveiled on the Senate side, but Alexander has pledged the matter will be among his highest priorities during 2016. Despite the uncertain outlook in the Senate, we like the chances of Cures-style legislation being enacted before President Obama leaves office. It is a safe bet Upton, who is retiring from Congress at the end of the session, will work with Speaker Paul Ryan and his counterparts on both sides of the aisle in the House to keep the pressure on the Senate to act. And if anything can become law during an election year, it's a bipartisan bill promoting medical research.
- Energy legislation.** A broad energy bill (S. 2012) championed by Senate Energy and Natural Resources Chairman Lisa Murkowski (R-AK) and Ranking Member Maria Cantwell (D-WA) was approved by the committee last summer and is poised for action on the Senate floor early this year. House Energy and Commerce Committee Chairman Fred Upton has legislation as well that is aimed at expanding North American energy production and promoting an "architecture of abundance" for the United States in support of an all-of-the-above approach to domestic energy. Democrats in Congress probably hold the key to determining whether a final bill that merges the two products passes both chambers of Congress and goes to President Obama's desk during 2016.
- Spectrum.** A recent POLITICO analysis summarized the outlook well: "Even though the FCC is expected to kick off a massive auction of TV airwaves licenses in March and Congress passed a budget deal requiring the government to give up another 30 MHz in the coming years, lawmakers are sure to keep looking at filling the spectrum pipeline," a favorite phrase among those eager to free up federally held spectrum for use by the nation's cellphone networks. The House Energy and Commerce communications subcommittee has already passed the Federal Spectrum Incentive Act (H.R. 1641), which would give federal agencies willing to part with their airwaves a cut of the auction proceeds. The bill is likely to pass the full committee with little controversy soon, just as a previous version did in 2014. Meanwhile, Senate Commerce Chairman John Thune (R-S.D.) continues to hold out hope for his sweeping spectrum bill, the MOBILE NOW Act, which was supposed to be marked up in November or December. Work on that will be carried over to 2016. Thune has been optimistic about reaching a deal on the bill, which would increase the amount of airwaves federal agencies are required to let go."
- Drought relief.** Legislation to ease government water rules that have complicated the effort to ease conditions in drought-stricken regions of the west has been creeping forward in Congress for years, and appeared to be near the finish line in late 2015, as Republicans and Democrats engaged in negotiations that would have added relief measures to the omnibus appropriations bill that was signed by President Obama shortly before Christmas. But the negotiations collapsed short of the goal line, leaving the path forward for a legislative response unclear for 2016. Senator Murkowski has been urged by a broad, bipartisan group of western-state senators to focus her committee on producing "west-wide drought relief legislation" early in 2016. Given the bipartisan interest, our expectation is that this effort will proceed and eventually culminate in congressional approval of a response that can be signed into law by President Obama before leaving office.

## Outlook in Other Key Legislative Areas

### Appropriations

- One way in which Speaker Ryan's vow to recommit the House to regular order may manifest itself in 2016 is in the appropriations process. The leaders of both parties in both chambers have expressed a desire to return to what once was standard operating procedure in Congress, in that each of the 12 annual appropriations bills were considered and enacted individually, rather than as a single massive omnibus package. Boehner and Senate Majority Leader Mitch McConnell (R-KY) attempted to restore the practice in 2015, but these efforts eventually stalled as House Democrats threatened to use the process to force politically toxic votes on public displays of the Confederate flag and Senate Democrats adopted the tactic of blocking appropriations bills altogether unless the President's demands for increased spending on non-defense matters were accommodated. There is a strong chance similar forces could eventually derail the appropriations process in 2016, particularly given that it is a presidential election year. But there is also a possibility that Ryan is able to deliver. Senate Minority Leader Harry Reid (D-NV) and Ryan met early this year to discuss the process and emerged with a mutual vow of cooperation. Ryan's chief of staff, Dave Hoppe – a former senior policy advisor at Squire Patton Boggs – has a keen understanding of the Senate, and could be instrumental in forging a strategy with McConnell that actually allows all 12 bills to move, against the odds. But for such a strategy to succeed, Ryan and McConnell will need the cooperation throughout the year not just of Reid, but also of re-election hungry GOP senators and representatives, who may not relish the decisions they'll be forced to make when a wide-open appropriations process gives the minority an open invitation to force politically-charged votes on the Senate and House floors.

