Arnold & Porter

ELECTION 2022

MIDTERM ELECTION ANALYSIS & OUTLOOK FOR THE 118TH CONGRESS

Overview

The United States has just completed another highly contentious election campaign. The people, politics and policies debated on the campaign trail have created winners and losers, and the election will now dictate most of the actions in Congress and the Biden Administration for the next two years. Our 2022 post-election analysis is designed to help you navigate the new political landscape that was created by the November 8 elections. Our analysis discusses how major policy issues and economic sectors will fare in the next two years of the Biden Administration and the incoming 118th Congress. A team of dozens of Arnold & Porter professionals spanning a range of practices prepared this report. Our team is available at any time to talk with you about how best to engage Washington policymakers to achieve your business objectives.

Please read on for more of our overview of the 2022 election's impact on the future in Washington, or click one of the links to your left to jump directly to an analysis of the policy sectors that interest you most.

What was accomplished the last two years

President Biden took office on January 20, 2021 under unique historical conditions and his Inaugural address outlined four fundamental challenges his administration would work to solve:

1. Addressing a worldwide pandemic;
2. Rebuilding an economy that was ravaged by the shutdown of commerce and industry in the opening stages of the pandemic;
3. Bridging fundamental political divisions over how best to facilitate racial reconciliation and equality in America; and
4. Implementing long-term policies countering global climate change.

In addition, President Biden has made preserving American confidence in government and our common ideals a priority, criticizing the actions of his predecessor and his political supporters as threats to the civic health of the nation. These four domestic

storylines have dominated much of the political and policy landscape during the first two years of the Biden Administration. These four storylines were enough to convince voters to expand the Democratic control of the Senate, and to hold the party's losses to historic off-year lows in the House that almost allowed the President to retain full control of Congress.

Over the last two years, President Biden made significant policy efforts to attack each of these four fundamental challenges, pairing major legislative victories with decisive regulatory actions in each area.

President Biden's legislative success comes despite three sobering realities: (1) his public opinion polling began to decline immediately after withdrawing troops from Afghanistan in 2021 and remained low compared to other modern presidencies; (2) he had a very small legislative majority in the House where progressives and moderates clashed over the size and scope of most major legislative items; and (3) the Senate was 50-50, and two of the Democratic Senators were the primary obstacles to legislative priorities of a President from their own party. In that light, President Biden's accomplishments during his first two years are historic in their own right and, taken together, they add up to a very comprehensive retooling of federal government priorities and spending for the long-term. Also, his last two years of success and the election results have likely given the President confidence he can work with the new Congress on several key priorities over the next two years.

Crisis 1: The Worldwide Pandemic

When President Biden took office, the vaccines produced in coordination with President Trump's Operation Warp Speed were ready to go to market. President Biden's team implemented a rollout plan that resulted in most Americans getting two vaccine doses by the summer of 2021 and tens of millions getting a third and fourth booster later in the year. The Biden Administration also coordinated worldwide vaccine distribution efforts that were largely successful. Back home, the Biden Administration led the debate and provided regulatory actions across the government about how best to reopen schools and businesses.

The number of Americans who have faith in the scientific bureaucracy of the federal government—the Food and Drug Administration, the Centers for Disease Control and Prevention, and others—declined over time and began to resemble the political divide permeating across the nation. The bipartisanship that dominated initial pandemic relief efforts by Congress also faded during Biden's first two years in office, with Republicans' support deteriorating for subsequent COVID-related recovery packages. Recent proposals to provide more COVID-related economic relief, or even targeted funding for vaccines and therapeutics, were thwarted by Republicans on numerous occasions. While the White House continues to request supplemental pandemic relief and recovery funding, Congress has largely moved on from the pandemic.

Crisis 2: The Economic Recovery from the Pandemic

On the economic front, President Biden has been a historically consequential President, but the effectiveness of his actions will not be fully known for several more years. The stock market took a roller coaster ride—the Dow Jones and NASDAQ were up 18.7 percent and 21.4 percent, respectively in 2021, but the Dow Jones and NASDAQ are now down 8.74 percent and 32.14 percent, respectively, so far in 2022—with numerous days when contradictory economic data blurs the distinction between an economy in recovery and an economy in open distress. As the year closes, there are signs of recession in Europe that could spread across the globe.

Working with a friendly but historically small Democratic majority in both chambers of Congress, President Biden passed multiple economic relief bills aimed at restoring the country to its pre-COVID economic condition. The passage of the $1.9 trillion *American Rescue Plan Act of 2021* (Pub. L. No: 117-2) was an early highlight of the Biden Administration's economic efforts. Tens of millions of Americans were able to return to work in the last two years, resulting in a historic plunge in the unemployment rate. A historic bipartisan infrastructure deal, the *Infrastructure Investment and Jobs Act* (IIJA, Pub. L. No: 117-58), became law, and provides the base for improving American roads, bridges, public transportation, and ports to make us more competitive in tomorrow's global economy. *The Creating Helpful Incentives to Produce Semiconductors (CHIPS) and Science Act of 2022* (Pub. L. No: 117-167), passed in the summer of 2022, may be the catalyst needed to stimulate a long-term resurgence in American manufacturing and return the production of national security-level sensitive goods like microchips to the United States. The passage of the *Inflation Reduction Act of 2022* (IRA, Pub. L. No: 117-169) in August of 2022 gave President Biden one final pre-election legislative victory, and it will have long-term impacts on the domestic pharmaceutical and energy production sectors of our economy. A summer executive order cancelling up to $20,000 in student loan debt for millions of young Americans fundamentally alters their long-term ability to purchase homes, start families and open small businesses.

On the downside, the employment participation rate (the number of people in the workforce or looking to join it) is lower than it was pre-COVID, and employers have millions of open positions that they cannot fill. Trillions of dollars in new federal spending and constrained supply chains have contributed to record inflation in the last two years, resulting in diminished purchasing power for working-class Americans. The positive effects of the infrastructure package and the *CHIPS and Science Act* are years away, and may never reach the heights predicted by their legislative supporters. The student loan cancellation executive order may deliver on a key priority for Democratic progressives but its implementation has been stayed by two federal courts hearing a variety of legal challenges.

Crisis 3: The Fight for Racial Equality in America

President Biden has been focused on equality issues since his campaign for the White House began. He selected and ran with Vice President Kamala Harris, the first woman elected to federal office nationwide, the first female African-American so elected, and the first Indian-American Vice President. He appointed the most diverse Cabinet in history and has empowered its members to be key players in his legislative and regulatory success to date. President Biden appointed the nation's first African-American female Supreme Court Justice, delivering on a promise made in the South Carolina primaries at a moment when his quest for the White House was very much in doubt. In addition, President Biden has nominated the highest-ever number of women and minorities to serve on federal district and appeals courts, and he has worked with the Democratic-led Senate to see these nominees confirmed at a record pace. President Biden has focused Cabinet offices on addressing systemic racism in their agencies and action.

Congressional leaders like House Majority Whip Jim Clyburn (D-SC) have worked closely with President Biden to ensure equality issues are embedded in key legislation. The historic gun safety bill passed in the summer of 2022 provides landmark mental healthcare program funding, including for post-traumatic stress disorder treatment for minority communities disproportionately affected by acts of gun violence. Included in the 2021 *American Rescue Plan* (ARP) was a detail erasing more than $1.5 billion in capital finance debt for historically black colleges and institutions. The ARP's emergency rental assistance program also was a major boost that prevented millions of minorities from losing their residences during the pandemic's worst months. The student debt relief executive order will help create wealth for more first-generation Americans and minorities than any other federal program. Fighting to provide federal abortion rights after the Supreme Court's *Dobbs* decision is meaningful to African-American women in particular, as they have historically had the most trouble accessing reproductive health services.

Conversely, President Biden's efforts on this front have not all succeeded and some are not well-received in the polls. Despite months of protests nationwide, Congress failed to pass the *George Floyd Justice in Policing Act* (H.R. 1280) or the *John R. Lewis Voting Rights Advancement Act of 2021* (H.R. 4), both of which were top priorities for African-Americans in Congress and African-American voters. The Supreme Court already heard two cases this fall on college admissions and next spring may overturn a series of long-standing cases that allow universities to consider race in the admissions process.

Crisis 4: Climate Change

On entering the White House, President Biden appointed former Secretary of State John Kerry to be his special Climate Change Envoy to the world, and the President immediately took several actions to steer the nation towards a future less reliant on carbon-heavy fuel sources. The President rejoined the Paris Climate Agreement after President Trump withdrew the United States from the agreement during his term. President Biden signed an executive order stopping construction of the controversial Keystone Pipeline from Canada to the United States. Department of Energy and Environmental Protection Agency have taken a series of steps that sharply reduce domestic exploration and production of oil and natural gas. President Biden made climate change a visible and key negotiating point in discussing issues with China. Passage of the IRA should accelerate American investment in wind and solar energy infrastructure.

Nevertheless, many of President Biden's actions in the climate change space come with short-term costs to the American public. The Keystone pipeline cancellation and the new restrictions on domestic oil and gas development destroyed blue-collar jobs nationwide. Those actions, combined with the policy actions taken in response to Russia's invasion of Ukraine, caused oil and gas prices to soar worldwide. At home, higher energy costs have been a leading source of inflation during the Biden Administration. Abroad, the lack of American oil and gas in the marketplace makes Europe much more vulnerable to Russian threats to cut off supply this winter to countries that back Ukraine.

While the administration works to deploy billions of dollars to build out a national network of electric vehicle (EV) charging infrastructure, consumers are slow to adopt EVs and their availability is limited by domestic supply issues. Like many of the President's climate actions, the efforts to transform the way people fuel their vehicles won't be fully realized for decades.

Crisis 5: Fundamental Threats to the American Experience

President Biden wants to protect the sanctity of American democracy in a number of ways. He strongly supports a number of highly visible election reform bills pending in Congress and has even stated he would support the Senate creating a filibuster exception to allow these bills a better chance to become law. President Biden has picked Department of Justice leadership focused on aggressively challenging new state laws that threaten an individual's right to vote. The President has been a visible supporter of the House Select Committee investigating the events surrounding January 6, and his Department of Justice plays an increasingly visible role in pursuing potential criminal activity related to those events. Finally, and most importantly, the President has made increasing use of his bully pulpit to state his belief that the American form of government is under attack domestically by former President Trump and many of his supporters. His September speech at the Liberty Bell in Philadelphia is notable for its location, its prime time speaking slot, and its direct message that the greatest threat to the nation lies in our discord and disunity. The recent attack on the husband of Speaker Nancy Pelosi (D-CA) further highlights the political discord and violence that has concerned the President.

It appears the 2022 election proceeded without any major problems with casting or counting votes. It also appears that virtually all of the most prominent Republican candidates for Governor, Secretary of State, Senator, and House of Representatives who supported former President Trump's baseless claims the 2020 election was stolen were defeated at the 2022 ballot box.

In this politically fraught environment, political leanings tend to shape how individuals view President Biden's efforts to protect American democracy. Some see the Department of Justice and FBI as partisan actors themselves rather than as neutral referees charged with applying our nation's laws equally to all. The January 6 Committee's ongoing investigation and series of high profile hearings in the summer of 2022 changed few hearts and minds in the American public about what happened, how bad was it, and who (if anyone) should bear the blame. President Biden's Philadelphia speech was no olive branch to the 70 million Republicans and Independents who supported President Trump in the 2020 election.

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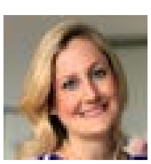

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118th Congress

Key Questions

- What does history say about the productivity of a split-control Congress headed into a Presidential race?
- What does the election mean for turnover in the Cabinet and for other Administration positions?
- Supreme Court changes?
- What does the election mean for the Biden Administration's ability to confirm judges?
- Who will be in Congressional Leadership?
- Will the Republicans use the Congressional Review Act?
- What will happen with the House's January 6 special committee?
- Will Congress Impeach President Biden?
- Will Congress change any of its operating rules like abolishing the filibuster or proxy voting?
- What major regulatory efforts will dominate the next two years and what can Republicans do to counter them?

What Does History Say About the Productivity of a Split-Control Congress Headed Into a Presidential Race?

As of November 15, it appears Republicans will win the House with but a single-digit majority, replacing the single digit majority the Democrats held for the last two years. If this occurs, it will be the first time since 1999-2003 that the House has had back to back sessions with single-digit majorities. In fact, this result would be the first time since 1888 that a House with one party in control by single digits flips to a single-digit majority controlled by the opposing party.

Two of the three longest government shutdowns in history—1995 and 2013—occurred after Republicans took control of the House and opposed the spending priorities of a Democratic President.

There's also no clear historical comparison to a four year period where the same party has a Senate majority of 50-50 with the Vice President of their same party (2021-22) and 51-49 (2023-24, if Sen. Warnock wins the Georgia runoff) or 50-50 again (if Hershel Walker wins the runoff). So when you put the House and Senate together, you are truly looking at a once in the country's lifetime set of political circumstances.

The knee-jerk reaction from pundits will be that gridlock will rule in this political configuration, but recent history suggests the President and both parties in Congress will have strong motivation to find some common ground on legislation over the next two years.

For Barack Obama, the 2010 election was so bad he himself called it a "shellacking" of his party that was largely his fault. Congressional Democrats lost seven Senate seats but retained the majority there, while losing 64 House seats. Exit polls showed voters thought the Obama Administration and an all-Democratic Congress had overreached on many major policy initiatives and there was widespread voter unhappiness with the passage of the *Affordable Care Act*. President Obama would go on to have a tough two years legislatively with a hostile Republican House and a smaller Democratic majority in the Senate, but he still passed legislation in a number of key areas like tax cuts, trade, intellectual property, anti-corruption efforts in Congress, and Russian sanctions. Major domestic legislative accomplishments included the *American Taxpayer Relief Act of 2012* (Pub. L. No: 112-240), the *Budget Control Act of 2011* (Pub. L. No: 112-25), the *Stop Trading on Congressional Knowledge (STOCK) Act of 2012* (Pub. L. No: 112-105), the *Jumpstart Our Business Startups (JOBS) Act* (Pub. L. No: 112-106), and the *Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 (Magnitsky Act)* (Pub. L. No: 112-208).

President Obama was also successful in building a bipartisan legislative coalition to pass free trade agreements with South Korea, Colombia and Panama in 2011.

Donald Trump's sole off-year election saw a gain of one Senate seat while his Republican Party lost 41 House seats. The 2018-19 transition in power started poorly—President Trump was unable to negotiate a post-election deal to conclude the annual appropriations process leading to a 35-day government shutdown that is the longest in American history. On January 3 of 2019, the day a new hostile Democratic House majority was sworn in, articles of impeachment against President Trump were introduced for the first time. While those articles were not ultimately the ones that led to his two impeachments later in the term, the act of filing such articles on day one set a tone that pitted the President against a unified House opposition party determined to deny him legislative success at every turn. As a result, the list of major legislation that became law in this split control Congress is relatively sparse, headlined by passage of the *United States-Mexico-Canada Agreement (USMCA) Implementation Act* (Pub. L. No: 116-113), the *Uyghur Human Rights Policy Act of 2020* (Pub. L. No: 116-145), the *Great American Outdoors Act* (Pub. L. 116-152), and the annual defense authorization bills that are the blueprint for Pentagon operations. The start of the COVID pandemic in March of 2020 did result in the rapid passage of three major relief bills in just two months' time—notably the *CARES Act* and the *Paycheck Protection Program*—all of which passed by massive bipartisan majorities. Nevertheless, the reality is that, except for a global pandemic, the Trump Administration had very few domestic policy legislative wins once the opposing party took control of the House. On the upside from the White House's perspective, the Senate continued to confirm judicial nominees, including Amy Coney Barrett, President Trump's third Supreme Court nominee in four years.

It is also worth noting that both President Bill Clinton and President Barack Obama lost the House in their first off-year elections but cruised to reelection victories just two years later even as the House remained in Republican control after their respective reelections.

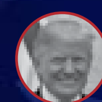
What Does the Election Mean for Turnover in the Cabinet and for Other Administration Positions?

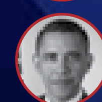
Historically, the off-year elections have been an important milestone for Cabinet turnover in a Presidential Administration. Given the high intensity and unique stresses of serving in COVID times, it is remarkable that the Biden Administration has not yet had a Cabinet-level leader depart in the first two years. It is likely several will take their leave at the end of 2022 and beginning of 2023. In fact, with Democrats continuing to hold the Senate by a narrow margin, President Biden knows he can continue to get his Cabinet nominees confirmed on a straight party-line vote and he will not have to sacrifice a lot of political capital to do so. Thus, the mid-term elections mark a good time to turn over some departments to new leadership.

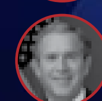
With a Democratic Senate, President Biden does not have to worry about losing Cabinet members who may not have wanted to stay for the partisan warfare that would occur if Republicans were in the majority, but a Republican House will still use its oversight powers to make life difficult for many Cabinet members. Still, the tempo of the last two years suggest several high-profile Cabinet members will choose to leave in the near future, including some that are not perceived to have been particularly effective or close to the White House.

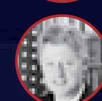
There are two categories of Cabinet members who may leave in the next few months. First are Cabinet members who are likely to face a lot of scrutiny from the new House Republican majority. High profile candidates in this category include Health and Human Services Secretary Xavier Becerra (concerns about COVID response in the government), Homeland Security Secretary Alejandro Mayorkas (concerns about immigration and the southern border), Education Secretary Miguel Cardona (concerns about COVID policies and student loan debt relief), and Energy Secretary Jennifer Granholm (concerns about oil/gas

The absolute number of Cabinet departures during an off-year election per President:


Trump - **4**


Obama - **12**


W. Bush - **13**


Clinton - **8**

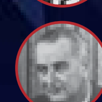

H.W. Bush - **4**

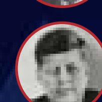

Reagan - **13**

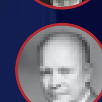

Carter - **7**


Ford - **9**


Nixon - **10**


Johnson - **8**


Kennedy - **0**


Eisenhower - **8**

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Overview

118th Congress (2023-2024)

2024 Preview

2022 Review

Committee Leadership

California

Defense/ National Security

Education

Energy & Environment

Federal Funding

Financial Services

Foreign Affairs

Healthcare/ Life Sciences

Immigration

Product Safety

Tax

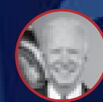
Technology

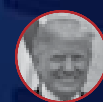
Trade

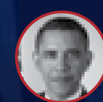
restrictions). Second are Cabinet members who have other political aspirations, including future runs for the White House. This category includes Commerce Secretary Gina Raimondo, widely credited for her role in passing the *CHIPS and Science Act*, and Transportation Secretary Pete Buttigieg, who was a strong contender for the 2020 Democratic nomination. If there is any sense that President Biden may not run for reelection, these Cabinet members will want to leave soon enough to be able to mount their own campaigns.

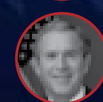
Outside the Cabinet, White House Chief of Staff Ron Klain is someone who may step down. His position is perhaps the most stressful in government, other than being President itself, and by recent standards few Chiefs of Staff have survived more than two years. Domestic Policy Advisor Susan Rice may be a candidate to succeed Ron Klain and would become the first woman to ever serve as White House Chief of Staff. Climate Change Envoy John Kerry is also widely expected to move on shortly after the election, joining White House National Climate Advisor Gina McCarthy who departed the administration in September.

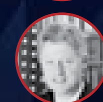
The number of White House Chiefs of Staff for each President:


Biden - **1**


Trump - **4**

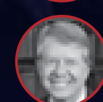

Obama - **5**


W. Bush - **2**

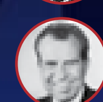

Clinton - **4**

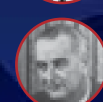

H.W. Bush - **3**

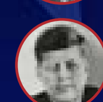

Reagan - **4**


Carter - **2**


Ford - **3**


Nixon - **2**


Johnson - **2**


Kennedy - **1**


Eisenhower - **2**

Supreme Court changes?

President Trump got three Supreme Court nominees confirmed in his one term in office and President Obama had two. President Biden has already had one in his first term, but there is no obvious retirement candidate over the next two years absent unexpected health issues. A retirement by a Democratic-appointed justice would not change the balance of power on the Supreme Court, so it might result in less of a scorched-earth campaign of opposition by right-wing interest groups and Senate Republicans, who would not have the ability to block such an appointment.

Looking at justices appointed by Republican Presidents, Justices Thomas and Alito are the oldest justices. The retirement of either justice—or another Republican appointee—would give President Biden an opportunity to flip a Supreme Court seat and create a narrower 5-4 conservative majority where Chief Justice Roberts is again the swing vote. In such a situation, it is thought Chief Justice Roberts could be a moderating force and minimize the ability of more conservative justices to overturn existing precedents in some key legal areas. A Republican appointee retiring from the Supreme Court would set off a major political battle in the closely divided Senate, but so long as Democrats stuck together the President would be able to get his nominee confirmed.

Since the Eisenhower Administration in the 1950s, eight out of twelve presidents have had their Supreme Court nominees confirmed in their first term. Six presidents confirmed two justices, President Trump (R) confirmed three and President Nixon (R) confirmed the most, with four justices in his first term. The Senate has already confirmed one in President Biden's first term, Justice Ketanji Brown Jackson.

What does the election mean for the Biden Administration's ability to confirm judges?

Split Control (R House, D Senate)

Even with a 50-50 Senate the last two years, President Biden enjoyed unprecedented success in confirming district and appellate judges to the bench in his first two years of office. President Biden was able to confirm 84 judges in his first two years, including the confirmation of Ketanji Brown Jackson as the first African-American female on the Supreme Court (*see* sidebar). Justice Jackson's confirmation highlighted President Biden's commitment to appoint the most diverse set of federal judges in history (*see* sidebars).

With a Republican House acting to block most of the President's major legislative initiatives, the existence of a Democrat-controlled Senate means appointing a friendly slate of judges will be a Biden Administration priority for the next two years.

As of Election Day 2022, the Senate had confirmed 84 of President Biden's judicial nominees, the highest number of confirmed federal judges in a President's first two years since John F. Kennedy got 102 federal judges confirmed from 1961-1962. Below is a list of the number of judges confirmed in the first 566 days of each presidency since Dwight D. Eisenhower.

Kennedy	102
Biden	84
Clinton	74
W. Bush	72
Reagan	72
H.W. Bush	57
Trump	51
Carter	47
Eisenhower	46
Obama	42
Nixon	35
Ford	32
Johnson	27

63 of 84 (75%) of Biden's confirmed federal judges have been women. The list below shows the percentage of judges appointed that were female, by President:

Biden	75%
Obama	50%
Clinton	36%
Trump	29%
W. Bush	22%
H.W. Bush	11%
Reagan	6%
Carter	4%
Kennedy	1%
Ford	0%
Nixon	0%
Johnson	0%
Eisenhower	0%

55 of 84 (65%) of Biden's confirmed judges have been non-White, including 13 Hispanic judges, 13 Asian judges, and 20 Black judges. The list below shows the percentage of judges appointed that were non-White, by President:

Biden	65%
Obama	40%
Clinton	36%
Carter	19%
W. Bush	17%
Ford	13%
Trump	12%
Johnson	7%
Nixon	6%
H.W. Bush	5%
Reagan	4%
Kennedy	3%
Eisenhower	0%

Who Will Be in Congressional Leadership?

After holding the Senate in the election, Sen. Chuck Schumer (D-NY) has won another two-year term atop the majority's leadership team. Over the last two years, Sen. Schumer grew into his leadership role, delicately negotiating with every wing of his 50-member caucus and winding his way to a series of transformative legislative accomplishments for the Biden Administration. In winning the Senate majority, it seems likely Democrats will keep their entire senior leadership team intact. One of the first decisions Sen. Schumer will have to make is who will steer the Democratic Senatorial Campaign Committee (DSCC) through what promises to be a difficult environment in the 2024 election cycle. There is a chance that current Chairman Gary Peters (D-MI) may stay for a second term atop the DSSC, but if not the candidates for the position may include Sens. Mark Kelly (D-AZ), Jon Ossoff (D-GA), Alex Padilla (D-CA), and Raphael Warnock (D-GA).

Republicans entered the 2022 election with high hopes of retaking the Senate majority but failed to do so, so the blame game is taking place in public and behind closed doors. Nevertheless, it does not appear the Republican Conference will ultimately punish any of its leaders for losing the election, and the current leadership team will stay largely intact at the top. The one exception may be NRSC Chairman Rick Scott (R-FL) who may not be able to launch an effective expected bid for President if the perception is he squandered resources that cost Republicans the Senate in this election.

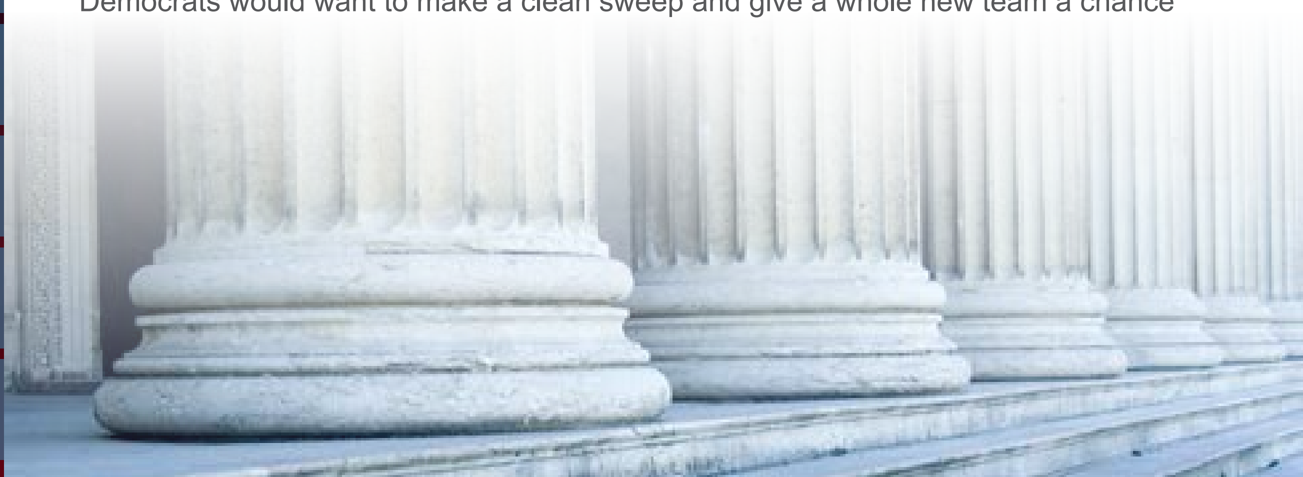
Sometime in 2023, Senate Minority Leader Mitch McConnell (R-KY) will pass Mike Mansfield as the longest-serving senate leader in history. Sen. McConnell is not up for reelection until 2026 and he shows no signs of yielding power before his next election. Thus, there is a quiet and largely invisible race going on behind the scenes to position candidates to succeed Sen. McConnell as Republican leader at some distant day in the future. The three candidates are Sens. John Barrasso (R-WY), John Cornyn (R-TX) and John Thune (R-SD). Each has their own strengths in being considered to be the next Republican leader whenever Sen. McConnell steps down. Sen. Barrasso is the pure conservative in the race—he rarely deviates from the political right's preferred policy position. Sen. Thune holds down the next-generation/business-friendly wing of the race and, as the current Republican Whip, he may have the inside track to move up when Leader McConnell departs. Sen. Cornyn is the prior Republican Whip and regarded as a team player and a deal maker—he has been instrumental in 2022 on bipartisan compromises to pass gun control legislation and the *CHIPS and Science Act*.

Lower down the leadership ladder, Sen. Roy Blunt's (R-MO) retirement opens the Policy Chair position that is likely to be filled by someone like Sen. Shelley Moore Capito

(R-WV). One of Leader McConnell's first acts after the election will be to appoint a Senator to lead the National Republican Senatorial Committee (NRSC) for the 2024 cycle. Leader McConnell would like to avoid the 2022 discord he had with Chairman Rick Scott (R-FL). Also, given the underperformance of various 2022 Senate Republican candidates, the next NRSC chairman may be eager to get involved in party primaries to ensure the most competitive general election candidates win their primaries. Leading contenders to lead the NRSC in 2024 include Sens. Steve Daines (R-MT), Joni Ernst (R-IA), Bill Hagerty (R-TN), Roger Marshall (R-KS), and Dan Sullivan (R-AK).

In the House, the new, very small Republican majority means there are new leadership opportunities and a ton of interested people competing for the available seats at the table. Absent extraordinary events, Kevin McCarthy (R-CA) will be the next Speaker of the House, though conservative Republicans are looking to extract policy concessions from McCarthy before providing their floor votes for him to become Speaker. McCarthy would succeed fellow Californian Nancy Pelosi (D-CA) in the position. That would be only the second time in American history the Speaker's gavel changed hands but remained with a Representative of the same state—the other occurred in 1835 and involved two Representatives from Tennessee, including future President James Polk. Steve Scalise (R-LA) will be the next House Majority Leader, and is probably the most uniformly well-liked Republican leadership team member in the House. He has aspirations to someday be Speaker of the House. There will be a fierce battle to be the House Majority Whip, with National Republican Campaign Committee (NRCC) Chairman Tom Emmer (R-MN) seeking to turn two winning election cycles at the NRCC helm into a prominent promotion on the leadership team, but the narrow win in 2022 compared to expectations may doom his candidacy. Republican Study Committee Chairman Jim Banks (R-IN) is running as the Trump-backed candidate in the Whip race, while Chief Deputy Whip Drew Ferguson (R-GA) is running as the only candidate with vote-counting experience. Republican Conference Chairman Elise Stefanik (R-NY) is running for another term in that position and may face a long-shot challenge from Rep. Byron Donalds (R-FL).

The landscape on the House Democratic side is much harder to discern even a week after the election, and everyone is waiting on House Speaker Nancy Pelosi to announce her intentions. House Democrats could be looking at a massive change in their leadership ranks, a generational shift that is long in the making, or the fact Democrats held their losses to historic lows in an off-year election may convince Speaker Pelosi to stay and run the whole thing back in 2024. If the former, this would be the moment Speaker Nancy Pelosi (D-CA) steps down and facilitates a transition to the next generation of Democratic leaders in the House. In that instance, it would seem House Democrats would want to make a clean sweep and give a whole new team a chance



to learn in the minority so they can be ready to be in the majority as soon as after the 2024 Presidential election. It is not clear if current House Majority Leader Steny Hoyer (D-MD) and Majority Whip Jim Clyburn (D-SC), both in their 80s like Speaker Pelosi, would willingly depart with Speaker Pelosi. It appears Speaker Pelosi prefers to make a much younger member the next Democratic leader. In that instance, the most likely slate of candidates for Minority Leader would include Reps. Hakeem Jeffries (D-NY) and Adam Schiff (D-CA). Rep. Jeffries would be heavily favored in a race that pits members from the two biggest Democratic delegations against each other. The election of Reps. Jeffries or Schiff would increase the desire for the Democratic caucus to find at least one woman to hold a leadership position. The race for Minority Whip and Caucus Chair could include Reps. Schiff, Katherine Clark (D-MA) and Pete Aguilar (D-CA). There will also be a spirited multi-candidate race for several lower positions that are seen as launching pads for future leadership opportunities.

Will the Republicans Use the Congressional Review Act?

The *Congressional Review Act (CRA)* allows Congress to overrule a regulatory action of the executive branch and provides a procedural fast track process to debate such actions. Before Donald Trump took office, the CRA was used only once to successfully repeal a regulation: After the 2000 election of George W. Bush, an all-Republican Congress used the CRA to revoke an office ergonomics regulation. After that, the CRA was not used successfully for more than 15 years, when it was revived by Republicans who controlled all of Washington after the 2016 election. In 2017-2018, Congress used the CRA to revoke 16 regulations President Obama had recently implemented before leaving office in 2017. In 2021, President Biden signed three CRA resolutions that passed the all-Democratic Congress, repealing three rules promulgated by President Trump.

House Republicans have a historically small majority in the next Congress, so they will need to choose their CRA battles carefully, looking for issues that will help them in the 2024 election. That would mean using the CRA to draw public attention to Biden Administration regulatory decisions that they believe are unpopular and unwise. They will pass these measures even as they know a Democratic Senate will reject them. Potential examples may include the student loan executive order, border enforcement, the ongoing Title IX process, and energy orders restricting development and production of oil and gas on federal lands. These CRA actions will be doomed from the start, but the effort is designed to build political support for the broader concept that President Biden has overstepped his boundaries.

What Will Happen with the House's January 6 Special Committee?

The Republicans taking control of the House in the 2022 election spells the end of the House Select Committee to Investigate the January 6th attack on the United States Capitol, which has operated for the last two years. In its place, there will be a push from more conservative Republicans in the House to establish a formal counter effort that looks at other aspects of the post-election events in 2020-2021. Given the fact Republicans have such a small majority in the House, and much of that majority comes from newly elected moderate Republicans, it more likely than not there will be no formal and organized response to the January 6 committee. Instead, we see it as more likely House Republicans will use existing committees to focus on oversight and investigations related to various alleged acts of misconduct inside the government.

Will Congress Impeach President Biden?

Democrats retook the House in 2018 and were sworn in on January 3, 2019. On that very same day, the first articles of impeachment against President Trump were introduced by some House Democrats, and another impeachment bill was introduced before the end of March. While the House twice impeached President Trump in 2020 and 2021, they did not use the first articles filed in 2017. Nevertheless, filing articles of impeachment on the first day of a Congressional session set the confrontational tone of a new Democratic House majority determined to oppose the President.

Republicans won the House but have a majority that is so narrow it is hard to see them allowing time and energy to be wasted on a Presidential impeachment effort that is dead on arrival in a Democratic Senate. You can expect an effort from the most vocal and Trump-friendly elements of the new House majority to push an effort, but doing so appears to be a quick ticket back to the minority for Republicans in 2024. The most likely grounds cited for impeachment would be: (1) hasty withdrawal in Afghanistan; (2) failures to enforce our southern border; (3) COVID-related failures; or (4) allegations of corruption surrounding the business operations of Hunter Biden.

On a related note, Republicans will use oversight and investigations of various Cabinet officials to consider impeaching officials like Attorney General Merrick Garland, Health and Human Services Secretary Xavier Becerra and Homeland Security Secretary Alejandro Mayorkas.

Will Congress Change Any of Its Operating Rules Like Abolishing the Filibuster or Proxy Voting?

Republicans winning the House means they will set the rules for the chamber when it convenes on January 3, and those rules will differ from the rules of the current Congress. First up, the House Rules package under Republican control is likely to eliminate proxy voting, a rule started by Democrats during the pandemic that allowed Representatives to vote without coming to Washington. Over the last two and a half years, proxy voting has grown in size and scope, allowing some Representatives to stay out of Washington for months at a time. Republicans sued Democrats, arguing proxy voting was unconstitutional, but federal courts continued a long tradition of staying out of Congressional operations and dismissed the suit. While some House Republicans learned to live with proxy voting and used it themselves the last two and a half years, House Republican leadership will abolish it as a visible example of setting a new path for the chamber's operations.

Second, we expect House Republicans to use the Rules package to retaliate for what they perceive as partisan Democratic efforts the last four years to interfere with Republican Conference decisions about committee service. Speaker Pelosi and House Democrats removed individual Republicans from their committee assignments. This was the first time in Congressional history the majority imposed its will on minority committee assignments, and Republicans will feel obligated to do the same thing. It is likely that high-profile Democrats like Intelligence Committee Chairman Adam Schiff (D-CA), Rep. Eric Swalwell (D-CA) and Rep. Ilhan Omar (D-MN) will be removed from their committee assignments. If they really want to do damage to the current lineup of Democratic leadership, the new Republican majority will go a step further and include in the Rules package a limit on service time as Chairman and Ranking Member. Republican conference rules already limit such service to six years, which promotes regular turnover at the top of committees, but Democrats have allowed their members to serve without limits at the top of the committee structure. Imposing a six-year limit would likely spark a lawsuit from Democrats, but it would also push out a large number of long-serving leaders in favor of a new, younger generation of House Democrats.

Third, we expect to see House Republicans take down the magnetometers Representatives must go through to access the House floor and perhaps even try to rescind the fines imposed on Republicans in the current Congress for failing to use the magnetometers on some occasions.

Fourth, House conservatives are attempting to leverage changes in the party's internal rules package before voting on the House floor for Kevin McCarthy to become Speaker. Notably, this group is seeking a change to an obscure parliamentary procedure that would essentially amount to a vote of no confidence that could force out a Speaker. Republicans changed their internal rules to bar this action after it was a driving reason Speaker John Boehner was pushed out as Speaker by house conservatives. It seems unlikely Kevin McCarthy will agree to this demand but negotiations will continue between now and January 3 when the House votes on the next Speaker.

Finally, House Republicans will take some more visible steps to restore House operations to pre-COVID conditions, allowing easier access to the Capitol complex as a sign of restoring a deeper connection with citizens. The ongoing manpower shortage for the Capitol Police might be the only limiting factor in what House Republicans might do to reopen their side of the complex.

Democrats retaining control of the Senate means they can consider again whether to abolish the legislative filibuster. The existence of a Republican House largely undercuts the need for the Senate to make the effort to abolish the filibuster in the new Congress. There has been tremendous pressure on Senate Democrats to abolish the filibuster for legislation popular on the left—notably legislation on voting rights, abortion and expansion of the Supreme Court—but the reality is a Republican House will not pass anything on those three topics that emerges from the Senate without substantial support from Senate Republicans. We believe there are more Democratic Senators who oppose ending the legislative filibuster, but those Senators have been reluctant to visibly join Sens. Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ) as they took fire for refusing to abolish the filibuster the last two years. We do expect Senate Democratic leadership will continue to cite the filibuster as the main reason they cannot achieve select legislative victories in the chamber. It makes little political sense for Senate Democrats to push for a vote on abolishing the filibuster when: (a) the Republican House will not pass any legislation that comes from the Senate on a straight party-line vote and (b) the vote to eliminate the filibuster would put a few Democratic Senators up for reelection in 2024 in a tough spot.

What Major Regulatory Efforts Will Dominate the Next Two Years and What Can Republicans Do to Counter Them?

The June Supreme Court decision in *West Virginia v. EPA* has the potential to alter future regulatory actions in the Biden Administration. The 5-4 decision sets an outer limit on a federal agency's ability to regulate in areas where Congress has not given it express authority to do so, but stopped short of changing the long standing *Chevron* standard of deference to agency decisions on all regulatory questions. This limitation would seem to end a multi-decade increase in federal regulatory activity where Congress passed sweeping generalized legislation in an area and left an endless array of details for the responsible agencies to define in the future.

The second two years of a Presidential term tend to be more regulation heavy in general. It takes at least a year for a new administration to get its senior officials in place at an agency, and more time than that to begin to execute on a governing philosophy that manifests itself in various rulemakings, guidance and other forms of regulatory power. The Biden Administration has maneuvered its chess pieces into place and will finalize hundreds of rulemakings that impact all sectors of the American economy over the next two years.

Thus, the momentum of ambitious Biden Administration rule-making in all areas is about to run into the new *West Virginia v. EPA* decision that appears to curtail the scope of what rule makers can do. You can expect the Biden Administration to adopt a “no lose” attitude of aggressive executive orders and rulemakings, figuring either those policies will survive legal challenges under the new Supreme Court standard or those policies will be struck down and the Biden Administration can use them as examples of judicial overreach harming politically popular initiatives. A good example of this may be President Biden’s recent student debt relief actions. Those decisions already face multiple court challenges arguing the President exceeded his constitutional powers. If those challenges fail, the President will gain a powerful precedent he might apply in other policy areas in the future. If the President loses, he can use his bully pulpit to offer this as an example of a Supreme Court that needs to be fixed because it vacated a politically popular executive action.

In the next two years, we expect to see major rulemakings or guidance on:

1. The SEC on ESG standards for public companies
2. The Department of Education on Title IX sexual assault procedures for college campuses
3. Regulations from Treasury implementing the billions of dollars in energy tax credits under the IRA
4. The EPA’s Mercury and Air Toxics Standards for power plants and the Clean Air Act “good neighbor” obligations under the 2015 *Ozone National Ambient Air Quality Standards*
5. The FTC on privacy
6. Implementation of the drug-pricing provisions of the IRA, including the *Drug Price Negotiation Program*, inflation rebates for Medicare drugs, and Part D benefit redesign.
7. The Office of the US Trade Representative on the existing Section 301 tariffs on Chinese imports and potentially new Section 301 tariffs

Arnold&Porter
Overview
118th Congress (2023-2024)
2024 Preview
2022 Review
Committee Leadership
California
Defense/ National Security
Education
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Federal Funding
Financial Services
Foreign Affairs
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Immigration
Product Safety
Tax
Technology
Trade

What Does the Election Mean for Oversight?

