

ClientAlert

International Trade

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Implications of the 2014 Congressional Elections for US Trade Policy

Summary

The November 4, 2014 mid-term elections in the United States increased Congressional support for trade liberalization at a critical time for US trade policy. A new Republican majority in the Senate and an enlarged Republican majority in the House of Representatives likely will offer a more straightforward legislative path to the enactment of Trade Promotion Authority (TPA) in 2015, which in turn could spur the conclusion and Congressional approval of the Trans-Pacific Partnership¹ (TPP) agreement. Significant obstacles to completing TPP exist, but enactment of TPA would ease Congressional consideration of the agreement and might aid in securing key concessions from negotiating partners. On the other hand, passage of TPA likely would not have a substantial, direct impact on the Transatlantic Trade and Investment Partnership² (TTIP) because TTIP negotiations remain in their early stages and are encumbered by multiple contentious issues.

Republican gains in Congress do not, however, guarantee TPA's ratification. President Obama's recently announced plan to pursue Executive action on immigration has the potential to create partisan gridlock, diminishing prospects for TPA legislation for the immediate future. In addition, President Obama still must court Congressional Democrats to secure bipartisan support for the legislation and to temper Democrats' TPA-related demands. An absence of Democratic support for TPA or a final TPA bill that contains currency or other divisive issues could jeopardize TPA's passage, potentially delaying the completion and Congressional consideration of a TPP agreement. Even if the partisan gridlock ensuing from the President's Executive action is short-lived, these issues still present major obstacles to ratifying TPA. As a result, although advancement of the US trade agenda remains likely in 2015, Congressional passage of TPA early in the year appears increasingly unlikely.

Less prominent trade issues, such as renewal of the Generalized System of Preferences (GSP) and the Miscellaneous Tariff Bill (MTB), also might be affected by Republican gains in Congress, TPA's passage, and the overall comity between the Executive and Legislative branches in 2015.



Scott S. Lincicome
Counsel, Washington, DC
+ 1 202 626 3592
slincicome@whitecase.com

Douglas Petersen
Associate, Washington, DC
+ 1 202 729 2356
douglas.petersen@whitecase.com

Brian Picone
International Trade Analyst, Washington, DC
+ 1 202 729 2427
brian.picone@whitecase.com

1 The Trans-Pacific Partnership is a proposed regional free trade agreement between the United States, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

2 The Transatlantic Trade and Investment Partnership is a proposed regional free trade agreement between the United States and the European Union.

Background

TPA commits Congress to use expedited (i.e., “fast track”) procedures to consider legislation to implement certain trade agreements that the President negotiates during a specified period of time. In so doing, TPA enables the President and foreign governments to negotiate trade agreements with the assurance that Congress, rather than amending any negotiated agreement, will wholly accept or wholly reject any such agreement via a timely “up or down” vote. Absent this assurance, foreign governments might have reduced incentives to negotiate trade agreements with the United States due to concerns that Congress might reject or revise individual clauses of such agreements. In exchange for this assurance, and as outlined in legislation to implement TPA, the President must adhere to certain negotiating objectives and certain procedures to notify and consult with Congress regarding the progress of any negotiations.

TPA was first enacted in 1975 and renewed in 1979, 1984, 1988 and 2002. Congress has used TPA to enact the Tokyo Round Agreements Act of 1979, the Uruguay Round Agreements Act of 1994, and 14 bilateral or regional trade agreements. The most recent iteration of TPA was enacted in December 2002 and expired in July 2007. With the exception of President Obama, every president since Franklin D. Roosevelt in the 1930s has possessed TPA or a special trade negotiating authority similar to TPA.

Analysis

EFFECTS OF THE 2014 ELECTIONS ON THE COMPOSITION OF CONGRESS

Senate

The 2014 Congressional elections transferred majority control of the US Senate to the Republican Party, which will hold at least 53 Senate seats in the 114th Congress (beginning January 3, 2015). Sen. Mitch McConnell (R-KY), formerly the Senate Minority Leader, will become Senate Majority Leader. Sen. Harry Reid (D-NV), who has served as Senate Majority Leader since 2007, will become the Senate Minority leader.

