

A Surprisingly Open Door for Legislation

Government Affairs



At first glance, the prospects for passing major federal legislation in 2020 appear somewhere between low and nonexistent. A rare confluence of factors—a split and fiercely partisan Congress, a controversial president facing impeachment, and a congressional and presidential election year whose outcomes are anyone’s guess—points straight to the likelihood that few proposed laws will find their way to passage.

Yet according to Crowell & Moring partner [Jim Flood](#), former counsel to Sen. Charles Schumer on the Senate Judiciary Committee and now chair of the firm’s [Government Affairs Group](#), the legislative door remains open. There’s a common misconception, Flood says, that Congress simply stops functioning in an election year (impeachment notwithstanding). “On the contrary, members of both parties in both houses still want to get things done, and they continue to seek out cooperation and sponsorship,” he says. “Interested entities should stay involved as they normally would.” (See sidebar, page 34, for an example of a successful collaborative effort.)

When Gridlock Is a Good Thing

It’s worth noting that some companies and industries would prefer to avoid new legislation. For them, the gridlock between the Democrat-controlled House and the Republican-majority Senate is just fine.

“Companies hate uncertainty, which can result from an active legislative environment in which things can change rapidly,” says [Byron Brown](#), a senior counsel in Crowell & Moring’s [Government Affairs](#) and [Environment & Natural Resources](#) groups.

Brown, who previously served as a senior official in the Environmental Protection Agency and both houses of Congress, notes, “It’s hard for companies to make long-term strategic

plans and financial commitments if the legislative ground keeps shifting underneath them. Gridlock in this context is a form of certainty, a status quo they’d rather maintain.”

Plan B

So how can companies expect lawmaking to take place if gridlock continues to prevail? Flood and Brown see the answer as a combination of executive orders and agency rulemaking.

The president hasn’t been shy about issuing EOs thus far, they observe, and there’s no reason to expect otherwise. They note that his objective is to achieve his policy goals—meaning that if legislation isn’t an option, he’ll find other avenues.

In addition, Brown posits that the administration will make a big push in the first six months of 2020 to finalize its highest-priority agency rules, such as those to reduce prescription drug prices (see next section) and roll back Obama-era environmental rules. The idea here is that the new rules would likely be challenged in court, where the Trump-friendly Department of Justice would defend them well ahead of the potential inauguration of a new president—and the installation of a new attorney general—in 2021.

A Tale of Three Bills

A look at three policy initiatives underscores the difficulty in getting much legislation passed this year.

Drug pricing reform: A sure thing hasn’t gotten off the ground. In 2018, President Trump announced his intention to reduce the price of prescription drugs—one of the rare goals with widespread appeal to voters and legislators of both parties. He issued a plan and proposed several rules that ultimately died in the face of opposition. House Democrats and a bipartisan pair of senators proposed their own bills to bring



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prices down, but both have drawn resistance from Senate Republicans on philosophical grounds.

Flood believes that rulemaking, not legislation, is the more likely vehicle for drug pricing reform in 2020. “It’s surprising that even this type of bread-and-butter issue can’t find enough support to get a bill passed,” he says. “In the absence of a politically acceptable bill, we expect the administration to propose new rules and try to push them through.”

Infrastructure: A huge missed opportunity. For years, legislation to repair and rebuild the nation’s deteriorating highways, bridges, ports, and power grids has been seen as a win-win for everyone: Updating infrastructure is a natural way to increase economic growth by turbocharging consumer spending and generating new tax revenues.

Despite these big potential benefits, Democrats and Republicans have been unable to agree on what should be done, how to do it, how much to spend, and where to find the money. A 2018 administration proposal, long on pronouncements, failed to excite Congress. “This is a huge missed opportunity,” Brown observes. “One would expect Congress to reach consensus and provide the funding for something as critical as infrastructure. The best we can hope for this year is smaller bills focused on things such as highways and rural broadband, but even those aren’t attracting much support.”

USMCA: A bipartisan success. The United States-Mexico-Canada Agreement (USMCA)—the trade deal set to replace the North American Free Trade Agreement—was signed by the leaders of its named countries in November 2018.

In early January of this year, Congress ratified USMCA, as is mandated by the Trade Preferences Extension Act of 2015. The act fast-tracks trade agreements negotiated by the president by requiring Congress to approve or deny them without amendment or filibuster.

House Democrats ultimately supported the agreement after securing more stringent provisions regarding labor protections and environmental standards with the U.S. trade representative.

USMCA still requires ratification in the Canadian legislature. Additionally, all three countries must meet certain obligations before the deal is enforced.



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A Bipartisan Success in a Divided Congress

Despite the bitterly partisan and divided state of Congress, passage of truly bipartisan, collaborative federal legislation is still possible. The United States Victims of State Sponsored Terrorism Clarification Act (USVSSTCA) is a case in point.