All congressional committees have the authority to engage in some form of oversight and investigations. There are only two committees that have a specific charge to engage in these activities without regard to jurisdiction: the House Committee on Oversight and Reform (COR) and the Senate Committee on Homeland Security and Governmental Affairs, specifically its Permanent Subcommittee on Investigations (PSI). In plain terms, oversight is the work of examining the operation of current law, including how it affects people, entities and things, how it is administered, including the agencies created and funded by Congress, and considering changes to law. Investigation, while not defined by the House or Senate rules, should be understood according to its ordinary meaning—that is, a focused development of facts. Both COR and PSI are authorized to inquire through oversight and investigations about matters across all branches of government, only limited by the breadth of Congress' power to make law.

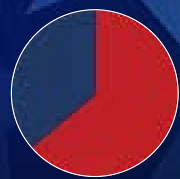
The authorities of COR and PSI are similar to those of other standing committees but certain nuances and practical considerations lend the panels extra heft. For example, COR and PSI, can take depositions, and both panels have commercial document review platforms. This may not appear remarkable, but usually committee budgets are almost exclusively reserved for personnel and committees and generally lack the capacity to manage large document productions. And COR in particular has a sizable staff. Both COR and PSI can issue subpoenas. Compulsory process from COR (and other House committees) is more readily enforceable than in the Senate: a majority vote of the Bipartisan Legal Advisory Group made up of the Speaker, Majority and Minority Leaders and Whips can authorize the House Counsel to seek the assistance of an Article III court. The Senate actually has statutory authority to seek a court's help but it requires a resolution of the Senate, which is difficult. Both COR and PSI have a reputation for identifying an object and pursuing it doggedly over time; that is not expected to change.

The midterm election will affect the leadership of COR. In the House the gavel for COR, expected to be renamed House Oversight and Government Reform (HOGR), will go to Rep. Jim Comer (R-KY). He is relatively new to Congress—this will be his fourth term—and has a reputation as a hard worker. Ideologically, he is a conservative who voted to certify the election. On the Democratic side, there is a race for position because the chair of COR in the 117th Congress, Rep. Carolyn Maloney (D-NY), was defeated in her primary. Rep. Jamie Raskin (D-MD) is the leading contender to succeed Rep. Maloney as the Democratic leader on the committee. If chosen, he will leap-frog more senior Rep. Gerry Connelly (D-VA) likely because of his performance on the Select Committee to Investigate the January 6th Attack on the United States Capitol, showing him to be an able competitor. Ideologically, he is aligned with the progressive wing of his caucus. PSI will likely be led by its current chair Sen. John Ossoff (D-GA). In his brief tenure, PSI has examined alleged corruption and abuse in the Bureau of Prisons and mistreatment of military families in privatized housing. Now that Sen. Ron Johnson (R-WI) has won re-election, he will likely continue to serve as ranking member.

Will Biden Run Again? If Not, Who Are the Front-Runners to Run for the Democratic Nomination?

Joe Biden was the oldest person ever elected to the White House when he won in 2020. On Election Day 2024, he will be almost 82, and is less likely to run for reelection than any incumbent President in our lifetime. There has been a lot of media speculation about President Biden's capacity and interest to serve a second term, which has contributed to his poor reelection numbers in polls. Nevertheless, there remains a sense in the Democratic party that: (a) Biden is still well- positioned to beat Trump; (b) President Trump is determined to run again; and (c) President Biden would feel he could not step aside for another candidate if the Republican nominee appears likely to be President Trump.

Most Voters and Most Democrats would prefer Joe Biden NOT run for reelection.



64% of voters prefer President Biden not run for reelection

(USA Today/Suffolk Univ., Oct. 2022)

In the summer of 2022 there was a brief moment when elected Democrats were openly suggesting President Biden should not run again, but the string of legislative successes he had in June, July and August quashed all but a few lonely voices. From a historical perspective, there are a lot of reasons for President Biden to run for election and to be the favorite from the start. Three of the last four Presidents and five of the last eight have been reelected. Barack Obama is the only President to win reelection in the last 50 years and finish with fewer electoral votes than in their first election. The last President eligible to run for reelection who failed to do so was Lyndon Johnson in 1968. Now, a hostile Republican House will make life challenging for President Biden and may reduce his enthusiasm to run for reelection.

Overall, there remains a sense in Washington that a Biden-Trump rematch is not only likely but is also something both candidates very much want to see happen, even if a plurality of Democrats and a majority of American voters would prefer President Biden step aside for 2024 (*see* sidebar).

If President Biden does decide not to run, there is a lot of work to be done to select a Democratic nominee as his replacement. Winning the White House in 2024 requires a candidate to form and operate a multi-billion dollar corporation over the next 12 months, so there is not much time to be lost on the Democratic side if they want to hold the White House in 2024.

If President Biden drops out, there would be a frenzy on the Democratic side in 2024. The 2016 Democratic nominee (Hillary Clinton) and many of Biden's top opponents in the Democratic primary in 2020 (Sens. Bernie Sanders and Elizabeth Warren) are themselves old enough to cast doubt that they could be credible challengers in 2024.

If President Biden runs for reelection, it would continue to delay the transfer of power to a future generation, quietly frustrating the ambitions of many governors and senators who would be forced to fall in line and visibly support President Biden's reelection efforts.

The last two Democratic Presidents—Bill Clinton and Barack Obama—both cruised to reelection two years after losing the House to Republican control.

If President Biden decides against running for reelection, there are five major categories of people who will look at running for the Democratic nomination.

Vice President Kamala Harris—She is the immediate frontrunner if President Biden bows out but she would be sure to face well-funded alternative candidates as she fought for the nomination. Some of the challenges Vice President Harris will face include:

1. No woman has won the White House and only Hillary Clinton even secured the Democratic nomination;
2. Barack Obama is the only African-American candidate to win the Democratic nomination;
3. She has incredibly low approval ratings, even lower than President Biden's; and
4. She was a poor 2020 primary candidate, dropping out before the Iowa caucuses, and there is no indication she would be a better candidate the second time around.

Nevertheless, Harris would be the immediate frontrunner if Biden stepped aside, and other candidates would have to jump over her to become the Democratic nominee.

Current and Former Cabinet Officials—Transportation Secretary Pete Buttigieg accorded himself well in the 2020 Presidential primaries and would consider running again in 2024. Commerce Secretary Gina Raimondo is widely considered one of the most effective members of the Biden Cabinet and would be a viable Presidential candidate. 2016 nominee and former Secretary of State Hillary Clinton would get a lot of media attention, and would have to consider the race, though she is widely expected to pass. Secretary Clinton could run and win and still be two years younger than Joe Biden was when he was elected to the White House.

Senators—A large number of sitting senators would consider running for the White House if President Biden declined to run for reelection. They include Sens. Cory Booker (D-NJ), Kirsten Gillibrand (D-NY), Amy Klobuchar (D-MN), Bernie Sanders (I-VT), and Elizabeth Warren (D-MA).

Governors—Several governors would be expected to run, including Phi Murphy (D-NJ), Gavin Newsom (D-CA), Jared Polis (D-CO), J.B. Pritzker (D-IL), and Gretchen Whitmer (D-MI). All of these Governors hail from states Democrats do well in and they may not have much past exposure to the type of campaigning needed to appeal to the independents and moderates who are the decisive votes in the race for the White House.

Business and Popular Leaders—The success of Donald Trump transforming from a business leader into the President likely will inspire some Democratic business leaders to run for the White House. The scope of candidates could include people like Disney's Bob Iger, Starbucks CEO Howard Schultz, and tech entrepreneur Mark Cuban.

The Road to the White House – Rematch or New Blood on the Republican side?

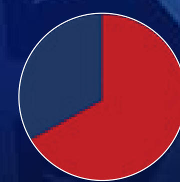
Given recent history and demographic trends, Republicans enter the 2024 race for the White House as the underdog. It is always difficult to beat an incumbent President, so if President Biden runs he will be the favorite. Still, for the last 40 years, the race to win the White House has been like a football game played only between the 45 yard lines: no candidate has won more than 53% of the raw national vote since 1988, and only one candidate in the last 50 years has cleared 55% (Reagan with 58.8% in 1984).

The Republicans face a seminal and unique historical challenge—renominate a candidate who won the White House but lost his reelection, or go with someone new and less controversial? The former President will launch his campaign for the 2024 nomination as soon as today, in an effort to prevent most viable Republican challengers from having an easy path to early money and key staff.

Republicans have not won the popular vote for President since 2004, and President Trump is very unlikely to change that trend. Most voters do not want President Trump to run again (*see* sidebar) but he is unlikely to consider those data points in making his decision.

History is not on President Trump's side for a second stint in the White House: You have to go back to 1948 to find a time when Republicans renominated the man who lost the race for the White House four years earlier (Thomas Dewey). To win, President Trump will look to repeat the events of 1884 and 1892—Grover Cleveland won in 1884 with less than a majority of the popular vote, lost his close reelection bid in 1888 despite winning 10% more votes than before, and came back and crushed his opponent/ incumbent Benjamin Harrison four years later to become the first and only President to serve non-consecutive terms. Teddy Roosevelt tried to repeat the feat and failed.

Most voters do not want former President Trump to run for the White House in 2024:



68% of Americans do not want Trump to run in 2024.

(USA Today/Suffolk Univ., Oct. 2022)

President Trump consistently tops all polls of potential Republican nominees. The January 6 Committee results and the ongoing FBI investigation after an August raid at Mar-a-Lago are a double-edged sword. They motivate partisans on both sides, but absent a clear legal victory against Trump, they provide the motivation and visibility needed to propel Trump to run.

Primaries are usually won by a mere plurality—that's how Trump won the 2016 nomination in a crowded field of candidates that were slow to identify a top-level player to oppose him—so there's reason to think the former President is likely to run the same playbook in 2024. A divided and crowded Republican primary gives former President Trump an advantage to win the nomination.

A Biden-Trump rematch would pit the two oldest candidates in Presidential history.

Outside of President Trump, the list of other potential 2024 Presidential candidates on the Republican side break down into four potential categories:

Vice President Mike Pence (R-IN)—The former Vice President would be the most prominent challenger to President Trump. He would be associated with the policy victories of the Trump Administration, but he also accorded himself well in the events between Election Day 2020 and January 6, 2021. President Trump would be particularly upset if his former Vice President were to run for the nomination against him, and that could create a very bitter primary environment.

Former Cabinet Officials—This group includes former Secretary of State Mike Pompeo (R-KS) and former United Nations Ambassador Nikki Haley (R-SC). Both have made efforts to distance themselves from the former president over the last two years, and to position themselves to enter the primaries. Both would offer a package similar to Vice President Pence—the substantive policy positions of President Trump, but with a smarter, slicker package that may appeal to millions of more moderate voters.

Current and Former Governors—This is perhaps the most crowded group. It could include Govs. Greg Abbott (R-TX), Chris Christie (R-NJ), Ron DeSantis (R-FL), Kristi Noem (R-SD), and Glenn Youngkin (R-VA). Governor Christie is an outsider because he has been out of office for years and has a complex past relationship with President Trump. The other three will have tangible governing accomplishments to run on as a platform. Governors Abbott and DeSantis lead the two largest Republican-leaning states in the country, just won surprisingly big re-election victories last week, and are on the frontlines of policy and political pushback against the Biden Administration. Governor Youngkin is limited to one term, and has the benefit of creating a blueprint and winning a race decided by the same moderate voters who decide most Presidential elections.

Senators—We would expect a number of Republican senators to enter the primaries. Sen. Ted Cruz (R-TX) was the official runner-up to President Trump in the 2016 primaries, and will look to run again. Sens. Marco Rubio (R-FL) and Rick Scott (R-FL) hail from the bellwether state of Florida—Rubio ran before and Scott has been open about his interest in running in the future - but it is hard to see them running in a primary if President Trump and Gov. DeSantis are both already in the race. Sen. Josh Hawley (R-MO) is also someone with national aspirations who may consider a run, but his heavily scrutinized activities surround the events of January 6 make his success a long-shot. Sen. Tim Scott (R-SC) also seems to be considering a run, pitching a positive message and perhaps appealing to a more racially diverse coalition of voters.

The Race for the Senate in 2024

Democrats retained control of the Senate in a result that was not widely expected at the start of 2022, but by many measures it will be the longest run in history of Senate operations so closely controlled by the same party. In extending their 2023-24 majority, Senate Majority Leader Chuck Schumer (D-NY) will still face numerous circumstances where he will be forced to negotiate with his two most moderate members—Sens. Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ).

The 2024 Senate map presents challenges for Senate Democrats, as they seek to defend 21 of the 33 seats up for election, and two of the other seats are held by independents who caucus with the Democrats. In the last 30 years, there has been an increasingly high correlation between the Presidential vote in a state and the vote for a Senate seat in that same state. For example, in 2020, the same party that won the state's electoral votes also won the Senate seat 34 out of 35 times that year.

Senate Republicans have only two Senators up in 2024 who (a) won in 2018 with less than 55% of the vote and (b) are from a state where President Trump won less than 55% of the 2020 Presidential vote. Surprisingly, those states are the perceived Republican strongholds of Florida and Texas. In Florida, Sen. Rick Scott (R-FL) is up for reelection, and he is not well-liked by many in the Senate Republican leadership structure, as he used his 2022 position leading the Senate campaign arm to pursue strategies and spend money in ways that conflicted with Majority Leader Mitch McConnell's (R-KY) wishes. Sen. Scott won 50.1% of the vote in 2018 and this is expected to be one of the most expensive Senate races in the country, with multiple high-profile Democrats jockeying for the chance to face him. Florida has trended more and more Republican in Presidential and gubernatorial races, and that is helpful to Sen. Scott's efforts to get reelected. Sen. Marco Rubio (R-FL) was reelected this week with 57.7% of the vote, despite getting outspent by Rep. Val Demings (D-FL) in the race.

Texas is another expensive defensive battle for Senate Republicans in 2024. Like Sen. Rick Scott, Sen. Ted Cruz (R-TX) has his own issues with the Senate leadership and with more moderate elements of his party in his home states. Sen. Cruz won just 50.9% of the vote in 2018, Donald Trump won only 53% of the vote in Texas in 2020, and national Democrats continue to pour tens of millions of dollars into efforts to win the Governor's mansion or a Senate seat in Texas—Governor Abbott was reelected this week with 54.8% of the vote despite Democrats spending more than $100 million to support Beto O'Rourke's campaign there. Now that O'Rourke is likely exhausted as a candidate in the Lone Star State, it is not clear who will rise to face Sen. Cruz, but they will surely be well-funded in doing so.

We expect several senators to run for President on the Republican side of the aisle and have covered that elsewhere in this analysis. Those runs may create some open seats in unexpected places, including Florida and Texas on the Republican side if Sens. Cruz and Scott run for the nomination. Sen. Cruz in particular may be tempted to run since he was the runner-up for the Presidential nomination in 2024.

If President Biden does not run for reelection, we would expect to see several Democratic senators consider a run for the White House. While Sens. Bernie Sanders (I-VT) and Elizabeth Warren (D-MA) are considered too old to be the preference of the party in a competitive primary, the success both had in 2020 would force them to consider running again. Sen. Amy Klobuchar (D-MN) outperformed expectations in the 2020 primaries and may look to run again. Other Democratic contenders from the Senate might include Sens. Cory Booker (D-NJ) and Kirsten Gillibrand (D-NY). Gillibrand, Klobuchar, Sanders, and Warren are all up for reelection to the Senate in 2024, so running for President may open their Senate seats up to competitive primaries.

The off-year of a Senate cycle is typically when older incumbents will consider whether they want to retire or if they will gear up to run for another six-year term. Sen. Dianne Feinstein (D-CA) is 89 and is widely expected to retire rather than run for reelection in 2024. Her retirement, coupled with California's open primary system that could advance two Democrats to a November general election, would set off a broad and expensive primary fight among several prominent elected Democrats. In particular, if Rep. Adam Schiff (D-CA) does not win a seat at the House leadership table, he has the name identification and deep war chest to be a viable Senate candidate. While Rep. Schiff would be a strong candidate, if Sen. Feinstein chooses to retire early, Governor Newsom is committed to appointing a Black female to fill her seat which could complicate the Senate race in California.

Other Democratic Senators on 2024 retirement watch would include Sens. Ben Cardin (D-MD), Tom Carper (D-DE), Joe Manchin (D-WV), and Bernie Sanders (I-VT).

Of those, West Virginia would most likely flip to Republican control if Sen. Manchin does not run for reelection, while the other three states are still likely to elect a Democrat. On the Republican side, the most prominent potential retiree might be Mitt Romney (R-UT) who has served but a single term, but is often out of step with the majority of his Senate Republican brethren.

There are three Democrats up for reelection in 2024 who come from states where: (a) they won less than 54% in their 2018 reelection and (b) Joe Biden lost in the 2020 election. They are: (1) Sherrod Brown (D-OH) (53% in 2018; Biden/Harris 45% in 2020), (2) Joe Manchin (D-WV) (49.6% in 2018; Biden/Harris 29.7% in 2020); and (3) Jon Tester (D-MT) (50.3.% in 2018; Biden/Harris 40.5% in 2020). Sen. Brown has won consistently even as Ohio has moved to the right in recent years, and he can expect to watch Republicans stage an expensive and bloody primary to pick his opponent, which may leave them hard-pressed to coalesce and beat him in the general election. Sen. Tester has also won in the past despite a state where Republicans control every other statewide office, and he has not moderated his positions on many key issues the way Sens. Manchin and Sinema have done. Joe Manchin is regarded as the only Democrat who could hold the Senate seat in West Virginia but it remains to be seen if passing the IRA was a positive or negative with his constituents.

The next tier down of vulnerable Democrats are seven Senators up for reelection in states where: (a) the Senator was elected in 2018 with less than 56% of the vote and (b) President Biden won the state with less than 55% of the vote in 2020. First on that list is Sen. Krysten Sinema (D-AZ) (50% in 2018; Biden Harris won 49.4% in 2020), who has cut a path as a maverick independent. She is likely to face a primary challenge from Rep. Ruben Gallego (D-AZ). Next is Nevada, where Jacky Rosen (D-NV) (50.4% in 2018; Biden Harris won 50.1% in 2020) faces her first reelection. This week's election saw the very narrow reelection of Sen. Catherine Cortez Masto (D-NV) in Nevada (48.8% of the vote this week). Nevada remains a battleground state for the White House, so this promises to be one of the most expensive Senate elections of the cycle. Democratic Senators in five other states in this category start the 2024 cycle as slight favorites in their respective races: Tammy Baldwin (D-WI) (55.4% in 2018; Biden Harris won 49.6% in 2020); Bob Casey (D-PA) (55.7% in 2018; Biden Harris won 50% in 2020); Martin Heinrich (D-NM) (54.1% in 2018; Biden Harris won 54.2% in 2020), Angus King (I-ME) (54.3% in 2018; Biden Harris won 53.1% in 2020); and Debbie Stabenow (D-MI) (52.3% in 2018; Biden Harris won 50.6% in 2020).

Finally, in a true Republican wave election, it is possible two more Democratic Senators are vulnerable to a loss in 2024. These Sens. are Robert Menendez (D-NJ) (54% in 2018) and Tim Kaine (D-VA) (57% in 20218), as both states had very high Republican turnout in the off-year 2021 state elections—and Sen. Menendez faces another federal investigation.

Three Republican Senators are also potentially vulnerable to primary challenges given their 2018 election: Mike Braun (R-IN) (50.7% in 2018), Deb Fischer (R-NE) (57.7%); and Josh Hawley (R-MO) (51.4%).

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The Race for the House in 2024

With Republicans winning the House this week, it is the 5th time in 30 years the House has changed control (Republican to Democratic control 2006 and 2018; Democratic to Republican control in 1994, 2010 and 2022), but it is the 4th time to happen in the last sixteen years (2006, 2010, 2018, and 2022). This election will be the first time since 1999-2003 that the House has had back-to-back sessions with single-digit majorities. In fact, this result would be the first time since 1888 that a House with one party in control by single digits flips to a single-digit majority controlled by the opposing party.

Still, even with narrow control of the chambers and the increasing correlation between Presidential votes and election races in the House, history suggests Republicans will control the House for more than one term. 1952 was the last time a party won control of the House and held it for only one term. In 1952, Republicans won the house by a narrow margin (221-213) and lost it two years later (232-203). Since then, every time the House has flipped in the last 70 years it has stayed that way for at least four years. Furthermore, while Republicans will have a narrow majority in a Presidential election year, the last time they lost a House majority in a Presidential election was in 1932 when FDR swept to power in Washington during the Great Depression.

Did *Dobbs* Affect the Outcome? What Does This Say About the Federalization of Issues, e.g., Education, Other?

The Supreme Court *Dobbs vs. Jackson Women's Health Organization* decision, reversing *Roe v. Wade* and returning the regulation of abortion to state legislatures, was a pivotal event in the 2022 election. The decision immediately spiked an increase in Democratic fundraising, turnout and intensity of desire to vote, all of which combined to place Congressional Democrats on a better footing for the election season. First, the *Dobbs* decision fired up registered and likely Democratic voters and indicated it made them much more likely to vote in 2022, erasing a lead Republicans had enjoyed for most of the election cycle. Second, polling indicated likely voters, especially Democratic-leaning voters and independents, considered abortion one of the three most important policy issues in the election; Republican-leaning voters do not rank abortion high on their list of policy concerns headed into the 2022 election. Third, polling indicated swing voters—especially the suburban, highly educated women who have been the deciding factor in most recent election cycles—generally support protecting a woman's right to choose an abortion, though more nuanced polling questions indicated strong support for limiting abortion in the second and third trimester. Fourth, it is clear the *Dobbs* decision was a primary motivator of voters 18-29 and they turned out in strong numbers for the races that decided control of the House, Senate, governors mansions, and key statehouses. Finally, several other elections—such as a defeated ballot initiative effort in Kansas to impose new restrictions on abortion and a special election for a House seat in New York—provided proof of concept that the abortion issue was politically powerful for Congressional Democrats.

On balance, the *Dobbs* decision created momentum for Democratic candidates nationwide, and many took advantage and focused their summer and fall advertising on the abortion issue. Republicans were largely caught flat-footed on this front and have spent much of the summer and fall trying to find a cohesive national and local message on the abortion issue.

In the Senate, abortion may have been the deciding factor that swayed several close races like Arizona, Nevada and Pennsylvania. Again, Senate Democrats played up the notion that a Republican Senate would use the *Dobbs* decision to federalize anti-abortion efforts instead of leaving these decisions to the states, and that was an effective message. According to AP/NORC Votecast exit poll data this week, abortion rights supporters were key to Senate victories for Democratic candidates in Arizona, Colorado, Nevada, New Hampshire, and Pennsylvania.

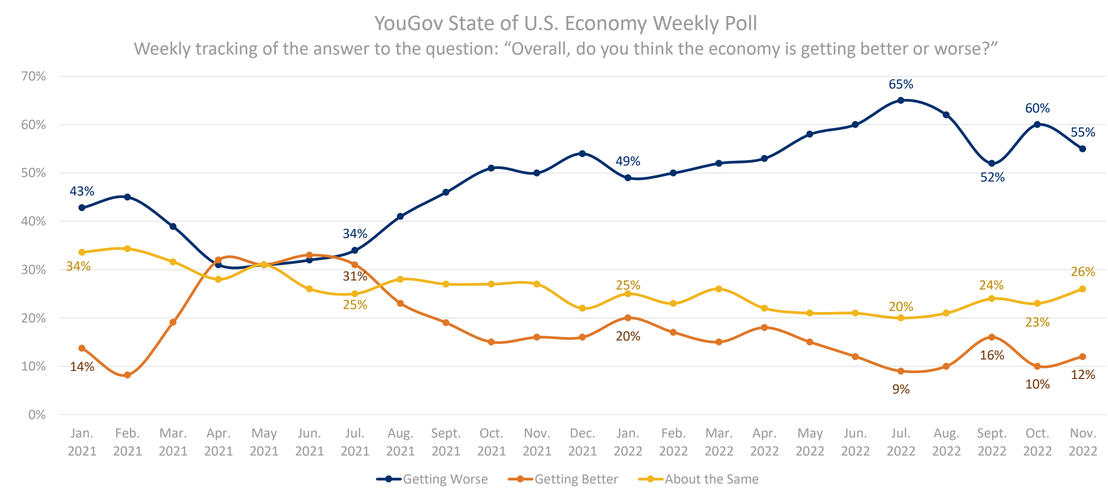
In the House, Republicans took control, as was widely forecast for months, but for the reasons cited above it is clear the *Dobbs* decision was a drag on the Republican ticket and contributed to Republicans underperforming in the elections that mattered most to control of Congress. Instead of winning the 20-30 seats predicted earlier this summer, Republicans are looking at a razor thin majority.

What Economic Data Affected the 2022 Election?

Americans continue to rate the economy as their top concern in the 2022 election. Here are some of the top-line trends over the last year for major economic indicators. We believe these numbers contributed to the election results this week, leading to split control of Congress after two years of an all-Democratic Washington. Enthusiasm and intensity of interest in domestic priorities like abortion rights and voting rights meant Democrats were able to overcome largely negative economic trends to counter the historical trends of the President's party suffering substantial losses in his first off-year elections.

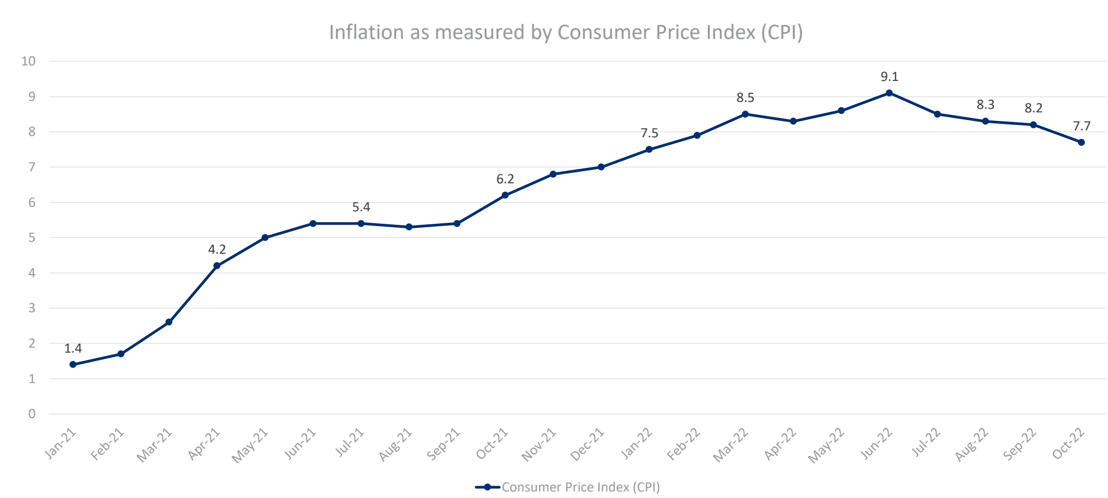
Recession or Not

The latest polling data indicates 55% of Americans believe the country is in a recession, and 38% do not believe we are in a recession.



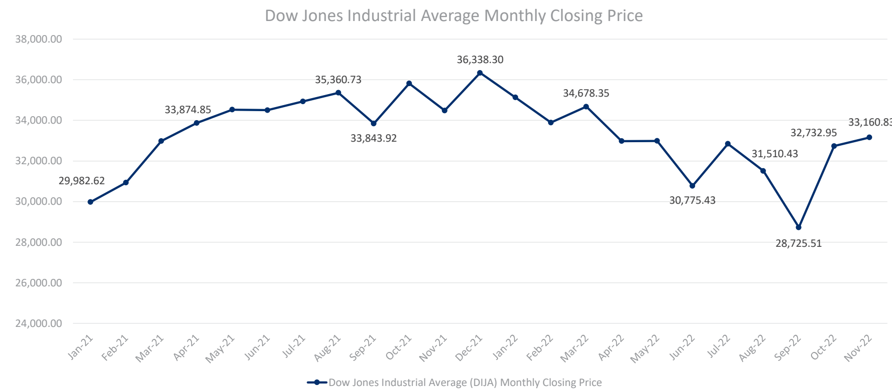
Inflation

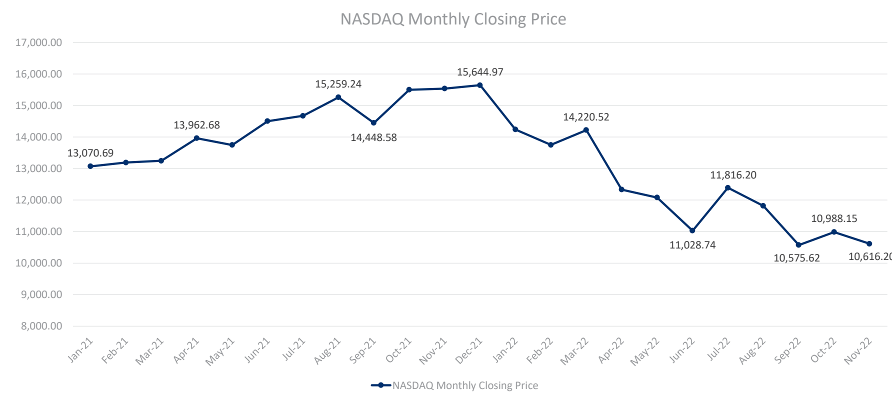
The country is suffering from its highest rates of inflation in more than 40 years. The annual inflation rate when President Biden took office was 1.4% and headed into Election Day the inflation rate was 7.7%.



Stock Market Performance

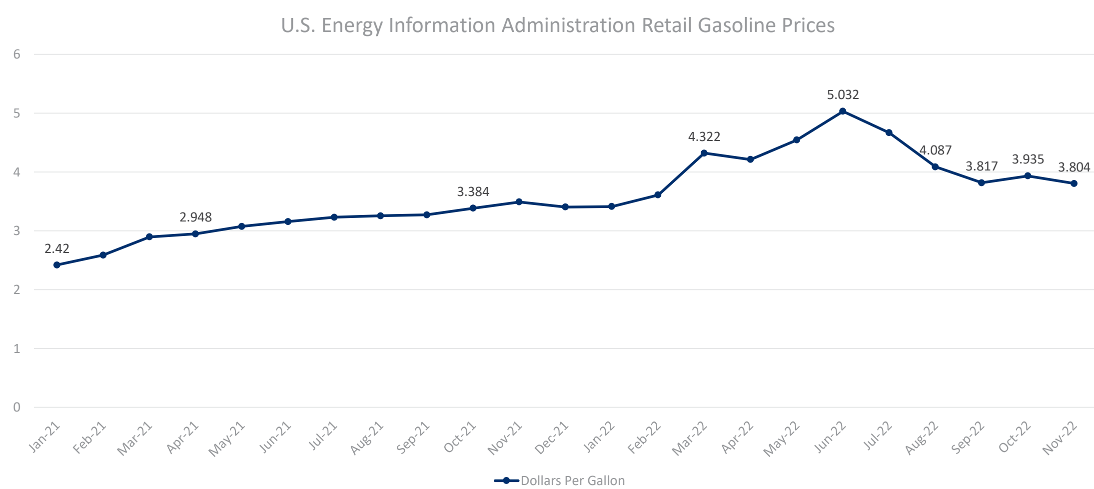
In the first two years of the Biden Administration, the Dow Jones has increased nearly 11%. The NASDAQ has shrunk nearly 18% in that same time period.





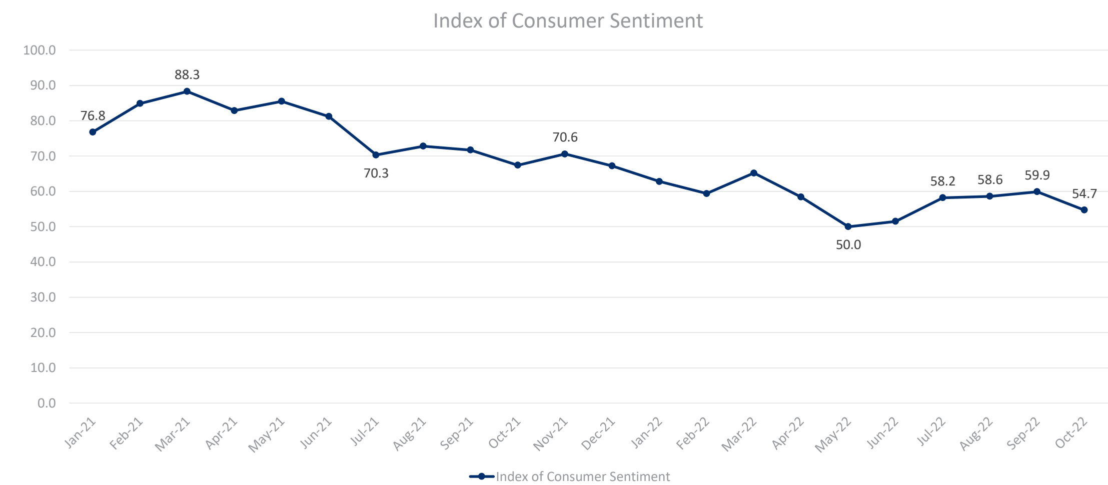
Gas Prices

Gas prices have been on a roller-coaster ride in the Biden Administration. Nationwide, gas prices have dropped $1.21 from their summer 2022 high of $5.01. Nevertheless, gas prices on election day 2022 were still $1.70 higher than they were on election day 2020, an increase of 56% over the last two years.



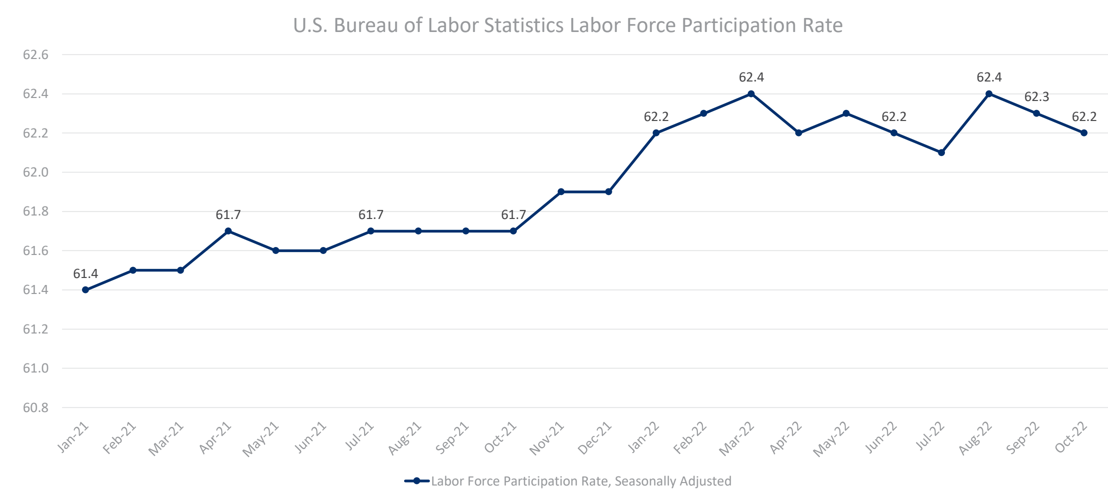
Consumer Sentiment

Over the course of 2022, consumer sentiment fell from 67.2 to 59.9.



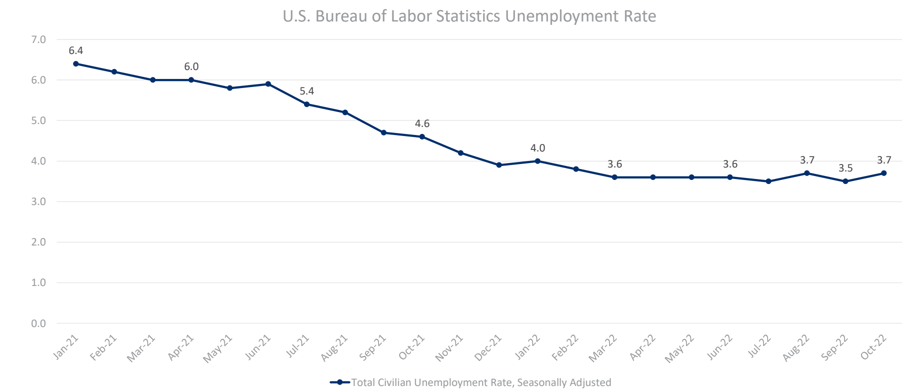
Workforce Percentage

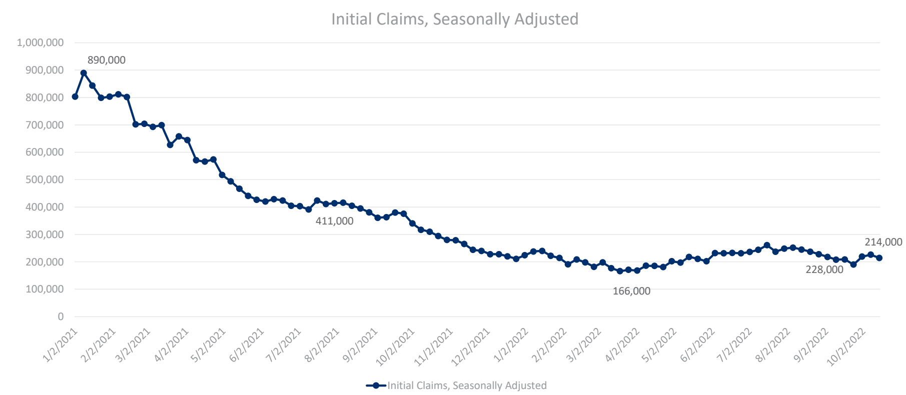
Over the first two years of the Biden Administration, the percentage of adults in the workforce has risen to just 62.3% and remains short of the 63.4% that existed before the start of the pandemic.



Unemployment Data

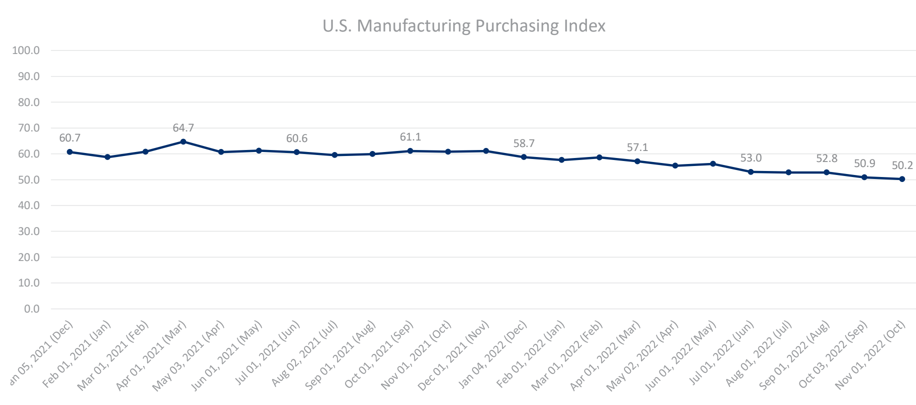
Unemployment claims continue to be historically low—the economy has roughly the same number of jobs it had before the pandemic—but there have been noticeable declines in the female rate of employment pre and post-pandemic.





Manufacturing Index

While President Biden has worked hard to pass legislation and regulations to improve the domestic manufacturing environment, the Manufacturing Index, which measures internal industry sentiment about the growth or contraction of domestic manufacturing is 50.4% (a rating above 50% is positive and a rating below 50% suggests manufacturing capacity is currently shrinking).



What did the exit polls show us about the state of the nation?

The data for the charts below come from AP/NORC Votecast exit poll data from 2022 voters, with the exception of the youth voter data, which comes from Tufts University. This information gives us some key insights into what drove the decisions of this year's voters.

Youth Vote

Turnout among voters under age 30 was 27 percent and was down from the 2020 Presidential election, and down from the last off-year election in 2018. Voters under 30 preferred Democratic Congressional candidates over Republican Congressional candidates by a margin of 53 percent to 41 percent.

Turnout Among Voters Under Age 30

Election Year	Turnout
2022	27%
2020	52%
2018	31%

Share of the Electorate Under Age 30

Election Year	Turnout
2022	13%
2020	13%
2018	12%

Party Preference of Voters Under Age 30

Election Year	Democratic	Republican
2022	53%	41%
2020	61%	36%
2018	60%	37%

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Urban/Suburban/Rural Split

There continues to be a noticeable rift between the political perspectives of urban and rural voters, with suburban voters often proving to be the swing demographic in recent elections. For 2022, urban voters preferred Democratic Congressional candidates over Republican Congressional candidates by a margin of 63 percent to 33 percent; in 2020, urban voters voted for Democrats by a 66 percent to 33 percent margin; and in 2018, they also voted for Democrats by a 63 percent to 34 percent margin. Conversely, rural voters preferred Republican Congressional candidates by a margin of 63 percent to 34 percent; in 2020, rural populations voted for Republicans by a 65 percent to 34 percent margin; and in 2018, they also voted for Republicans by a 60 percent to 37 percent margin.