Chairmanship of the Senate Finance Committee likely will transition to its current Ranking Member, Sen. Orrin Hatch (R-UT). Current Finance Chairman Ron Wyden (D-OR) will likely become Ranking Member. The new Finance roster is expected to contain 13 Republicans and 11 Democrats, a reversal of the current ratio. One subtraction from the Democratic membership will be Sen. John D. Rockefeller IV (D-WV), who will retire at the end of 2014. Assuming that another subtraction is required, Sen. Mark Warner (D-VA), the most junior Finance Democrat, likely will be removed.

House of Representatives

The Republican Party will extend its majority control in the US House of Representatives to hold 244 seats in the 114th Congress. Rep. John Boehner (R-OH) won re-election and will continue as Speaker of the House, while Rep. Nancy Pelosi (D-CA) will continue in her role as House Minority Leader.

Leadership of the House Ways and Means Committee will change due to the retirement of Chairman David Camp (R-MI) at the end of 2014. Rep. Paul Ryan (R-WI) will become Chairman, while Rep. Sander Levin (D-MI) will remain Ranking Member. Republicans currently hold 23 seats on the Ways and Means Committee, compared to the Democrats’ 16. How this ratio will change to reflect the larger Republican majority remains uncertain.

CONGRESSIONAL ATTITUDES TOWARD TRADE

The 114th Congress likely will be more supportive of major trade legislation than the present Congress. The change will be most pronounced in the Senate, where Republicans will gain control of the chamber and will replace several Democrats who opposed TPA, trade agreements and other trade initiatives. In the House, the effect of the enlarged Republican majority on support for trade legislation will be less pronounced.

Senate

A majority-Republican Senate in the 114th Congress likely will be more amenable to advancing trade legislation than the existing majority-Democratic Senate in the 113th Congress. Regarding leadership, Sen. McConnell is a strong proponent of TPA, TPP and TTIP. For example, in 2011, he sponsored an amendment to the Trade Adjustment Assistance Extension Act (H.R. 2832) that would have granted TPA to President Obama, and in 2014 he supported the Bipartisan Congressional Trade Priorities Act (BCTPA) (S. 1900), TPA legislation introduced by Sens. Max Baucus (D-MT) and Hatch. In contrast, Majority Leader Reid, in apparent response to trade skeptics and labor groups in the Democratic Party’s base, opposed both initiatives. Reid also refused to permit the BCTPA, supported by the White House and Republican leadership, to receive a floor vote in the Senate. The change in Senate leadership to Republican control thus increases the probability that TPA legislation and other trade initiatives will receive a floor vote during the 114th Congress.

The change in Finance Committee leadership also improves prospects for passage of major trade legislation in the Senate. Likely Finance Chairman Hatch co-sponsored the BCTPA in 2014 and TPA legislation in 2011 and has described TPA as a top priority for the 114th Congress. In contrast, Chairman Wyden, who

State	Defeated/Retired Incumbent	2011 TPA Vote	2011 Korea FTA Vote	2011 Panama FTA Vote	2011 Colombia FTA Vote	New Member
AK	Mark Begich (D)	Nay	Yea	Nay	Nay	Dan Sullivan (R)
AR	Mark Pryor (D)	Yea	Yea	Yea	Yea	Tom Cotton (R)
CO	Mark Udall (D)	Nay	Yea	Yea	Yea	Cory Gardner (R)
GA	Saxby Chambliss (R)	Yea	Yea	Yea	Yea	David Perdue (R)
IA	Tom Harkin (D)	Nay	Nay	Nay	Nay	Jodi Ernst (R)
LA	Mary Landrieu (D) ³	Nay	Yea	Yea	Yea	Bill Cassidy (R)
MI	Carl Levin (D)	Nay	Yea	Yea	Nay	Gary Peters (D)
MT	Max Baucus (D) ⁴	Nay	Yea	Yea	Yea	Steve Daines (R)
NC	Kay Hagan (D)	Nay	Nay	Nay	Nay	Thom Tillis (R)
NE	Mike Johanns (R)	Yea	Yea	Yea	Yea	Ben Sasse (R)
OK	Tom Coburn (R)	Yea	Did not vote	Did not vote	Did not vote	James Lankford (R)
SD	Tim Johnson (D)	Nay	Yea	Yea	Yea	Mike Rounds (R)
WV	Jay Rockefeller (D)	Nay	Nay	Nay	Nay	Shelley Moore-Capito (R)