## Defense

- **Pentagon Budget.** While last year's bipartisan budget deal allows congressional leaders to avoid some of the clashes that have caused challenges for Congress and the Obama Administration in recent years, it doesn't mean everything has been settled. A battle is set to be renewed between Republicans and Democrats on the matter of funding for the Pentagon. A gap of some \$17 billion exists between what the Pentagon has budgeted for the next fiscal year, and the amount approved for it in the recent budget agreement. Congressional Republicans argue the Pentagon can tap the off-budget Overseas Contingency Operations (OCO) fund to make up the difference.
- **Authorization for Use of Military Force (AUMF).** The possibility also exists that the White House and congressional leaders will attempt in the months ahead to pass an AUMF to define US military operations against ISIS. Last night, the President urged Congress to take action. But with House Speaker Ryan and Senate Majority Leader McConnell seemingly in different places on the prospects for adoption of such a measure in 2016 (Ryan has tasked House committees with looking into the feasibility of drafting one, while McConnell has recently said he prefers to wait until a new president has been chosen to avoid tying the hands of the next Commander-in-Chief), the odds seem to be against an AUMF against ISIS being approved by the full Congress before 2017.

## Tax

- **International tax reform.** Key players on both sides of the aisle devoted considerable energy in 2015 to the possibility of enacting a bipartisan international tax reform package. It did not come to fruition, but that doesn't necessarily mean the matter will fall by the wayside completely until 2017. House Ways and Means Chairman Kevin Brady (R-TX) has made clear he plans to pick up where now-Speaker Paul Ryan left off last fall. The White House has long sought to reform the international components of the tax code, as has Ryan, and both would presumably welcome the opportunity to enact an agreement if it were somehow to emerge in 2016. It is not completely unprecedented for major policy reforms to be enacted in divided government during a presidential election year (think welfare reform in 1996, under President Clinton, a Democrat, and a Republican-led Congress). But it is not likely, either, particularly with Senate Majority Leader Mitch McConnell and many of the most conservative members of the House Republican Conference insisting that tax reform be addressed in a "comprehensive" fashion, after Obama (who has made clear he will not sign any tax reform bill that does not raise tax rates on individuals) leaves office.

- **Online sales tax parity.** House Judiciary Committee Chairman Bob Goodlatte (R-VA) is under external pressure from governors and retailers to move online sales tax parity legislation, but has steadfastly resisted moving a bill for several years. Whether leadership forces his hand – or circumvents him – remains to be seen. Speaker Ryan has said he will promote regular order in the committees, which would seem to leave little chance of a leadership-sanctioned "end around" happening in the House in 2016. But for many stakeholders, regular order on the issue of online sales tax parity means no legislative solutions are going to be acted upon during the second session. Meanwhile, the coalition backing a fusion of the Remote Transactions Parity Act (RTPA) with a permanent ban on taxation of Internet access will be tested early in the new year when Senate leaders attempt to pass conference agreement on customs rules with only the latter attached.

## Trade

- **Trans-Pacific Partnership (TPP).** Congressional action on the Trans-Pacific Partnership (TPP) may be difficult at best before the November election, but it may be equally or even more difficult to pull off after that. The agreement is expected to be signed February 4 in New Zealand, but what happens to it in Washington DC after that is anyone's guess. Neither House Speaker Paul Ryan nor Senate Majority Leader Mitch McConnell has endorsed the agreement, which means the work to build the votes on the Republican side of the aisle that will be essential to passing TPP has not even begun yet in either chamber. McConnell recently noted that all of the Democratic candidates for president are against TPP, and that many of the Republican ones are as well. Passing Trade Promotion Authority (TPA) through the House and Senate last year was a major undertaking that required months of negotiation, maneuvering, dealing, and arm-twisting. This one will be harder. Everyone seems to agree the fate of TPP lies mostly in the hands of the President and his ability to build a bipartisan coalition willing to push it through.

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The second session of the 114th Congress will be much different than the surprisingly productive first session. It is unlikely to be marked by the enactment of many massively consequential new laws. But that doesn't mean that the work House and Senate legislators do in 2016 will be without consequence. In fact, much of what occurs this year could have significant implications for business in 2017, such as international tax reform. This is the year in which what Congress does now could have real-world impacts for many years to come.

We look forward to working with our clients and prospective clients in the year ahead, as the second session of the 114th Congress completes its work, the President seeks to lock in rules and regulations to further his legacy, and the American public heads to the polls with our hope that they will elect leaders who will turn down the volume, listen to each other, and focus on advancing legislation in a new-found spirit of compromise.

**LOCAL CONNECTIONS  
GLOBAL INFLUENCE**