For suburban voters, it was much closer than urban or rural voters, with Democrats narrowly winning their vote by 49 percent to 48 percent; in 2020, suburban voters voted for Democrats by a 54 percent to 44 percent margin; and in 2018, they also voted for Democrats by a 53 percent to 45 percent margin.

Party Preference of Urban Voters

Election Year	Democratic	Republican
2022	63%	33%
2020	66%	33%
2018	67%	30%

Party Preference of Suburban Voters

Election Year	Democratic	Republican
2022	49%	48%
2020	54%	44%
2018	53%	45%

Party Preference of Rural Voters

Election Year	Democratic	Republican
2022	34%	63%
2020	34%	65%
2018	37%	60%

Male/Female Vote

There continues to be a profound gulf between the political views of men and women in the country. Women favored Democratic candidates by a margin of 50 percent to 46 percent. This was lower than 2020 and 2018 when women favored Democrats by 55 percent to 43 percent in 2020 and 56 percent to 41 percent in 2018. Conversely, men favored Republican candidates by a margin of 53 percent to 44 percent. This was higher than 2020 and 2018 when men favored Republicans by 51 percent to 46 percent in both 2020 and 2018.

Party Preference of Female Voters

Election Year	Democratic	Republican
2022	50%	46%
2020	55%	43%
2018	56%	41%

Party Preference of Male Voters

Election Year	Democratic	Republican
2022	44%	53%
2020	46%	51%
2018	46%	51%

Independents

Political independents voted for Democrats by a margin of 42 percent to 38 percent in the election, providing the margin of victory for many Senate and House candidates.

Party Preference of Independent Voters

Election Year	Democratic	Republican
2022	42%	38%
2020	52%	37%
2018	49%	37%

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Immigration

Product Safety

Tax

Technology

Trade

Top Issues

Democrats identified the following three issues as their top concerns in casting a vote this week: abortion and reproductive health care, climate change, and gun policy. Republicans identified the following three issues as their top concerns in casting a vote this week economy/jobs, immigration, and crime.

Most Important Issues Facing the Country

Issues	% of voters	Democratic	Republican
Economy/Jobs	**47%**	**33%**	**64%**
Abortion	**10%**	**77%**	**19%**
Climate Change	**9%**	**87%**	**10%**
Immigation	**9%**	**10%**	**87%**
Crime	**8%**	**40%**	**56%**
Health Care	**7%**	**71%**	**24%**
Gun Policy	**6%**	**79%**	**16%**

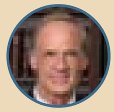
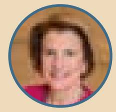
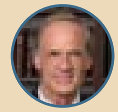
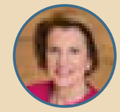
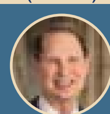
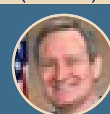
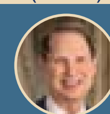
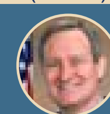
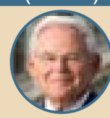
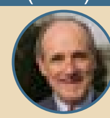
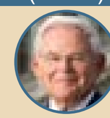
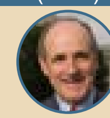
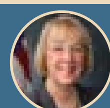
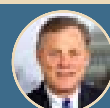
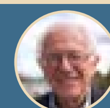
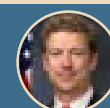
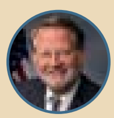
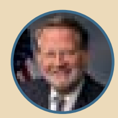
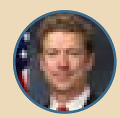
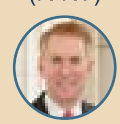
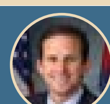
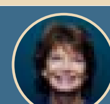
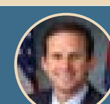
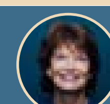
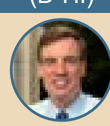
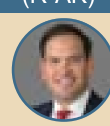
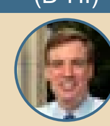
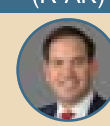
2022 Post-Election Analysis
Committee Leadership in the 118th Congress

Senate

Committee	117th Chairman	117th Ranking Member	118th Chairman	118th Ranking Member
Aging	Bob Casey (D-PA)	Tim Scott (R-SC)	Bob Casey (D-PA)	Tim Scott (R-SC)
Agriculture	Debbie Stabenow (D-MI)	John Boozman (R-AR)	Debbie Stabenow (D-MI)	John Boozman (R-AR)
Appropriations	*Patrick Leahy (D-VT)*	*Richard Shelby (R-AL)*	Patty Murray (D-WA)	Susan Collins (R-ME)
Armed Services	Jack Reed (D-RI)	*Jim Inhofe (R-OK)*	Jack Reed (D-RI)	Roger Wicker (R-MS)
Banking, Housing & Urban Development	Sherrod Brown (D-OH)	Pat Toomey (R-PA)	Sherrod Brown (D-OH)	Tim Scott (R-SC)
Budget	Bernie Sanders (I-VT)	Lindsey Graham (R-SC)	Sheldon Whitehouse (D-RI)	Lindsey Graham (R-SC)
Commerce, Science & Technology	Maria Cantwell (D-WA)	Roger Wicker (R-MS)	Maria Cantwell (D-WA)	Ted Cruz (R-TX)
Energy & Natural Resources	Joe Manchin (D-WV)	John Barrasso (R-WY)	Joe Manchin (D-WV)	John Barrasso (R-WY)

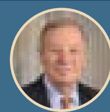
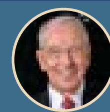
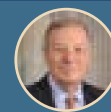
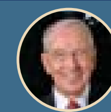
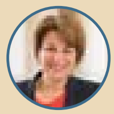
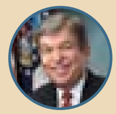
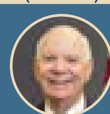
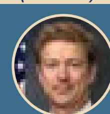
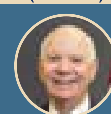
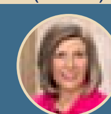
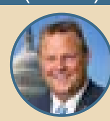
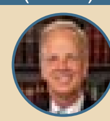
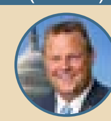
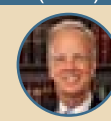
Members in italics are retiring at the end of the 117th Congress.

Senate (cont'd)

Committee	117th Chairman	117th Ranking Member	118th Chairman	118th Ranking Member
Environment & Public Works	 Tom Carper (D-DE)	 Shelley Moore Capito (R-WV)	 Tom Carper (D-DE)	 Shelley Moore Capito (R-WV)
Finance	 Ron Wyden (D-OR)	 Mike Crapo (R-ID)	 Ron Wyden (D-OR)	 Mike Crapo (R-ID)
Foreign Relations	 Bob Menendez (D-NJ)	 Jim Risch (R-ID)	 Bob Menendez (D-NJ)	 Jim Risch (R-ID)
Health, Education, Labor & Pensions	 Patty Murray (D-WA)	 *Richard Burr (R-NC)*	 Bernie Sanders (I-VT)	 Rand Paul (R-KY)  Bill Cassidy (R-LA)
Homeland Security & Governmental Affairs	 Gary Peters (D-MI)	 *Rob Portman (R-OH)*	 Gary Peters (D-MI)	 Rand Paul (R-KY)  Jim Lankford (R-OK)
Indian Affairs	 Brian Schatz (D-HI)	 Lisa Murkowski (R-AK)	 Brian Schatz (D-HI)	 Lisa Murkowski (R-AK)
Intelligence	 Mark Warner (D-VA)	 Marco Rubio (R-FL)	 Mark Warner (D-VA)	 Marco Rubio (R-FL)

**Members in italics are retiring at the end of the 117th Congress.*

Senate (cont'd)

Committee	117th Chairman	117th Ranking Member	118th Chairman	118th Ranking Member
Judiciary	 Dick Durbin (D-IL)	 Chuck Grassley (R-IA)	 Dick Durbin (D-IL)	 Chuck Grassley (R-IA)
Rules & Administration	 Amy Klobuchar (D-MN)	 *Roy Blunt (R-MO)*	 Amy Klobuchar (D-MN)	 Deb Fischer (R-NE)
Small Business & Entrepreneurship	 Ben Cardin (D-MD)	 Rand Paul (R-KY)	 Ben Cardin (D-MD)	 Joni Ernst (R-IA)
Veterans Affairs	 Jon Tester (D-MT)	 Jerry Moran (R-KS)	 Jon Tester (D-MT)	 Jerry Moran (R-KS)

**Members in italics are retiring at the end of the 117th Congress.*

House of Representatives

Committee	117th Chairman	117th Ranking Member	118th Chairman	118th Ranking Member
Agriculture	David Scott (D-GA)	Glenn Thompson (R-PA)	Glenn Thompson (R-PA)	David Scott (D-GA)
Appropriations	Rosa DeLauro (D-CT)	Kay Granger (R-TX)	Kay Granger (R-TX)	Rosa DeLauro (D-CT)
Armed Services	Adam Smith (D-WA)	Mike Rogers (R-AL)	Mike Rogers (R-AL)	Hakeem Jeffries (D-NY) Brian Higgins (D-NY) Brendan Boyle (D-PA)
Education & Labor	Bobby Scott (D-VA)	Virginia Foxx (R-NC)	Virginia Foxx (R-NC) Joe Wilson (R-SC) Elise Stefanik (R-NY)	Bobby Scott (D-VA)
Energy & Commerce	Frank Pallone (D-NJ)	Cathy McMorris Rodgers (R-WA)	Cathy McMorris Rodgers (R-WA)	Frank Pallone (D-NJ)

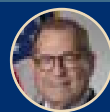
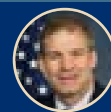
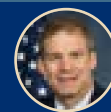
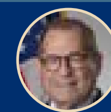
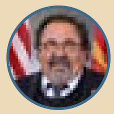
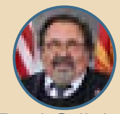
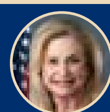
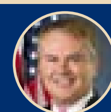
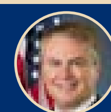
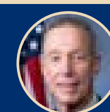
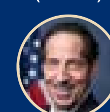
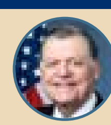
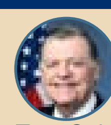
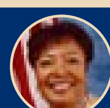
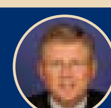
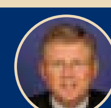
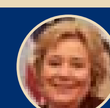
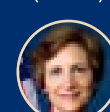
**Members in italics are retiring at the end of the 117th Congress.*

House of Representatives (cont'd)

Committee	117th Chairman	117th Ranking Member	118th Chairman	118th Ranking Member
Financial Services	Maxine Waters (D-CA)	Patrick McHenry (R-NC)	Patrick McHenry (R-NC)	Maxine Waters (D-CA)
Foreign Affairs	Gregory Meeks (D-NY)	Michael McCaul (R-TX)	Michael McCaul (R-TX)	Gregory Meeks (D-NY)
Homeland Security	Bennie Thompson (D-MS)	*John Katko (R-NY)*	Dan Bishop (R-NC) Michael Guest (R-MS) Clay Higgins (R-LA) Scott Perry (R-PA)	Bennie Thompson (D-MS)
House Administration	Zoe Lofgren (D-CA)	*Rodney Davis (R-IL)*	Barry Loudermilk (R-GA) Bryan Steil (R-WI)	Zoe Lofgren (D-CA)
Intelligence	Adam Schiff (D-CA)	Mike Turner (R-OH)	Mike Turner (R-OH)	Adam Schiff (D-CA)

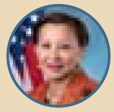
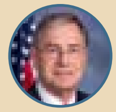
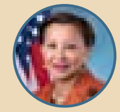
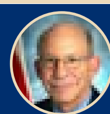
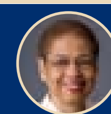
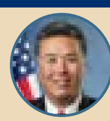
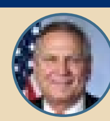
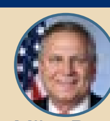
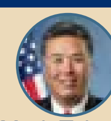
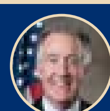
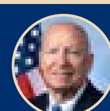
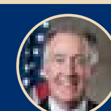
**Members in italics are retiring at the end of the 117th Congress.*

House of Representatives (cont'd)

Committee	117th Chairman	117th Ranking Member	118th Chairman	118th Ranking Member
Judiciary	 Jerry Nadler (D-NY)	 Jim Jordan (R-OH)	 Jim Jordan (R-OH)	 Jerry Nadler (D-NY)
Natural Resources	 Raul Grijalva (D-AZ)	 Bruce Westerman (R-AR)	 Bruce Westerman (R-AR)	 Raul Grijalva (D-AZ)
Oversight & Government Reform	 Carolyn Maloney (D-NY)	 James Comer (R-KY)	 James Comer (R-KY)	 Stephen Lynch (D-MA)  Gerry Connolly (D-VA)  Jamie Raskin (D-MD)
Rules	 Jim McGovern (D-MA)	 Tom Cole (R-OK)	 Tom Cole (R-OK)	 Jim McGovern (D-MA)
Science, Space & Technology	 *Eddie Bernice Johnson (D-TX)*	 Frank Lucas (R-OK)	 Frank Lucas (R-OK)	 Zoe Lofgren (D-CA)  Suzanne Bonamici (D-OR)

**Members in italics are retiring at the end of the 117th Congress.*

House of Representatives (cont'd)

Committee	117th Chairman	117th Ranking Member	118th Chairman	118th Ranking Member
Small Business	 Nydia Velazquez (D-NY)	 Blaine Luetkemeyer (R-MO)	 Blaine Luetkemeyer (R-MO)	 Nydia Velazquez (D-NY)
Science, Space & Technology	 *Peter DeFazio (D-OR)*	 Sam Graves (R-MO)	 Sam Graves (R-MO)	 Eleanor Holmes Norton (D-DC)  Rick Larsen (D-WA)
Veterans' Affairs	 Mark Takano (D-CA)	 Mike Bost (R-IL)	 Mike Bost (R-IL)	 Mark Takano (D-CA)
Ways & Means	 Richard Neal (D-MA)	 *Kevin Brady (R-TX)*	 Vern Buchanan (R-FL)  Adrian Smith (R-NE)  Jason Smith (R-MO) (D-MD)	 Richard Neal (D-MA)

**Members in italics are retiring at the end of the 117th Congress.*

California

Katie Pettibone

Key Takeaways

- Despite news reports, the red wave failed to materialize this year, particularly in California. While the control of Congress has changed, California remains resolutely controlled by the Democrats.
- Governor Gavin Newsom continues to move California forward on a variety of progressive fronts as he lays the groundwork for an eventual campaign on the national stage.
- He will continue to focus on environmental policy issues, including addressing climate change, often ahead of the reality of the state's aging infrastructure. With a split-controlled Congress, expect California to move more aggressively on carbon removal and capture, energy storage from sustainable sources, reducing greenhouse gas emissions, reducing plastic usage and restriction of other types of chemicals.
- The state will continue to focus on the delivery of healthcare but with an increased scrutiny on cost from the newly enacted Office of Healthcare Affordability. The attention on the state's manufacturing partnership of insulin, providing mental health with wraparound services, affordable housing and getting the homeless off the streets will be a central part of the governor's platform.

Introduction

California's political climate will continue to remain extremely blue, with supermajorities controlling both houses of the state legislature. Once again, all statewide offices remain in Democratic hands, although Republican Lanhee Chen had been the best chance for the Republicans to change that scenario. Unfortunately, with low name recognition in a state where 47 percent of the population is Democratic, 24 percent Republican and 22 percent independent, it was too tall of a hill to climb and Democratic candidate Malia Cohen prevailed in the race for State Controller. Voters supported the entire Democratic slate of Governor Gavin Newsom, Lieutenant Governor Eleni Kounalakis, State Treasurer Fiona Ma, Secretary of State Shirley Weber, U.S. Senator Alex Padilla,

Attorney General Rob Bonta, Superintendent of Public Instruction Tony Thurmond, State Controller Malia Cohen and, by a narrower margin in the context of a Democratic challenger, the Insurance Commissioner Ricardo Lara. The state's relationship with the Democratically-controlled Congress has resulted in very warm relations, including tens of billions in funding support from the federal government on a variety of issues such as pandemic response, education, infrastructure, and emergency response.

Moving back to a split control of Congress will see California ramping up its PR on its "first-in-the-nation" actions, notably climate change, immigration, pandemic response, consumer protections, and technology. While Congress will wrestle with stalemates on contentious issues, California's politicians will make every effort to lead by passing policies on such issues. As the fifth largest economy in the world and with a population of 40 million, California often makes de facto national policy. This will become even more evident as the well-known rumors of Governor Newsom making a presidential run become more firm. Ironically, a split in Congress may result in more moderation from the governor. For example: (1) backing off a strict single payor model for healthcare; (2) now supporting the extension of Diablo Canyon's nuclear plant for energy reliability (SB 846, Dodd (D-Napa)); (3) vetoing supervised injection sites (SB 57 Wiener (D-San Francisco)); and (4) embracing a stronger approach to handling of homeless suffering from mental illness and substance abuse (SB 1338, Umberg (D- Santa Ana)) and Eggman (D-Stockton). Congress will merely provide the backdrop from which a Californian governor will showcase his executive prowess to a national voting audience.

State Legislature

Although California is blue, it is a state of varying shades of blue. Democrats from agricultural districts and inland areas are generally more moderate. In the 2022 election, the progressive wing of the Democratic caucus grew, while the "Moderate Dems," who have been an important segment of bringing some balance to business issues, will return with fewer members than before. 2012's Proposition 28 imposed 12-year term limits for either house, and this year saw the beginning of the turnover with 30 legislators resigning or retiring for a variety of reasons, including redistricting and impending term limits. The state legislature will suffer a tremendous loss of institutional knowledge between elections this year and 2024, which will include the loss of the current Pro Tem Toni Atkins (D-San Diego) and Speaker Anthony Rendon (D- Los Angeles). Ultimately these changes will result in at least a 40 percent turnover in the 120-member state legislature by 2025. This means many of the chairs and vice chairs of standing committees who have garnered expertise on state budget, health care, insurance,

banking, public safety, tax, privacy, environmental, and more will be out of office. Significantly, previous legislation that did not or could not move may have new life with new members, and promises or compromises made before in legislation may not carry over to the new members.

Ballot Propositions

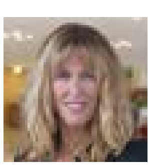
California has a strong direct democracy with the public often weighing in on thorny policy issues or unhappy voters. Many will remember a clear example of this playing out in last year's recall effort of Governor Newsom. Although it failed, propositions and the threat of taking propositions to the general voting public can result in moving legislative inaction, as it did this year on compromise legislation AB 35 (Reyes, D- San Bernadino). That bill updated the Medical Injury Compensation Reform Act of 1975, which, among other things, created caps on medical malpractice pain and suffering awards. This year there were seven ballot propositions on a variety of issues, including a response to the *Roe v. Wade* decision, and two competing measures to legalize online sports betting. Breaking records, over $448 million was raised on the sports wagering measures, Propositions 26 and 27. The former would have legalized in-person sports betting on tribal lands and at a few horse-racing tracks, while the latter would have allowed licensed tribes and companies such as FanDuel and DraftKings to offer online sports betting. It was confusing for voters with waring ads by different tribes, and when there is confusion, voters often stick with voting "no." It was not surprising therefore, that both failed.

One of the more interesting battles was the pro and con side of Proposition 30 which would have increased taxes on high earners to help fund zero-emission vehicles and wildfire programs. This measure was supported by Lyft (which has a regulatory deadline of 2030 to electrify its fleet of cars), environmental activists, the California Democratic Party, and some labor groups. Opposing it was Governor Newsom (who pushed legislation to phase out gas-powered automobiles by 2035), the Chamber of Commerce, the California Republican Party, the California/Hawaii State Conference of the NAACP, and the influential California Teachers Association. The governor was opposed to the proposition because he believes it is bad corporate behavior to use taxpayer subsidies to comply with its regulatory order. Before the governor weighed in, polling showed voters in favor of the proposition but his opposition helped flipped support, and ultimately the proposition failed.

A list of the ballot propositions are below:

- **Proposition 1: Constitutional Right to Reproductive Freedom**—This Legislative Constitutional Amendment creates a state constitutional right to reproductive freedom, including access to abortion, and access or refusal to contraceptives. Final Status: **Passed**
- **Proposition 26: Sports Betting on Tribal Lands**—This proposition would have allowed in-person roulette, dice, sports wagering on tribal lands with compacts, and four racetracks. Racetracks would have paid a share and tribes would have to support state sports betting regulatory costs at casinos. It would also add more enforcement with civil lawsuits and penalties. Final Status: **Failed**
- **Proposition 27: Allows Online and Mobile Sports Wagering Outside Tribal Lands**—This proposition would have allowed tribes or gambling companies to offer online sports betting and to made certain payments to the state to support state regulatory costs and to address homelessness. A new online sports betting regulatory unit would have had enforcement and there would be penalties for using an unlicensed entity. Final Status: **Failed**
- **Proposition 28: Additional Funding for Arts and Music Education in Public Schools**—This proposition requires a minimum level of funding for K-12 public and charter schools from the state's General Fund. Final Status: **Passed**
- **Proposition 29: Requires On-Site Licensed Medical Professional at Kidney Dialysis Clinics**—This proposition would have required kidney dialysis clinics to have at least one physician, nurse practitioner or physician assistant with six months of relevant experience available on site. It would have required that clinics report infection data to the state, as well as publicly listed physicians who have ownership interest of 5 percent or more in a clinic. It also would have prohibited clinics from closing or reducing services without state approval and from refusing treatment to people based on their insurance type. Final Status: **Failed**
- **Proposition 30: Provides Funding for Programs to Reduce Air Pollution and Prevent Wildfires by Increasing Tax on Personal Income Over $2 Million**—This proposition was a 1.75 percent tax increase on incomes over $2 million dollars to create the Clean Cars and Clean Air Trust Fund which would have supported zero-emission car incentives and infrastructure and wildfire suppression. Final Status: **Failed**
- **Proposition 31: Referendum on 2020 Law That Would Prohibit the Retail Sale of Certain Flavored Tobacco Products**—This proposition would have overturned the legislative action banning the sale of flavored tobacco products. Final Status: **Passed**

Key Contacts



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Defense and National Security

Adrienne Jackson, James Courtney, Paul Waters

Key Takeaways

- Defense policy will continue to be a fairly bipartisan issue, with the *National Defense Authorization Act* (NDAA) passing annually for over 60 years. With Democrats remaining in control of the Senate, Chairman Jack Reed (D-RI) will continue to craft the upper chamber's defense policy goals. However, Democratic influence on defense policy will still be tempered, with a slim majority in the Senate and House Republicans poised to take back the majority.
- In shaping the annual defense bill, Democrats in the Senate will focus on defense funding parity with non-defense spending, closely negotiating with leading House Republicans who will continue to argue for annual 3-5 percent inflation-adjusted increases to keep up with China and Russia. Democrats' ability to advance more progressive Department of Defense (DOD) personnel policies is unlikely with such a slim majority and with House Republicans focused on oversight of "woke" DOD policies as well as the withdrawal in Afghanistan.
- Anti-China measures will continue to be bipartisan and at the forefront of any defense strategy. Outbound investment measures and support of the domestic industrial base will also continue to see support in the 118th Congress. For Ukraine military and economic aid, House Republicans will question additional large funding packages, while Democrats and Senate Republicans will support President Biden's requests for the country.

Defense Policy and Funding Overview

The NDAA has been must-pass, bipartisan legislation for over 60 years. The annual bill, drafted and managed by the House and Senate Armed Services Committees, sets forth US national security policy and funds the Department of Defense and related intelligence and nuclear programs for the following fiscal year. For the past several years, Congress has provided DOD additional funding over the President's budget request, citing near-peer threats from China and Russia as well as inflation. Despite the split between the two chambers, Congress is likely to continue to increase DOD funding over the President's budget request in FY 2024 and FY 2025, as well as object

to some of the capacity reductions proposed by the administration. Chairmen of the Senate and House Armed Services Committees, Sen. Jack Reed (D-RI) and Rep. Mike Rogers (R-AL), represent constituencies with expansive defense industrial bases and they are expected to remain supportive of robust annual defense spending, in addition to legacy platforms and programs built and maintained by their respective constituencies. The two lawmakers will work closely with their counterparts on the House and Senate Appropriations Defense Subcommittee, Chairmen Rep. Ken Calvert (R-CA) and Sen. Jon Tester (D-MT) to do so.

Republicans and Democrats will also tackle major policy issues within the NDAA including US support for Taiwan against Chinese aggression, defense cooperation in Europe as Russia's war in Ukraine continues, and the need to acquire strategic and critical resources and increase domestic supply chain capabilities.

China. Expected Speaker of the House Kevin McCarthy (R-CA) has pledged to stand up a Select Committee on China in the 118th Congress if Republicans take the majority as they are expected to do. This committee, which Republicans will not be required to provide Democrats seats on the dais, will focus on probing Chinese military threats, economic advantages and the origins of COVID-19. Further, House Armed Services Committee Republicans are likely to pursue military construction and personnel funding in their version of the NDAA to further DOD presence in INDOPACOM, alleging deficiency in this area in President Biden's annual budget request. Additionally, expected Chairman of the House Foreign Affairs Committee, Rep. Michael McCaul (R-TX), has stated he will work closely with his House Armed Services counterpart, likely Chairman Rogers, to "slash" a yearslong backlog of weapons sales to Taiwan. However, with Democrats still leading the Senate, he will have to work closely with Chairman of the Senate Foreign Relations Committee, Sen. Bob Menendez (D-NJ) on this issue as well. Sen. Menendez, the Chairman of the Senate Taiwan Caucus, is extremely supportive of Taiwan but he will also be working closely with the Biden Administration to balance this priority with the "One China policy."

Ukraine. While there remains large bipartisan support for continued Ukraine military packages, there is a growing population of House Republicans, including expected Speaker McCarthy, signaling pushback against additional packages to the country. The group cites spending concerns and oversight of President Biden writing "blank checks" to the country. Due to this possible push-back in the 118th, we are expecting President Biden to request another $50+ billion Ukraine aid package in this lame duck period.

Personnel Policy and Oversight. More partisan personnel issues, including Republican rollback of President Biden's servicemember vaccine requirement, transgender troop policy and/or the DOD's directive on abortion travel funds, are likely to be deferred in the 118th Congress given the slim majority Republicans are likely to have in the House. However, we expect House Republicans to use their majority to conduct oversight hearings of these policies as well as President Biden's withdrawal in Afghanistan. In October, expected Chairman of the House Foreign Affairs Committee, Rep. McCaul sent a letter to Secretary of State Antony Blinken requesting the Department preserve all Afghanistan withdrawal-related documents, signaling an intent to conduct oversight in the 118th.

Overview
118th Congress (2023-2024)
2024 Preview
2022 Review
Committee Leadership
California
Defense/ National Security
Education
Energy & Environment
Federal Funding
Financial Services
Foreign Affairs
Healthcare/ Life Sciences
Immigration
Product Safety
Tax
Technology
Trade

Expected Congressional Committee Leadership

Senate Armed Services Committee

Chairman

Sen. Jack Reed
(D-RI)
[current chairman]

Ranking Member

Sen. Roger Wicker
(R-MS)
[position is open with retirement of Sen. Jim Inhofe (R-OK)]

House Armed Services Committee

Chairman

Rep. Mike Rogers
(R-AL)
[current ranking member]

Ranking Member

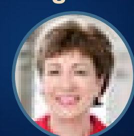
Rep. Adam Smith
(D-WA)
[current chairman]

Senate Appropriations Committee, Defense Subcommittee

Chairman

Sen. Jon Tester
(D-MO)
[current chairman]

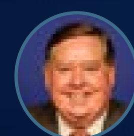
Ranking Member



Sen. Susan Collins
(R-ME)

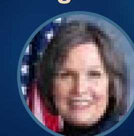
House Appropriations Committee, Defense Subcommittee

Chairman



Rep. Ken Calvert
(R-CA)
[current ranking member]

Ranking Member



Rep. Betty McCollum
(D-MN)
[current chairman]

Emerging Technologies

Policymakers on both sides of the aisle are having discussions about the implications of advanced and emerging technologies, such as hypersonics, artificial intelligence, facial recognition software, quantum computing, advanced drones, and others. In the national security space, the discussions implicate the "race to advancement" against near-peer adversaries, especially China. Robust research and development funding is likely to be bipartisan in almost all of the above categories as they have been in recent NDAA bills as well as the *CHIPS and Sciences Act* (Pub. L. 117-167).

Artificial Intelligence. The development of innovative artificial intelligence (AI) technology has been at the forefront of the DOD's efforts in 2022, including through the establishment of the office of the Chief Digital and AI Officer (CDAO), headed by Dr. Craig Martell. In Congress, AI policy has been a priority, which is reflected in the House-passed version of the FY 2023 NDAA. An amendment introduced by Rep. Darren Soto (D-FL), would encourage the development of AI-focused curriculum at military academies. An amendment introduced by Rep. Carolyn Maloney (D-NY), would expand Privacy and Civil Liberties Oversight Board authority over artificial intelligence used for counterterrorism. Both amendments were adopted in the House-passed NDAA. Additionally, the DOD's FY 2023 budget request includes $1.1 billion in funding for research into core AI technologies.

Biotechnology. On September 14, President Biden issued an executive order (EO) for DOD to invest $1 billion in bio-industrial domestic manufacturing infrastructure to catalyze the establishment of a domestic bio-industrial manufacturing base accessible to US innovators. This support will incentivize private- and public-sector partners to expand manufacturing capacity for products important to both commercial and defense supply chains, such as critical chemicals. If Congress appropriates the EO, an additional $200 million will support enhancements to biosecurity and cybersecurity postures at these facilities. Given the likely very slim Republican majority in the House, this proposal could see bipartisan support in the 118th Congress.

Defense Department Small Business Innovation Research Priorities

The *Small Business Innovation Research* (SBIR) program serves to stimulate innovation and increase small business participation in federal research and development. While the SBIR program offers funding overseen by a variety of participating government agencies, the DOD accounts for over half of the program's spending. In order to focus its research, the DOD publishes a series of priorities governing the distribution of funding in the next year. In 2022, DOD focus areas included 5G, microelectronics, artificial intelligence, autonomy, biotechnology, cybersecurity, directed energy, hypersonics, networked command, control and communications, nuclear, quantum, space, and warfighting requirements. On September 30, President Biden signed the *SBIR and STTR Extension Act*, extending the SBIR and the *Small Business Technology Transfer* (STTR) authorization for three years.

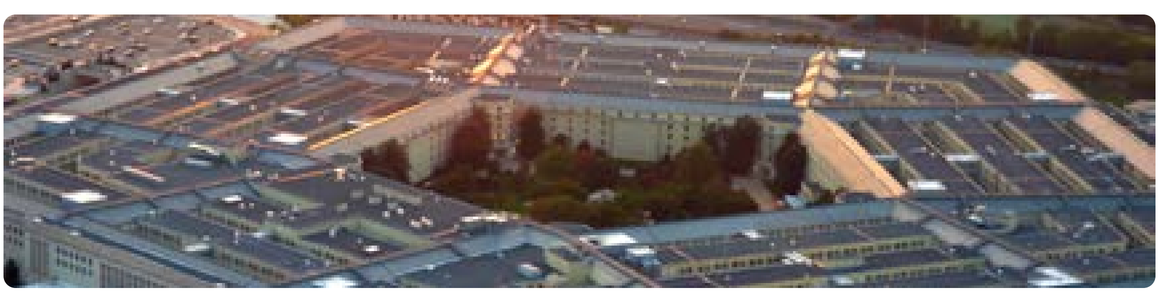
Legislative Efforts. A number of legislative efforts were undertaken in 2022 to expand the SBIR program and the DOD's procurement abilities broadly. The Investing in

American Defense Technologies Act (S. 4588), introduced by Sens. Marsha Blackburn (R-TN) and Jacky Rosen (D-NV), would provide the DOD authority to establish federal public-private partnerships in the defense space. Sen. Alex Padilla's (D-CA) *Encouraging Small Business Innovation Act* (S. 4158) would increase oversight of the inclusion of minority-owned business in SBIR funding, expand funding access to small businesses and increase data collection requirements for the SBIR program. Sen. Jim Risch's (R-ID) *FAST Fix Act* (S. 802) would encourage the SBIR program to allocate more funding toward states traditionally underserved by SBIR loans. These, and similar bills expanding the scope of the SBIR program, are expected to continue to receive bipartisan support in 2023.

Some lawmakers, however, have criticized the program. During a September 2021 hearing, Sen. Rand Paul (R-KY) identified SBIR "mills," or companies who receive multiple SBIR awards but do not actually intend to use the awards to achieve commercialization, as a threat to the program. In a July 12 letter, SBIR program head Heidi Shyu responded to three legislative proposals from the House and Senate Small Business Committees that would restrict eligibility for SBIR funding. The two Senate proposals sought to restrict SBIR eligibility based on the number of awards previously received over a five-year period or the total number of awards since the program's inception. The House proposal would have restricted eligibility based on Phase I to II transition rates and Phase III commercialization benchmarks for previous awards. Several of these issues are addressed in the reauthorization legislation passed by the Senate, including increased minimum performance and reporting standards for funding recipients to prevent SBIR mills and requiring the SBIR program to create a due diligence program for determining the foreign connections of applicants.

Microelectronics and Critical Minerals. Microelectronics and critical mineral components are expected to remain top priorities for the SBIR program in the 118th Congress. The global semiconductor shortage in 2022 highlighted US dependence on semiconductor supply chains in Asia, and the SBIR program is expected to continue to focus on supporting small businesses that can help promote US semiconductor leadership. SBIR funding may also target businesses that develop unique semiconductor designs that are less reliant on critical minerals traditionally sourced from China and other adversarial nations. The CHIPS Act includes an additional $1 billion in funding for semiconductor-related research and development, including through the SBIR program. This funding may be further bolstered through the FY 2023 NDAA.

Next G. "Next G" is broadly defined as wireless telecommunications technology beyond the capabilities of 5G. The Biden Administration underscored its commitment to developing Next G in 2022, including through the promotion of public-private



partnerships through the *Resilient and Intelligent NextG Systems* program and *Innovate Beyond 5G* program. Undersecretary for Defense for Research and Engineering, Heidi Shyu, has repeatedly discussed her enthusiasm for innovative research in the broadband space, underscoring the importance of developing Next G technology and standards ahead of geopolitical rivals. Given this, and bipartisan support from Congress on the importance of developing Next G technology, the SBIR program is expected to target innovative small businesses in the Next G space for research funding in 2023.

Outbound Investment/CFIUS

The Committee on Foreign Investment in the United States (CFIUS) was established in 1975 and serves as the federal government's main body to review national security risks and implications of foreign investments in US companies. While CFIUS has largely remained unchanged since 2018, when it was updated under the *Foreign Investment Risk Review Modernization Act* (FIRRMA) of 2018, on September 15, President Biden signed EO 14083 to clarify and add new national security factors for CFIUS to consider during its review process of inbound foreign investments in the US. These factors include: (1) the impact on domestic critical supply chain resiliency; (2) the impact on the US's technological leadership in critical technology industries; (3) any industry investment trends impacting national security; (4) cybersecurity risks threatening national security; and (5) risks to Americans' sensitive data. In 2023 and beyond, the Biden Administration will likely continue this hardline approach and seek other methods to ensure adversarial countries, namely China and Russia, are unable to influence domestic industries.

Despite this recent activity surrounding CFIUS, it was outbound investment screening that drew more attention from lawmakers on both sides of the aisle in the 117th Congress as well as the administration. On October 12, the Biden Administration released its *National Security Strategy* which includes initiatives to modernize US technology trade restrictions, including an outbound investment screening mechanism "to prevent strategic competitors from exploiting investments and expertise in ways that threaten our national security." National Security Advisor Jake Sullivan said the administration is "making progress in addressing outbound investments in sensitive technologies that would not be captured by export controls." We expect these efforts from the administration to continue in 2023.

The most notable effort in the 117th Congress was the introduction of the *National Critical Capabilities Defense Act* (S. 1854/H.R. 6329), which was spearheaded by Sens. Bob Casey (D-PA) and John Cornyn (R-TX). The bill would establish a Committee on National Critical Capabilities with the power to screen investments involving national

critical capabilities made in "countries of concern," which includes China, Iran, North Korea, and Russia. The committee would serve a similar purpose as CFIUS, but would be focused on outbound, rather than inbound investments. The text of this bill was included in the House-passed *America COMPETES Act*, but ultimately was not included in the pared-down *CHIPS and Science Act*. There were also talks of including the text of the bill in the Fiscal Year 2023 NDAA, although it was ultimately not introduced as an amendment to the bill and no outbound investment-related provisions were included in the final bill.

Sen. Pat Toomey (R-PA), who is retiring after the 117th Congress, did introduce an amendment to the FY 2023 NDAA aiming to set clear boundaries for any future outbound investment screening or notification requirements to prevent any unilateral moves from the White House on the matter. While Sen. Toomey will not be part of future policy decisions, Republicans in the 118th Congress, particularly those who are weary of supporting the same initiatives as the Biden Administration, could follow his lead in taking smaller steps to authorize studies and create guidelines for outbound investment screening, rather than establishing a new authority with the ability to issue prescriptive decisions. This could prove to be more acceptable to the business community and others in the private sector, but there will likely still be opposition to any efforts to establish outbound investment guidelines.

However, in the 118th Congress, Sens. Casey and Cornyn, along with Reps. Rosa DeLauro (D-CT), Bill Pascrell (D-NJ), Victoria Spartz (R-IN), and Brian Fitzpatrick (R-PA), who led the introduction of the *National Critical Capabilities Defense Act* in the House, will only continue these efforts to match the Biden Administration's increased focus on the issue. Given the national security implications and the threat of Chinese influence, we anticipate general bipartisan cooperation on the issue in both the House and Senate. However, given widespread private sector opposition to the bill, it will likely prove difficult to get this bill, or any other outbound investment screening legislation, passed in the 118th Congress.

Defense-Related Electric Vehicle (EV) Policy

With a very closely divided Congress, it will likely be difficult to build on previous efforts in the 117th Congress to electrify the DOD's non-tactical commercial vehicle fleet. In June 2022, both House and Senate Democrats, including House Armed Services Subcommittee on Readiness Chairman John Garamendi (D-CA), whose subcommittee has jurisdiction over the authorization of DOD's non-tactical fleet, and Sens. Elizabeth Warren (D-MA) and Mazie Hirono (D-HI), who both sit on the Senate Armed Services Committee, introduced the *Military Vehicle Fleet Electrification Act* (H.R. 7379, S. 4380). The bill would require at least 75 percent of DOD's non-tactical commercial fleet to be electric or zero-emission vehicles for Fiscal Year 2023 and beyond.

Republicans, however, are largely opposed to gearing precious defense dollars toward the widespread electrification of DOD's non-tactical fleets. They argue these funds would be better utilized for "true" defense programs in order to combat China and Russia. Thus, there is unlikely to be any major policy shifts in this area in the 118th Congress. Instead, there could be smaller pilot projects in future NDAA authorizations for FY 2024 and FY 2025, but we do not expect major policy developments or funding increases for an electrified/zero-emission DOD fleet.

One area of common ground could be the expansion of electric vehicle charging infrastructure on military bases. House Armed Services Chairman Mike Rogers (R-AL) has previously supported provisions in the FY 2023 NDAA (H.R. 7900) that would expand charging infrastructure, but is unlikely to support major increases in funding for any EV-related program.

Defense Production Act

The *Defense Production Act* (DPA) provides the President a variety of authorities to promote the production of goods and services deemed necessary for national defense, emergency preparedness and disaster recovery. These authorities can include requiring companies to prioritize and accept government contracts for specific items, creating incentives for domestic production and creating supply agreements with the private sector, among others. During the Biden Administration, the DPA has been invoked several times, including to facilitate COVID-19 vaccine development, promote clean energy technologies and combat critical supply chain shortages. The administration is expected to continue to use the DPA to bolster the US economy and national security in 2023, particularly as inflation and supply chain crises related to the conflict in Ukraine persist.