will likely become the Committee's Ranking Member in 2015, voted against TPA in 2011 and delayed action on the BCTPA in 2014. All 11 of the Democratic senators expected to remain on the Finance Committee in 2015 voted against TPA in 2011. However, several Senate aides speculate that, of those 11 senators, only Sens. Sherrod Brown (D-OH) and Robert Casey (D-PA) would oppose TPA legislation in the 114th Congress. Sens. Benjamin Cardin (D-MD) and Debbie Stabenow (D-MI) also might oppose TPA, however, depending on the details of the legislation.

In the full Senate, the replacement of at least eight incumbent Democrats with Republicans very likely will shift the Senate towards greater support for TPA legislation and any future free trade agreements (FTAs) considered under TPA. The most recent Senate vote to grant TPA to the President, held in 2011, was split along party lines, with 43 out of 47 Republicans supporting and 50 out of 51 Democrats opposing. As the table above shows,

multiple Democrats being replaced by Republicans voted against the 2011 TPA amendment, whereas no retiring Republican voted against the amendment.

The table also indicates that the replacement of incumbent Democrats with Republicans bodes well for potential passage of TPP and TTIP, as several outgoing Democratic senators opposed one or more FTAs in 2011 that robust Republican majorities supported. Senators-elect Cory Gardner (R-CO), James Lankford (R-OK) and Shelley Moore-Capito (R-WV) voted for all three FTAs in question—the US-Korea FTA, the US-Panama FTA and the US-Colombia FTA—while serving in the House of Representatives in 2011. So too did Rep. Bill Cassidy (R-LA), who is predicted to defeat Sen. Mary Landrieu (D-LA) in a Dec. 6 runoff election. Moreover, nearly all year 2011 Senate votes against those trade agreements were cast by Democrats, as shown in the table below:

Legislation	Total Senate "Nay" Votes	Total Senate Democratic "Nay" Votes
United States–Korea Free Trade Agreement Implementation Act (H.R. 3080)	15	14
United States–Panama Trade Promotion Agreement Implementation Act (H.R. 3079)	22	21
United States–Colombia Trade Promotion Implementation Act (H.R. 3078)	33	30

³ Sen. Landrieu faces a Dec. 6 runoff election with polls indicating a likely Republican victory.

⁴ Sen. Baucus retired on Feb. 6, 2014. The remainder of his term was served by Sen. John Walsh (D-MT).

House of Representatives

The extension of the Republican majority likely will have only a minor positive impact on the already strong probability that the House would support major trade legislation in the 114th Congress, including TPA and, should agreements be completed, legislation to implement TPP and TTIP. House Speaker Boehner expressed support for TPA in early 2014, calling on President Obama to help generate Democratic support for TPA legislation. In addition, incoming Ways and Means Chairman Paul Ryan has consistently supported trade initiatives and advocated for the BCTPA. As a whole, the House remains amenable to passage of major trade initiatives, with the US trade agreements with Korea, Panama and Colombia passing the Republican-majority House in 2012 by margins of 95 votes or more.

PROSPECTS FOR COMPLETION AND PASSAGE OF TRADE POLICIES

TPA

Republican control of the Senate increases the likelihood, but does not guarantee, that Congress will pass TPA. The existing Senate Democratic leadership opposes granting TPA to President Obama. Majority Leader Reid, a longstanding critic of trade agreements, has stated that his Senate colleagues would be “well-advised” not to “push” for TPA. Majority Whip Richard Durbin (D-IL), who describes himself as “critical and skeptical” of TPA, has claimed that a consensus exists among Senate Democrats that the Senate should not consider TPA legislation during 2014. In contrast, the existing Senate Republican leadership supports granting TPA to President Obama. Shortly after the conclusion of the November 4 elections, Sen. McConnell made clear that the 114th Congress’s Republican-majority Senate would work with President Obama to pass TPA as a means to advance TPP and TTIP.