Signed into law on Nov. 21, 2019, USVSSTCA resolved issues arising around the 2015 United States Victims of State Sponsored Terrorism Fund. Specifically, it:

- Consolidated in one place funding for compensation of all victims and family members both of 9/11 and non-9/11 terrorism acts, such as the 1998 bombings of the U.S. embassies in Kenya and Tanzania.
- Divided the Fund equally between 9/11 and non-9/11 claimants.
- Provided increased funding not through taxpayer dollars but rather through penalties imposed on states found to be sponsors of terror.
- Extended the Fund’s life by 10 years, to 2030.

Crowell & Moring helped secure passage of USVSSTCA and create the Fund itself in 2015 following the successful litigation of key cases against Iran and Sudan by partner Stuart Newberger and the firm’s International Terrorism Litigation practice, one of the few such practices at a major law firm. Partner Jim Flood, chair of the firm’s Government Affairs Group, who formerly worked for Senate Minority Leader Charles Schumer, quarterbacked the Crowell & Moring teams that worked on both the Fund and USVSSTCA. Flood worked directly with Schumer’s staff, while Government Affairs Group Senior Policy Director Scott Douglas did the same with the staff of Majority Leader Mitch McConnell, whom Douglas had previously served as finance director.

What can entities seeking to pass legislation learn from the success of USVSSTCA? According to Flood, the key lessons are to “be flexible, be consistent, and focus your efforts on those best positioned to champion your bill and guide it across the finish line.”



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In the U.S., Flood expects both sides to claim credit for USMCA in the 2020 elections. “Democrats feared a political cudgel against them in such a close election year, and Republicans felt they needed to give the president a victory he can tout to his voter base,” he says.

The Case for Passing Legislation

Despite the clear obstacles to passing legislation this year, it’s not impossible. In fact, says [Scott Douglas](#), senior policy director in Crowell & Moring’s Government Affairs Group and former finance director for Sen. Mitch McConnell, the road to success is straightforward—and involves a little luck.

“It really comes down to sticking to fundamentals,” says Douglas. “Companies and other entities that pursue their legislative agendas should keep doing what they’ve always done and try to be in the right place at the right time.”

Douglas notes several factors that are favorable for passage:

- Even as the House conducts investigations and aggressive oversight, it’s eager to show the country it can “walk and chew gum at the same time” by proposing and voting on legislation.
- The federal budget for fiscal 2020 was set in 2019, meaning that uncertainty about how much funding is available—a major sticking point in negotiating many bills—isn’t an issue. The same can be said for the federal debt ceiling.
- Representatives and senators running for re-election need to keep their names in the headlines and be seen as trying to deliver for constituents.

As of early 2020, a total of 35 House members and four senators had announced their retirements following the end of their current terms in 2021. This freedom from re-election pressures could render the impending retirees more open to new ideas and give them greater political room to maneuver.

There are two tried-and-true strategies for obtaining passage: direct and indirect. Douglas sees reward and risk in each.

The direct approach: Create your own opportunity. Entities that want to focus on specific issues often find it best to draft their own bills and then circulate them through Congress for feedback and support. Keeping the bills as nonpolitical and noncontroversial as possible can enhance the odds of success.

Standard procedure is to find sponsors who will champion a bill with their colleagues and help guide it through the legislative process. Ideally, sponsors will sit on the congressional committee that would first review and approve the bill and then submit it to the full House or Senate for debate and voting. Douglas additionally recommends that entities discuss their bills with the majority and minority leadership in each chamber both as a heads-up and to secure crucial backing.

The main risks associated with creating bills are both timeless and time-specific. The former is that it’s almost always tougher to succeed as a stand-alone bill than as a rider or amendment to someone else’s bill, and the latter is that stand-alone bills are increasingly harder to pass in these days of intense partisanship.

The indirect approach: Hitch a ride. There are certain major pieces of legislation, such as the National Defense Authorization Act, that Congress must pass every year to keep the government running. These offer opportunities to “hitch a ride,” as Douglas puts it, by attaching policy riders for non-funding issues.

The downside, however, is that entities that worked very hard to craft their bills and gather sponsorship must yield control to forces that have nothing to do with them. It’s not unusual, for instance, for riders to survive multiple drafts only to be deleted at the last minute as casualties of congressional dealmaking.

Winning Strategies: Stay Focused, Keep It Simple, Find Opportunities

Flood, Brown, and Douglas offer commonsense suggestions for entities seeking to pursue their legislative agendas in 2020. Most notably:

- Stay focused on your goals, and don’t get caught up in political noise. “It’s easy to get distracted by politics, but it’s rarely helpful to do so,” notes Douglas.
- Try to keep your message and bill terms simple to facilitate communication with the Hill, win support, and make the drafting process easier.
- Keeping in mind that “all politics is local,” make clear to potential supporters that your issue is important locally as well as nationally.
- Take advantage of Congress’s eagerness to show it can maintain a legislative calendar even in a high-stakes election year.