Given similar efforts this Congress, we could see bipartisan efforts to expand the scope of the DPA in the 118th. Several proposed amendments to the FY 2023 NDAA sought to expand the scope of the DPA. In the House, a bipartisan amendment introduced by Reps. Mike Gallagher (R-WI), Joe Courtney (D-CT), Blake Moore (R-UT), and Rob Wittman (R-VA), would expand the definition of “domestic source” from the “United States and Canada” to include the UK, Northern Ireland and Australia, allowing DPA funds to be appropriated toward the industries of these nations. A Democratic amendment, introduced by Rep. Juan Vargas (D-CA) would authorize the use of DPA funding to produce critical medical supplies, including respirator masks and face shields, drugs, devices, biological products, and machinery and equipment necessary to produce such medical supplies, in response to national emergency declarations. Finally, a Republican amendment introduced by Reps. French Hill (R-AR) and Bill Posey (R-FL) would allow DPA funding to be used to strengthen medical material and drug supply chains. All of these amendments were adopted into the House-passed version of the NDAA.

Critical Minerals and Electric Vehicles. In March of 2022, the Biden Administration invoked the DPA to facilitate the production of large-capacity batteries and their associated critical minerals in an effort to reduce US dependence on China. The order also represents an attempt by the Biden Administration to address the growing US demand for EVs, which contain parts sourced from China and other geopolitical rivals. The Inflation Reduction Act (IRA, Pub. L. 117 - 169) further empowered the administration to source critical minerals by appropriating an additional $500 million toward the use of the DPA to strengthen critical mineral supply chains. The IRA also reauthorized a $7,500 consumer tax credit for EV purchases, predicated on controversial domestic component sourcing and assembly requirements. These requirements are intended to work in concert with the Biden Administration’s DPA invocations to promote the development of new, domestic mineral

and EV component supply chains. We expect the Biden Administration to continue to use the DPA into 2023 to promote domestic critical mineral sourcing and EV manufacturing. The administration may also use DPA funding to finance critical mineral mining by Canadian firms, who are considered part of the US domestic industry for the purposes of the DPA, according to a 2022 White House supply chain report.

Clean Energy. The Biden Administration may continue to use the DPA to incentivize the production of clean energy equipment, including solar technology. In June 2022, the Biden Administration invoked the DPA to increase domestic production of five types of renewable energy generation equipment and components, and urged the application of domestic content requirements for federal solar systems. Shortly thereafter, Congress passed the CHIPS and Science Act, which provides $50.3 billion for the research and development of new energy technologies. The CHIPS Act also includes funding for clean energy technology transfer programs, including $1 million for the creation of a clean energy technology competition for university students. In addition, the IRA included a number of tax credits designed to incentivize clean energy production. Given the administration's commitment to incentivizing the domestic production of clean energy, we expect the administration to continue prioritizing the sourcing of clean energy equipment into 2023.

Monkeypox Vaccines. As the Monkeypox crisis persists, Democratic legislators have called on the Biden Administration to invoke the DPA for the production of monkeypox vaccines. Groups of legislators in the House and Senate have sent letters to the Biden Administration arguing that the DPA is necessary to expedite vaccinations against Monkeypox and protect the public from a second pandemic. Despite calls from Democrats, however, the Biden Administration has declined to invoke the DPA to increase production of monkeypox vaccines. This is also reflected in the administration's official plan to address Monkeypox, which does not include invoking the DPA. However, the administration may invoke the DPA to increase production if the virus proliferates to pandemic levels.

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Key Takeaways

- In a divided Congress, Congress will have a hard time getting much done in the education space through legislation.
- Democrats will continue to look to the Biden Administration to enact policy changes via regulations where possible.
- House Republicans will use oversight tools to attempt to prevent further executive action on high-priority education issues like student loans.
- All eyes will be on the new leaders of the education committee in the Senate, while House education leaders are likely to return and provide some stability for what to expect in the chamber.

Introduction

Before the 117th Congress closes out, it must push through a year-end appropriations omnibus package, which also will serve as a likely vehicle for several policy riders. As House Democrats face losing the majority in the new year, their efforts to include Democratic priorities are unlikely to move in the House under Republican control, so they may seek to compromise on some areas in the lame duck session. One such area is further investments in child care. While Republicans are seeking policy changes to the Child Care and Development Block Grant before Senate Health, Education, Labor and Pensions (HELP) Committee Ranking Member Richard Burr's (R-NC) retirement, Democrats want more funding and may choose to strike a deal rather than take their chances with a Republican House. Policy around student loans will continue to develop post-election, though most of the action will take place on the other side of the National Mall as the Biden Administration looks to make good on its promise for student loan forgiveness and program improvements.

Once the 118th Congress is sworn in, all eyes will be watching how new leaders of the Senate HELP Committee work together. Stakeholders cannot imagine a more interesting pair in Sens. Bernie Sanders (I-VT) and Rand Paul (R-KY), who are likely to serve as

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Immigration

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Tax

Technology

Trade

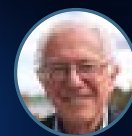
Chair and Ranking Member, respectively. Sen. Bill Cassidy (R-LA) also has expressed interest in leading Republicans on the committee if Sen. Paul decides to take a leadership position at the Senate Homeland Security and Governmental Affairs Committee instead. While Sen. Sanders is likely to push more progressive policies, such as tuition-free college and additional student loan forgiveness, these positions will not garner bipartisan support. Instead, he will try to find compromise solutions on dual enrollment and strengthening and expanding the Pell Grant program. Outside of higher education, Sen. Sanders will be an advocate for early learning, public schools and public school teachers.

In the lower chamber, Rep. Virginia Foxx (R-NC) will seek a waiver to serve another term in leadership on what will revert back to the Education and the Workforce Committee. While recent rumors indicate House Speaker Kevin McCarthy (R-CA) will not grant waivers in the 118th Congress, Rep. Foxx is one of the only women in the caucus to lead a committee and is the House Republicans' most well-known leader on educational issues. If she does win approval, she will have a more conservative membership down dais. Rep. Foxx already has previewed her priorities in the next Congress. A focus on reauthorizing the *Higher Education Act* (HEA) will center on reimagining the student loan program, preventing executive overreach and holding institutions accountable for the federal student aid dollars they receive. For several reasons—including this could be Rep. Foxx's last shot with the gavel, the narrower-than-expected majority in the House, Democrats holding the Senate, and the vastly overdue HEA—an HEA rewrite could be an area of unexpected compromise in the coming Congress. This focus will crowd out early action on other issues, such as reauthorizing the expired *Workforce Innovation and Opportunity Act* (WIOA) and child nutrition programs.

Expected Congressional Committee Leadership

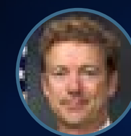
Senate Committee on Health, Education, Labor and Pensions (HELP)

Chairman



Sen. Bernie Sanders
(I-VT)

Ranking Member

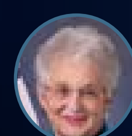


Sen. Rand Paul
(R-KY)

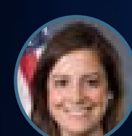
Sen. Bill Cassidy
(R-LA)

House Education and the Workforce Committee

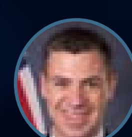
Chairman



Rep. Virginia Foxx
(R-NC)

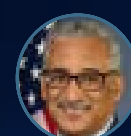


Rep. Elise Stefanik
(R-NY)



Rep. Jim Banks
(R-IN)

Ranking Member



Rep. Bobby Scott
(D-VA)

With Republicans back in charge in the House, they will focus on aggressive oversight of the Departments of Labor and Education, particularly on student loans, Title IX, critical race theory (CRT) and curriculum issues, campus free speech, and child nutrition policy stemming from the White House Conference on Hunger, Nutrition and Health held in late September. Senate Democrats, meanwhile, will focus on protecting access to abortion and contraception for college students in the wake of the Dobbs decision, in addition to reacting to a Supreme Court decision that limits or eliminates affirmative action in college admissions.

Child Care and Early Learning

Over the past three years, Congress provided billions of dollars in emergency funding through three COVID-19 relief packages to stabilize the child care and early learning industry. Congress also provided increased annual appropriations funding in recent years for programs such as CCDBG and Head Start. While child care and early learning policy has remained a concern for both parties throughout the pandemic, it is Democrats who continue to sound the alarm that additional funding is needed to stave off a fiscal cliff and provide greater access in the wake of the pandemic. Despite President Biden's *Build Back Better* agenda calling for significant funding and policy changes to expand access to child care and provide universal preschool, such provisions ultimately were not included in the *Inflation Reduction Act* (IRA) (Pub. L. 117-69). Democrats' continued focus on additional stabilization dollars and the passage of the IRA have turned off many Republicans. This may mean more support for the child care sector will be hard to come by in the lame duck session.

In the absence of a major increase in funding for CCDBG or the child care stabilization fund established under the *American Rescue Plan (ARP) Act* (Pub. L. 117-2) by year end, Senate Democrats are expected to work with House Republicans to incrementally increase annual appropriations to CCDBG and other relevant programs. Although current Senate HELP Committee Chair Patty Murray (D-WA) will leave that committee's top post to chair the Senate Appropriations Committee, she will continue to be a vocal advocate on child care issues given her previous leadership on the Senate Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies (LHHS). Progressive Sen. Elizabeth Warren (D-MA) also has said additional child care support is at the top of the Democrats' agenda. Sen. Sanders will work closely with Sen. Murray to push for child care funding in annual appropriations bills and to expand the program in reauthorizing CCDBG. With Sen. Burr's retirement, the Senate is losing a strong advocate on the Republican side for increased support for early learning and child care. That said, a growing number of Senate Republicans have shown interest in picking up Sen. Burr's mantle. Earlier this year, Sen. Tim Scott (R-SC) introduced the *Child Care and Development Block Grant Reauthorization Act of 2022*

(S. 3899) to increase authorized funding levels and improve federal child care and early learning programs.

Both sides of the aisle have expressed interest in CCDBG reauthorization as a tool to expand access to affordable child care, which may be a means to pass bipartisan child care legislation and go beyond annual funding increases. Although Rep. Foxx is more likely to focus on higher education policy early in the new Congress, House Republicans will model child care legislation after Sen. Scott's bill as their starting point for negotiations in reauthorizing CCDBG. Senate Democrats will formally introduce their most recent proposal, crafted by Sens. Murray and Tim Kaine (D-VA), to reform the child care system, though Sen. Sanders will want to put his own mark on the debate and craft a new, more generous proposal.

In the absence of early progress to reauthorize CCDBG or HEA, Democrats will push for stand-alone measures or other actions to support the child care system, including:

- ***Child Care Access Means Parents in School (CCAMPIS) Reauthorization.*** While authorized under HEA, the program provides federal grants for higher education institutions' provision of child care services to low-income student parents. Sen. Tammy Duckworth's (D-IL) *CCAMPIS Reauthorization Act* (S. 2625), which would update and significantly increase authorized funding to expand the program, will likely serve as the base for such legislation moving forward. Rep. Katherine Clark (D-MA), a strong child care advocate in the House, also may reintroduce her 2019 bill on the topic. Given Republicans' control, Rep. Clark may look to work with Republicans to introduce a bipartisan version.

- ***Support for Early Childhood Educators.*** Supporting early childhood educators and support staff could be an area of bipartisan agreement as Democrats and Republicans have introduced bills to increase support for, and expand the education and professional development of, child care employees. Earlier this year, the Department of Education (DOE) asked for public comment on whether and how to include for-profit early childhood educators as eligible participants in the *Public Service Loan Forgiveness* (PSLF) program to qualify for student loan forgiveness after 10 years of service. Democratic education leaders on Capitol Hill overwhelmingly supported such a change in the program, and Sen. Burr has called for the change, as well. Yet, the DOE's rule published in late October left out the revision saying it needed more time to consider how to implement eligibility for these providers. It intends to publish a final rule on the topic, potentially next year.

- ***Tax Credits.*** Congress will attempt to pass a tax extender package before the end of the year, which could include the expanded *Child Tax Credit* (CTC). While less likely to be addressed, the *Child and Dependent Care Tax Credit* (CDCTC), which seeks to offset working families' child care expenses, could be expanded as an alternative to broader child care system funding. If the expanded CTC and CDCTC extensions are not included in a year-end package, Sen. Sanders will work with tax committee leaders to revive these expanded credits to help families offset child care costs.

K-12 Education

The COVID-19 pandemic drastically altered the state of K–12 education in the US, which resulted in nearly all students experiencing learning disruptions since March 2020. Republicans highlighted these disruptions while campaigning on a variety of K–12 education issues, which contributed, at least in part, to their House gains. Republicans in the House will make K–12 education policy one of their legislative priorities as they continue conversations started on the campaign trail, particularly K–12 curriculum content and empowering parents to make decisions for their child's education. In addition, they are likely to hold oversight hearings on Biden Administration K–12 initiatives and keep close tabs on how states and local school districts utilize *Elementary and Secondary School Emergency Relief* (ESSER) Fund dollars to address issues stemming from the pandemic. However, Democrats in the Senate will continue their support of the Biden Administration's goals for equity in K–12 education for all American students. The following topics indicate some of the areas in which Congress and the administration will focus in the next two years.

- ***Parental Rights.*** House Republicans outlined their K–12 education priorities in the September 2022 "Commitment to America," which calls for "giving parents a voice" to ensure student success and addressing learning loss that resulted from school closures during the pandemic. House Republicans also will look to pass the Parents Bill of Rights (H.R. 6056/S. 3218) early on in the 118th Congress. The bill would provide the right for parents to: 1) see what materials are being taught; 2) be heard by teachers and administrators; 3) see schools' budgets and spending information; 4) protect their child's privacy; and 5) receive updates on violent activity at their child's school. Rep. Foxx will champion the effort through the House, but this will likely only be a messaging effort, as Senate Democrats are not open to considering the bill.
- ***Curriculum Issues.*** House Republicans will focus attention on curriculum content issues, including investigating and conducting oversight of the use of CRT in textbooks. While course content is largely controlled by state and local education agencies, Republicans in the House are likely to continue introducing messaging bills, similar to the bills introduced in the 117th Congress, targeting CRT and other anti-racism curricula in K–12 education. Most of these bills will not have bipartisan support, which makes it unlikely the Senate will consider them. Furthermore,

curriculum is an area of potential oversight activity where Republicans may call in high-level Biden Administration officials, such as Secretary of Education Miguel Cardona, to testify on CRT's presence in schools.

- ***Online Learning.*** Expanding student resources, such as online learning, will continue to be a topic of discussion in the K–12 space. While students have transitioned back to in-person learning, online learning and virtual resources are now seen by many as a supplemental tool to boost K–12 education. The *ARP Act* and the *Infrastructure Investment and Jobs Act* (Pub. L. 117-58) were two significant packages passed in the 117th Congress that included funding programs for universal broadband, including money through the Emergency Connectivity Fund to specifically address the homework gap. While the issue is not expected to be a priority for the 118th Congress given the transition to in-person learning, both chambers will look for ways to continue to support students who need access to the internet to succeed in their educational pursuits, including conducting oversight into how previous broadband investment funding was spent.
- ***School Infrastructure.*** While the current House Education and Labor Committee Chair Bobby Scott (D-VA), who will serve as the committee's ranking member next year, is the key Democrat driving school infrastructure funding with his *Reopen and Rebuild America's Schools Act* (H.R. 604/S. 96), Democratic Senators could reintroduce the bill in the Senate. The bill would invest over $130 billion for school infrastructure improvements, specifically targeting schools in high-poverty areas, which would increase equity for low-income and minority schools. However, due to spending concerns from moderate Democrats and Republicans who would be needed to overcome a filibuster, this bill will face a difficult path through the Senate and would not pass the Republican-controlled House, making a large-scale school infrastructure package unlikely to be a priority in the 118th Congress.

Given the competing priorities between House Republicans and Senate Democrats, it is unlikely there will be any substantive or large legislative efforts on K–12 issues in the 118th Congress. There is essentially no chance of any reauthorization of or significant changes to the *Elementary and Secondary Education Act*, barring a major change in the political environment. That said, there is potential for targeted, bipartisan efforts on a narrow range of K–12 issues. The two chambers may find a way to work together with the Biden Administration to provide resources to states and school districts to address the educator workforce shortage, though the two parties are likely to disagree on the best path forward for how to address this issue.

Student Loans

President Biden wasted no time upon assuming office to address a core promise of his campaign: tackling burdensome student loan debt. Over the past two years, the Biden Administration pursued executive action aimed at both improving how the federal student loan program works for borrowers and providing targeted debt relief. Specifically, the administration: 1) extended the student loan payment and interest moratorium five times since the initial announcement to pause student loan payments in March 2020; 2) provided relief to borrowers who qualify for total and permanent disability discharges and closed school discharges; 3) announced a waiver for eligible borrowers to receive relief through the PSLF program; 4) allowed eligible borrowers to apply for an adjustment via Income-Driven Repayment (IDR) plans; 5) proposed two new rules addressing systemic issues within the federal student loan program; and 6) announced a sweeping plan to cancel student loans for millions of borrowers.

Congressional Republicans have opposed much of the administration's activity on student loans. Actions taken in the months leading up to the mid-terms (i.e., broadly cancelling student debt, further extending the payment pause and writing a generous new repayment plan) were of particular concern and something Republicans vowed to address should they regain control of Congress. Some of the actions may be too far advanced for Republicans to reverse, and without a Republican-controlled Senate, House Republicans will use oversight, and potentially litigation, to unwind the administrative actions.

The following actions related to student loans are likely to occur during the 118th Congress:

- **Return to Repayment.** On August 24, the Biden Administration announced the seventh extension of the student loan payment and interest moratorium (two occurred under the previous administration), which expires December 31. Communications from the White House and DOE have indicated this will be the "final" extension and payments will resume after being paused for nearly three years, but legal challenges to the one-time student debt relief plan could impact a restart. The DOE has and will spend much of the time since the announcement gearing up for repayments to resume. This means ensuring the DOE's processes are in place, servicers are prepared and borrowers are on notice. The Office of Federal Student Aid (FSA) will implement *Operation Fresh Start* once the moratorium expires, which will eliminate delinquency and default on eligible student loans so borrowers will enter repayment in good standing.

Congressional Democratic education policy leaders will closely watch the return to repayment to ensure it is on track for a smooth and efficient restart come January. Given the one-time student debt relief is currently stalled in the courts, such leaders likely will call for another extension and will continue to do so in the event FSA and/or servicers are not ready to resume payments. Meanwhile, once House Republicans take power, they will use a more aggressive approach to oversight on the issue by holding oversight hearings, particularly if the administration announces another extension.

- **Debt Forgiveness.** Also in August, the administration announced a plan to cancel a portion of student loan debt for federal borrowers, depending on annual income and Pell Grant status. Since President Biden assumed office, Senate Majority Leader Chuck Schumer (D-NY), Sen. Elizabeth Warren (D-MA) and Rep. Ayanna Pressley (D-MA) pressured the administration (H.Res. 100/S.Res. 46) to broadly cancel up to $50,000 in debt for all borrowers. Despite the fact that only up to $20,000 could be forgiven for qualifying borrowers, most progressives claimed victory after the announcement. That said, these policymakers are likely to continue to pressure the administration to cancel additional debt, particularly if the economy goes into recession. Sen. Sanders has been a leading voice on broad-based forgiveness for several years and will push proposals that tackle college costs on the front end. House Republicans will be tougher in their oversight of the forgiveness plan, including potentially suing to stop its implementation. Several conservative stakeholders sued the DOE to stop the President's forgiveness plan: in one case a temporary stay has been in place for weeks; in another, the court ruled the plan was unlawful and DOE stopped accepting applications as a result. Republicans saw this as a winning issue in the campaign, and while Rep. Foxx will continue to take the lead, it will become a mainstream issue for leadership and the base. That said, we expect the Supreme Court to ultimately resolve the issue.

- **New Regulations.** The administration released final regulations to make improvements to the PSLF program and is currently drafting a rule to establish a new, more generous IDR plan. These rules are set to take effect July 1, 2023. The first proposed rule stemmed from the negotiated rulemaking committee's efforts late last year, which agreed to include changes to the 90/10 rule and establish Pell Grant eligibility for incarcerated individuals. The regulations on PSLF were paired with a late October DOE announcement to permanently streamline the path to forgiveness for eligible borrowers. Hundreds of stakeholders, including congressional leaders such as Rep. Foxx and Sen. Sanders, submitted comments on both rules. Republicans criticized the DOE's proposals as an overreach of executive authority, while Democrats generally supported the DOE's proposed changes.

  House Republicans will pursue oversight hearings and introduce legislation on the DOE's proposals before next year's implementation. Rep. Foxx will continue to lead efforts opposing the changes, though it is unlikely she and her colleagues can block them. Her expected HEA rewrite, discussed at length below, will address what a fix would look like in this space, including streamlining repayment plans and potentially eliminating or restricting PSLF.

- **Legislation.** The introduction of student loan-related bills will remain a priority for members of Congress. Democrats will reintroduce legislation addressing broader reforms to the system, including bills focused on student loan discharges in bankruptcy, expansion of the Pell Grant program, targeted forgiveness, student loan refinancing, and changes to repayment plans. Republicans will introduce bills to promote their opposition to the administration's executive actions. These include measures like the *Federal Student Loan Integrity Act* (H.R. 7058), the Student Loan Accountability Act (H.R. 8102/S. 4253) and *Debt Cancellation Accountability Act of 2022* (S. 4483). An updated version of Rep. Foxx's *Responsible Education Assistance through Loan (REAL) Reforms Act* (H.R. 8655), which would overhaul the federal student loan system and prevent the administration from taking further action on student loans that cost the federal government, will serve as the base for a Republican HEA reauthorization bill next Congress.

With a divided Congress, there is unlikely to be major legislative movement on student loan reform. House Republicans will use their position in the majority to continue to oppose the administration's executive actions on student debt, including potentially pursuing legal action. Incoming HELP Committee Chair Sanders is expected to lay out his vision for addressing student debt more broadly, and Democrats generally will rely on the administration to continue to implement its vast reforms to ease the burden of student debt and lower the cost of college. That said, court challenges to the current one-time debt relief proposal may determine what more, if anything, is possible.

Higher Education

Congress last reauthorized the HEA in 2008 and remains at odds about rewriting the comprehensive law. While a split Congress has historically led to more popular reauthorizations, the two sides have never been farther apart on such issues. Additionally, given the flurry of activity on student loans from the Biden Administration in the last two years, Democrats will feel less pressure to deliver on an HEA rewrite. While reconciliation used by Democrats during this Congress may mean Republicans will be reluctant to work in a bipartisan manner, Rep. Foxx is serious about updating the outdated law and has a good working relationship with Rep. Scott. Congress is more likely to take a piecemeal approach to advance limited bipartisan measures and ensure some needed higher education updates are enacted, but do not count out a comprehensive measure, particularly if this is Rep. Foxx's last Congress with the gavel.

Despite the low probability that a bill will pass both chambers of Congress, there is no doubt House Republicans will want to show they have policy solutions to address broader issues in higher education, like college affordability and alternative pathways to gainful employment. Despite the fact the Senate has not introduced a comprehensive draft HEA bill in several years, Senate Democrats may pursue ambitious reforms under new leadership of Sen. Sanders. Again, his position on free college may be a starting point for negotiations, but it will not be taken seriously by a more conservative House Republican Conference. The most difficult obstacle to overcome will be new leadership in the Senate and how it works with House education leaders to advance a bill.

Additional higher education legislation and congressional activity will be concentrated in four major areas:

- **Popular Bipartisan Measures.** Bipartisan bills such as the *Jumpstart Our Businesses by Supporting Students (JOBS) Act* (H.R. 2037/S. 864) and the *College Transparency Act* (CTA) (H.R. 2030/S. 839) will be reintroduced and could be attached to other broader vehicles to become law. The *JOBS Act* would allow qualifying short-term programs to be eligible for federal Pell Grants.

  The CTA, which would establish a modernized postsecondary data system on student outcomes, faces a more uncertain future. Rep. Foxx has been a vocal critic of the bill, complicating its chances of moving beyond the committee either as a standalone bill or as part of the HEA. While down-dais Republicans have been willing to oppose her on the CTA in the past, Republicans on committee are moving to the right. This rightward shift makes them unlikely to challenge her in the next Congress. However, incorporating a version of the CTA into the FY 2023 or FY 2024 spending bill as a policy rider is a possibility. Rep. Foxx also may look for a compromise once and for all to ensure this issue does not stall broader progress on HEA.

- **Institutional Accountability.** Tuition costs and student debt continue to rise, and Republicans remain concerned with the lack of accountability measures for institutions participating in Title IV student aid programs. Specifically, Republicans will seek stronger accountability measures related to student outcomes, in addition to significant changes to the student loan system, while Senate Democrats will focus on improving access and affordability of higher education. In any Republican comprehensive package, institutions of higher education will have a larger role in the proposed accountability measures. The *Changing Our Learning, Loans, Endowments, and Graduation Expectations (COLLEGE) Act* (H.R. 8729/S. 4772), introduced by Sen. Rick Scott (R-FL), is an example of the type of measures Republicans will introduce. The bill would require institutions to agree to risk-sharing agreements with student loan borrowers where institutions would be responsible for a percentage of the loan balance of students in default within the first three years of repayment. In a Senate Democratic proposal, Sen. Sanders is likely to double down on his free college proposal with reintroduction of the *College for All Act* (H.R. 2730/S. 1288), which would make public institutions tuition-free.

- **Student Success and Support.** Increases to the Pell Grant program, Historically Black Colleges and Universities and Minority Serving Institutions remain priorities for the administration, and Democrats will utilize the appropriations process to continue increasing funds for programs that support these institutions, particularly trying to make good on the President's promise to double Pell Grants. While Republicans have supported recent increases to Pell Grants, House Republicans will likely try to reign in dramatic increases to domestic spending. Further increases to Pell Grants will be modest, at best, or nonexistent.

  Democrats also will pursue increases in funding for college completion and retention grants. The Biden Administration, which previously proposed the inclusion of a $62 billion College Completion Fund in the *Build Back Better Act*, knows it will get nowhere near that total with a split Congress, but will work closely with Democrats and sympathetic Republicans to bring additional funding in this space to fruition. The parties may find common ground with respect to improvements in college completion and retention. For example, the Fund for Innovation and *Success in Higher Education Act (FINISH) Act* (H.R. 1521/S. 518), which would extend grants to institutions of higher education to implement college completion and retention strategies, garnered bipartisan support in both chambers. Rep. Brian Fitzpatrick (R-PA) and Sens. Todd Young (R-IN) and Tim Scott (R-SC) stand out as Republican champions for college completion and retention.

- **Executive Oversight.** House Republicans will lead congressional oversight efforts on the administration's executive authority and additional higher education relief funding included in Democrats' *ARP Act*. Democrats will focus on collaboration with the administration, highlighting the success of relief and other federal funds provided.

Updating the HEA was once a bipartisan process that occurred every four to six years; however, it recently has become difficult for the two parties to agree. The differing philosophies and priorities of new education policy leadership in the 118th Congress may continue this trend and lead to yet another deferment on reauthorization. There is more to learn about a post-COVID higher education system in the coming years and, in the meantime, Congress may take a piecemeal approach to addressing urgent issues in the space. Additionally, the Biden Administration will continue to prioritize funding for its higher education programs and use the regulatory process, when possible, in lieu of passing legislation.

Student Health and Safety

In light of recent news about tragic mass shootings in schools, as well as conversations about the mental health impact on students and teachers during the pandemic, Congress will continue to discuss and consider legislation related to gun violence prevention, mental health and student safety. With Republicans gaining control in the House, the tone and content of these discussions will shift, particularly as it relates to other issues of student health, including abortion and campus sexual assault.

- **School Safety and Mental Health.** House Republicans will approach student safety topics with messaging about increasing the presence of law enforcement in schools and arming teachers, though these proposals will be non-starters in the Senate. While many bills in this space are likely to be partisan in nature, legislation that would invest in students' mental health at K–12 public schools and institutions of higher education have the potential to garner bipartisan support given both parties have proposed these objectives as solutions to school-based violence. Disagreements will likely arise, however. Cost may present some challenges given the *Bipartisan Safer Communities Act* (Pub. L. 117-159) recently invested hundreds of millions of dollars into mental health support and community violence intervention for children and communities. It remains to be seen whether the bipartisan interest in school safety is stronger than Republicans' resolve to reverse the high social spending seen during the first two years of the Biden Administration. Even if the caucuses agree on cost, they may clash over the sources from which such investments should be derived. Republicans will likely support allowing states to tap into unspent COVID-19 relief funding, while Democrats will favor using the appropriations process or creating new sources of funding. If such legislation does come to fruition, President Biden will likely sign it.
- **Title IX.** Much of the Biden Administration's time will be focused on finalizing, implementing and defending its Title IX rewrite. The proposed rule updates how K–12 schools and institutions of higher education must respond to allegations of sexual harassment and sex discrimination on their campuses and overturns the Trump Administration's previous rule, which was heavily criticized by survivor advocacy groups. It also recognizes discrimination on the basis of gender identity as a form of prohibited sex discrimination, which is a historic win for transgender rights advocates. The proposed rule received over 240,000 comments, which is significantly more than the number of comments on the Trump Administration rule. As such, the DOE may take at least a year to review and respond to all the comments before proposing a final rule, though it will closely watch the timeline

to ensure it will not potentially trigger a *Congressional Review Act* resolution if Republicans take additional ground in the 2024 elections. Congressional Democrats conveyed their support for the administration's proposed Title IX rule when it was first released in June. Congressional Republicans, by contrast, will continue to criticize the proposed rule and author *amicus curiae* briefs to support the plaintiffs that will inevitably challenge the final rule whenever it is released.

A separate pending rule from the DOE interpreting Title IX's implications for the participation of transgender athletes in youth sports also will draw the ire of many Republicans, who will be actively engaged in the ensuing rulemaking process, as well as conducting oversight into this issue. Congressional Republicans introduced a number of bills, like the *Protection of Women and Girls in Sports Act of 2021* (H.R. 426), to chill the participation of transgender athletes in women's sports. House Republicans may have sufficient numbers to pass these bills, but they will falter in the Senate.

- **Abortion.** Abortion policy is likely to command a significant amount of legislative attention during the 118th Congress, particularly in the wake of the holding in *Dobbs v. Jackson Women's Health Organization* that there is no constitutional right to abortion access. More than 100 House Republicans rallied behind the Protecting Pain-Capable Unborn Children from Late-Term Abortions Act (H.R. 8814/S. 4840) to nationally ban abortions after the 15th week of pregnancy, which is likely to be reintroduced and could be considered in the 118th Congress, though some Republicans would prefer to allow states to set abortion policy in the wake of the Dobbs decision and the fact that protecting abortion was a primary reason given for Democrats holding the Senate and many competitive House seats. House Republicans also are likely to support more targeted legislation in the vein of the *Protecting Life on College Campus Act of 2021* (H.R. 4607/S. 2408), which would prohibit the disbursement of federal funding to any institution of higher education that allies with professionals that provide abortions to its students or employees. Neither category of legislation has a future in the Senate, however, where it would be quickly denounced and dismissed by the Democratic majority.

Student-Athletes

While the 117th Congress began with bipartisan momentum towards legislative action to institute a federal standard on student-athletes' use of their name, image and likeness (NIL), there were little legislative results to show from the discussions. In the last two years, much of the substantive policy developments have occurred at the state level with

29 states having laws on the books regulating student-athletes' use of NIL. Many of the state-level bills are based on California's *Fair Pay to Play Act*—the first NIL bill passed in the US in 2019. While stakeholders and federal policymakers have criticized the patchwork of state laws and have advocated for a singular federal standard, Democrats and Republicans have struggled to find broad consensus on this issue in the past, a trend that will likely continue in the 118th Congress.

- **Partisan Proposals.** With a split Congress, it is likely Democrats and Republicans will endorse competing NIL bills in the 118th Congress. Senate Democrats may look to move forward with a bill similar to the *College Athletes Bill of Rights* (S. 4724), introduced by Sens. Cory Booker (D-NJ) and Richard Blumenthal (D-CT). The bill would regulate NIL issues, as well as compensate student-athletes based on revenue generated by their sports and create a fund to cover out-of-pocket medical expenses for student-athletes, among other benefits. The revenue sharing provisions and health coverage requirements are likely a non-starter with House Republicans who may look to previous Republican proposals, such as Sen. Jerry Moran's (R-KS) *Amateur Athletes Protection and Compensation Act* (S. 414) as a starting place for negotiations. That bill would establish a federal NIL standard and provide narrow health insurance benefits for student-athletes but does not include any employment or labor protections.
- **Bipartisan Efforts.** There have been recent bipartisan efforts on NIL legislation, with Sens. Tommy Tuberville (R-AL) and Joe Manchin (D-WV) indicating, in August 2022, their intention to work together on drafting bipartisan NIL legislation. While they are unlikely to release anything substantive until next year, they will be the two members to watch during the 118th Congress, given most bills on this issue have been partisan in nature. The only other bipartisan bill to date is the *Student Athlete Level Playing Field Act* (H.R. 2481), introduced by Reps. Anthony Gonzalez (R-OH) and Emmanuel Cleaver (D-MO). Rep. Gonzalez is retiring this year and has been working with his House colleagues to identify a House Republican who will take up his mantle on student-athlete issues. Several members of Congress, including Reps. Mike Carey (R-OH) and August Pfluger (R-TX), have expressed interest in taking the reins on the issue. Yet, even with these potentially bipartisan developments, it remains uncertain whether either chamber will prioritize NIL issues in their legislative agenda, leaving the patchwork of state laws as the status quo for NIL laws for the foreseeable future.
- **Transgender Student-Athletes.** Outside of NIL issues, House Republicans will focus their attention on transgender student-athletes' participation in high school and college sports. As previously mentioned, the Biden Administration is planning to issue a proposed rule on transgender athletes' participation in youth sports, which will likely draw significant criticism from congressional Republicans. On top of holding oversight hearings on the issue, House Republicans are expected to look for ways to push back against any sort of rulemaking on this topic via legislation. For example, they are likely to reintroduce bills like the *Protection of Women and Girls in Sports Act of 2021* to restrict transgender women from participating in women's sports. Senate Democrats are likely to support the Biden Administration's efforts on Title IX and inclusion, but they will be much less vocal than Republicans about issues specifically related to transgender women's participation in college sports.

Child Nutrition

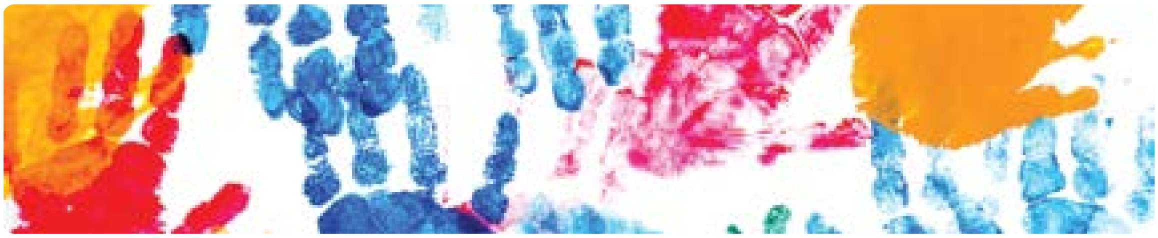
The last time Congress passed a child nutrition reauthorization (CNR) was in 2010 with the passage of the *Healthy, Hunger-Free Kids Act* (Pub. L. 111-296). Although the bill expired in September 2015, Congress has yet to pass another CNR bill, and it is unclear whether the changing political dynamics of the 118th Congress will alter the years-long trend of congressional inaction. A piecemeal CNR bill with low-hanging fruit provisions may have a more viable path to passage than a full reauthorization. For example, provisions allowing schools to update the *Child and Adult Care Food Program* (CACFP), serve meals at non-congregate settings or require paperwork reductions may engender bipartisan support in both chambers. Nevertheless, major developments on a CNR bill this coming year are unlikely given the focus of the committees of jurisdiction will be in other areas.

- **House Dynamics.** House Republicans' previous CNR legislation, the Improving Child Nutrition and Education Act of 2016 (H.R. 5003), could prove to be predictive for CNR legislative efforts in the House, though Rep. Foxx's focus on reauthorizing HEA could delay consideration on such a bill in this Congress. That legislation would have: 1) increased reimbursements to schools participating in the School Breakfast Program; 2) empowered schools to serve meals during the summer in non-congregate settings; 3) mandated the US Department of Agriculture (USDA) review regulations structuring school meal programs; and 4) restricted access to universal meals in high poverty areas, among other changes. House Republicans have spent the first two years of the Biden Administration criticizing Democrats for excessive spending on social programs, including the CNR proposal from House Democrats this year—the *Healthy Meals, Healthy Kids Act* (H.R. 8450)—that passed the House Education and Labor Committee on a party-line vote. A House Republican-initiated CNR bill is likely to avoid increasing spending for child nutrition programs, as Democrats had proposed, and instead may reproduce the revenue-raising provisions of the *Improving Child Nutrition and Education Act* of 2016, particularly the higher threshold for universal meal eligibility in high poverty areas. As the drumbeat of Republican calls for increased state empowerment have only grown in the COVID-19 era, a House Republican-led CNR bill will likely provide states with greater flexibility to execute programs. The provisions piloting block grant funding to states and allowing states to serve meals at non-congregate sites could receive support from the caucus.

- **Senate Dynamics.** A CNR bill passed by House Republicans is unlikely to garner meaningful support in the Senate. The first complicating factor is a matter of competing priorities. The committee of jurisdiction for CNR legislation in the Senate, the Committee on Agriculture, Nutrition and Forestry, will be primarily focused on reauthorizing the *Farm Bill*, which would put a hold on considering CNR legislation. *The Farm Bill*, a massive bill that can span over one thousand pages, may require so much time, energy and political capital that the committee would have little interest in tackling CNR legislation afterwards. The second complicating factor is a numerical one. Though Senate Republicans will hold leverage over Senate Democrats eager to avoid a filibuster, Democrats still retain the majority. Senate Democrats will not support raising the universal meal eligibility threshold, and House Republicans are unlikely to abandon this revenue-raising measure given their concerns about the cost of a CNR bill. As such, a CNR bill initiated by Senate Democrats is unlikely to inspire enthusiasm from House Republicans. For example, based on the *Access to Healthy Food for Young Children Act of 2021* (S. 1270), Senate Democrats may pursue legislation that would allow child care providers to feed children an additional meal through CACFP. However, House Republicans may reject Senate Democrats' attempts to increase school meal reimbursement rates through CNR legislation, having just done so in passing the *Keep Kids Fed Act of 2022* (Pub. L. 117-158).
- **Biden Administration Priorities.** The Biden Administration has its own goals for child nutrition policy that may put it on a separate collision course with the Republican-controlled House. A national strategy comprised of five pillars emerged from the September 2022 White House Conference on Hunger, Nutrition and Health that promises "to end hunger in America and increase healthy eating and physical activity by 2030 so fewer Americans experience diet-related diseases." As part of this commitment, the Biden Administration plans to expand access to school meals, which it hopes will culminate in ultimately providing universal school meals. Spending-shy Republicans are unlikely to approve the investments required to bring this goal to fruition. Several House Republican leaders, including Rep. Foxx and incoming House Committee on Agriculture Chairman GT Thompson (R-PA), regarded the conference with skepticism even before the circulation of the national strategy, calling it a "partisan gathering" and promising to conduct oversight of the recommendations that stemmed from the conference. This posture suggests the Biden Administration may face resistance from Republicans in realizing more ambitious goals like expanding funding for school meals and more modest goals like ensuring food served through CACFP meets the nutrition standard set by the Dietary Guidelines for Americans.

Workforce and Labor Policy

Expanding workforce opportunities will remain a priority for both parties in the next Congress, particularly in light of the current workforce shortages across the country. With Republicans taking over the House, they will focus on legislative reforms to existing programs to accommodate innovations in workforce development and high-quality skills training, moving away from Democrats' focus on organized labor. One example of this change will be evident in the naming of the House Education and Labor Committee,



which Republicans will likely rename once again as the House Education and the Workforce Committee as Rep. Foxx has done in previous years when Republicans held the majority. Policy changes are likely to take place through a combination of executive actions and legislative vehicles, including attempts to reauthorize WIOA and pass legislation to update to the apprenticeship system, though a divided Congress will require these efforts to be bipartisan to secure final passage.

- **WIOA Reauthorization.** The 118th Congress could address a WIOA reauthorization bill given previous efforts stalled during the 117th Congress. Earlier this year, House Democrats passed, on a largely partisan vote, the *Workforce Innovation and Opportunity Act of 2022* (H.R. 7309), which would authorize $74 billion over six years for workforce development programs at the Department of Labor (DOL). Although WIOA reauthorization has traditionally been bipartisan, this year's process divided Republicans and Democrats on issues related to funding levels and pro-union provisions. Rep. Foxx said the bill would provide too much federal control over the workforce and halt innovation, while Democrats touted the need to boost funding for workforce training programs, make critical reforms to expand worker opportunities and strengthen community colleges' capacities to help workers succeed. The parties will have to return to WIOA's bipartisan roots if they want to see something passed into law as this year's partisan approach did not lead to an enacted bill. Yet, it is unclear whether this will be a priority next year given other competing priorities, such as the HEA reauthorization.