It is expected, therefore, that the existing Democratic-majority Senate will not vote on TPA, and that the pending Republican-majority Senate likely will approve TPA legislation sometime in 2015. Sen. Hatch, presumed Finance Chairman in the 114th Congress, previously co-sponsored the BCTPA, TPA legislation intended to apply to TPP and TTIP. Introduced on January 9, 2014 in the Senate (S.1900) by former Finance Chairman Baucus and Ranking Member Hatch, and in the House of Representatives (H.R.3830) by Ways and Means Chairman Camp, the BCTPA would apply to trade agreements entered into before July 1, 2018 (or July 1, 2021 if the President requests an extension and Congress does not vote against such an extension).

While the Republican-majority Senate is supportive of TPA legislation, the substance of that legislation remains uncertain. Aides for Sen. Hatch reportedly have stated that he prefers to pass TPA legislation with as few changes as possible to the BCTPA. However, Congressional trade leaders disagree regarding the contents and details of that legislation, and Sen. Hatch will remain the only BCTPA author in the 114th Congress. Ways and Means Ranking Member Levin, a longtime critic of trade agreements, declined to co-sponsor the legislation and likely will oppose TPA legislation in the 114th Congress. Sen. Wyden, who replaced Sen. Baucus as Finance Chairman in February 2014, intends to seek “smart track” changes to the BCTPA. While the specific content and parameters of such changes remain uncertain, they likely would relate to consultation and transparency requirements. Sen. Wyden has emphasized that (i) the Obama Administration should provide Congress and the public with increased information regarding ongoing negotiations, perhaps through the appointment of a transparency officer within the Office of the United States Trade Representative (USTR); and (ii) Congress should be granted more time to deliberate, as well as access to “procedures” to “right the ship if trade negotiators get off course.”

Because the Finance Chairmanship will transfer from Sen. Wyden to Sen. Hatch in 2015, the degree to which Sen. Wyden’s proposals will be incorporated into any final TPA legislation is uncertain. However, Sen. Wyden, as well as several other Finance Democrats, likely will condition support for TPA legislation on the inclusion of at least some of the proposals crafted during his Chairmanship. Furthermore, other Democratic members of the Finance or Ways and Means Committees might demand the inclusion of controversial provisions, beyond those already included in the BCTPA, regarding labor, the environment and currency manipulation. In particular, several Democrats have demanded that TPA legislation include a provision requiring that covered trade agreements include enforceable currency rules. Exclusion of such a provision could result in inadequate Democratic support for TPA and TPP, while inclusion of such a provision could weaken Republican support for TPA and potentially impede the successful conclusion of TPP negotiations. Sen. Hatch likely will wish to advance TPA legislation that, similar to the BCTPA, enjoys bipartisan support among the Finance Committee leadership and lacks the most controversial provisions. However, Sen. Hatch might need to modify the BCTPA or similar legislation to secure Democratic support. If final TPA legislation contains controversial labor, environment, currency or transparency provisions demanded by several Senate Democrats, the bill’s passage could be jeopardized.

TPA also might face problems without bipartisan support. With public skepticism regarding the benefits of trade well-documented by public opinion polls, Republicans might be hesitant to take sole responsibility for the passage of trade initiatives prior to the 2016 elections. Doing so could expose Republican candidates to potential criticisms during the 2016 Congressional and Presidential campaigns; thus, some degree of Democratic support for TPA is likely necessary to advance the legislation next year.

Republican leadership thus must craft a TPA bill that gains some Democratic support but avoids the most controversial provisions demanded by many Congressional Democrats. As such, TPA legislation likely will include a balance of labor, environment and currency provisions that is sufficient to acquire bipartisan support but insufficient to discourage free trade Republicans or US trading partners. Achieving this balance will require significant work by the Obama administration to secure Democratic votes for TPA and ensure that no provisions in the law will jeopardize TPP, TTIP or other future FTAs.