- **Apprenticeships.** In addition to WIOA, Democrats and Republicans both agree apprenticeships are an important piece of the education and labor systems yet differ on how to update the federal apprenticeship system, including the role unions should play. In the last couple of Congresses, House Democrats attempted to pass the *National Apprenticeship Act* (H.R. 447), which would invest $3.5 billion in federal apprenticeships and create nearly one million new apprenticeship opportunities, but they have been unsuccessful. House Republicans have not supported the bill in the past given concerns about cost. Democrats will continue to push for measures to hold employers accountable and create new apprenticeship opportunities. Since the Biden Administration terminated the Trump Administration's Industry-Recognized Apprenticeship Program, House Republicans are likely to work to encourage employer-led innovation and allow more flexibilities for employers who offer apprenticeships.

- **Short-Term Pell.** Efforts to update existing financial aid policy to allow Pell Grant recipients to use their grants for short-term programs are likely to be in the spotlight again next year. While Democrats tried to include a provision allowing Pell Grants for short-term programs in the CHIPS and Science Act (Pub. L. 117-167), these efforts were unsuccessful. Sen. Kaine is a key champion for short-term Pell Grants and will likely continue working on the issue until it becomes a reality, including reintroducing the *JOBS Act*. Rep. Foxx also is supportive of the concept, including a provision to authorize "Workforce Pell Grants" as part of her *REAL Reforms Act*, though she is adamant about including for-profit institutions and online colleges in the eligibility for such grants, which will ruffle feathers among her Democratic colleagues.

- **Worker Classification.** Beyond the legislative agenda, there are several areas of workforce and labor policy where the Biden Administration will likely utilize its regulatory authority to enact change, specifically as it relates to its worker classification agenda. DOL released a proposed rule in October that provides guidelines for determining whether an individual is an employee or independent contractor of a hiring entity. The proposed rule parallels the Obama Administration's model, which employed an economic reality test. Under this test, the DOL may consider a wide variety of factors when determining an individual's employment status, including "the opportunity for profit or loss, investment, permanency, the degree of control by the employer over the worker, whether the work is an integral part of the employer's business, and skill and initiative." The proposed rule also directs the DOL to analyze the totality of a worker's circumstances when making its determination, rather than looking for discrete criteria. Notably, the proposed rule does not include any version of the ABC test, California's three-pronged labor classification system, because DOL officials previously stated they lack authority to implement such a program without congressional authorization. DOL will be collecting comments on the proposed rule through November 28 and will likely publish a final rule sometime next year.

- **PRO Act.** Senate Democrats may attempt to enact worker classification and other labor policy changes via legislation, though they are unlikely to be successful in a divided Congress. For example, Democrats in both chambers are expected to reintroduce the *Protecting the Right to Organize (PRO) Act of 2021* (H.R. 842/S. 420), which President Biden endorsed on the campaign trail. The bill seeks to empower workers to exercise their right to organize; hold employers accountable for violating workers' rights; and secure free, fair and safe union elections. It also includes provisions to clarify the definition of "independent contractor." With a Republican-controlled House, the *PRO Act* it is not expected to move forward in the next Congress since support for the bill is largely divided among party lines.

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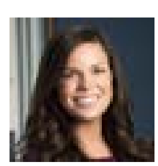

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Energy & Environment

*Ethan Shenkman, David Skillman, Emily Orler, Vincent Brown,
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Key Takeaways

- Close oversight of the Biden Administration is expected by Congressional Republicans in the House, particularly on energy and climate related policies, including the administration of grant programs at DOT, DOE and EPA, as well as on the development of tax regulations by Treasury created to guide the tax credit programs created or expanded under the IRA.
- The Biden Administration, protected by Senate Democrats, will continue to deploy funding and policies approved by Congress during the 117th Congress, allowing federal support for clean energy transition efforts to continue.
- Congressional Republicans in the House will promote legislation to increase domestic fossil energy production and ward off environmental justice protections; permitting reform may offer a bipartisan opportunity to advance energy and environmental policies.
- Tax and charging incentives alone are insufficient for the transportation sector to meet greenhouse reduction goals, and the EPA is likely to issue rules encouraging increased efficiency and limiting greenhouse gas emissions.
- Reauthorization of the Federal Aviation Administration provides an opportunity to review developments and establish new requirements in the unmanned aviation and electric vertical take-off and landing industries.

Introduction

With control of the House, Republicans are poised to exercise significant oversight of Biden Administration environmental and energy policies. Narrow Democratic control in the Senate, however, will allow the President and Senate Democrats to maintain leverage in legislative discussions and ensure that Biden Administration appointees can be confirmed. In the House, Republican members will set the agenda, guide committee activity, and highlight legislative alternatives to the Biden Administration's regulatory actions. Using the appropriations process, Congressional Republicans will put pressure on federal agencies,

even if spending legislation ultimately requires Democratic votes in the Senate. Significant oversight is expected in the House, particularly of energy and environmental initiatives that received funding during the 117th Congress under the Inflation Reduction Act. Congressional Republicans may also attempt to roll back tax and other policies related to the *Inflation Reduction Act* (IRA), particularly its fee on methane and potentially the excise tax funding Superfund programs, although such policies are not expected to advance through a Democratic Senate. However, there is modest bipartisan interest in legislation expediting permitting decisions, and should permitting legislation not be addressed during the lame duck session, it might be an area of bipartisan compromise during the 118th Congress.

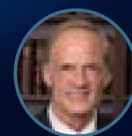
Oversight Outlook

During the 117th Congress, Democrats enacted significant environmental legislation, including the *Infrastructure Investment and Jobs Act* (IIJA, Pub. L. No. 117-58) and the Inflation Reduction Act (Pub. L. No. 117-69). These laws require the Environmental Protection Agency (EPA) and the Department of Energy (DOE) to implement a variety of new policies and programs. For instance, at the EPA, the IRA created the Greenhouse Gas Reduction Fund to deploy $27 billion in competitive grants for clean energy and climate projects to reduce or avoid greenhouse gas emissions, largely in disadvantaged communities. Under the IIJA, Congress provided DOE with $62 billion in funding for a variety of clean energy and related industrial programs. Programs created under these bills will be significant oversight targets for the Republican House.

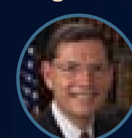
Committee leaders in the Republican House are expected to use oversight hearings both as a source of leverage to guide the implementation of these laws in a manner that Republicans support, and to highlight

Expected Congressional Committee Leadership

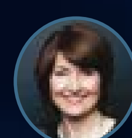
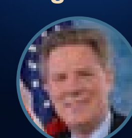
Senate Environment and Public Works

Chairman	Ranking Member
	
Sen. Tom Carper (D-DE) [current chairman]	**Sen. Shelley Moore Capito** (R-WV) [current ranking member]

Senate Energy and Natural Resources

Chairman	Ranking Member
	
Sen. Joe Manchin (D-WV) [current chairman]	**Sen. John Barrasso** (R-WY) [current ranking member]

House Energy and Commerce Committee

Chairman	Ranking Member
	
Rep. Cathy McMorris Rodgers (R-WA) [current ranking member]	**Rep. Frank Pallone, Jr.** (D-NJ) [current chairman]

management or political problems that may feature in the 2024 elections. For instance, Rep. Cathy McMorris-Rodgers (R-WA), who is likely to chair the Energy and Commerce Committee, has called the additional funding provided to the DOE's Loan Program Office, "Solyndra on steroids," a reference to the failure of a solar firm that received government support and was the subject of significant Republican oversight investigations during the Obama Administration.

Republicans will also use investigations and letters to seek answers on executive branch actions they believe bypassed or exceeded proper legislative and regulatory processes. For instance, Republicans on the Committee on Oversight and Reform, led by their likely chairman, Mr. James Comer (R-KY), recently outlined their concerns about the Biden Administration's dealings with OPEC and warned against imposing a domestic oil export ban. The letter sought a broad swath of communications between the White House and DOE on these topics, a preview of what to expect under Republican control. Similarly, Republicans on the House Oversight Committee sent a letter to EPA Administrator Michael Regan requesting answers to a series of questions related to the EPA's decision to allow special interest groups to "sue and settle" with federal agencies without stakeholder input. As part of this oversight process, Republicans in Congress will request key agency leaders such as Secretary of Transportation Pete Buttigieg, Secretary of Energy Jennifer Granholm and EPA Administrator Michael Regan to testify.

In addition to programs created and funded under the IIJA and IRA, regulatory actions will also be oversight targets, particularly by the House Energy and Commerce Committee. The EPA has issued several regulatory actions over the last two years, such as proposing to update the Mercury and Air Toxics Standards for power plants and strengthen the *Clean Air Act* "good neighbor" obligations under the *2015 Ozone National Ambient Air Quality Standards*. House Republican members have already outlined their concerns with these actions, and are expected to continue their confrontational approach. House Republicans are likely to investigate the Department's authority for future rulings and to work with stakeholders to counter the EPA's decisions. Similarly, Republicans will focus on how the Department of Energy is deploying IRA and IIJA funds, and implementing related programs. These oversight efforts will attempt to develop a narrative for the 2024 elections as the Biden Administration and the Republican party attempt to establish a narrative on the success of these programs.

With control of the Senate, however, Democrats will be able to tamp down any oversight efforts requiring legislative action that conflict with Biden Administration priorities and will be able to establish a counter narrative highlighting successes of the Biden Administration, the IRA and the IIJA's energy and climate provisions.

Climate/Energy Outlook

With a split House and Senate, the momentum behind President Biden's clean energy and climate change priorities is expected to slow, due both to the legislative successes of the 117th Congress, as well as a result of opposition by House Republicans to many of the policy goals. In addition to the oversight priorities noted above, House Republicans have outlined several legislative goals for the 118th Congress. These include:

- The *American Energy Independence from Russia Act*, (HR 6858, 117th Congress), which would approve the Keystone pipeline, require additional oil and gas leasing, and streamline permitting for LNG import and export facilities;
- The *Protecting Our Wealth of Energy Resources Act* (POWER Act), (HR 543, 117th Congress), which would prohibit administration officials from withdrawing mineral claims or from blocking energy or mineral leasing and permitting;
- The *Accessing America's Critical Minerals Act of 2021*, (HR 2604, 117th Congress), which would mandate a time period to complete the permitting process and would require the Department of Interior to report on its permitting performance; and
- The *Hydropower Clean Energy Future Act*, (HR 1588, 117th Congress), which would define hydropower as renewable energy, revise and streamline the licensing process for hydropower, and speed resolution of inconsistent or conflicting license terms.

None of this legislation is likely to clear the Democratic Senate as drafted. Instead, Senate Democrats will be focused on assisting the Biden Administration in rolling out programs from the IRA and IIJA. The Republican proposals may, however, lay the groundwork for legislative compromise between the two chambers. For instance, House Republicans have an interest in speeding federal permitting programs, as several of the bills cited above indicate. Similarly, Senator Joe Manchin (D-WV) has introduced permitting legislation (discussed below) that could be approved during the 117th Congress's lame duck period. Should that legislation slip into the 118th Congress, it may serve as the basis for a legislative compromise allowing both parties to achieve some of their legislative goals. As a result, much of the serious legislative effort in the 118th Congress is expected to be tailored to finding bipartisan consensus and to protecting initiatives and funding from the IRA and IIJA.

Chairman Manchin will remain at the top of the Senate Energy and Natural Resources Committee and will likely continue to offer an independent voice on energy and environmental-related issues. Chairman Manchin was crucial in negotiating the IRA, and will seek to balance the Biden Administration's climate change and clean energy priorities with West Virginia's energy interests. Chairman Manchin is expected to continue to seek areas of bipartisan support for domestic energy expansion, including his permitting legislation and will continue advocating for the programs he included in the IRA and IIJA. Senator Tom Carper (D-DE) will remain chairman of the Environmental and

Public Works Committee and remains a strong champion of policies designed to protect the climate. As a strong supporter of the Biden Administration's environmental priorities, Chairman Carper will continue to use his position to advance policies to help meet the Biden administration's climate goals.

Environmental Justice Outlook

During the 117th Congress, Environmental Justice (EJ) issues occupied a central position in the Biden Administration's climate and environmental policy agenda. An analysis by the Just Solutions Collective, in fact, showed that the IRA would invest $40 billion in EJ-related programs. Still, many environmental activists demand more from Democrats in Congress and the Biden Administration to advance EJ legislation and to establish policies protecting minority and low-income communities who face greater threats related to climate change and legacy pollution. A central concern among EJ groups is that federal legislation to relax permitting requirements will result in direct negative impacts on their communities and undo many of the gains seen from the IRA or in other Biden Administration policies.

Republicans in the House are likely to oppose any additional EJ legislation and will likely use their powers of oversight and investigation to make the implementation of the Biden Administration's EJ priorities, such as the *Justice40 initiative*, as difficult and inefficient as possible. House Natural Resources Committee Chairman Bruce Westermann (R-AR) will likely lead House Republicans' efforts to combat the Biden Administration's EJ implementation efforts through oversight hearings and investigations. Additionally, it is likely House Republicans will support legislation similar to Rep. Scott Perry's (R-PA) legislation to prohibit the obligation or expenditure of funds relating to the Office for Environmental Justice and any other program, project or activity relating to climate change of the Department of Justice (H.R. 7481). Given Democratic control of the Senate, however, it is unlikely this bill will advance.

Democrats in the Senate, led by Environmental and Public Works Chairman Tom Carper, will offer support for the Biden Administration's EJ efforts. While it is unlikely there will be any major legislation advancing EJ issues enacted in the 118th Congress, Chairman Carper and other Senate Democrats will use their power to offer support to the Biden Administration's priorities, such as the *Justice40 initiative*.

Electric Vehicles and Charging Infrastructure

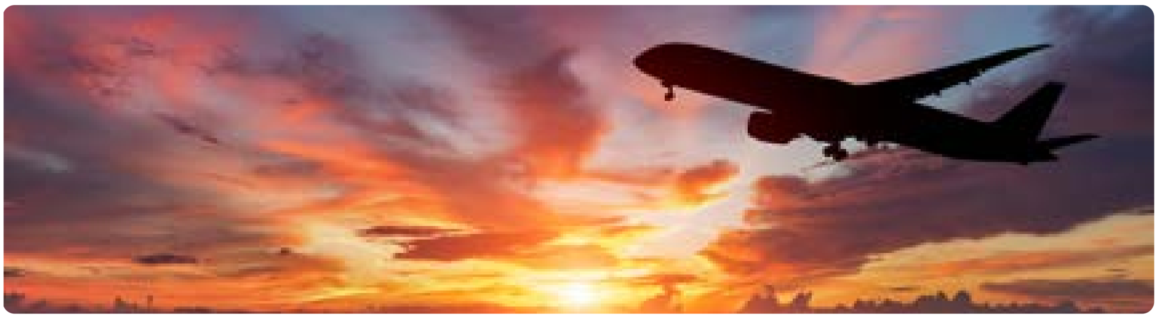
Continued implementation of the IRA and the IIJA will dictate the vast majority of issues related to electric vehicles and charging infrastructure during the 118th Congress.

The IIJA, signed into law by President Biden on November 15, 2021, allocated $7.5 billion for electric vehicle charging infrastructure. Under the National Electric Vehicle Infrastructure program, the US Department of Transportation (USDOT) will approve and fund a national network of at least 500,000 electric vehicle charging stations by 2030. The investments are designed to reduce range anxiety and encourage the wider adoption of electric vehicles. Under the program, USDOT provides 80 percent of the cost of installing EV charging stations and up to five years of operations and maintenance costs. The remaining 20 percent of costs are funded by site owner-operators. The IIJA also provides substantial funding for critical mineral production, battery manufacturing and battery recycling facilities.

In addition to the IIJA funding programs, the IRA expands the existing tax credit for deployment of charging infrastructure. Under Section 30C, subject to certain limitations, a tax credit is available for 30 percent of the cost of any qualified alternative fuel vehicle refueling property placed in service by the taxpayer during the taxable year up to $100,000. The IRA also removed "per location" limits that, prior to passage of the IRA, reduced the value of Section 30C. The IRA also offers tax credits for the production of clean energy components (26 USC Section 45X), including battery inputs, and a tax credit (26 USC Section 48C) to offset the cost of developing facilities to produce plug-in electric drive motor vehicles or components specifically designed for use with such vehicles. Finally, the IRA also creates a tax credit for medium- and heavy-duty EVs worth 15 percent of a qualifying vehicle's cost (30 percent if the vehicle does not have a gas- or diesel-powered internal combustion engine), limited to the incremental cost of the vehicle relative to one powered by fossil fuels, capped at $40,000 (26 USC Section 45W).

These generous subsidies are likely to attract significant Republican oversight attention. The Treasury Department is developing tax regulations to guide adoption of these provisions that will likely be the subject of oversight by Republican members of the Ways and Means and Finance committees. Similarly, decisions made by USDOT and DOE with respect to the NEVI program will be closely reviewed by Republicans on the transportation and energy committees of both chambers. It is expected that there will be significant oversight on expenditures made while these two laws are being implemented. The key committees that will look at this implementation are the House Transportation and Infrastructure Committee, led by Sam Graves (R-MO), and the House Energy and Commerce Committee, led by Cathy McMorris Rodgers (R-WA).

To achieve Biden Administration climate goals, however, additional regulatory activity may be necessary. Outside experts suggest that the tax credits and charging investments alone are insufficient to eliminate transportation-related greenhouse gas emissions. As a result, the Biden Administration is likely to continue seeking transportation-related climate policies, presenting the Republican House of Representatives with opportunities to engage in the broader debate about decarbonizing the transportation sector.



Federal Aviation Administration Reauthorization

During the 118th Congress, the House Transportation and Infrastructure Committee and the Senate Commerce Committee will consider the reauthorization of the Federal Aviation Administration (FAA), which otherwise expires September 30, 2023. Among the policies Congress will consider as part of this reauthorization will be innovations in unmanned aviation (UAS) and in the electric vertical take-off and landing (eVTOL). Already, FAA has adopted some regulatory policies advancing eVTOL adoption, with FAA Acting Administrator Billy Nolen stating that FAA's mission regarding eVTOLS is "to constantly advance our outstanding level of safety, without stifling the innovators. We aim to be a gateway, not a hurdle."

Republican leadership of the House Transportation and Infrastructure Committee and the retirement of Chairman Peter DeFazio marks a generational change of leadership on the Committee in the House. With Republican control, the Chairmanship will pass to Sam Graves (R-MO). At the Aviation Subcommittee, the present subcommittee chairman is Rep. Rick Larsen (D-WA), who is expected to compete for the full committee ranking member position in the minority. The current Ranking Member of the Aviation Subcommittee is Rep. Garret Graves (R-LA), who is expected to become chairman of the subcommittee in the 118th Congress. At the subcommittee level, Chairman Graves is expected to focus on some of the more innovative aspects of the aviation industry, such as UAS and eVTOL, during consideration of the FAA reauthorization, rather than environment or labor issues. This interest is shared at the Senate Commerce Committee, which recently held a hearing titled "FAA Reauthorization: Integrating New Entrants into the National Airspace System" and included numerous mentions related to eVTOLs and other related technologies. At the hearing, several witnesses emphasized the need for the government to have a coordinated strategy on eVTOLs.

In addition to reviewing innovations in the UAS and eVTOL space, among the issues likely to be addressed in a future FAA reauthorization are traveler options when an airline delays or cancels your flight, airline seat size and other aircraft related standards, commercial space usage, workforce development, and climate change as related to the airline industry. The previous authorization included policies focused on unmanned aircraft systems integration and included "expediting the financing and development of airport capital projects, directing the FAA to advance leadership in the field of international supersonic aircraft policies, addressing aircraft noise, and ensuring safe lithium battery transport," as the FAA summarized. Those issues are expected to remain relevant in the upcoming reauthorization as well.

The chair of the Senate Commerce Committee's Aviation Safety, Operations and Innovation Subcommittee is Sen. Kyrsten Sinema (D-AZ), while the full committee Chairman will remain Senator Maria Cantwell (D-WA) and the Ranking Member is expected to be Sen. Ted Cruz (R-TX). Chairman Sinema will look to bolster the Biden Administration interest and tamp down the more partisan Republican objectives. FAA reauthorization, however, is expected feature bipartisan support for many of its policies.

Permitting Reform

With their new majority, House Republicans will seek to deliver policy wins on energy and infrastructure. The 117th Congress achieved unprecedented victories in providing funding for infrastructure projects under the IIJA and IRA. Much work remains, however, to deliver tangible benefits from those laws. In order to shape these investments, Republicans are expected to prioritize reform of federal permitting and environmental review requirements that they have long vilified as impediments to energy production and infrastructure development.

Republican efforts in the House will be aided by bipartisan support, particularly in the Senate, to certain permitting reforms. There is bipartisan interest in reforms of the statutes related to issuance of permits, authorizations and financing to private parties to enable the construction of infrastructure projects. In essence, Republicans generally want to cut bureaucratic red tape and ensure all energy and natural resource projects get permitted; many Democrats seek to build infrastructure that will drive decarbonization. However, as demonstrated by Senator Manchin's (D-WV) failed attempt to pass the *Energy Independence and Security Act of 2022* (committee summary) as a part of the Continuing Resolution (Pub. L. No. 117-180) and the flurry of rulemakings by the Biden Administrative to rollback related regulatory reforms by the Trump Administration, there is limited agreement between the parties about how to achieve that reform.

Senator Capito's (R-WV) *Simplify Timelines and Assure Regulatory Transparency (START) Act* (S. 4815), introduced in September 2022, provides a preview of three key categories of action that we can expect in permitting and environmental review reform from the Republicans:

- Attempt to codify Trump Administration rulemakings, blocking the Biden Administration from making changes inconsistent with those rules. Key targets for Republicans are the regulations related to the Council on Environmental Quality's implementation of *National Environment Policy Act* (NEPA), the definition of "waters of the United States" in the *Clean Water Act*, Nationwide Permits under Section 404 of the *Clean Water Act*, Water Quality Certifications under Section 401 of the *Clean Water Act*, and interagency consultation under Section 7 of the *Endangered Species Act*;
- Attempt to curtail federal and state authorities to block projects, including, for example, by prohibiting EPA vetoes of permits already issued; and
- Attempt to expand process efficiencies and extent them to all energy and infrastructure projects, including fossil fuel projects.

Despite these partisan differences, the shared interests in prioritizing infrastructure development, including Sen. Manchin's work on the issue, offers an opportunity for bipartisan compromise on this crucial energy and environment matter among House Republicans and Senate Democrats. Such support must be robust, as legislation must gain the support of 60 Senators to end debate and advance to a vote in the closely divided Senate. Should it do so, it might illustrate a path forward on enacting environmental policies in which both parties share an interest.

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Federal Funding

Jessica Monahan

Key Takeaways

- With a Democratic Senate and likely narrow Republican majority in the House, the appropriations process may be one of the best opportunities for bipartisanship in the 118th Congress. However, government shutdowns could once again become a reality if House Republicans decide to utilize the appropriations process as a divisive platform.
- Earmarks are likely to continue under a Democratic Senate majority and have the potential to unify both chambers to pass appropriations bills.
- Forces within the Republican party will continue to resist the administration's budget priorities related to climate change, education, healthcare, and energy.

Introduction

Congress has long struggled to pass spending bills on time and last did so 25 years ago. Since the establishment of the modern appropriations process in the *Congressional Budget Act of 1974*, Congress has passed all its required appropriations bills on schedule only four times: in fiscal years (FYs) 1977, 1989, 1995, and 1997. The budget and appropriations process in the current 117th Congress was no exception. It was irregular, delayed and fraught with continuing resolutions, which were further complicated by a new presidency and narrow Democratic majorities. One saving grace from the last two years was the return of earmarks—or congressionally directed spending for projects included in annual appropriations bills, otherwise referred to as "Community Project Funding," which increased many members' investment in the appropriations process and ultimately resulted in the passage of an omnibus funding package for FY 2022.

The 118th Congress will face its own set of unique challenges. A Democratic Senate and a likely narrow Republican majority in the House present a distinct opportunity for bipartisanship if Republican leadership is willing to work with their Democratic colleagues to advance compromised spending bills and avoid government shutdowns. Conversely, a Republican majority in the House could omit Democratic input and produce vastly different spending bills than its Senate counterparts, leading to

difficult negotiations and potential stalemates. The probable new chair of the Senate Appropriations Committee, Patty Murray (D-WA), will likely have to negotiate with Rep. Kay Granger (R-TX), who has been serving as ranking member of the House Appropriations Committee. Sen. Murray is the most senior Democrat on the committee following outgoing Chair Patrick Leahy (D-VT), who is retiring. In order to take the gavel, Sen. Murray will give up her top spot on the Health, Education, Labor, and Pensions (HELP) Committee.

Democrats will have their work cut out for them if they are to support the President's budget request for FY 2024 in a divided Congress. Passing anything through both chambers will require bipartisan support and funding for the administration's priorities related to climate change, education, healthcare, and energy will face major opposition in the House. Under a Democratic majority in times of pandemic and economic crisis, the White House saw most of its priorities bolstered by the Appropriations Committee with large year over year increases that cannot be replicated in the new Congress. The conflict between the two chambers will impact the ability to pass regular appropriations bills as Republicans attempt to promote their own priorities for the next fiscal year.

If they assume the majority, House Republicans will utilize the budget and appropriations process to exercise oversight over the Biden Administration—Cabinet Secretaries and Agency officials will testify before a Republican-led House Appropriations Committee in spring of 2023 to promote and defend the President's budget request for FY 2024, and they will also be subject to an onslaught of oversight and investigations activity as the House looks into specific Biden Administration programs that Republicans oppose. Unobligated pandemic relief funding is sure to be a focus under a Republican House majority, along with investments made through the *Inflation Reduction Act*.

A divided legislative branch would call into question the fate of earmarks in the 118th Congress. In the House, 121 Republicans requested Community Project Funding for FY 2023, with only 40 percent of the House Republican Conference choosing to abstain from the process, including Minority Leader Kevin McCarthy (R-CA) and Rep. Kay Granger (R-TX). Notably, Minority Whip Steve Scalise (R-LA) and House Republican Conference Chair Elise Stefanik (R-NY) both requested funding for projects in their districts for FY 2022 and FY 2023. If the divide within Republican leadership is any indicator, a Republican majority would face a tough choice—whether to continue to request earmarks or once again ban the process.

The last time Republicans took over the majority of the House after the 2010 midterms, party leadership banned earmarks, a decision fueled by anti-spending tea party politics and corruption scandals. Senate Democrats in control of the upper chamber adhered to the ban but the dynamics were different than they are today. Unlike 2010, there is not the anti-earmark sentiment today that existed then. While a few Republicans have made attempts to eliminate earmarks since their return in 2021, like Sen. Mike Braun (R-IN), who authored an amendment to cut all earmarks out of the FY 2022 omnibus bill, the popularity of earmarks has actually increased among House Republicans.

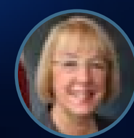
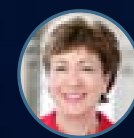
House Republicans voted in March 2021 to allow conference members to request earmarks. While incoming House Appropriations Committee Chair Kay Granger (R-TX) has not requested earmarks since their return, she routinely requested earmarks prior to their moratorium in 2011. Since Senate Democrats will continue to support Community Project Funding in the upper chamber, Republicans have an opportunity to put their own stamp on the process by changing guidelines and guidance for FY 2024 to better reflect their priorities.

Minority Leader Kevin McCarthy (R-CA) has even acknowledged that Republican members want to have a say in how federal funding is spent in their districts and that his colleagues have "a real concern about the administration directing where money goes." With nearly 60 percent of the Republican House Conference requesting project funding for FY 2023, banning earmarks is not likely to succeed if the conference takes it up for a vote.

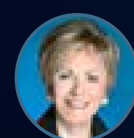
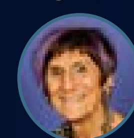
The continuation of earmarking would increase the likelihood Congress works in a bipartisan fashion to pass appropriations bills, as both parties would be invested in passing regular appropriations and bringing project funding back to their states and districts. Alternatively, if a House Republican majority decides to eliminate Community Project Funding, it will further complicate the budget and appropriations process and may mimic the dynamics that led to the 2013 federal government shutdown which nearly lasted two weeks.

Expected Congressional Committee Leadership

Senate Appropriations Committee

Chairman	Ranking Member
	
Sen. Patty Murray (D-WA) [next most senior member]	**Sen. Susan Collins** (R-ME) [expected to become ranking member]

House Appropriations Committee

Chairman	Ranking Member
	
Rep. Kay Granger (R-TX) [current ranking member]	**Rep. Rosa DeLauro** (D-CT) [current chairman]

In 2013, under the Obama Administration, the House was led by Republicans and the Senate was led by Democrats. House Republicans and Senate Democrats sparred over the President's top domestic policy achievement—the *Affordable Care Act*—and utilized the appropriations process to attack or defend the legislation. This occurred for several years following the earmark ban, while members of Congress felt less personally invested in the outcome of the appropriations process.

As history has proven, the modern federal appropriations process rarely functions as intended. The 118th Congress will likely be no different as recent examples suggest divided government can wreak havoc on the federal funding process. A glimmer of hope remains that earmarks could bridge the deep divide between the two parties and keep the government funded.

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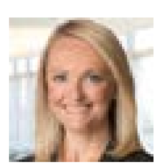

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Key Takeaways

- A Democratic Senate will be limited on its legislative agenda and will focus on confirming judges and other Biden nominees. Senate Democrats will continue to utilize its oversight functions as a platform to defend Biden Administration policies and to conduct ongoing oversight of the industry with special focus on consumer protection.
- Consideration of nominees for key agency positions that require Senate confirmation will continue. This may include: Vice Chair of the Federal Deposit Insurance Corporation (FDIC); Comptroller of the Office of the Comptroller of the Currency (OCC); Federal Reserve Governor Lisa D. Cook; and the Commissioner of the IRS.
- Narrow opportunities for bipartisan agreement may include bills to promote capital formation and the creation of a regulatory framework for digital assets, particularly stablecoins.
- There will be significant pushback from a Republican House on a majority of Biden Administration initiatives, particularly those related to environmental, social and corporate governance (ESG).

Introduction

A divided Congress will limit the focus and scope of financial services policymaking and may have a modest impact on the administration's regulatory agenda. Democrats have retained control of the Senate despite the traditional large-scale losses borne by a sitting president's party during a midterm election. However, Republicans now narrowly control the House and are in a stronger position to oppose Democratic legislative efforts and bolster their own policies. A Republican House takes the use of reconciliation, which is the special rule that Democrats used to pass the *Inflation Reduction Act* with a bare partisan majority, off the table. While the outcome of the Georgia Senate race on Tuesday, December 6 will not change control of the Senate,

Democrats will have gained a seat in the Senate. As a result, executing a Democratic agenda will be easier if Sen. Raphael Warnock (D-GA) retains his seat.

Republican efforts to slow Democratic legislative initiatives in the 117th Congress resulted in the Biden Administration's increased reliance on executive orders and agency rulemaking. We expect this trend to continue in the divided 118th Congress. With 23 Democratic senators up for reelection in 2024, both chambers will aim to spotlight the flawed policies of the opposing party. A Democratic Senate affords the Biden Administration with an opportunity to advance some priorities, including nominations to key executive branch positions and judges, but it will be met with Republican resistance in the House.

Expected Committee Leadership in the 118th Congress

Senate Committee on Banking, Housing, and Urban Affairs Chairman Sherrod Brown (D-OH) will continue to advance financial inclusion, industry oversight, and consumer protection. We analyze Senate Committee on Finance Chairman Ron Wyden's (D-OR) priorities in the tax section. House Committee on Financial Services (HFSC) Ranking Member Patrick McHenry (R-NC) is expected to become chairman from which he will continue to prioritize (i) oversight of relief funds; (ii) support for access to capital by checking the Securities and Exchange Commission (SEC) authorities, while encouraging innovation and investor protection in digital assets; (iii) challenging the Consumer Financial Protection Bureau; (iv) countering China in the financial services sector; and (v) increasing the U.S. housing supply.

The issues at the forefront for Senate Democratic leadership are housing affordability; ESG reporting, especially on climate; diversity, equity, and inclusion (DE&I) accountability; fair lending; student loan debt relief; consumer protections in fintech, digital assets, and private equity; and continued oversight of financial regulators. Republican leadership priorities include shining a spotlight on inflation and promoting US competitiveness relative to China. They can also be expected to prioritize the protection of individual freedom by confronting big tech and addressing gaps in privacy laws. House Republicans plan to conduct rigorous oversight of the administration, especially the SEC rulemaking agenda, but may also examine public companies that they view as using the corporate structure to advance "woke" policies.

It is unlikely the 118th Congress will find the bipartisan support necessary to pass sweeping changes in financial services law. A split Congress ordinarily will not muster sufficient consensus to address controversial issues without a pressing threat to the stability of the US economy, banking system, or a national crisis. Bipartisan agreement on certain issues, even in a closely divided congress, is nonetheless possible. For example, the *Anti-Money Laundering (AML) Act of 2020*, which was included in the FY 2021 National Defense Authorization Act (NDAA) (Pub. L. 116-283) was presented to the President for his signature. Somewhat more remote in time, a split Congress passed the *Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018* (Pub. L. 115-174). Based on that precedent, it is possible that bipartisan consensus can be found around narrowly tailored measures.

Regulatory Outlook

The Biden Administration has made regulation addressing climate change an "all of government" priority, including through financial services regulators, followed by a focus on removing illicit funds from the global financial system, examining bank mergers, promoting responsible development of digital assets, and removing bias from the sector, including fintech. The administration is expected to continue to pursue these priorities. Some of these actions will be met by House Republicans pursuing oversight and investigations of the federal agencies, questioning whether they are acting outside of their congressionally delegated authority, but there may be room to compromise on other actions.

The President's nominees to key administration posts are the means by which he executes his agenda. A majority of the President's nominees to financial regulatory agencies were confirmed in the 117th Congress, however, key positions that would be important to move the regulatory agenda forward remain or will become open. These positions include the Vice Chair of the FDIC; Comptroller of the OCC; and the Commissioner of the IRS. The White House announced its intent to nominate Martin Gruenberg to be chairman of the FDIC on November 14. Additionally, the term of Democratic SEC Commissioner Caroline Crenshaw, will end in 2024. The commissioners may continue to serve up to eighteen months after their terms expire, which would maintain their positions until the end of President Biden's term. The Honorable Lisa Cook's term as governor on the Federal Reserve Board will also expire in 2024. A slim Democratic majority will continue to allow individual Democratic senators to have an outsized influence on the nomination process. A victory for Sen. Warnock reduces the influence wielded by Sens. Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ). We expect the Biden Administration to continue prioritizing diverse nominees and encouraging agencies to ensure staff adequately represents underrepresented and marginalized communities.

In the financial institutions sector, the administration may pursue review of the framework for evaluating bank mergers. The focus of this review will be on the perceived anti-competitive effects of certain mergers and is expected to include subject matter expertise of the Antitrust Division of the Department of Justice. The review would also include bank compliance with the *Community Reinvestment Act* and other consumer protections. Finally, banking agencies would be expected to consider whether certain mergers may give rise to systemic risk. The President's *Executive Order on Ensuring Responsible Development of Digital Assets* (EO 14067) broadly acknowledged the affirmative need to address the opportunities and concerns raised by the expanding digital asset market. There are emerging bipartisan conversations on some of those opportunities and concerns. Bringing stablecoins within the regulatory regime is well-suited for such cooperation. There is more skepticism by Republicans on the development of a central bank digital currency (CBDC) by the Federal Reserve Board. Republicans will continue to challenge what they contend is SEC Chairman Gary Gensler's actions to regulate digital assets by enforcement rather than providing the industry with broad guidance.

There may be an effort in the 118th Congress to pursue lawmaking that would complement administrative efforts to remove illicit funds from the global financial system. Efforts to strengthen AML laws have historically garnered bipartisan support. It is likely the 118th Congress will pass some form of the *Establishing New Authorities for Businesses Laundering and Enabling Risks to Security (ENABLERS) Act* (H.R. 5525) to expand AML requirements to so-called "gatekeeping" activities such as accounting and legal services. A version of the *ENABLERS Act* was included in the House-passed FY 2023 NDAA (H.R. 7900), but it is not clear that the provision will be included in the House-Senate compromise. There is also an outstanding need for congressional action regarding agencies' statutory authority and jurisdiction with respect to digital assets that the Republican House will seek to address under the HFSC leadership of Rep. McHenry.

House Republicans will likely continue their opposition to SEC Chairman Gary Gensler's planned overhaul of the market structure. This effort may include close coordination with appropriators, which are viewed by Republicans as best equipped to affect agency behavior because their work directly impacts agency spending.

Capital Formation

Starting with the *JOBS Act of 2012* (Pub. L. 112-106) and in two subsequent efforts, *2.0* (signed into law as part of Pub. L. 114-94), which was successful, and 3.0 (S.488, 115th Congress), which came close, the committees of jurisdiction followed the pattern

Arnold & Porter
Overview
118th Congress (2023-2024)
2024 Preview
2022 Review
Committee Leadership
California
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Foreign Affairs
Healthcare/ Life Sciences
Immigration
Product Safety
Tax
Technology
Trade

of packaging narrowly tailored bipartisan bills to promote capital formation into a single bill. Retiring Sen. Pat Toomey (R-PA), along with his colleagues from both parties, emulated this approach with the release of the *JOBS Act 4.0*, which includes many bipartisan bills. According to the press release, the legislation will "encourage companies to be publicly-traded[,] … [i]mprove the market for private capital[, and] … [e]nhance retail investor access to investment opportunities," among other reforms. Neither HFSC Ranking Member McHenry nor Senate Banking Committee Chairman Brown announced an intention to reprise this legislation, but they may pursue this practice in the 118th Congress. The approach has the benefit of assembling dozens of bipartisan bills and allows Republican members to advance their respective profiles by attaching their name to a successful legislative package.

Cannabis Banking

The *Secure and Fair Enforcement (SAFE) Banking Act* (H.R. 1996/S. 910) would create a safe harbor for providing financial services to cannabis businesses in states where such businesses have been legalized. With near unanimous support among Democrats, the bill also garnered substantial support among House Republicans, with 106 Republicans voting in favor as it passed the House in April 2021. Senate Majority Leader Chuck Schumer (D-NY) declined to consider the measure without additional criminal justice reforms. The bill's House champion, Rep. Ed Perlmutter (D-CO), is attempting to include the measure in a year-end package before he retires from Congress in December. If unsuccessful, the chance of a bipartisan reform bill in the 118th Congress seems remote. Significant support of the measure exists in both chambers, but success depends on the will of party leadership. Following President Biden's mass pardon of federal marijuana possession charges last month, a remaining sticking point for Democrats is whether to accept the *SAFE Banking Act* as an incremental reform in lieu of more ambitious legalization goals. While there is Republican support for such reforms, such support represents only half of the conference, making it a low priority for Republican leadership.

Regulation of Digital Assets

Digital asset regulation will remain a priority for committees of jurisdiction in the 118th Congress as the Biden Administration further develops its domestic and international approach. The FTX meltdown will further focus attention. As HFSC Chairman, Rep. McHenry will likely use the committee's jurisdiction first to advance bipartisan stablecoin legislation. Chairman McHenry is expected to work with Senate efforts to bring digital asset exchanges and service providers into the regulatory fold to simultaneously protect consumers and support industry innovation. Republicans generally support a federalist regulatory regime that confers regulatory authority on federal agencies while allowing states to innovate; this is a tension that will continue as policy is developed in this space. Senate Democrats have emphasized the need for heavy federal oversight in the industry. As chairman, Rep. McHenry will convene hearings to assess SEC Chairman Gensler's failure to provide regulatory certainty to the digital asset industry prior to enforcement action.

The rapid growth of digital asset use has resulted in congressional and regulatory attention, especially the use of stablecoins to facilitate trading, lending, and borrowing of other digital assets. Stablecoin providers are presently most likely to become participants in the broader financial system and recent legislation to regulate stablecoins indicates significant bipartisan cooperation to address vulnerability to stablecoin runs and the opacity of issuer operations. Given the bipartisan support of this legislation in the House and the input from Republican leadership, the bill has an opportunity to pass a split Congress. While Senate Banking Committee Chairman Brown has indicated support for the creation of a Fed-issued CBDC, Rep. McHenry and other influential Republicans on committees of jurisdiction remain uncertain of its benefits. Progressive Senate Democrats, including Sen. Elizabeth Warren (D-MA), have lent support to the idea of a CBDC as a safer alternative to private digital currencies. Federal Reserve officials said the central bank will only develop a CBDC with "clear support" from Congress, preferably in the form of authorizing language.

A broader framework for digital asset regulation passed during the 118th Congress will emphasize increased consumer protections in digital asset markets. Given Chairman Brown's lack of interest in moving bipartisan digital asset legislation in the 117th Congress, he will likely focus on Democratic priorities, such as expanding SEC jurisdiction, and perhaps support a regulatory framework to expand federal authority over digital asset markets to bolster defense against illicit actions and increase consumer protections. Democratic Senate leadership on the committees of jurisdiction will continue to scrutinize the environmental impact of crypto mining, as several Democrats have raised concerns over the topic. Republican resistance in the House and the narrow margin in the Senate will likely prevent the progression of any legislation to limit crypto mining emissions.

Climate and ESG Regulatory Outlook

Republican opposition to the use of financial services regulation to affect climate change and advance other ESG objectives is premised on the view that public companies should focus on maximizing shareholder value. They can be expected to pushback on what they perceive to be financial services regulators seeking to advance environmental objectives outside of congressionally delegated authorities. In one stark example, Republicans and a key Democrat forced President Biden's nominee for the Federal Reserve's top regulatory seat—Sarah Bloom-Raskin—to withdraw from consideration in March 2022 due to her position on discouraging banks from lending to the fossil fuel industry. We expect the federal banking agencies will nonetheless continue to advance climate-related risk management proposals. Federal Reserve Vice Chair for Supervision Michael Barr stated in September 2022 that the Fed plans to work with the OCC and the FDIC on climate-related risk management guidance for large banks. The OCC and FDIC are led by officials who have been vocal proponents of implementing climate-risk management supervisory expectations, including climate scenario analysis for certain banks to develop strategic and risk management plans based on possible future climate scenarios. Republicans can be expected to closely scrutinize these actions, though their ability to impact this policy is limited.

The SEC issued its March 2022 *Proposed Rules to Enhance and Standardize Climate-Related Disclosures for Investors* in response to President Biden's May 2021 *Executive Order on Climate-Related Financial Risk* (EO 14030) directing Treasury Secretary Janet Yellen to report how FSOC members are integrating climate-related financial risk in their policies. The SEC's proposed rule amendments would require public companies to disclose direct emissions (Scope 1), emissions from the company's energy consumption (Scope 2), and downstream and upstream emissions in a company's value chain (Scope 3), along with the company's governance, risk management, and strategic planning related to climate risk. Climate disclosure remains a heavily politicized issue with growing opposition from industry advocacy groups and Republicans. A coalition of twenty-one Republican States Attorneys General sent a public comment to the SEC opposing the Proposed Disclosure Rule, arguing it exceeds the Agency's authority. Even if Republicans are not successful in preventing its implementation entirely, the Scope 3 reporting requirements will likely be eliminated, or significantly altered to reduce the burden on reporting companies.

With respect to enforcement, we expect the SEC will aggressively investigate claims of greenwashing. The SEC established the Climate and Environmental, Social and Governance (ESG) Task Force in March 2021 to identify material omissions or misstatements in issuers' disclosures of climate risks and analyze disclosure and compliance issues related to investment advisers' and funds' ESG strategies. As the SEC's enforcement actions against companies making materially misleading disclosures has typically been an apolitical pursuit, it is likely both chambers will

approve of the Task Force's expected ESG-related enforcement actions in 2023. Senate Banking Committee Chairman Brown urged SEC Chairman Gensler in May 2022 to include a required disclosure of ESG-related data in all future rules relating to human capital management and diversity.

Diversity, Equity & Inclusion (DE&I)

The Biden Administration prioritized advancing policies in support of DE&I efforts across the federal government through a series of executive orders within his first six months in office. These efforts included advancing racial equity and support for underserved communities (EO 13985) and establishing a whole-of-government approach on DE&I in the federal workforce with a timeline (EO 14035). There have been over 300 agency actions to support underserved and marginalized groups in the federal government as a result; these efforts have resulted in the most diverse administration in U.S. history.

Relatedly, there will be continued bipartisan interest in funding and supporting Community Development Financial Institutions (CDFIs) and minority-owned financial institutions. Sens. Mark Warner (D-VA) and Bill Hagerty (R-TN) will likely reintroduce the *Scaling Community Lenders Act* (S. 4537) designed to unlock more sources of liquidity and support for CDFIs to scale their activities and fuel more lending in low- and moderate-income (LMI) communities. The bill would authorize new resources to implement the CDFI liquidity enhancement program. In an effort to build long-term support for CDFIs, Sens. Warner and Mike Crapo (R-ID) formed the bipartisan Senate Community Development Finance Caucus (CDFC) in August 2022. The CDFC is dedicated to supporting the missions of CDFIs and Minority Depository Institutions (MDIs) to promote lending in LMI communities. Supporting CDFIs and MDIs will remain a priority for both parties in the 118th Congress as they attempt to reach underrepresented and underserved communities across the United States.

OCC leadership will continue to explore ways to encourage banks to increase the diversity of their board members. Acting Comptroller of the Currency Michael Hsu supports Nasdaq's SEC-approved "diversify or explain" listing rule and noted the Agency is considering "encouraging banks to make it a practice to nominate or consider a diverse range of candidates or requiring institutions to either diversify their board or explain why they have not." Whether banking agencies issue explicit guidance on increasing board diversity may depend on the outcome of several pending legal challenges to the Nasdaq rule, as well as pending legal challenges to the California laws requiring companies to have a certain number of female directors and directors from underrepresented communities. The FDIC and Federal Reserve may explore ways to encourage diversity of their board members as well.

Insurance

The federal government supervises several insurance programs and maintains general oversight of market conditions. The Biden Administration has shown particular interest in the role insurers might play in addressing climate change; it will continue to oversee implementation of the "covered agreements" with the EU and the UK. Additionally, the Federal Insurance Office as well as the Fed will partner with state regulators to participate in standard setting at the International Association of Insurance Supervisors. The *National Flood Insurance Program* (NFIP), administered by the Federal Emergency Management Agency, remains in an uncertain state because its authority has been extended in conjunction with annual government funding since 2017 instead of through reauthorization. Hurricane Ian highlighted the significant underutilization of NFIP policies despite the program's cost to taxpayers. Though nearly all observers agree that NFIP needs reform, reaching consensus on changes remains unlikely in the split Congress.

It is possible that Congress may act on other issues perceived by some to be insurance market failures, namely pandemic risk and wildfire risk. With pandemic risk, an earlier proposal to enact a backstop similar to the *Terrorism Risk Insurance Act* lost its chief sponsor when Rep. Carolyn Maloney (D-NY) lost her primary, but a bipartisan working group in the Senate may pick up that mantle. Proposed legislation to study the availability of wildfire insurance has made progress in the House in the 117th Congress and may be revived in the new year.

Housing Finance Reform

There is only a minute possibility for progress on housing finance reform in the 118th Congress. Senate Banking Committee Chairman Brown will continue to focus on housing access and affordability, but this is not a priority for the Republican House. After fourteen years, releasing the two Government-Sponsored Enterprises (GSEs), Fannie Mae and Freddie Mac, from conservatorship remains a partisan issue. House Republicans may continue to push the Federal Housing Finance Agency to increase oversight of these GSEs and may reject initiatives they view as focused on race rather than economic opportunity generally.

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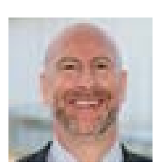

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Foreign Affairs

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Key Takeaways

- The 118th Congress will face a number of foreign policy challenges, including the Russian invasion of Ukraine; a newly empowered President Xi Jinping in China; a slowdown in the global economy; political instability, global conflicts and migration driven by food and energy shortages; convergence between hostile authoritarian powers; long-term challenges like terrorism and climate change; and the troubled relationship with Saudi Arabia and nuclear non-proliferation concerns raised by the breakdown of *Joint Comprehensive Plan of Action* (JCPOA) talks with Iran.
- The Biden Administration's response to these challenges, as outlined in the National Security Strategy released on October 12, 2022, seeks to renew American power at home and competitiveness abroad through a modern industrial policy and renewed system of alliances.
- The Democrat-led Senate Foreign Relations Committee is expected to support the Biden Administration's foreign policy by confirming ambassadorial nominees, increasing foreign assistance and considering legislation to promote competitiveness at home, even as some members use the confirmation process, oversight, foreign military sales (FMS), proposed sanctions, and outreach to foreign counterparts to exert pressure on human rights violators and advance policy priorities.
- The Republican-led House Foreign Affairs Committee is expected to attempt to block much of President Biden's agenda and to conduct thorough oversight of the Biden Administration's foreign policy aimed at uncovering alleged improper behavior by the administration and a failure to respond effectively to the rise of China, the fallout from the US withdrawal from Afghanistan, and other national security challenges.

Overview

The United States is now facing a geopolitical landscape unlike any in the modern era. We can discern a number of challenges, as well as some opportunities:

- The Russian invasion of Ukraine has broken peace in Central Europe, brought Sweden and Finland into NATO, and re-energized the European Union. US and NATO-led efforts to support Ukraine have held firm, but the war and resulting sanctions are having a global cost that is not easily borne beyond Europe and North America. Meanwhile, the growing US irregular presence in Ukraine and Russian President Vladimir Putin's nuclear saber-rattling are increasing the risk of direct conflict between NATO and Russia, even as aid for Ukraine became politicized during the election cycle.
- The long-expected election of Xi Jinping to a third term as China's leader promises Beijing will continue to be hostile to US and Euro-Atlantic interests as it seeks a dominant position in the world. The US-China rivalry continues to escalate, with Taiwan becoming a potential flashpoint.
- The global economy is sputtering under the weight of compounding burdens, including inflation, COVID-19, war-related tensions, the warping of supply chains, climate disasters, the slowdown of the Chinese economy, and disjointed policy responses.
- The effects of food and energy shortages are intensifying the already record highs of human migration and political fragility around the world and flaming global conflicts, even as international aid and conflict resolution efforts are consumed by the invasion of Ukraine.
- The resurgence of authoritarianism—and particularly growing convergence between countries hostile to Western values like Iran, Russia, and China—threatens the rule of law and portends more conflicts to come.
- Long-term challenges—terrorist networks; the proliferation of nuclear weapons; the rise of cyber and non-traditional security threats; climate change and natural disasters; and a widening of inequality in much of the world, including in the US—continue to stretch the fabric of societies and complicate planning for the future. Nonetheless, the disruptions the US and allies face may also offer opportunities to create new norms, institutions, partnerships, and economic models that better fit the modern world.

The Biden Administration's response to these challenges and opportunities, as outlined in the *National Security Strategy* released October 12, 2022, centers around the renewal of U.S. national power at home and our network of allies and partners overseas. In doing so, the administration ties domestic policy to foreign policy, uniting everything from semiconductors to combatting climate change under the umbrella of national security. The consequence is a proliferation of foreign policy priorities, with Russia and China at the top of the list, without any significant expansion of diplomatic capabilities. The cumulative effect—if successful—will be a new industrial policy that uses government investment and regulation to enhance American competitiveness and strength at home and overseas.

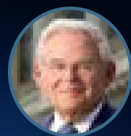
The Democratic Party under President Biden's leadership is expected to implement this vision by attempting to advance legislation promoting democracy, investing in domestic innovation, increasing public-private connectivity, and above all, being tough on Russia and China. Following better than expected mid-term election results, we expect the Democratic Party to pursue their priorities energetically while also looking for creative solutions to energy and food shortages, new forms of international trade agreements, and greater scrutiny of outbound investment.

The Republican Party, meanwhile, is expected to limit and constrain President Biden's agenda and turn voters against Democratic priorities. Republicans will likely question the President's foreign aid priorities and seek to reduce foreign assistance funding, even for Ukraine, preferring instead to focus on domestic priorities, the threat posed by China, and fallout from the US withdrawal from Afghanistan. Nonetheless, in the 118th Congress, members across the political spectrum are expected to compete to find new opportunities to deliver victories that resonate at home, making US foreign policy more volatile and partisan.

Expected Congressional Committee Leadership

Senate Foreign Relations Committee

Chairman



Sen. Bob Menendez
(D-NJ)
[current chairman]

Ranking Member

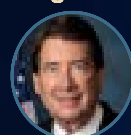
Sen. Jim Risch
(R-ID)
[current ranking member]

Senate Subcommittee on State Department and USAID Management, International Operations and Bilateral International Development

Chairman

Sen. Ben Cardin
(D-MD)
[current chairman]

Ranking Member



Sen. Bill Hagerty
(R-TN)

Sen. Marco Rubio
(R-FL)

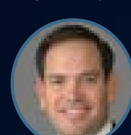
Senate State, Foreign Operations and Related Agencies

Chairman

Sen. Chris Coons
(D-DE)
[current chairman]

Ranking Member

Sen. Lindsey Graham
(R-SC)



Sen. Marco Rubio
(R-SC)

House Foreign Affairs Committee

Chairman

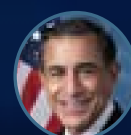
Rep. Michael McCaul
(R-TX)
[current ranking member]

Ranking Member

Rep. Gregory Meeks
(D-NY)
[current chairman]

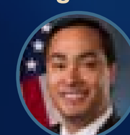
House Subcommittee on International Development, International Organizations, and Globally Corporate Social Impact

Chairman



Rep. Darrell Issa
(R-CA)
[most senior member below ranking member on subcommittee]

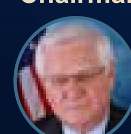
Ranking Member



Rep. Joaquin Castro
(D-TX)
[current chairman]

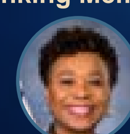
House State, Foreign Operations, and Related Programs

Chairman



Rep. Hal Rogers
(R-KY)
[current ranking member]

Ranking Member



Rep. Barbara Lee
(D-CA)
[current chairman]

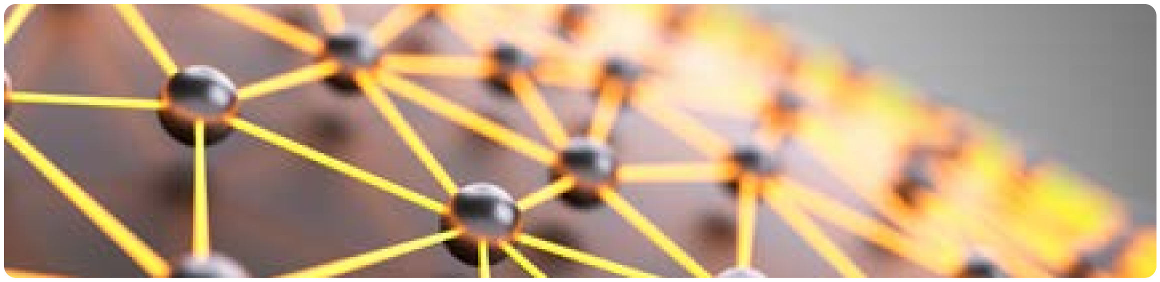
Working with a Divided Congress

With foreign policy and diplomacy largely in the hands of the executive branch, Democrats are at a significant advantage. Nonetheless, both parties in Congress can shape and influence foreign policy through the confirmation process, budgetary authority, oversight authority, legislation, and the foreign military sales (FMS) approval process.

The Democrat-led Senate Foreign Relations Committee, if chaired as expected by Sen. Bob Menendez (D-NJ), will likely continue efforts from the 117th Congress, namely supporting Ukraine and empowering countries around the world to challenge Russian and Chinese influence. We also expect ambassadorial confirmations to continue to move forward at a sluggish pace, with career officials in key posts prioritized.

The slim Democratic majority and Republican-held House, however, will make for a difficult environment in which to move legislation forward. In addition, some members will likely seek to use their authority to pressure the administration to be more proactive on issues of their particular concern, especially human rights and climate change. In this context, we expect to see significant debate on several key issues:

- Heightened oversight of FMS for countries with human rights concerns, or who have worked at cross-purposes to U.S. foreign policy goals, including Saudi Arabia and Turkey.
- Proposed mandatory sanctions as a signaling tool and punishment for individuals and countries that violate human rights standards, engage in corruption, or have perceived authoritarian and anti-democratic trajectories.
- Additional oversight of security assistance packages for the Ukrainian Armed Forces (UAF), during which debate is expected to focus on dwindling stockpiles, spending concerns, end-uses of US weapons, and the imperative of addressing Russian aggression.
- Expanded assistance and engagement with countries threatened by Russian aggression in Eastern Europe, the Balkans, and elsewhere.
- Increased assistance for global food security, migratory assistance, climate and natural disaster relief, and other humanitarian assistance for the *State, Foreign Operations and Related Programs* (SFOPS) appropriations bills.
- Immigration reform and efforts to address the root cause of migration to the US southern border.



- Renewal of the *African Growth and Opportunity Act* (AGOA) in 2025.
- Reauthorization of the economic provisions of the *Compacts of Free Association* (COFA) of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI) in Fiscal Year (FY) 2023 and of Palau in FY 2024, with a focus on both the role of long-term US financial assistance and the strategic importance of a U.S. presence in the Pacific.

Following an unexpectedly poor performance in the midterm elections, turmoil within the Republican party is expected to grow while factions within the party grow increasingly fractious. This could lead to significant changes to the committee selection process, and potentially, a weakening of leadership control over the caucus. That being said, the Republican-led House Foreign Affairs Committee, if chaired as expected by Rep. Michael McCaul (R-TX), will likely spend significant time and resources conducting thorough oversight of the Biden Administration's foreign policy. Republicans across the political spectrum are likely to support investigations, oversight hearings, and mandatory reporting aimed at uncovering alleged improper behavior by the Biden Administration and a failure to respond effectively to the rise of China and other national security challenges. One important exception, however, is the shared commitment to Africa shared by Chairman McCaul and Ranking Member Gregory Meeks (D-NY), who will likely seek passage (again) of their co-led *Countering Malign Russian Activities in Africa Act* (H.R. 7311).

Both parties in the next Congress will likely increase their outreach to leaders and parliamentary counterparts overseas, including through a vigorous return of congressional delegations (CODELs) after the pandemic lull, aimed at sending signals to partners, adversaries, and domestic audiences. In some cases, members may also seek to use conversations with foreign leaders to move diplomacy, including on American detainees unjustly held overseas, potential sources of energy, and support for member (and partisan) priorities.

Key Contacts

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Amb. Miomir Zuzul
Senior International Policy Advisor
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+1.202.942.6468

Healthcare/Life Sciences

Eugenia Pierson, Sonja Nesbit, Dan Kracov, Allison Shuren, Cate Brandon, Mahnu Davar, Jeff Handwerker, Kristin Hicks, Raqiyyah Pippins, Howard Sklamberg, Jami Vibbert, Paul Rudolf, Kristine Blackwood, Rosemary Maxwell, John McInnes, Monique Nolan, Nancy Perkins, Amanda Cassidy, Katie Pettibone, Bobby McMillin, Pari Mody, Alex Altman, Tyler Scandalios, Casey Brouhard, Mike Wood, Sunha Cha, Jackie Degann, Kasia Foster, Alyssa Lattner, Ali Peters, Alana Reid, Lori Wright, Mickayla Stogsdill, Grace Banfield, Peter Duyshart, Dorothy Isgur

Key Takeaways

- Congress has a number of healthcare items left to address this term, including FDA-related policy items left over from the passage of this year's *User Fee Act* (UFA) reauthorization, legislation to prevent cuts to physicians and labs, pandemic response, and federal funding.
- With Republicans in charge of the House by what will likely be a small margin, expect to see aggressive oversight, especially related to the COVID-19 pandemic and its origins, and implementation of drug-pricing provisions in the *Inflation Reduction Act* (IRA) in the absence of legislative bills supported by the conference signed into law.
- With a split Congress, some of the more ambitious items from President Biden's healthcare agenda—expanding Medicaid and adding additional benefits to Medicare—will have to wait until a more favorable legislative environment returns.
- We anticipate there could potentially be some appetite for more targeted bipartisan policy items, such as telehealth or reforms to *Medicare Advantage* (MA), though Congressional Budget Office (CBO) costs estimates could ultimately doom passage.
- Also look to the administration to take certain executive actions in an attempt to fulfill the remaining pillars of the Biden agenda, where possible, and Congressional Republicans charging such initiatives exceed the President's authority and must be sent to Congress for approval.

Closing Out the 117th Congress

Before the 118th Congress is sworn in and begins its work, the current Congress will have to contend with an end-of-the-year package. As with most years, the appropriations bills were not signed into law by September 30, leading to a continuing resolution (CR) which largely extended current federal funding levels through December 16. Members will revisit federal funding negotiations, which also is expected to serve as a likely vehicle for several policy riders. It is not clear how quickly these negotiations will resume given the large number of undecided House races and lack of clarity on the final size of the Republican majority in the House. Nonetheless, with House Democrats narrowly losing their majority in the new year, we expect a big push to include policy priorities that are unlikely to move under Republican control. Certain Democrats may also make noise about using the omnibus as a vehicle to expand abortion rights and funding, particularly in light of the number of state ballot initiatives on abortion that failed in several states across the country. Possible initiatives could include an attempt to repeal the Hyde amendment, though that effort and others are likely to fall short given the need for Republican votes in the Senate.

The omnibus package may also include policy riders left over from the Food and Drug Administration (FDA) UFA reauthorization process such as the *Verifying Accurate Leading-edge IVCT Development (VALID) Act* (H.R. 4128/S. 2209). The bill, sponsored by Sens. Richard Burr (R-NC) and Michael Bennet (D-CO), and Reps. Diana DeGette (D-CO) and Larry Bucshon (R-IN), would provide for FDA regulation of clinical in vitro tests, among other things. The legislation was removed from the UFA Reauthorization package that passed as part of the CR on September 30, and the end-of-the-year package is the last opportunity for Sen. Burr to pass the *VALID Act* before he retires. Other bipartisan policies under consideration include another Burr priority, the *Prepare for and Respond to Existing Viruses, Emerging New Threats, and (PREVENT) Pandemics Act* (S. 3799), as well as mental health legislation aimed to create mental health parity, expand the behavioral health workforce and address network deficiencies, dietary supplement and cosmetic product regulation, responses to recent decisions in the Genus and Catalyst cases, and relief for physician fee schedule cuts in Medicare. Reps. Ami Bera (D-CA) and Larry Bucshon (R-IN) have introduced H.R. 8800, the *Supporting Medicare Providers Act of 2022*, which would halt the 4.42 percent cuts to Medicare providers, and a bipartisan group of 46 senators recently wrote to Senate leadership asking them to address the issue. Spurred by recent FDA activity and media coverage, the omnibus package may also include accelerated approval reforms, including requiring confirmatory studies to begin during the FDA approval process and expedited processes for product withdrawal when effectiveness has not been confirmed by post-market studies.

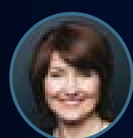
Despite heated debate over funding levels and abortion policy, the end-of-the-year package will be a must-pass bill, often used to threaten lawmakers' holiday recess. Expect House Democrats to fight to attach as many policies as they can to the package, while they still have the votes to do so. The biggest challenges, however, will be timing, as the window to negotiate with House Republicans will be smaller than expected given the desire by Republicans to delay discussions on the package until they have a better sense of the size of their majority in the coming year, and scope. The current list of member priorities far exceeds the amount of available offsets, so many of these policy issues are expected to carry into the new Congress.

Beyond working through their list of must-pass items before the end of the year, House Republicans will also use the lame duck session to prepare for their new majority in the 118th Congress. One of the top priorities for House Republicans is the [Commitment to America](), which sets forth their broad agenda and priorities for governing in the majority. This includes the Healthy Future Task Force, a 17 member panel led by Reps. Brett Guthrie (R-KY) and Vern Buchanan (R-FL), that includes subcommittees on affordability, modernization, treatment, security, and the doctor-patient relationship. The various subcommittees have held stakeholder roundtables and released white papers with high-level solutions, and we expect staff to use the lame duck period to translate those policy ideas into legislation.

Expected Congressional Committee Leadership

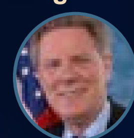
House Energy and Commerce Committee

Chairman



Rep. Cathy McMorris Rodgers
(R-WA)
[current ranking member]

Ranking Member



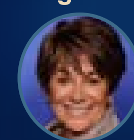
Rep. Frank Pallone, Jr.
(D-NJ)
[current chairman]

House Energy and Commerce Committee -- Health Subcommittee

Chairman

Rep. Brett Guthrie
(R-KY)
[most senior member below ranking member on subcommittee]

Ranking Member



Rep. Anna Eshoo
(D-CA)
[current chairman]

House Ways and Means Committee

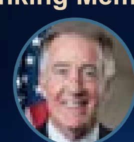
Chairman

Rep. Vern Buchanan
(R-FL)

Rep. Adrian Smith
(R-NE)

Rep. Jason Smith
(R-MO)

Ranking Member



Rep. Richard Neal
(D-MA)
[current chairman]

House Ways and Means Committee -- Health Subcommittee

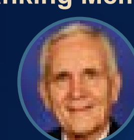
Chairman

Rep. Vern Buchanan
(R-FL)

Rep. Adrian Smith
(R-NE)

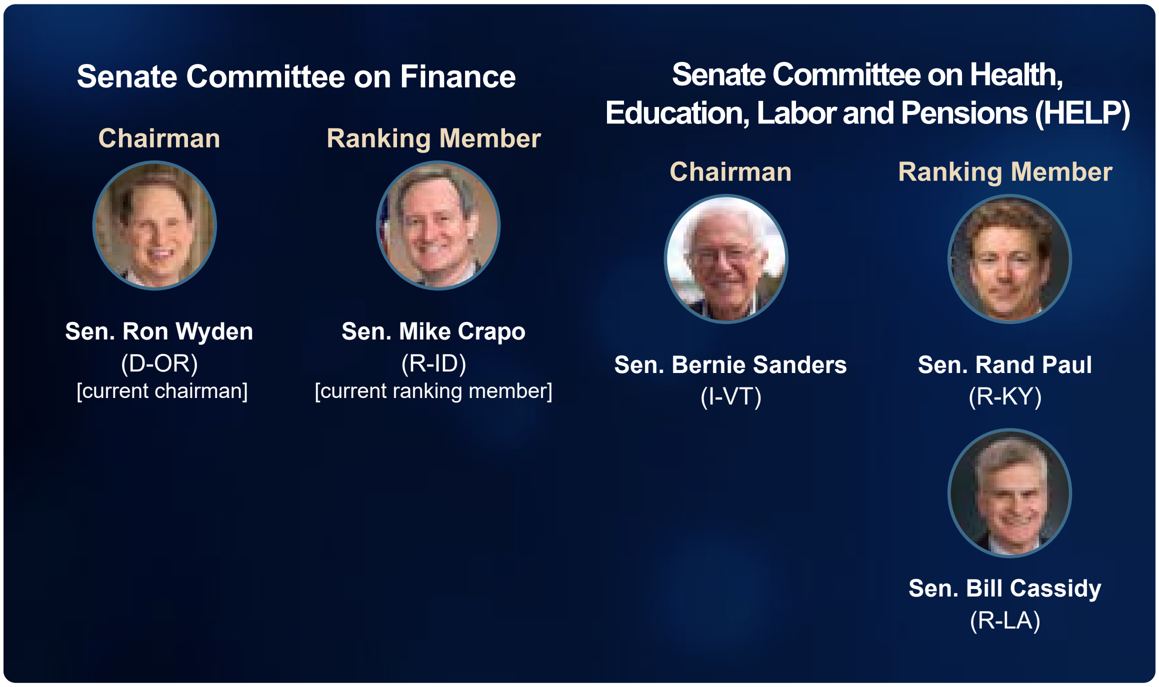
Rep. Jason Smith
(R-MO)

Ranking Member



Rep. Lloyd Doggett
(D-TX)
[current chairman]

Expected Congressional Committee Leadership



A House (and Senate) Divided

While history shows divided government often leads to gridlock, there are certain areas for potential bipartisan action. The new House Republican majority will naturally be reluctant to help the Biden Administration notch additional legislative wins ahead of the 2024 presidential election, particularly after a lackluster performance during the midterm elections, but they do need to demonstrate that they can govern—even in divided government. While many Republicans' focus will be geared toward oversight efforts, there may be some room for ongoing bipartisan discussions on mental health legislation, as well as legislation to extend certain telehealth flexibilities granted under the COVID-19 *Public Health Emergency* (PHE) and expand patients' access to innovative drugs, biologics, diagnostics, and devices.

We may also see some action to refine the IRA (Pub. L. 117-169), Democrats' key drug pricing reform bill approved this summer. Any efforts to expand these policies will hit a brick wall in the House as Republicans oppose Medicare price negotiation, but some Republicans may be open to more granular reforms to the IRA's Part D redesign or other measures.

In an effort to address rising healthcare costs, Democrats and Republicans will continue bipartisan oversight efforts into the pricing practices of Pharmacy Benefit Managers (PBMs). Rep. Brett Guthrie (R-KY), who is expected to chair the House Energy & Commerce Health Subcommittee and co-chairs the House Republican Health Future Task Force, has historically investigated insurance companies' involvement in the PBM market and their role in rising prescription drug costs. House Republicans will also focus some efforts on highlighting any waste, fraud and abuse related to COVID-19 relief spending, with a particular focus on the Biden Administration's response to the pandemic, in addition to discussing market-based healthcare solutions to expand access to rare-disease drugs and innovative health technologies.

COVID-19 Response and Pandemic Preparedness

Likely End of COVID-19 Public Health Emergency (PHE) and What it Means

The Department of Health and Human Service's (HHS's) COVID-19 PHE declaration is currently expected to extend until at least April 2023. Beyond that, it is difficult to predict with precision when the PHE declaration will end. HHS has indicated in several instances, however, that the decision to end the PHE declaration will follow the science, and that the Department will provide 60 days' notice before allowing the PHE declaration to lapse. By law, a PHE declaration must be renewed by HHS every 90 days or the PHE declaration ends automatically.

A separate but related "*Emergency Use Authorization* (EUA) declaration" allows the FDA to issue EUAs authorizing drugs, biologics and medical devices to be distributed, or used in certain ways, even though the product or use does not necessarily meet all of FDA's typical regulatory requirements. An HHS EUA declaration generally continues until the HHS Secretary terminates it. By law, HHS must provide a reasonable transition period before terminating an EUA declaration. FDA has indicated the PHE declaration and EUA declarations may, although not necessarily, end at different times.

FDA has recognized that it will take time for drug and device manufacturers, healthcare facilities, healthcare providers, patients, consumers, and FDA to adjust from the policies and operations implemented during the PHE to normal operations. FDA has stated that, although it will be important for the Agency to provide continued flexibility during the transition to a post-EUA-declaration environment, it will continue to maintain necessary regulatory oversight and protect consumers. With regard to medical devices in particular, FDA has stated in draft guidance that it intends to withdraw its COVID-19 medical device enforcement discretion policies either 180 days after the termination of the PHE declaration or 180 days after a prior point in time that FDA determines is appropriate (whichever occurs first). Manufacturers, distributors and importers of EUA-authorized products, products subject to a COVID-19 enforcement discretion policy, and the healthcare facilities and providers who rely on them, should be taking proactive steps to ensure they are prepared for the transition.

What is certain, however, is that Congressional Republicans will demand the administration quickly end the PHE, and will oppose any request for additional relief funding short of an extraordinary resurgence of COVID-19 or other complicating factor.

Overview

118th Congress (2023-2024)

2024 Preview

2022 Review

Committee Leadership

California

Defense/ National Security

Education

Energy & Environment

Federal Funding

Financial Services

Foreign Affairs

Healthcare/ Life Sciences

Immigration

Product Safety

Tax

Technology

Trade

Healthcare Access and Coverage

A. Congressional Priorities: Mental Health, Telehealth, Medicare Advantage

With Democrats narrowly losing control of the House, the party will have no leverage to advance through the chamber the more liberal healthcare coverage measures originally included in President Biden's 2020 campaign platform but omitted from the passage of the IRA (Pub. L. 117-169), including "*Medicare for All*" and other coverage expansion proposals, all of which will be put on hold.

Despite Republican opposition, the 2010 *Affordable Care Act* (ACA) reshaped the healthcare system in the U.S. by making significant changes to the individual insurance market, including requiring protections for people with pre-existing conditions, creating new insurance marketplaces, authorizing premium subsidies for people with lower incomes, and extending family insurance coverage of children until they turn 26. During his 2020 campaign, President Biden called for the expansion of the ACA's premium tax credits, which provide support for middle-class families who purchase insurance through the ACA marketplaces. While these tax credits were expanded in the IRA, Senate Democrats may try to negotiate toward a deal to make these tax credits permanent, which House Republicans would almost certainly oppose without significant concessions from Democrats. If successful, this expansion would permanently eliminate the current income cap on tax credit eligibility (now 400% of the federal poverty level), open up the credit to more people who could otherwise access employment-based insurance and key credit levels to a more generous set of plans. These steps would ultimately increase the number of people qualifying for the tax credits and lower out-of-pocket spending, and would therefore carry a hefty score which presents significant challenges for advancement.

House Republicans will use the Healthy Future Task Force platform to address access and coverage issues. The Healthy Future Task Force has identified several ways in which they plan to address healthcare affordability through the promotion of innovation and transparency, policies aimed at increasing patient choice through competition, safeguards in place to maintain expanded access to healthcare options such as telehealth, and policies aimed at expanded access to innovative technologies and therapeutics. The Task Force has not introduced legislation yet and is working to develop these policy ideas into legislation.

Congressional action on extending telehealth flexibilities will also be looming when the administration elects not to extend the PHE declaration. However, there continues to be disagreement about whether telehealth flexibilities should be temporarily or permanently extended, and how to pay for it. Congress included a provision in the FY 2022 omnibus spending package that would extend pandemic-era Medicare telehealth flexibilities for five months after the PHE ends.

Senate Democrats may focus on more bipartisan issues to expand healthcare access and coverage, including expanding patient access to mental healthcare services and increasing patients' access to innovative drugs, biologics and devices.

In September, the House passed by unanimous consent the *Improving Seniors' Timely Access to Care Act* (H.R. 3173) which seeks to modernize several aspects of the prior authorization process for MA plans to address inefficiencies in patients accessing care. The bipartisan legislation, which has the support of 326 members, passed by voice vote. The legislation has the endorsement of over 500 organizations. A Senate companion bill, which is identical to the House legislation, has 45 cosponsors, including 22 Republicans. The legislation has not advanced to date in the Senate for a vote.

Earlier this year, the Office of Inspector General (OIG) at the HHS released a report that found Medicare Advantage Organizations (MAOs) sometimes used prior authorization to delay or deny Medicare beneficiaries access to coverage, even though the requests met Medicare coverage rules. The report also found that MAOs denied payments to providers for some services that met both Medicare coverage rules and MAO billing rules. These findings will likely continue to drive bipartisan Congressional interest if the bill is not completed by the end of the year.

B. Centers for Medicare & Medicaid Services (CMS) Administrator's Priorities (Chiquita Brooks-LaSure); Health Equity

CMS Administrator Chiquita Brooks-LaSure's top priority has been health equity, and she has spoken repeatedly about advancing this goal through targeted quality measures, promoting the accessibility and affordability of healthcare and bolstering the sustainability of Medicare. These issues have been reflected in CMS' regulations and other activities during the Biden Administration, and CMS policy initiatives will likely continue this emphasis over the next several years even while the agency wrestles with implementation of the IRA.

CMS will continue to incorporate health equity into quality measurements and use performance-based payments aimed at increasing health equity, including incentivizing providers to reduce disparities in health outcomes and increasing the number of beneficiaries who have a physician/practice responsible for coordinating, managing and improving their care. CMS is also likely to standardize and analyze healthcare and demographic data across programs—traditional Medicare, Medicare Advantage, Medicaid, and the healthcare marketplace—to measure health equity and coverage in the future.

CMS will likely attempt to improve healthcare accessibility by focusing on the affordability of health insurance coverage through the health insurance marketplace, expanding access and incentivizing and facilitating expansion of state Medicaid programs, including improving access to mental healthcare and postpartum coverage in Medicaid. Over time, CMS will continue to emphasize value-based models and promote further accountable care programs in traditional Medicare.

C. Biden Administration's Response to *Dobbs* Decision

The Biden Administration takes a two-pronged approach in response to the *Dobbs v. Jackson Women's Health Organization* decision: (1) pulling federal levers, including issuing executive orders and guidance, to strengthen and clarify federal abortion access measures, and working with federal agencies to enhance abortion access and (2) fighting state actions that impinge on federal abortion access freedoms. Common law doctrine established through state challenges is the biggest predictor of the post-*Dobbs* legal landscape, while shifts in Congress are likely to have little impact on the course of abortion access.

1. Federal Actions

In response to the *Dobbs* decision, President Biden issued the July 8, 2022 Executive Order (EO) on *Protecting Access to Reproductive Healthcare Services* (EO 14076). The EO instructs the Secretary of HHS to submit a report within 30 days regarding how HHS can take additional action to protect and expand access to FDA-approved medication for abortion, expand access to a full range of reproductive health services, including family planning and procedures (e.g., access to emergency contraception and other contraceptive devices), and increase its outreach and public education efforts regarding access to reproductive health services.

President Biden subsequently issued the August 3, 2022 EO on Securing Access to Reproductive and Other Healthcare Services (EO 14079), directing the administration to "take further action to protect access to reproductive healthcare services and to address the crisis facing women's health and public health more broadly." Among other components, EO 14079 urges the Secretary of HHS to "consider action to advance access to reproductive healthcare services" for women, particularly those who travel out of state to have abortions. It is not clear from the language in the EO exactly which abortion services would be covered.

The Biden administration is also working closely with federal agencies to re-enforce existing protections and expand abortion access. For example, on October 2, 2022 the administration announced that the Department of Education will issue a reminder to universities that they cannot discriminate against students on the basis of pregnancy, including if a pregnancy has been terminated.

In addition, the Biden administration is working closely with HHS to expand abortion access. For example, HHS Secretary Xavier Becerra announced a number of changes and removed barriers to ensure access to abortions, including:

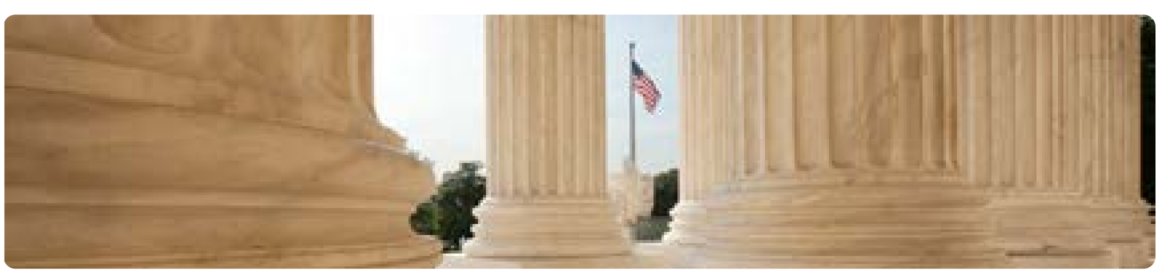
***Emergency Medical Treatment and Labor Act* (EMTALA) Clarification:** Issuing guidance, including a letter from Secretary Becerra, to clarify the obligation of hospitals and providers under EMTALA, 42 USC 1395dd, to provide to patients presenting at an emergency department with an emergency medical condition stabilizing care, including an abortion, if that care is necessary to stabilize their emergency medical condition.

***Guidance to Protect Patient Privacy*:** HHS Office for Civil Rights issued new guidance to help protect patients seeking reproductive healthcare, as well as the providers administering such healthcare. This guidance (1) addresses how federal law and regulations protect individuals' private medical information (known as protected health information or PHI) relating to abortion and other sexual and reproductive healthcare—and makes clear that providers are not required to disclose private medical information to third parties and (2) addresses the extent to which PHI is protected on personal cell phones and tablets, and provides tips for protecting individuals' privacy when using period trackers and other health information apps.

August 26, 2022 Letter to United States Governors: HHS Secretary Xavier Becerra and CMS Administrator Chiquita Brooks-LaSure issued a letter to US governors inviting them to work with CMS and apply for Medicaid 1115 waivers to provide increased access to care for women from states where reproductive rights are under attack and women may be denied medical care. The letter also underscored that current or proposed abortion restriction laws do not negate providers' responsibilities to comply with federal laws protecting access to emergency healthcare.

Federal Grants: On October 2, 2022, HHS announced $6 million in grants to expand access to family planning clinics that receive Title X federal funding.

Looking forward, the Biden administration will continue to work creatively to combat the *Dobbs*' impact on abortion access, including pulling federal levers to ensure abortion



access through executive orders, coordinating with federal agencies to expand and enhance existing rights and pressuring HHS to promulgate new rules within *Dobbs*' remit. Meanwhile, some Congressional Republicans may seek to expand on the *Dobbs* decision by introducing new, possibly more restrictive, legislation. For example, Sen. Lindsey Graham (R-SC) introduced a bill that would ban abortion nationally after 15 weeks, with exceptions for rape, incest and when the life of the mother is in danger.