Non-trade factors also might weigh heavily on TPA in 2015. Most notably, President Obama's recently announced plan to legalize certain undocumented immigrants without Congressional approval may diminish Congressional Republicans' willingness to work with him on trade or grant him the appearance of new powers under TPA, at least in the short term. Congressional Republicans generally opposed the President's plan, and stated prior to its official announcement that any unilateral efforts by President Obama would cause them to reconsider their willingness to cooperate with the President on TPA, TPP, or TTIP.

The extent to which President Obama's Executive action will diminish prospects for TPA in the new Congress is uncertain. Incoming Ways and Means Chairman Ryan has described the Executive action as a "stunning act of polarization" that would result in "gridlock" and "an even more adversarial relationship" between President Obama and the new Congress. Sen. McConnell has suggested that Congress will act to curtail the immigration plan but has not stated how potential cooperation in other areas, such as trade policy, might be affected. US Trade Representative Michael Froman has discounted the notion that the immigration dispute will imperil Congressional passage of trade initiatives in 2015.

Although Congress is now controlled by the more trade-friendly Republican Party, potential partisan gridlock resulting from the President's Executive action on immigration throws the immediate future of US trade policy, and TPA in particular, into doubt. Early 2015 action on TPA now appears unlikely, unless tempers on

Capitol Hill—and among the conservative grassroots—cool dramatically over the Christmas and New Year's holidays. Moreover, even if this gridlock is broken or short-lived, irreconcilable differences over the substance of TPA legislation or an inability to attract significant bipartisan support present major obstacles to ratifying TPA. Passage of TPA and advancement of the US trade agenda remains likely in 2015 but will be affected as much by the administration's intentions and actions as by the new makeup of Congress.

FTAs

The Republican takeover of the Senate increases prospects for completion and passage of TPP and TTIP. These improved prospects stem from the likelihood that the soon-to-be Republican-majority Senate, in contrast with the existing Democrat-majority Senate, will vote to reauthorize TPA sometime in 2015.

Passage of TPA appears to be critical to TPP's success for several reasons. First, Congressional Republicans have insisted repeatedly that TPA must precede the finalization of ongoing TPP negotiations. In a July 2014 letter to USTR Michael Froman signed by all 23 Republican members of the House Ways and Means Committee, the Representatives stated that they would not support a TPP agreement if it were completed before the enactment of TPA. Failure to adhere to Republican demands on this issue would inject new, and needless, uncertainty into the process. Second, several TPP members have used the United States' lack of TPA as a reason to withhold their most ambitious market access concessions and agree to some of TPP's more politically sensitive elements. Without TPA's procedural limits on Congressional consideration, they argue, the United States cannot offer concrete assurances the agreement they sign will be the one actually approved and implemented. Thus, the conclusion of an ambitious, high-standard TPP likely requires TPA. Finally, and likely because of the first two reasons, the Obama administration also wishes to secure TPA before finalizing the TPP agreement.

Passage of TPA is less significant to the outcome of TTIP. TTIP negotiators are far from achieving consensus on issues considered central to the agreement, including regulatory harmonization and market access for goods and services. The proposed inclusion of an investor-state dispute settlement mechanism also has engendered strong opposition from EU member states. Moreover, European negotiators have not expressed concerns about undertaking TTIP negotiations without TPA's assurances—likely due to the talks' early stages and their familiarity with the US political process. Thus, passage of TPA likely would not affect the TTIP, at least in the short term.