Shifts in Congress will have little impact on post-*Dobbs* abortion access. Efforts stalled in the 117th Congress and appear unlikely to move forward next year, particularly given the interpretation of the impact of the *Dobbs* decision on motivating some voters to back Democrats in competitive Congressional districts, as well as the failure of abortion ballot initiatives in states such as Kentucky and Michigan. Further developments are likely to continue at the state level in Republican-led states, executive branch and the courts.

2. State Challenges

State challenges to EMTALA and other HHS guidance will continue to proliferate following the Court's *Dobbs* decision, creating a patchwork of abortion access providers and establishing a jigsaw puzzle of abortion restriction common law doctrine across the United States. For example, on July 14, the Texas Attorney General challenged the EMTALA guidance in a suit filed before the US District Court for the Northern District of Texas. The state is seeking, specifically, a declaratory judgment that the federal government is violating the law, that the EMTALA Guidance be set aside and preliminary and permanent injunctions prohibiting enforcement of the EMTALA Guidance. The District Court granted Texas's preliminary injunction on August 23. In granting this injunction, Judge James Hendrix held, in relevant part, "[p]laintiffs were likely to succeed on merits of their claim that guidance exceeded HHS's statutory authority and was not permissible construction of EMTALA." *See State of Texas v. Becerra*, 5:22-CV-185-H (N. Dist. Tex. 2022).

By way of further example, in Idaho, the Department of Justice (DOJ) filed a lawsuit to protect the rights of patients to access emergency medical care guaranteed by federal law. The suit challenges Idaho Code § 18-622 (§ 18-622), which was set to go into effect on August 25 and imposes a near-total ban on abortion. The complaint seeks a declaratory judgment that § 18-622 conflicts with, and is preempted by, EMTALA in situations where an abortion is necessary stabilizing treatment for an emergency medical condition. The United States also seeks an order permanently enjoining the Idaho law to the extent it conflicts with EMTALA. On August 24, the District Court granted a partial preliminary injunction that prevents Idaho from enforcing the new law when it conflicts with federal law. *See United States v. State of Idaho*, Case No. 1:22-cv-00329-BLW.

The extent to which courts will defer to HHS's EMTALA Guidance is unclear. Recent US Supreme Court decisions have weakened the Chevron doctrine, under which courts defer to federal agencies' interpretation of ambiguous laws. *See, e.g., American Hospital Association v. Becerra* (June 15, 2022) (reversed a DC Circuit decision that relied on Chevron to uphold CMS's payment policy for Medicare outpatient drugs administered to 340B hospitals). As well, *Chevron* deference usually applies only to agency pronouncements with the force and effect of law (*e.g.*, notice and comment rulemaking) and the EMTALA guidance is not a regulation issued through notice and comment.

There will be more challenges to HHS's abortion access guidance as states begin to grapple with the post-*Dobbs* environment.

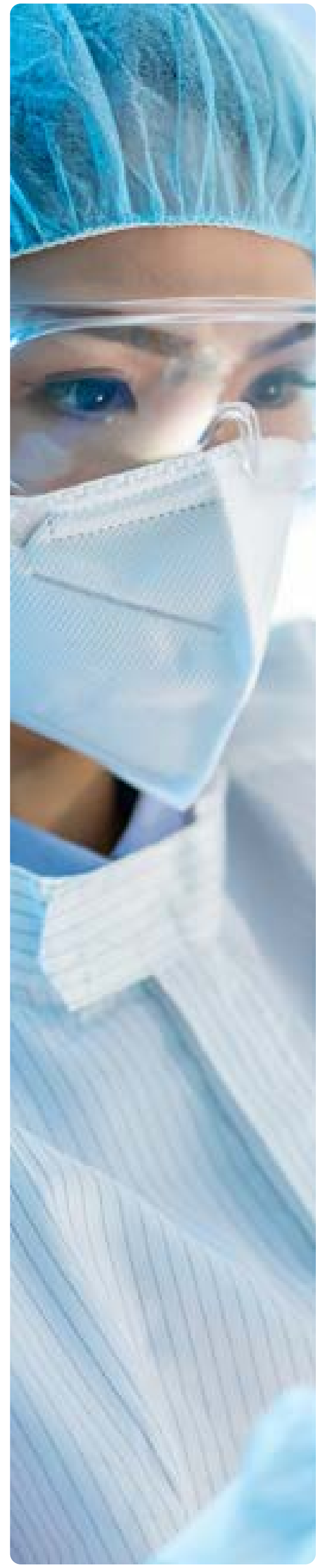
D. Physician Payments Cuts

1. CMS Actions

On November 1, 2022, CMS issued the Calendar Year (CY) 2023 Medicare Physician Fee Schedule (MPFS) and Quality Payment Program final rule. The final CY 2023 MPFS conversion factor is reduced from $34.61 in CY 2022 to $33.06 in CY 2023. The decrease is partly due to the expiration of a temporary three percent increase in the conversion factor for 2022 to offset increases in spending caused by changes to the evaluation and management (E/M) codes. Congress had thought it was out of the business of needing to pass annual "Doc Fix legislation" to avoid steep physician pay cuts after repealing the universally disliked Sustainable Growth Rate (SGR) formula in 2015. However, the methodology that Congress applied when it repealed the SGR still accounts for increases in MPFS spending by requiring a reduction in the conversion factor. Recent changes to the E/M codes, which are the most commonly reported services paid under the MPFS, have increased expected spending. Congress stepped in to limit reductions in the conversion factor in CY 2021 and 2022, and stakeholders are hoping they will do so again for CY 2023.

2. Congressional Response

While the end of the year package is likely to include temporary relief to Medicare physician fee cuts, CMS's quality-based payment adjustments under Merit-Based Incentive Payment Systems (MIPS) and Alternative Payment Models (APM) still produce around 10 percent pay cuts each year, forcing Congress to continue to offset them through legislative action. In response to fierce advocacy efforts and growing concern about future payment cuts, Reps. Bera (D-CA), Bucshon (R-IN) and others released a request for information on the Medicare Access and CHIP Reauthorization Act (MACRA) of 2015. The RFI cites the negative impact of these cuts on patient outcomes and access to care, and the need for a stable payment system in the future. The RFI requests stakeholder comments on the effectiveness of MACRA and implementation barriers, seeks proposals on how to increase provider participation in value-based models and seeks recommendations to improve MIPS



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and APM programs. While payment reform will take more time, relevant committees may pursue hearings and roundtable forums on potential recommendations coming out of the RFI exercise given the bipartisan support to stabilize payments.

E. Surprise Billing

Addressing surprise medical bills as a result of emergency care or care provided by out-of-network providers is a rare healthcare issue which has enjoyed bipartisan support. Enacted by Congress in 2020 at the end of the Trump administration, the *No Surprises Act* (the Act, enacted as a part of the *Consolidated Appropriations Act of 2021* (Pub. L. 116-260)) aims to curb surprise billing by, among other reforms, (1) prohibiting out-of-network providers from charging commercially-insured patients more than their in-network cost-sharing amount for emergency and non-emergency services in certain circumstances and (2) creating a federal baseball-style "independent dispute resolution" (IDR) process for resolving payment disputes between insurers and providers for the remainder of an out-of-network bill. The Act, touted as a major legislative achievement by Republicans and Democrats, has been subject to a much-criticized rollout by the Biden administration, which had to move quickly to issue implementing regulations to support the law's January 1, 2022 effective date.

One area of contention surrounding the Act's implementation involved the probative value during the IDR process of the "qualifying payment amount" (QPA), a metric calculated by insurers that is generally intended to reflect the median in-network rate for the same or similar item or service. Under the Act, the QPA establishes the basis for calculating a patient's maximum cost-sharing obligation for out-of-network services governed by the law and is among the factors arbitrators must consider when evaluating payment disputes. The regulations issued by the Biden administration required arbitrators to presume the QPA—the calculation of which insurers are not required to validate and which regulators indicate cannot be challenged or questioned during an IDR dispute—represents the appropriate payment rate for the disputed out-of-network bill, unless a party (i.e., the provider) presents credible evidence to clearly demonstrate otherwise.

This interpretation of the Act found support among insurers but was disputed vigorously by provider groups, who sued successfully to vacate the regulatory provision in district court, with support from bipartisan members of Congress. This August, the Biden Administration issued a new final rule calling on arbitrators to determine payment disputes based on the offer "that best represents the value" of the out-of-network bill, taking into consideration all statutory factors. Although updated regulations removed the language the district court found objectionable, IDR entities are still instructed to consider other information beyond the QPA only if relevant, credible and not already accounted for in the QPA. These modified regulations—which some providers have argued continue to give the upper hand to the QPA—also were immediately challenged in court by provider groups in litigation that remains ongoing.

This new Congress appears unlikely to take up additional legislation on surprise billing; however, it is possible legislators will continue to weigh in on key questions facing the Biden administration as they implement the law. One important decision relates to the scope of the Act: the statute specifically impacts surprise bills generated from hospitals and ambulatory surgery centers, yet allows expansion to other sites of care if provided for by regulation.

At least one Democrat has publicly advocated for expansion to other care settings, though a broader scope may be subject to push-back from Republicans who may argue the law already targets the settings most likely to generate surprise bills. Another question involves how aggressively HHS will implement the Act, including the level of oversight the Biden Administration will exert over the actions of both insurers and providers. Republicans, who generally appear sympathetic to provider concerns about unintended consequences of the law, may seek out active policing of insurers who, for example, are alleged to have calculated the QPA metric incorrectly or dropped providers from their networks where they believe the QPA results in a lower reimbursement rate than the contractually agreed upon in-network amount.

F. Enforcement Trends (CMS, OIG, and DOJ)

In FY 2021, the federal government set another record for the largest annual total for healthcare fraud judgments and settlements, winning or negotiating more than $5 billion. In connection with that total, the DOJ opened more than 830 new criminal healthcare fraud investigations, and inquiries from the HHS OIG resulted in more than 500 criminal actions against people or organizations for Medicare and Medicaid-related crimes and almost 670 civil actions, which include false claims lawsuits and civil monetary penalty settlements.

A few broad enforcement trends can be discerned from these hundreds of disparate cases and claims, and because the executive branch drives law enforcement priorities, these trends are very likely to continue under the Biden Administration, despite Republicans taking control of Congress in 2023.

First, regulators continue their pandemic-related enforcement and oversight efforts, including a coordinated, multi-agency focus on fraud and abuse related to telehealth services. On July 20, 2022, OIG released a special fraud alert, highlighting the growth and prevalence of fraudulent and suspect arrangements within telemedicine and telehealth. On the same day, DOJ announced that it charged telemedicine company executives, owners and executives of clinical laboratories, durable medical equipment companies, marketing organizations and medical professionals for $1.2 billion in health fraud, stemming in part from the Agency's increased focus on fraudulent telemedicine schemes, while the CMS and the Center for Program Integrity announced it took adverse administrative actions against providers involved in similar telehealth schemes. OIG also recently conducted an analysis of Medicare fee-for-service claims data and

MA encounter data for the first year of the pandemic from March 1, 2020–February 28, 2021. From that review, the Agency found that 1,714 providers out of approximately 742,000 whose billing for telehealth services poses a high risk to Medicare. In response, OIG issued the following recommendations to CMS: (1) strengthen monitoring and targeted oversight of telehealth services, (2) provide additional education to providers on appropriate billing for telehealth services, (3) improve the transparency of “incident to” services when clinical staff primarily delivered the telehealth service, (4) identify telehealth companies that bill Medicare, and (5) follow up on the providers identified in this report. CMS concurred with OIG’s recommendation to follow up on the providers identified in the report, but did not explicitly indicate whether it concurred with the other four recommendations.

Additionally, in recent years, DOJ and OIG have increasingly focused enforcement efforts on suspect relationships and arrangements involving clinical and genetic laboratory diagnostic companies. In April 2022, OIG issued Advisory Opinion 22-16, approving a manufacturer-sponsored genetic testing and counseling arrangement, but the opinion emphasized the importance of implementing strong guardrails to restrict commercial use of testing data and the need for compelling facts and circumstances that demonstrate the parties’ commitment to protecting against the risk of fraud and abuse in the arrangement. Furthermore, clinical laboratories and genetic testing facilities continue to be the subject of many ongoing and recently settled enforcement actions and the industry remains a significant focus of the current OIG Work Plan. Although telehealth considerations may add some degree of complexity to a subset of these cases, lab-focused investigations continue to center around the fundamental question of medical necessity. The sheer number of recently initiated enforcement actions involving laboratories, however, indicates a strong renewed focus on the industry.

DOJ and OIG have also continued the focus from prior administrations on the investigation of manufacturer relationships with Electronic Health Record (EHR) and clinical decision support providers. For example, in March 2022, DOJ intervened in a *qui tam* action against Modernizing Medicine, Inc. (MMI), an EHR software provider that failed to comply with federal standards from the Office of the National Coordinator. The relator alleged in that case that the EHR directed customers to specific labs on a per-lab-order fee basis, provided “e-couponing companies” a financial benefit to prescribe drugs and influenced prior authorization companies to assist with increased prescribing. Several other recently settled cases demonstrate that MMI is not the only EHR company that has pursued business models that create risk for the end users of their software. Among the claims in these recent cases are allegations that EHR providers falsely obtained certification for EHR incentive programs, paid kickbacks to customers for promoting EHR products and failed to ensure that software could reliably and accurately record, access and/or transmit essential patient data.

OIG and DOJ also remain focused on priorities from previous years including (1) improper or sham speaker programs, (2) consulting arrangements with healthcare providers, (3) nurse support and clinical educator arrangements, and (4) co-pay assistance in Medicare Part D.

G. *Protecting Access to Medicare Act* (PAMA) Reforms

To better align Medicare and private payor spending on Clinical Diagnostic Lab Tests (CDLT), Congress passed PAMA. The legislation, passed in 2014, instructed the Centers for Medicare and Medicaid Services (CMS) to establish a new method for determining Medicare's Clinical Laboratory Fee Schedule (CLFS) payment rates for CDLTs. As part of the new method, CMS requires applicable laboratories or laboratories meeting specific requirements, to report their private-payer rates, which CMS employs to calculate each test's volume-weighted median to determine CLFS payment rates. CMS requires applicable laboratories to report private payment rates every three years starting in 2017. However, Congress has delayed the second data reporting deadline three times, with the current deadline set for 2023.

CMS's applicable laboratory definition requires, among numerous conditions, laboratories to receive more than 50 percent of their Medicare revenues from the CLFS and the Physician Fee Schedule (PFS), a component hindering hospital outpatient and physician-office laboratories from qualifying as applicable laboratories. Excluding such entities, however, artificially deflates CLFS payment rates as hospitals tend to receive higher private payer rates for laboratory tests due to their heightened negotiating leverage, according to representatives of the laboratory industry. In 2020, Congress directed the Medicare Payment Advisory Commission, partly due to the significant drop in CLFS payment rates, to conduct a study to determine a less burdensome and more representative method for calculating CLFS payment rates. The Commission's resulting method consists of a sample survey of independent, hospital and physician-office laboratories. According to the Commission, surveying a portion of the population instead of its entirety reduces the number of applicable laboratories required to report private-payer data by 70 percent. Additionally, the Commission believes including hospital outpatient and physician-office laboratories in the sample survey increases Medicare CLFS spending, a conclusion based partly on the Commission's finding that the two entities received 45 percent to 53 percent higher private-payer rates than independent laboratories in 2016.

In June 2022, Sens. Richard Burr (R-NC) and Sherrod Brown (D-OH) introduced the *Saving Access to Laboratory Services Act* (SALSA, S. 4449). This bipartisan bill directs CMS to conduct a sample survey every four years of applicable laboratories' private-payor rates for each widely available CLDT. The legislation excludes non-widely available tests to prevent newer, high-cost tests from exaggerating CLFS payment rates. Supporters of the legislation believe it would avoid the need for Congress to issue temporary fixes to address significant cuts to CLFS payment rates as it has done in previous years. Reps. Bill Pascrell (D-NJ), Richard Hudson (R-NC), Scott Peters (D-CA), Kurt Schrader (D-OR), and Gus Bilirakis (R-FL) introduced companion legislation in the House.

With a Republican turnover in the House and Democrats remaining in control of the Senate, the 118th Congress will seek to include legislation delaying the second reporting deadline to the end of year package. Given the short window to legislate and negotiate on the year end bill, Congress will not have time to pass a more permanent fix, like SALSA. A permanent fix is more costly and will very likely not have support in the Republican-controlled House due to its cost.

Drug Pricing

A. Implementation of the Inflation Reduction Act

A key focus for CMS in the coming year will be the implementation of the IRA (Pub. L. 117-169), which President Biden signed into law on August 16, 2022. The IRA includes a package of significant prescription drug pricing measures, such as a Medicare Drug Price Negotiation Program, inflation rebates for Medicare drugs and Part D benefit redesign.

With limited exceptions, the IRA refers to CMS implementing the drug pricing provisions through sub-regulatory guidance, such as program instructions for the first several years. Initial guidance will likely focus on the Drug Price Negotiation Program, with the HHS Secretary selecting the first 10 Part D drugs by September 1, 2023, and the inflation rebates, which have already started accruing for Part D drugs and will begin accruing for Part B drugs in January.

The IRA will also drive structural changes within the Agency. CMS recently established a new Medicare Drug Rebate and Negotiations Group within the Center for Medicare, which will lead implementation of the Drug Price Negotiation Program and inflation rebates. This new group will be made up of six divisions, focused on issues such as contract support, manufacturer compliance and oversight, data assessment, and drug price negotiations. CMS will move quickly over the next several months to increase its capacity to implement and oversee the new IRA programs. Administrator Brooks-LaSure has indicated that the Agency intends to open at least 100 new positions this fall, with a focus on bringing in more individuals with clinical and negotiation experience.

To further highlight their opposition to the IRA, House Republicans will focus on oversight of the IRA and its implementation. House Energy and Commerce Committee Ranking Member Cathy McMorris Rodgers (R-WA) and retiring Ways and Means Committee Ranking Member Kevin Brady (R-TX) have already formally requested HHS Secretary Becerra provide additional information and regularly brief Congress on the implementation of the IRA. These efforts will continue in the new Congress, and will include a careful eye to ensure that CMS does not exceed its authority to pursue technical fixes on their own that may require Congress to act.

B. Healthy Future Task Force

The Healthy Future Task Force has put forth its set of Republican healthcare policies that is intended to promote a “modernized and personalized approach to health that focuses on lower costs, more options and peace of mind.” The Treatment Subcommittee tackled efforts to lower drug costs specifically.

The Task Force has said Republicans plan to reintroduce their drug pricing legislation, the *Lower Costs, More Cures Act* (H.R. 19) in the next Congress. The legislation, if reintroduced, could serve as the basis for drug pricing policy in the House. The bill would have to be modified to reflect the enactment of the IRA but could largely remain the same as previous iterations including provisions prohibiting “pay for delay” agreements, efforts to incentivize health plans to share drug discounts with patients at the pharmacy counter, efforts to promote transparency and competition, and Medicare Part D reform.

However, because many of the reforms proposed by Republicans were aimed at preventing the types of policies included in the IRA, they could revise the legislation or shift their focus to other policy areas altogether. Republicans are expected to focus their message on their support for biomedical and pharmaceutical R&D and innovation, specifically alleging the negative impacts the IRA will have on the industry.

C. 340B

1. AHA/OPPS Case and Next Steps from CMS

Section 340B of the Public Health Service Act (340B) allows certain providers, including qualifying hospitals, federal grantees from the Health Resources and Services Administration (HRSA), the Centers for Disease Control (CDC), the HHS Office of Population Affairs, and the Indian Health Service, to purchase certain covered outpatient drugs from manufacturers at discounted prices.

Starting in 2018, CMS reduced the OPPS payment for drugs (including biologicals) acquired by hospitals under the 340B drug discount program from Average Sales Price (ASP) plus 6 percent, (the general payment rate for most separately paid drugs under the OPPS) to ASP minus 22.5 percent, citing the reduced cost of acquiring 340B drugs because of the program’s deep drug discounts. The OPPS is a budget neutral payment system; paying less for certain items (i.e., 340B drugs) reduces total OPPS spending. To keep total spending at the expected level, CMS increased the payment for all services paid under the OPPS to offset the reduction in spending on 340B drugs.

From the outset, this OPPS 340B drug payment policy sparked litigation, recently culminating in the Supreme Court’s decision in *American Hospital Association v. Becerra* (No. 20-1114, 142 S. Ct. 1896, 2022 WL 2135490). On June 15, 2022, the U.S. Supreme Court held that HHS may not set different drug payment rates for different hospital groups (i.e., 340B hospitals vs. hospitals that do not participate in the 340B program) without having conducted a survey of hospitals’ drug acquisition costs. The Supreme Court’s decision concerned OPPS drug payment rates for 2018 and 2019, but it was based on an interpretation of the OPPS statute’s drug payment provisions and thus has implications for payment rates for 2020 through 2022.

CMS is planning to pay ASP plus 6 percent, for separately payable drugs—340B and non-340B—in 2023, but the Agency is "still evaluating how to apply the Supreme Court's recent decision to prior cost years."

While the Supreme Court unanimously held that the 2018 and 2019 reimbursement rate cuts for 340B hospitals exceeded CMS's statutory authority, how the error will be remedied remains to be seen. On remand, the plaintiffs asked the district court to hold unlawful the 2020, 2021 and 2022 OPPS rules and to order CMS to promptly correct their past underpayments to plaintiffs and their members for 2018–2022 and to immediately begin reimbursing 340B drugs at ASP plus 6 percent, for the remainder of 2022. On September 28, 2022, the District Court vacated the prospective portion of the 2022 reimbursement rate and court directed CMS to begin paying hospitals the full amount for 340B drugs for the remainder of 2022. CMS stated on October 13 that it is "uploading revised OPPS drug files that will apply the default rate (generally ASP plus 6 percent,) to 340B-acquired drugs for the rest of the year "and also will reprocess claims paid on or after September 28, 2022, using the default rate (generally ASP plus 6 percent,). However, remedies for underpayments for 2018 through the earlier part of 2022 remain under consideration.

While the government indicated that it agrees that the Supreme Court's decision as to the 2018 and 2019 calendar years effectively resolves plaintiffs' claims relating to the 2020, 2021 and 2022 calendar years, the federal government moved to remand the case to CMS (without vacatur) to allow the Agency to determine in the first instance what remedial measures are appropriate. The federal government has suggested that CMS may conduct a survey of hospital acquisition costs that could validate the rates at issue or otherwise inform the appropriate remedy.

On November 1, 2022, CMS issued the CY 2023 Medicare Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System Final Rule with Comment Period (CMS 1772-FC). As expected, and as a result of the *American Hospital Association v. Becerra* decision, CMS formally finalized a general payment rate of ASP plus 6 percent, for drugs and biologicals acquired through the 340B Program for CY 2023. CMS will also implement a 3.09 percent, reduction to the payment rates for non-drug services to achieve budget neutrality for the 340B drug payment rate change for CY 2023.

It is not entirely clear at this point whether the remedy for incorrect 340B drug payments from 2018-2022 will be determined by the District Court or in future rulemaking. In the final OPPS rule, CMS stated that "[i]n order to balance our ability to give the remedy the type of deliberation encouraged by the Medicare statute and Administrative Procedure Act, stakeholders' ability to comment and their interest in a timely remedy, we plan to issue a separate proposed rule detailing our proposed remedy for CYs 2018–CY 2022 in advance of the CY 2024 OPPS/ASC proposed rule" but also acknowledged the "motion pending before the district court with respect to this issue." (OPPS final rule at 652.).

2. Contract Pharmacies

As a condition of participating in Medicaid, Section 340B requires pharmaceutical manufacturers that have entered into an agreement with the Secretary of HHS to "offer each covered entity covered outpatient drugs for purchase at or below the applicable ceiling price if such drug is made available to any other purchaser at any price." 42 USC § 256(b)(a)(1). Some 340B covered entities historically have elected to dispense 340B drugs to patients through contract pharmacy services, an arrangement in which the 340B entity signs a contract with a pharmacy to provide pharmacy services.

In recent years, the 340B program has received attention through inquiries into some manufacturers' moves to limit the role of contract pharmacies. In 2020, some manufacturers began to impose restrictions on the sale of 340B drugs to covered entities' contract pharmacies. Then California Attorney General Xavier Becerra submitted a letter encouraging the Secretary of HHS and Administrator of HRSA to address drug manufacturers' alleged unlawful refusal to provide discounts for 340B drugs shipped to pharmacies that administer drugs on behalf of covered entities.

In December 2020, HHS issued Advisory Opinion 20-06, under which HHS asserted that the 340B statute requires manufacturers to recognize that covered entities may use an unlimited number of contract pharmacies for dispensing 340B drugs. Following the opinion, several manufacturers sued HRSA, asserting that the federal government failed to comply with APA requirements in issuing the advisory opinion (and subsequent letters similarly asserting violations of the 340B statute). The district courts to date have taken different views on the issues presented, although each court to consider the issue has recognized that the 340B statute is silent with respect to contract pharmacy arrangements. Each of these lawsuits is currently being appealed, with decisions expected in 2023.

D. Pharmacy Benefit Managers—FTC study

On June 6, 2022, the five Federal Trade Commission (FTC) commissioners unanimously voted to conduct a 6(b) study of the six largest PBMs, including CVS Caremark, Express Scripts, Inc., OptumRx, Inc., Humana Inc., Prime Therapeutics LLC, and MedImpact Healthcare Systems, Inc. This 6(b) study will closely examine the competitive impact of PBM practices, which has been a growing concern since the increase in vertical mergers between PBMs, health insurers, providers, and other sectors of the healthcare market.

Specifically, the FTC will evaluate whether these vertically integrated PBMs, among other things, steer patients to PBM-affiliated services, increase cost of drugs, increase patient costs, and impose unnecessary administrative requirements and prior authorization. The recent unanimous vote comes after the FTC voted against a 6(b) study of PBM practices on February 17, 2022, and after receiving numerous public comments in response to a subsequent request for information. The FTC investigation will continue post-election, and it will be interesting to see whether the report is critical of any PBM practices.

E. State Price Reporting Laws

Since 2016, nearly twenty states have enacted some form of price transparency reporting for pharmaceutical manufacturers, with requirements including periodic price reporting, as well as reporting tied to price increases and the introduction of new drugs. In recent years, states have also begun enforcement actions. Nevada reported that it imposed $17.4 million in fines in 2019 on 21 diabetes drug manufacturers who failed to timely comply with its 2017 drug pricing transparency law, while California issued fines totaling $17.5 million in 2020 to over a dozen manufacturers who failed to report price increases.

In 2021 and 2022, new reporting requirements took effect in several states, such as Minnesota (SF1098), North Dakota (HB1032) and Virginia (HB2007), while other states amended existing requirements and/or implemented or expanded the role of price transparency oversight boards, such as Colorado (SB175), Maine (LD686), Nevada (SB380), Oregon (SB844), and Washington (SB5532). Lawmakers in at least six other states—Pennsylvania, Iowa, Massachusetts, New York, North Carolina, and Rhode Island—and the House of Representatives considered new price transparency legislation in the 2021–2022 session. Although a federal price transparency bill appears unlikely in 2023, recent state legislative trends suggest additional states are likely to enact state price transparency reporting laws in the near term.

Food and Drug Administration (FDA)

A. Commissioner's Priorities (Dr. Robert Califf)

Throughout his tenure as FDA Commissioner, Dr. Robert Califf has laid out several important priorities for the FDA. Arguably, Dr. Califf's number one priority, by necessity, has been to ensure FDA continues to respond effectively to the COVID-19 pandemic. Dr. Califf has expressed other important priorities as well, including striking a balance between innovation and safety when FDA reviews and approves drug and device applications, strengthening the FDA's food and tobacco programs, continuing to respond effectively to the opioid crisis, and working with industry to fight misinformation about medical products (COVID-19-related products in particular). Having long been a proponent of using robust real-world data in the medical space, Dr. Califf is also likely to continue prioritizing the modernization of FDA's digital infrastructure, supporting the use of real-world evidence in FDA's regulatory decision-making process, and championing efforts by industry to ensure the real-world evidence presented to the Agency is reliable and meaningful. Additionally, a more recent important priority of Dr. Califf's is to ensure FDA responds effectively to the Monkeypox outbreak, now subject to its own PHE and EUA declarations as of August. The FDA has taken various steps to implement all of these priorities, including issuing several EUAs for products to combat monkeypox and commencing a comprehensive review of the FDA's food and tobacco programs.

Commissioner Califf and FDA are likely to carry all of these priorities into 2023. Further, as FDA continues to get a better handle on the pandemic as it moves towards endemic status, FDA will continue to have more room to focus on those priorities not directly related to COVID-19.

B. User Fee Act Reauthorization Implementation

On September 30, President Biden signed the *FDA User Fee Reauthorization Act* of 2022 (Division F of the CR, Pub. L. 117-180), after negotiations on a UFA reauthorization measure stalled over the summer. In the end, Congress passed a clean reauthorization, leaving out "super riders" on diagnostic tests (*VALID Act*, incorporated in the *FDASLA Act of 2022*, S. 4348), dietary supplement listing requirement and cosmetics safety. However, the enactment of the law will now provide FDA with its drug, biologic and device review funding and commit the Agency to the negotiated performance goals and procedures for Fiscal Years 2023–2027.

Despite a strong push to clarify FDA's authority over diagnostic tests, the *VALID Act* was not included in the UFA package. Since the 1990's, FDA's authority over laboratory developed tests (LDTs) has been a source of controversy. Following pushback on an October 2014 draft guidance that proposed a "risk-based approach to regulatory oversight of LDTs," FDA dropped its proposal and urged Congress to adopt a legislative solution. The legislation has evolved significantly from the *Diagnostic Accuracy and Innovation Act* to the latest draft of the *VALID Act*, which the Senate HELP Committee advanced in June. There will likely be renewed efforts to attach the *VALID Act* to an end-of-year package, if possible. If those efforts are unsuccessful, FDA Commissioner Robert Califf has indicated that FDA will lean harder on its existing authorities, stating that "federal rulemaking" is "always an option for the FDA."

The end-of-year package may also include measures to increase diversity in clinical trials and reform the accelerated approval pathway, as well as provisions that would effectively reverse two recent court decisions:

In response to the Eleventh Circuit's decision in *Catalyst Pharmaceuticals, Inc. v. FDA*, earlier drafts had proposed largely reverting to FDA's longstanding interpretation, under which an orphan drug designation is limited to the orphan indication and does not cover a broader orphan use or population for which a drug may be designated but is not approved for marketing. This leaves in place Catalyst, which held that an orphan designation of a drug in the adult population should have blocked the approval of the same drug in a pediatric population, which fell within the original orphan designation.

1. In response to the Eleventh Circuit's decision in *Catalyst Pharmaceuticals, Inc. v. FDA*, earlier drafts had proposed largely reverting to FDA's longstanding interpretation, under which an orphan drug designation is limited to the orphan indication and does not cover a broader orphan use or population for which a drug may be designated ,but is not approved for marketing. This leaves in place *Catalyst*, which held that an orphan designation of a drug in the adult population should have blocked the approval of the same drug in a pediatric population, which fell within the original orphan designation.

2. In response to the D.C. Court of Appeals decision in *Genus Medical Technologies v. FDA*, earlier drafts had proposed deeming certain contrast agents, radioactive drugs and drug dispensing devices to be drugs, and not devices. In *Genus*, the Court had held that FDA could not classify a contrast agent as a drug when it met the definition of a device.

The end-of-year package may also include other FDA reforms, including the *PREVENT Pandemics Act* (S. 3799) or provisions from the *Cures 2.0 Act* (H.R. 6000). Led by Senate HELP Committee Chair Patty Murray (D-WA) and Ranking Member Richard Burr (R-NC), the *PREVENT Pandemics Act* includes policies aimed at strengthening the medical product supply chain, accelerating the development and review of countermeasures and mitigating medical product shortages. Meanwhile, the *Cures 2.0 Act* proposes a package of FDA reforms, such as mandating a report to Congress on FDA review of cell and gene therapy products, establishing two new FDA Intercenter Institutes and supporting the use of real world evidence. The bill has not been considered by the House Energy & Commerce Committee, but popular provisions could be in play as legacy items for the retiring Rep. Fred Upton (R-MI) though a truncated lame duck negotiating session makes it less likely.

C. Infant Formula Shortage and Response

After reports of contamination in Abbott Nutrition (Abbott) infant formula as early as September 2021, FDA investigated and inspected Abbott's Sturgis, MI manufacturing facility. On February 17, 2022, Abbott voluntarily recalled the potentially affected product and on May 16, 2022, Abbott and the DOJ, acting on behalf of FDA, entered a consent decree of permanent injunction requiring Abbott to take corrective actions following the FDA inspection of its Sturgis facility. The recall and subsequent cease in production at the plant caused a strain on the infant formula supply chain. There have been several bipartisan congressional inquiries into the timeliness and effectiveness of FDA's response. The House Oversight and Reform Committee's investigation into the shortage included hearings with FDA Commissioner Robert Califf and executives for infant formula manufacturers. The HHS OIG also announced a review to evaluate FDA's oversight over the inspection and recall process for infant formula. FDA released an internal report describing key issues that led to the contamination and shortage, which was condemned by Sen. Richard Burr (R-NC) as inadequate for failing to provide an explanation for delays between the time when FDA became aware of the issues with infant formula production and when it took action to respond.

In addition to FDA, the Department of Agriculture (USDA), FTC, Biden administration, and Congress took action in response to the infant formula shortage. The USDA offered nationwide waivers to increase access to infant formula for families in need under new authority from the *Access to Baby Formula Act* (Pub. L. 117-129). The FTC launched an inquiry into the baby formula shortage to crack down on any price gouging or unfair market practices. President Biden invoked the *Defense Production Act* to ensure that manufacturers have the necessary ingredients to make infant formula and launched *Operation Fly Formula* to speed up the import of infant formula. Finally, Congress passed the *Formula Act* to temporarily suspend tariffs on imported infant formula until December 31, 2022 to make infant formula more affordable. As discussed below, following the infant formula crisis, there will be continued scrutiny and calls for reform of the food division at FDA along with public interest in the safety and availability of infant formula.

D. Review of Food and Tobacco Programs

In July 2022, FDA announced that the Agency would have outside experts working with the Reagan-Udall Foundation to conduct a comprehensive review of the Agency's food and tobacco programs, with an eye towards improvement and reform.

Food: FDA has received calls to improve its food program from Congress, the food industry and consumers. Following a report released by Politico about FDA's regulatory inaction on food safety, Senate HELP Committee Chair Patty Murray sent a letter to FDA Commissioner Califf calling on FDA to quickly address food safety failures, including issues related to infant formula, heavy metals in baby food and pathogens found in produce. Additionally, a broad coalition of food industry, consumer, health, and state groups sent a letter to the FDA Commissioner calling for a reorganization of the Agency's food program, which has two top food officials, with neither official having authority over the other even when their functions overlap.

FDA Commissioner Califf has emphasized that the food program could improve in areas such as its organization, internal processes and communication, and the use of technology. The Commissioner has also pointed to the mismatch between the food program's mandate and its funding level. Scrutiny of the food program is not new; for example, in 2017, the HHS OIG highlighted areas for improvement in FDA's food recall system. FDA's comprehensive review of the food program is likely to result in recommendations that the Agency restructure certain aspects of the program, including how they report to and interact with the Commissioner's office, and may also result in FDA making requests to Congress for additional funding and for new statutory authorities to help FDA prevent shortages of key food products, such as infant formula.

FDA continues to also prioritize its nutrition initiatives, including its nutrition innovation strategy, which involves modernizing claims, ingredient labels, standards of identity, nutrition facts labels, nutrition education, and reducing sodium.

Tobacco: The FDA's Center for Tobacco Products (CTP) has recently faced operational and policy setbacks, including losing its long-time Center Director Mitch Zeller and the D.C. Circuit Court of Appeals issuing an emergency stay of the FDA's June 2022 denial of Juul's premarket tobacco product applications (PMTAs). CTP has also been subject to criticism from members of Congress that it has not done enough to prevent the use of tobacco products by minors and to criticism from some in the tobacco industry that FDA has acted too rashly in denying PMTAs. The review of the FDA's tobacco program may result in recommendations for organizational changes to CTP and could also result in recommendations relating to how CTP internally reviews and considers evidence submitted by tobacco companies in support of PMTAs.

E. Consumer Products: Over-the-Counter (OTC) Drugs, Cosmetics, Dietary Supplements, and Foods

Consumer products, including over-the-counter (OTC) drugs, cosmetics, dietary supplements, and foods have been in the headlines this year and included in proposals for legislative reform. Notably, FDA has increased enforcement against online retailers. For example, Amazon has received two FDA warning letters throughout

2021 and 2022 for distributing unapproved drugs, including products marketed as sexual enhancement, weight loss dietary supplements and mole and skin tag removal products. While FDA's focus on OTC products has been expanding, Congress has been contemplating legislation to increase FDA's oversight over cosmetics and dietary supplements, and, as discussed above, FDA's food program has been under scrutiny. FDA's nonprescription drug office is growing and FDA's focus on OTC products is expected to expand. On June 28, 2022, FDA published a much-anticipated proposed regulation to establish parameters for nonprescription drug products with additional conditions for nonprescription use such as apps, secure websites, automated telephone response systems, or requiring consumers to navigate a video and associated tests. This proposed regulation, which will facilitate prescription-to-OTC drug switches, has been anticipated following FDA's 2018 draft guidance entitled "Innovative Approaches for Nonprescription Drug Products" and OTC Monograph Reform. Additionally, on September 29, 2022, FDA published a proposed rule, *Food Labeling: Nutrient Content Claims; Definition of Term "Healthy,"* to revise the existing regulatory criteria for when advertisers may use the term "healthy" as an implied nutrient content claim in the labeling of human food products.

Regarding cosmetics and dietary supplements, the UFA reauthorization measure that passed in the Senate over the summer included policy riders that would have expanded FDA's authority to regulate cosmetic and dietary supplement products. However, the House bill did not include these riders and House members, including two Democrats and 13 Republicans, sent a letter to House Speaker Nancy Pelosi and Minority Leader Kevin McCarthy stating their opposition to the mandatory dietary supplement product listing provision rider. Policy riders requiring dietary supplement listing and increased FDA oversight for cosmetics were ultimately not included in the clean UFA reauthorization passed as part of a CR (Pub. L. 117-180) on September 30, 2022. Similar bills, including cosmetic and dietary supplement reform, have been repeatedly introduced in the past and Senate Democrats will likely continue pushing for these reforms. Sens. Patty Murray (D-WA) and Richard Burr (R-NC), among other lawmakers, have pledged to continue working to pass FDA reform in a year-end legislative package when the continuing resolution expires.

F. FDA Legislation in the 118th Congress

With UFAs reauthorized for five years and the highest priority FDA-related items potentially included in an end of year package, there may not be much urgency to move FDA-related items next Congress. Many champions of provisions that do not get signed into law will continue to push for those items in the new Congress, but FDA-related legislative vehicles are lacking and many of those proponents are changing roles—or leaving Congress altogether.

The retirement of Sen. Richard Burr (R-NC) and the expected transition of Sen. Patty Murray (D-WA) to lead the Senate Appropriations Committee will mean that the two biggest Senate champions of many proposed FDA-related reforms, including the *VALID Act* and the *PREVENT Pandemics Act*, are no longer driving that agenda in the new Congress. Meanwhile, Rep. Fred Upton (R-MI), one of the co-authors of, the *21st Century Cures Act* (Pub. L. 114-255), the last substantial FDA reform bill to move outside

Arnold & Porter
Overview
118th Congress (2023-2024)
2024 Preview
2022 Review
Committee Leadership
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Foreign Affairs
Healthcare/ Life Sciences
Immigration
Product Safety
Tax
Technology
Trade

of an UFA reauthorization, is also retiring. He is the co-author of follow-on legislation, *Cures 2.0* (H.R. 6000) with Rep. Diana DeGette (D-CO), but a Republican has yet to step forward to lead that legislation next Congress.

Congressional Oversight

A. Oversight of the Biden Administration

With split control of Congress, the approaches to oversight will be vastly different in the Senate and in the House. Senate Democrats will continue to defend the Biden Administration and its respective agencies. Key oversight committees in the Senate are likely to continue to focus their investigative efforts on industry drug manufacturers and those accused of exploiting the COVID-19 pandemic for financial gain, as has been in the case in the 117th Congress. In contrast, House Republicans who have spent four years in the minority, will take an aggressive posture on their oversight of the Biden Administration which will likely be a primary component of their agenda, leading to industry stakeholders getting caught in the crosshairs.