Other Trade Initiatives

Prospects for passage of additional trade initiatives, most notably GSP, also will be improved in the 114th Congress. In 2013, attempts to advance GSP legislation in the Senate failed when Sen. Tom Coburn (R-OK) placed a hold on the bill (S.1331), citing disapproval of the funding mechanism used to offset the program's tariff reductions. However, Sen. Coburn retired at the end of 2014. The most likely path to renewal of GSP is to attach renewal legislation to a Continuing Resolution expected to pass in December 2014. Nonetheless, improved prospects for TPA in the 114th Congress also bode well for GSP's potential renewal as part of a larger package of trade legislation. In particular, GSP might be attached to a TPA proposal to gain bipartisan support. Such a package also might include customs reauthorization legislation and a new MTB. Whether such a package will be proposed remains uncertain, but, regardless, the increased likelihood of a TPA proposal in the 114th Congress improves prospects for GSP, MTB and customs legislation.

Outlook

While the Republican takeover of the Senate increases the likelihood that Congress will pass major trade legislation, any effects that the Republican takeover might have on ongoing TPP and TTIP negotiations should not be overstated. First, each trade agreement—and TTIP in particular—remains incomplete. TPP parties have failed to make progress in several key sectors, and TTIP parties have refrained from advancing negotiations regarding multiple politically contentious issues. Some analysts argue that it will be months, if not years, before TPP or TTIP parties reach an agreement. Most recently, the Prime Minister of New Zealand stated that failure to conclude TPP by summer 2015 could lead to the agreement being put "on ice" until 2016 or later.

Second, whether the President's Executive actions on immigration will result in diminished prospects for bi-partisan Congressional-Executive initiatives in 2015 is uncertain. The US business community likely will pressure Republicans to cooperate with the President on trade initiatives, despite his actions on immigration. However, certain Republican constituencies likely will oppose such cooperation. As a result, some Republican Senators and House Members—in particular those who might be considering running in the 2016 Presidential election—might be reluctant to grant President Obama the appearance of new powers under TPA.

Third, even if TPA legislation does materialize in 2015, leadership from President Obama will be required to pass the bill into law, as well as to complete TPP and TTIP. The Obama Administration has not publicly promoted TPA, TPP and TTIP to Congressional

Democrats, whose constituents largely oppose the agreements. While a Republican Senate and House offer a more straightforward legislative path to granting TPA, Presidential leadership is essential to secure the bipartisan consensus required by Republicans. The President must court at least some Democratic votes in Congress, and these can be won only through active involvement. Similarly, President Obama must attempt to persuade the public of the benefits and importance of the pending trade agreements and stand firm against opposition from labor and industry groups that have inhibited progress in the negotiations. Such Presidential actions and positions are far from certain.

Fourth, ideological divisions within the Republican Party might impact a potential vote on trade initiatives. However, these disagreements should not be oversold. Some critics suggest that certain conservative Republicans might oppose granting additional authority, including TPA, to President Obama. However, such alleged ideological divisions do not appear to have impeded previous trade initiatives during President Obama's term. For example, Sen. Susan Collins (R-ME) and then-Sen. Olympia Snowe (R-ME), considered two of the most moderate Senate Republicans in recent years, were the only Senate Republicans to oppose 2011 trade agreements with Korea and Colombia and two of only four Senate Republicans to oppose TPA in 2011. In the House, less than 4 percent of voting Republicans opposed implementation of the Panama or Colombia agreements, while less than 10 percent opposed a 2011 trade agreement with Korea. Thus, trade policy divisions within the Republican Party alone should not derail TPA or the US trade agenda.

Despite the House and Senate coming under Republican control, potential partisan gridlock ensuing from the President's Executive action on immigration makes passage of TPA in early 2015 unlikely. Furthermore, resolution of this gridlock would not guarantee swift passage of TPA, due to differences over the substance of TPA legislation and minimal bipartisan support. If such problems can be avoided and if Congress can move beyond immigration, then implementation of TPA would reinvigorate TPP, while TTIP would remain largely unaffected due to the negotiations being in their early stages. A potential best-case scenario would include TPA passage in early 2015, followed by conclusion of TPP negotiations in summer 2015 and Congressional consideration of TPP implementing legislation in autumn 2015. However, the President's actions on immigration now make this optimistic scenario increasingly unlikely. A potential worst-case scenario would include failure by Congress to enact TPA in 2015, possibly preventing TPP's conclusion or implementation during President Obama's second term.

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