In the healthcare space, House Republicans, led by likely chairman of the House Oversight & Reform Committee James Comer (R-KY) and likely chairman of the House Energy & Commerce Committee Cathy McMorris Rodgers (R-WA), will launch investigations into: (1) the origins of the COVID-19 virus; (2) the Biden Administration's response to the COVID-19 pandemic, including the CDC, NIH and Dr. Anthony Fauci's role in the response efforts; and (3) the use of federally appropriated COVID-19 relief funding. Statements released by both Comer and McMorris Rodgers during the 117th Congress suggest the primary focus of these inquiries will be the origin of the COVID-19 virus. Moreover, the narrow Republican majority in the House will limit their ability to get legislative items through the Democratic-controlled Senate, leaving oversight as their best opportunity to score political wins against the Biden administration and Congressional Democrats as they seek to expand the size of their majority in 2024.

As HHS begins to implement the IRA (Pub. L. 117-169), House Republicans are very likely to conduct inquiries to determine whether the law has a chilling effect on medical innovation and access to cutting-edge cures for older Americans. As previously noted, current House Energy & Commerce Ranking Member McMorris Rodgers (R-WA) and current Ways & Means Committee Ranking Member Kevin Brady (R-TX) have requested additional information and regular congressional briefings from HHS Secretary Xavier Becerra on the implementation of the law. Requests of this nature are likely to pick up in the 118th Congress as House Republicans will be looking to leverage their oversight capacity to express their concerns with the policy.

In the 118th Congress, House Republicans are also likely to take aim at the FDA. As previously discussed, House Republicans are expected to probe the infant formula shortage and the FDA's role in the crisis. Additionally, as the country continues to grapple with the implications of the Supreme Court's reversal of *Roe v. Wade*, FDA Commissioner Robert Califf could again be questioned about the agency's decision to relax regulation of the abortion-inducing pill, Mifepristone, particularly as blue states attempt to expand access to abortion services by shipping the pill across state lines. However, efforts to take on abortion-related issues may face some pushback among Congressional Republicans in light of the role the *Dobbs* decision played in galvanizing support for Democratic candidates. As House Republicans face tough challenges from Democrats who will seek to retake the House in 2024, Republicans representing districts won by President Biden will likely not be eager to take on abortion issues out of fear of alienating women and young voters.

Finally, House Republicans could pursue opportunities to force Biden Administration officials to testify on divisive issues, including, but not limited to, abortion rights, healthcare for transgender people, illegal immigration across the southern border, and the use of critical race theory in educational curricula. However, doing so could face blowback from moderate members in their caucus given the concerns about alienating independents, young people, and women.

B. Pharmacy Benefit Managers (PBMs)

House Republicans are expected to increase congressional oversight of the business practices of PBMs. In the 117th Congress, in response to a staff report by House Committee on Oversight and Reform (COR) Democrats on their drug pricing investigation, Committee Republicans, led by Ranking Member James Comer (R-KY), released a staff report in which they argued that PBM's business tactics lead to higher prescription drug costs. The Republican staff report stated that the Democrats' investigation was solely focused on pharmaceutical drug manufacturers, but failed to address the role PBMs play in "forcing" patients onto more expensive drug options. The Republicans' report concluded that, in part, drug manufacturers are forced to raise their prices due to the actions of PBMs. The report also asserted that greater transparency is needed to determine the extent to which PBMs business practices are driving up costs. House COR, under Republican leadership, will likely take an even more expansive role in PBM oversight work under the leadership of Rep. Comer, who is expected to be the Chairman.

Additionally, the House Energy and Commerce (E&C) Committee, led by Ranking Member Cathy McMorris Rodgers (R-WA), will also likely play a key role in PBM oversight in the chamber. Rep. McMorris Rodgers has been critical of PBMs in recent months, even asserting that Democrats' policies give PBMs "a pass." She was also one of two lead cosponsors on the Restoring Hope for Mental Health and Well-Being Act (H.R. 7666), along with current E&C Chairman Frank Pallone, Jr. (D-NJ). Of note, the bill includes provisions which require additional oversight of PBMs through the submission of reports describing the usage of rebates, copayment assistance, drugs covered, and other pertinent data. Rep. McMorris Rodgers was effusive in her praise of the bill when it passed the House in June 2022. Furthermore, other E&C Republicans are also highly critical of PBMs, including Rep. Buddy Carter (R-GA), who is a practicing pharmacist. Rep. Carter and fellow pharmacist Rep. Diana Harshbarger (R-TN) recently wrote a letter to FTC Chair Lina Khan to urge the FTC to investigate PBM's "predatory" business practices, arguing they lead to higher prices of prescription medications for patients. Additionally, Reps. Carter and John Rose (R-TN) spoke at an FTC Open Commission Meeting in early 2022 to urge the FTC to investigate PBMs. With the two top Republicans on two relevant committees of jurisdiction holding negative views of PBMs, there will likely be increased scrutiny and oversight of PBMs in the House in the 118th Congress, especially as Republicans attempt to shift the focus from manufacturers to PBMs in the drug pricing space.

Moreso than his House counterparts, Senate Finance Committee Chairman Ron Wyden (D-OR) has shown a propensity for questioning PBMs' business tactics. In October 2021, Chairman Wyden sent a letter to CMS Administrator Brooks-LaSure to urge CMS to investigate how direct and indirect remuneration (DIR) fees imposed by PBMs are causing local pharmacies to close. Sen. Wyden has even called the use of these DIR fees "anti-competitive." He then praised CMS's decision two months later, in response to his letter, to make plans to issue proposed rulemaking addressing price concessions and DIR fees. Sen. Wyden has also gone as far as to ask the FTC to get involved in oversight of PBMs. In December 2021, he urged the FTC to launch a federal investigation of "anti-competitive" drug industry practices, including PBMs' use of DIR fees, noting that the rate of growth in DIR fees is "substantial."

More recently, in May 2022, Sen. Wyden also joined Sens. Chuck Grassley (R-IA) and Mike Braun (R-IN) in submitting public comment to the FTC as part of the FTC's investigation into the business practices of PBMs. In their letter to FTC Chair Lina Khan, they urged the FTC to specifically review the impact of PBMs' practices on insulin prices. They ask the FTC to assess and analyze how consolidation, vertical integration and lack of transparency have enabled PBMs to "exacerbate" insulin prices, and cite a past comprehensive Senate Finance Committee investigation which addressed the role of PBMs in insulin pricing.

Sen. Amy Klobuchar (D-MN), who is the current chairman of the Senate Judiciary Committee's Subcommittee on Competition Policy, Antitrust, and Consumer Rights, has expressed skepticism of PBMs in the past, particularly related to their business practices pertaining to prescription drug rebates. Additionally, Senator-elect Peter Welch (D-VT) could push Democratic leadership to investigate PBMs; while in the House, he argued that DIR fees are causing costs for both patients and community pharmacies to rise. Sen. Maria Cantwell (D-WA), the current chairman of the Senate Commerce Committee, has also pushed to crack down on PBM's "deceptive" practices, introducing the *Pharmacy Benefit Manager Transparency Act of 2022* (S. 4293) with Sen. Grassley. The bill intends to "hold pharmacy benefit managers (PBMs) accountable for unfair and deceptive practices." The bill passed the Senate Commerce Committee by a 19–9 vote, indicating that there is bipartisan support for enacting guardrails on PBMs. Additionally, Sen. Richard Blumenthal (D-CT), who is the current chairman of the Commerce Committee's Consumer Protection, Product Safety, and Data Security Subcommittee, has also said he is focused on proposals to increase transparency of PBMs. Recent public actions from these Senators (and House members) provide a window into the degree of congressional oversight PBMs can be expected to face in the next Congress. These activities suggest that oversight and investigations into PBMs will be bipartisan in nature.

C. 340B

340B is another area where we expect oversight activity from Congressional Republicans, despite the varying levels of support for the program within the conference. There are some House Republicans, such as Reps. Larry Bucshon (R-IN), Michael Burgess (R-TX) and Brad Wenstrup (R-OH), who do not approve of how the 340B program has been administered by the Health Resources Services Administration (HRSA), and some of these same Republicans argue that many hospitals do not utilize the program appropriately. These members essentially believe the program has grown and expanded far beyond its initial purpose and has been abused to drive profit from the program. Rep. Matthew Rosendale (R-MT) has also shown skepticism of the current scope of the program, and has previously introduced the *Drug Pricing Transparency and Accountability Act* (H.R. 5463). The bill would establish a two-year moratorium on allowing new, non-rural hospitals and associated child sites to participate in the 340B program.

However, many hospitals argue the 340B program provides facilities that serve disadvantaged and resource-scarce communities with the savings needed to provide critical services and care for patients, such as care for uninsured patients. The program does have support among Congressional Republicans, particularly given how much rural hospitals in under-resourced regions rely on the program and in light of the impact of the pandemic. Over 20 House Republicans have supported legislation that would waive certain eligibility requirements for hospitals participating in the 340B drug discount program during the COVID-19 PHE. For this reason, some of these Republicans support strengthening the 340B program, rather than curtailing it or further scrutinizing the program. Due to a lack of strong, clear consensus among the House Republicans regarding its approach to 340B, the intensity of the oversight of the program will come down to who holds the gavel on the key committees of jurisdiction, and we expect incoming Energy and Commerce Oversight Subcommittee Chairman Morgan Griffith to pursue oversight of the program. The narrow majority in the House will constrain Republicans ability to enact major reforms of the program, but they could attempt to pursue initiatives to enhance transparency and improve the administration of the program. Such changes will require support from House Democrats to pass the chamber, which will be difficult without other major concessions on other healthcare issues.

Senate Democrats will likely show little to no interest in conducting oversight over the 340B program. The vast majority of Senate Democrats support the 340B program, and do not want to see the program cut or weakened. Sixteen Senate Democrats have supported legislation that would waive certain eligibility requirements for hospitals participating in the 340B drug discount program during the COVID-19 PHE. Senior Democrats such as Sen. Richard Blumenthal (D-CT) have argued for the importance of 340B, and have even contended that a bigger problem is PBMs “pocketing” discounts that are given to 340B providers. If Democrats choose to conduct any oversight over the 340B program, it could focus on PBM and drug manufacturer activity that they see as harmful to the program. This could include investigating pharmaceutical companies who have either withdrawn from the 340B program entirely or who have imposed more requirements for covered entities that dispense drugs through contract pharmacies. Of note, there also has not been a large amount of 340B legislation or other initiatives in the Senate in the last couple years, which potentially further demonstrates that Senate Democrats are probably more interested in pursuing other health-related and drug pricing-related matters in the 118th Congress.

VI. Healthcare Privacy

With the future of any comprehensive privacy legislation uncertain, the Biden Administration will continue to exercise its executive powers to bolster privacy protections in the life sciences and healthcare space. In response to the *Dobbs* decision and resulting concerns that personal data could be used to identify and prosecute persons seeking reproductive healthcare, the administration has taken a variety of steps to protect individual rights. For example, on June 29, 2022, the HHS issued guidance clarifying the HIPAA Privacy Rule's provisions governing disclosures of patient information to law enforcement officials, including that, absent a court order, the HIPAA Privacy Rule "does not permit a disclosure to law enforcement where a hospital or other healthcare provider's workforce member chose to report an individual's abortion or other reproductive healthcare." Additionally, on July 8, 2022, President Biden issued an Executive Order Protecting Access to Reproductive Healthcare Services advocating Agency action to "address the potential threat to patient privacy caused by the transfer and sale of sensitive health-related data and by digital surveillance related to reproductive healthcare services, and to protect people seeking reproductive health services from fraudulent schemes or deceptive practices."

Separately, the FTC has recently exercised its authority to prevent unfair or deceptive practices by taking action against allegedly illegal uses and sharing of highly sensitive data, including location and healthcare data. For example, the FTC brought a suit against a data broker, alleging improper sales of consumer location data, including at sensitive places such as reproductive health clinics. The FTC also issued an *Advanced Notice of Proposed Rulemaking* to consider whether to promulgate new rules to address commercial surveillance, including rules that may limit how healthcare, finance, and internet search companies may use consumer data. Additionally, although not specifically citing healthcare privacy as a motivating factor, Federal Communications Commission Chairwoman Jessica Rosenworcel sent letters to the top 15 mobile

providers in the United States requesting information on how they collect, share and retain location data.

These actions all point to ever-increasing scrutiny into how a wide range of businesses use personal information in ways that may adversely impact consumers of healthcare. The administration is expected to issue further guidance, particularly with respect to the collection and sale of location data. There also is likely to be an increase in enforcement actions against individuals and organizations that are seen to insufficiently protect patient privacy, both in general and in the context of reproductive healthcare.

VII. California

In the absence of any closely contested statewide races and control of the legislature remaining firmly in Democratic hands, Governor Gavin Newsom (D) is likely to continue to build on existing initiatives around improving the cost of healthcare, passed during his first term—especially if, as some pundits contend (despite his denials), his focus may turn to White House in 2024.

In this first act as California's 40th Governor, Governor Newsom announced concentrated efforts to reduce healthcare and prescription drug costs as a central pillar of his broader "California for All" agenda. His first step was signing Executive Order N-01-19, which recaptured the state's purchasing power to recapture from managed care pharmacy benefits and transition them to fee-for-service pharmacy benefits in what is called Medi-CalRx.

While efforts to permit the importation of prescription drugs from Canada (and potentially elsewhere) failed (Assembly Bill 458 (AB 458), Kamlager (D-Los Angeles)), and multiple proposals to provide consumers with certain rebates negotiated between PBMs and prescription drug manufacturers did not advance out of the legislature, the Governor signed Senate Bill 852 (SB 852), sponsored by Sen. Richard Pan (D-Sacramento) in 2020, which requires the California Health and Human Services Agency (CHHS) to develop manufacturing partnerships to produce or distribute generic prescription drugs under Cal Rx—a state-sponsored generic drug label. This initiative (CalRx) has culminated this year in pursuing the production of insulin. With an anticipated investment of $100 million in CalRx—$50 million to develop the most popular short- and long-acting types of insulin and another $50 million to support the construction of an insulin manufacturing facility in California—the Newsom administration hopes to reduce

patients' annual out-of-pocket costs by up to 90 percent, while also saving commercial insurers up to 66 percent on insulin expenditures. While many details remain to be announced, Dr. Mark Ghaly, California's Secretary of the CHHS believes the effort will "inject steep price competition and help shift the industry from obscure, rebate-based pricing toward low, transparent pricing." Washington and Maine have also expressed an interest in exploring whether to join California as a drug manufacturer.

After several failed efforts to significantly increase regulation of healthcare-related transactions in the state—most recently Assembly Bill 2080 (AB 2080), the "Health Care Consolidation and Contracting Fairness Act of 2022"—the legislature and the Governor compromised and instead created the Office of Healthcare Affordability (OHCA) within the Department of Health Care Access and Information (HCAI). Had it passed, AB 2080, among other things, would have required that all transactions where the value exceeds $15 million involving for-profit medical groups, health systems, PBMs, health plans, health insurers and hospitals, receive approval from the state attorney general. While the Attorney General's efforts to obtain pre-approval authority of these mergers failed, OHCA will be looking at healthcare mergers as a part of the cost-driver function of healthcare cost.

Created as part of the new 2022–2023 California state budget signed earlier this year by Governor Newsom, the OHCA is tasked with analyzing the healthcare market for cost trends and drivers of spending, developing data-informed policies for lowering healthcare costs, setting and enforcing cost targets, and creating a state strategy for controlling the cost of healthcare and ensuring affordability. The OHCA will also analyze price trends for the healthcare workforce, as well as healthcare technologies/devices and pharmaceuticals. The OHCA's Health Care Affordability Board's inaugural meeting is scheduled for January 2023 and the new office plans to hit the ground running with emergency regulations to collect data on total healthcare expenditures from payers and certain healthcare transactions. Thereafter, the Health Care Affordability Board will establish an overall healthcare cost growth target for changes in per capita spending in California and set specific cost targets by healthcare sector and geographic region. The OHCA plans to progressively enforce compliance with identified cost targets, beginning with technical assistance, followed by testimony at public meetings, corrective action plans, and finally, an assessment of escalating financial penalties.

In addition, the OHCA aims to increase transparency regarding "material" market transactions by requiring that, starting in April 2024, certain providers notify the office of the intent to transact at least 90 days prior to the transaction. The office will prospectively review transactions prior to their execution by either conducting a cost and market impact review and issuing a report, or issuing a waiver. Any transaction subject to a cost and market impact review may not be completed until 60 days after the office releases a report—without any statutorily set deadline for the issuance of a report. Although the OHCA is not empowered to block any market transactions, it may refer its findings to the Attorney General for further review and action. Regulations further defining "material" for purposes of the OHCA's prospective review of certain market transactions are expected in 2023.

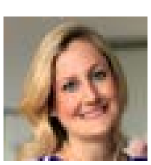
Despite initial generic support of a single payor at a conceptual level and vocal support from some Democrat legislators, efforts to establish single-payer universal healthcare in California stalled during the Governor's first term. Assembly Bill 1400 (AB 1400, Kalra (D-San Jose)) failed to move in 2022, particularly after it was estimated by legislative analysts to cost between $314 billion and $391 billion annually. While similar bills are likely to be reintroduced in 2023, absent a new funding mechanism, implementation appears unlikely. Moreover, Governor Newsom touts his version of healthcare for all as including undocumented individuals, this year expanding it to all ages.

In addition, Governor Newsom signed Assembly Bill 1278 (AB 1278, Nazarian (D-San Fernando Valley)) which will require, among other things, that physicians and surgeons provide a written or electronic notice of the federal *Physician Payments Sunshine Act Open Payments database* to a patient at the initial office visit. Physicians and surgeons (and in some cases, their employers) must also post notices in certain practice locations, as well as on their website.

Although Governor Newsom plans to end the COVID-19 state of emergency in February 2023, his administration intends to work with the state legislature to codify some of the Governor's executive orders, which may include permitting nurses to order and dispense COVID-19 medications and steps to ensure the ability of labs to process COVID-19 tests.

The legislature is expected to remain focused on efforts to increase access to healthcare while being mindful of costs in the next session. There will continue to be legislation passed that increases access to medical tests, remove utilization controls and enhance requirements of plans to cover additional benefits despite employer and health plan opposition.

Key Contacts



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Immigration

Paul Howard, Drew Benzaia

Key Takeaways

- Immigration remains a particularly divisive issue and the likelihood of a breakthrough on reform efforts is not high, particularly with Republicans narrowly controlling the House of Representatives in the 118th Congress.
- Immigration will nevertheless continue to be a front-burner issue given bipartisan interest in stopping the flow of fentanyl into the United States, and we expect that Republicans will use their oversight authority and border security legislation to tie what they perceive as a “border crisis” to the Biden Administration ahead of the 2024 election.
- House Republicans will work to pass border security legislation based on their proposed “framework” released earlier this year, which focuses heavily on border wall and Immigration and Customs Enforcement (ICE) funding. Senate Democrats, however, will pursue their own priorities, focused more on expanding immigration.

Introduction

There is little dispute that the parties have become increasingly polarized in recent years, and nowhere is this more evident than with the topic of immigration. While immigration reform efforts have been divisive for several decades, in recent years the existence of any middle ground—or at least the willingness of legislators to even attempt to seek some level of bipartisan consensus—has all but disappeared.

This is not to say there is any shortage of legislative proposals; indeed, both parties will have immigration legislation at the ready for the new Congress. But, with the margins remaining so slim in both chambers the chances of enacting immigration reform will depend upon the legislation’s ability to attract bipartisan support. Given recent history, the odds of that happening are not good. Nevertheless, with border security and stopping the flow of fentanyl into the United States becoming front-burner issues, the 118th Congress is likely to see substantial action on the topic.

House Action

On the House Judiciary Committee, Rep. Jim Jordan (R-OH) will take over as chairman, while current chairman Jerrold Nadler (D-NY), having survived a competitive primary against outgoing Rep. Carolyn Maloney (D-NY), will become the ranking member.

With the House now narrowly in Republican hands, we expect the party will attempt to enact their border security framework, released in July 2022. The GOP framework prioritizes funding for the border wall, more staffing and better technology for the Border Patrol, enhanced authority for public health agencies to combat illegal narcotics like fentanyl, and implementation of several ICE policies aimed at "regaining operational control" of the southern border, which Republicans maintain has been lost under the Biden Administration. In particular, the framework calls for restarting the *Migrant Protection Protocols* (commonly referred to as the "Remain in Mexico" program).

Additionally, we expect Republicans will push for funding to force the administration to complete President Trump's border wall (President Biden quietly authorized completion of a few sections this summer). Also, several senior Republicans have hinted that they may try to impeach Homeland Security Secretary Alejandro Mayorkas over his perceived failings in dealing with border security. Whether Republicans' extremely narrow margin in the House will impact those plans remains to be seen.

With their newly acquired gavels, Republicans are likely to conduct immigration-related oversight hearings in every possible committee, and if they are able to hold their caucus together they will have the ability to pass legislation implementing their proposed framework out of the lower chamber. But with the Senate remaining in Democratic hands—along with a likely presidential veto—

Expected Congressional Committee Leadership

Senate Judiciary Committee

Chairman

Sen. Richard Durbin (D-IL)
[current chairman]

Ranking Member

Sen. Chuck Grassley (R-IA)
[current ranking member]

Senate Homeland Security and Government Affairs Committee

Chairman

Sen. Gary Peters (D-MI)
[current chairman]

Ranking Member

Sen. Rand Paul (R-KY)
[next in seniority; but could choose to lead HELP Committee instead]

Sen. James Lankford (R-OK)

House Judiciary Committee

Chairman

Rep. Jim Jordan (R-OH)
[current ranking member]

Ranking Member

Rep. Jerrold Nadler (D-NY)
[current chairman]

House Homeland Security Committee

Chairman

Six Republicans are pursuing the top GOP slot:

Rep. Dan Bishop (R-NC)

Rep. Michael Guest (R-MS)

Rep. Clay Higgins (R-LA)

Rep. Scott Perry (R-PA)

Rep. Dan Crenshaw (R-TX)

Rep. Mark Green (R-TN)

Ranking Member

Rep. Bennie Thompson (D-MS)
[current chairman]

chances of enactment are extremely small. As a result, we anticipate Chairman Jordan will use his power to set the committee's agenda to focus on oversight of the Biden Administration's perceived failings at the southern border, and to the extent there is any bipartisan cooperation on legislative efforts, it is likely to be on smaller, targeted measures such as those focused on fentanyl.

Senate Outlook

On the Senate Judiciary Committee, Sen. Dick Durbin (D-IL) will remain chairman, while Sen. Chuck Grassley (R-IA)—fresh off reelection—is likely to remain the ranking member.

We anticipate that immigration reform efforts in the Senate will look drastically different than those in the House. Whereas the House is expected to focus on deterrence-based policies, Senate Democrats, led by Chairman Durbin, will likely push measures aimed at expanding immigration, such as measures intended to address current workforce shortages, including the *Healthcare Workforce Resilience Act* (S. 1024/H.R. 2255) and the *Equal Access to Green cards for Legal Employment (EAGLE) Act* (S. 4567/H.R. 3648).

Several of these more targeted measures, including the two identified above, have garnered some level of bipartisan support. It therefore remains at least theoretically possible that such measures could find their way through to the President's desk in the 118th Congress, as it also remains possible that funding to combat the flow of fentanyl into the United States may find bipartisan support. Still, with House Republicans clearly intending to use the southern border against President Biden in 2024, their willingness to move even bipartisan legislation in this area remains unclear at best.

Product Safety

Eric Rubel, Michelle Gillice, Mike Gentine

Key Takeaways

- Significant Consumer Product Safety Commission (CPSC) reform is unlikely in the 118th Congress. Small issue-fixes may be possible, and where there are areas of alignment, legislation may move, but gridlock will likely be the order of the day, and CPSC is unlikely to generate enough consensus to buck that trend.
- Because Democrats retain the Senate, the White House may still be able to get a replacement for Commissioner Dana Baiocco confirmed. There will be some pressure on Republican Senate leadership to keep that seat open to allow a potential Republican President to fill the seat in 2025, but not as much as there would be if the Commission were evenly split.
- Particularly because they do not also control the Senate, expect Republican leaders to make full use of the oversight and investigation functions of the House, including CPSC where opportunities arise.

Overview

Tucked into an office building in Bethesda, MD, the CPSC is a relatively small agency (roughly 550 employees) with a relatively small budget (more on that below), so it does not usually feature prominently in post-election discussions. However, with a jurisdiction that spans more than 15,000 product categories, it touches products that many companies make or sell and that virtually every consumer uses constantly throughout each day. Because of that reach, understanding how the makeup of the 118th Congress may shape what consumer product companies can expect from CPSC can be critical.

Legislation

Since its passage in 1972, CPSC's core statute, the *Consumer Product Safety Act* (CPSA) has had only a few overhauls. The most recent of these came with the *Consumer Product Safety Improvement Act of 2008* (CPSIA). Since then, the CPSA has gone essentially unchanged.

Further, in recent years, only a handful of bills have addressed CPSC-area issues. Notably, however, the 116th and 117th Congresses saw an uptick in activity around such bills. This included the enactment of *"Reese's Law"* (Pub. L. 117-171, regarding coin- or button-cell batteries), the *"Safe Sleep for Babies Act"* (Pub. L. 117-126, banning inclined sleepers and padded crib bumpers), and language in Title XXI of the *Fiscal Year 2020 appropriations act* (Pub. L. 116-260, adopting California's Technical Bulletin, T.B. 117-2013, as a national standard for upholstered furniture flammability). Both chambers also passed slightly differing versions of the *"Stop Tip-overs of Unstable, Risky Dressers on Youth Act"* (STURDY Act (H.R. 1314), regarding furniture stability), an issue that has long been a priority of consumer advocacy organizations. The Senate passed its version on September 29, but the House was out all of October, so any further movement will have to happen in the lame duck session.

Following the 2020 election, with President Biden's win and Democrats' control of both chambers of Congress, the ground seemed as ripe as it had been in years for this simmering legislative activity to boil over into a more sweeping reform bill that could carry such other consumer-advocate priorities as drastic revision of Section 6(b) of the CPSA (15 USC § 2055(b)), which governs agency disclosure requirements, including potential disclosures of company-specific information. However, the slimness of that congressional control (particularly a 50-50 Senate) and the urgency of other priorities chilled the product-safety broth.

Now, the midterms have likely shut the stove off for a couple of years. Republicans have generally opposed the structural reforms Democrats and their supporters have called for, such as revising or eliminating Section 6(b). More targeted bills directed at particular products have typically fared somewhat better, but the Republican-controlled 118th House is likely to see little need to move many bills, and an already-small legislative plate will likely have little room for product safety bills.

The caveat is, as always, circumstance. The CPSIA was passed by the 110th Congress, which saw Democrats flip both chambers but take control by thin margins: The House was 233-202 and the Senate 49-49-2 (Senators Joe Lieberman and Bernie Sanders were independents caucusing with the Democrats) at the beginning of the Congress.

Despite these small Democratic majorities, the final bill cleared the House 424-1 (Rep. Ron Paul (R-TX), was the lone dissenter) and the Senate 89-3 (Sens. Tom Coburn (R-OK), Jim DeMint (R-SC) and Jon Kyl (R-AZ), all Republicans, voted against). And Republican President George W. Bush signed the bill into law. The reason for this consensus was the "Year of the Recall" in 2007 (into 2008), when countless products were recalled, with stories of lead-laced toys driving the narrative. While congressional Republicans typically have not made passing CPSC legislation a priority, they also generally do not expend scarce political capital opposing it when public sentiment calls for more product rules or more authority for CPSC, so, if product safety becomes a hot topic, that may be enough to move legislation despite the Republican House majority.

Beyond substantive bills, the agency has seen a recent—if modest—upswing in its funding, with appropriations of $132.5 million in FY 2020, $135 million in FY 2021 and $139.05 million in FY 2022, though the latter was still well short of the $170 million the agency requested. *The American Rescue Plan Act* (Pub. L. 117-2) COVID relief bill also included a $50 million supplemental appropriation for CPSC's import surveillance operations, but that came on the heels of criticism that the agency had stepped back too far from the ports in the early days of COVID-19 and had taken too long to move back toward normal operations.

CPSC requested $195.5 million for FY 2023. The House voted out a $166.3 million appropriation—nearly splitting the difference between the agency's request and its FY 2022 level—on July 20, but the Senate has not acted on that bill. In the event Congress takes up an appropriations bill in a post-election lame duck session, CPSC's low profile may help it, as members may be less likely to use political capital drawing that number down. Of course, in the unlikely event Congress fails to pass an omnibus spending bill during the lame duck, the $139.05 million level from FY 2022 will remain.

Nominations

Following the departure of Commissioner Joe Mohorovic in October of 2017, the Commission was below its full five-member strength, even dropping briefly to three members, until Commissioner Mary Boyle's confirmation in June of 2022. With Boyle's arrival, the body looked to be set for at least two years, until the term expiration of Commissioner Dana Baiocco. However, Baiocco left the agency in October. Her early departure leaves another slot for the Biden Administration to fill (having already appointed Chair Alex Hoehn-Saric and Commissioner Richard Trumka, Jr., along with Boyle).

The wrinkle is that the CPSA allows only a bare majority of the Commission—three seats—to be filled by members of the same political party, and Hoehn-Saric, Trumka and

Boyle were appointed as Democrats. So, in all likelihood, Biden will need to nominate a Republican. This likely increases the odds of getting a nominee confirmed during President Biden's term, as replacing Baiocco (Republican) with another Republican will not change control of the agency. Thus, there's less political upside to Senate Republicans blocking a nominee, and Democrats have an incentive to choose a more moderate successor to Baiocco than would be likely under a Republican administration.

Oversight

When former Commissioner Bob Adler took over as Acting Chair of CPSC in October 2019, he began pushing the agency's day-to-day enforcement operations—which are largely under the chair's purview, with only indirect input from the commission as a whole—toward a more aggressive posture. In addition to more behind-the-scenes moves, his public changes included shifting the attorneys who support defect investigations and potential recall demands from the Office of General Counsel into the Office of Compliance and Field Operations, the body responsible for such inquiries, a move widely seen as "lawyering up" Compliance and Field Operations to intensify enforcement activity in corrective action and penalty investigations. For example, in the most high-profile examples, in 2022, CPSC, which had filed just one administrative lawsuit against a company to compel a recall between 2012 and 2021, launched three such lawsuits in a span of six months. The loss of air cover from a fully Democratic Congress is unlikely to prompt any public retreat from this trend, but it may give agency leadership reason to look over their shoulders.

House Republicans have already signaled an intent to use their oversight authority to check the Biden Administration. That dynamic may be intensified by Democrats' retention of the Senate, which narrows any opportunity to move legislation and may leave oversight as the primary political vehicle.

We are unlikely to see public fights with CPSC over issues of policy, as Republicans may worry that opposing a CPSC policy position can too easily be cast as opposing safety. However, if questions about process, management or ethics arise—such as the 2019 revelation that the agency had improperly disclosed mountains of company and personally identifiable consumer data—odds are good that the relevant House committees (Energy and Commerce, Oversight and Reform) will take the opportunity to present those issues as emblematic of the Biden Administration and Democratic governance more broadly. Even old news may be new again: During Commissioner Boyle's confirmation process, Republicans expressed concerns about her role as a then-staffer at CPSC during and after the 2019 "data breach," and House Republican overseers may see her presence on the Commission as a reason to revisit the issue.

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Key Takeaways

- Split control of Congress puts an end to the expansive tax proposals that marked the first two years of the Biden Administration; Democratic control of the Senate will allow the Biden Administration to preserve the tax policies enacted in the *Inflation Reduction Act*.
- House Republicans will engage in close oversight of the expansion of the IRS and the rulemakings necessary for the *Inflation Reduction Act*, slowing both efforts.
- Both parties will focus attention on setting the policy stage for consideration of the expiration of a number of key *Tax Cuts and Jobs Act* provisions in 2025.

Introduction

Republican control in the House provides Republican leaders with significant say regarding tax policy, and likely nullifies the Biden Administration's efforts to increase income tax rates on corporations and individuals. Recent Treasury Greenbooks, for instance, called for increasing the corporate rate to 28 percent and increasing the top marginal rate for individuals to 39.6 percent. Similarly, the Republican victory also likely prevents the enactment of tax measures to conform with the Pillar 1 and Pillar 2 regimes negotiated under the auspice of the Organisation for Economic Co-operation and Development (OECD). Work instead will be geared to preparing for the expiration of the *Tax Cuts and Jobs Act* (TCJA) (Pub. L. 115-97) tax cuts in 2025, which could lead to significant tax policy changes. Split control, coupled with the significant tax policy changes looming in 2025, will likely stymie significant changes in tax policy in the next Congress.

As outlined in the "Commitment to America" platform released by House Republicans on September 23, Republican lawmakers will pursue several objectives, chief among them protecting the tax changes under the *Tax Cuts and Jobs Act* (TCJA, Pub. L. 115-97). Twenty-three significant TCJA provisions expire in 2025, so an expected theme in this Congress will be shoring up public and stakeholder support for TCJA provisions, such as its reduced corporate and individual income tax rates, benefits for passthrough business entities (such as the so-called "passthrough" deduction allowed under Section 199A of the tax code) and preserving changes like the caps to the state and local tax (SALT) deduction.

Congressional Republicans will also attempt to enact legislation supporting domestic innovation, such as a set of bills designed to support medical supply chains and encourage development of treatments and cures. These bills include the American Innovation Act (H.R. 7503), legislation to make refundable a portion of the research credit (H.R. 7504) and legislation to add a new medical research component to the research and development credit (H.R. 7505). All three are introduced by Rep. Vern Buchanan (R-FL), widely seen as a leading contender to chair the powerful Ways and Means Committee.

A substantial portion of the Republican agenda will be oversight of the Biden Administration, in particular the investment in the Internal Revenue Service (IRS) made under the *Inflation Reduction Act* (IRA, Pub. L. 117-169). A second oversight target will be the sufficiency of Treasury's rulemaking with regard to the IRA, which provided Treasury with significant regulatory latitude on a number of tax measures.

Conversely, Senate Democrats will continue their work to ensure Treasury adopts the necessary rules to effectuate the IRA changes and will work to protect the additional resources secured by the IRS under the IRA for improved taxpayer service, key technology investments and upgrades, and cracking down on tax evasion. Democrats in both chambers will continue efforts to illustrate flaws in the TCJA, refine legislative concepts to tax high net worth individuals, confirm critical agency personnel, and counter House Republican messaging on the IRS spending.

Race for the Gavel

With Republicans newly in control of the House of Representatives, the process of selecting a new chair of the House Ways and Means Committee is set to begin. The Republican selection process is influenced by several factors, including seniority, influence, fundraising ability, and policy expertise. When the Republican Steering Committee meets to assign chairmanships, they will consider three candidates for Ways and Means Chairman: Rep. Vern Buchanan (R-FL), Rep. Jason Smith (R-MO) and Rep. Adrian Smith (R-NE).

Rep. Buchanan (R-FL) is a likely frontrunner, co-chairing the Florida Congressional Caucus (the second largest concentration of House Republicans behind the Texas delegation), previously serving as the Chairman of the Tax Policy Subcommittee of the Joint Committee on Taxation and having the most seniority on the Committee. Rep. Buchanan has also consistently been a top Republican fundraiser, contributing or raising a strong multiple of what the other candidates for the gavel have raised.

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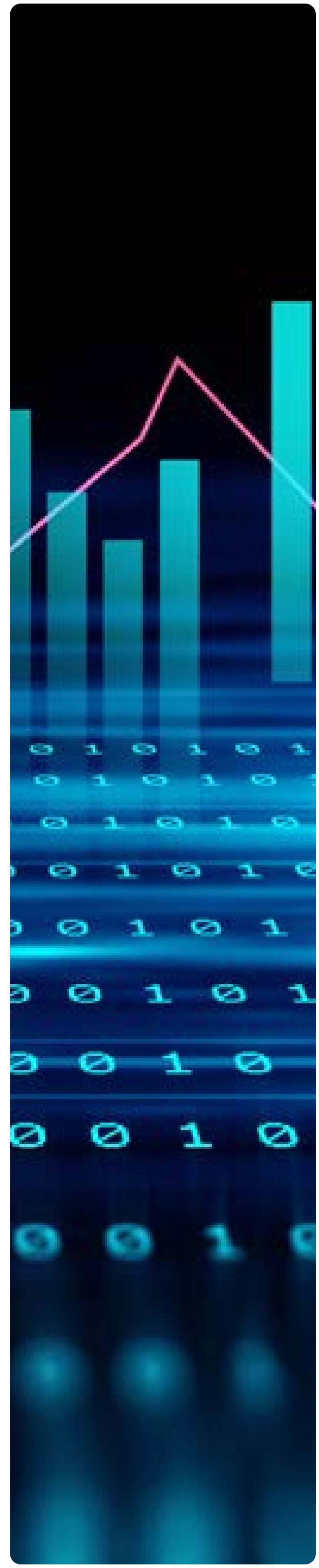
Under Rep. Buchanan's leadership, the Ways and Means Committee would prioritize supporting domestic innovation through expansions to the research tax credit, as well as reauthorizing critical TCJA provisions, including reduced corporate and individual tax rates and benefits for pass-through entities.

Rep. Jason Smith (R-MO) is also a leading candidate, and currently serves as Ranking Member on the House Budget Committee. Rep. Smith is best known for his effective messaging around the Congressional Budget Office score of the Biden Administration's *Build Back Better Act*, which some in the GOP credit with sinking parts of the bill. He may have an edge among the more ideologically conservative members of the Republican conference. Rep. Smith would likely exercise particularly strong oversight over the IRS and rollout of *Inflation Reduction Act* guidance, and has supported extending an amended version of the *Child Tax Credit* to pregnant mothers.

Finally, Rep. Adrian Smith (R-NE) trails Reps. Buchanan and Smith but is still a contender. Rep. Smith is considered one of the foremost experts on tax and trade policy in the Ways and Means Committee, having served on the Ways and Means Committee since 2010 and playing a critical role in drafting the TCJA. Rep. Smith's priorities include expanding telehealth and prescription drug access and promoting favorable trade agreements for the US.

Republicans may have nine seats to fill on the Ways and Means Committee, setting off a fierce intra-party battle to join the exclusive panel. These openings are due to several factors: (1) the tragic passing of Rep. Jackie Walorski (R-IN); (2) retirements and other attrition; and (3) the shift in committee ratios accompanying movement from the minority to the majority. Contenders to join the Ways and Means Committee on the Republican side may include Michelle Steel (R-CA), Randy Feenstra (R-IA), Greg Steube (R-FL), Blake Moore (R-UT), and Bryan Steil (R-WI), among others. The reverse is true on the Democratic side, where the new minority may lose four returning members due to changes in the committee ratio. Current Ways and Means Committee Chairman Richard Neal (D-MA) is expected to return as the Ranking Member in the 118th Congress.

The Senate Finance Committee will continue to be chaired by veteran lawmaker Sen. Ron Wyden (D-OR). Sen. Wyden, while a proponent of progressive tax policy, has a history of



bipartisan collaboration. Chairman Wyden's priorities will include enacting significant changes to partnership taxation and the implementation of the *Inflation Reduction Act's* many provisions, including the shift to "tech-neutral" energy incentives (e.g., Sections 45X, 45Y, 45Z). Sen. Mike Crapo (R-ID) will return to the committee as ranking member. With the retirements of Sens. Richard Burr (R-NC), Rob Portman (R-OH) and Pat Toomey (R-PA), there will be three Republican openings on the committee. With Sens. Catherine Cortez Masto (D-NV) and Maggie Hassan (D-NH) winning their reelections, we do not expect any Democratic openings on the committee.

Business Tax Measures

A split Congress where Democrats control the Senate will limit significant changes to business taxes during the upcoming 118th Congress. The remaining lame duck period of the 117th Congress, however, may provide a window to enact several tax measures. These include a bipartisan set of retirement security measures, the possible restoration of an option to expense certain research costs in the current year under Section 174, the elimination of caps on business interest expense under Section 163(j), a set of measures providing disaster relief for victims of Hurricane Ian, measures championed by former member Jackie Walorski, and an easing of the last-in, first-out (LIFO) accounting rules for car dealers.

Areas of potential bipartisan agreement include innovation incentives, and in particular, those with a domestic manufacturing component. For example, the investment tax credit included with the *CHIPS Act* of 2022 (Pub. L. 117-167) had bipartisan support, and House Republicans have introduced a suite of healthcare focused research and development incentives that could form the basis for bipartisan negotiations to expand the research and development credit under Section 41 of the Code.

Should it fail to be enacted during the lame duck period of the 117th Congress, Rep. Buchanan supports reinstituting the option to expense research costs under Section 174, a measure with broad bipartisan support. Similarly, the TCJA limited the deductibility of certain business interest costs and both members support restoring the pre-TCJA rules. Republicans may also attempt to make permanent the bonus depreciation rules that allow businesses to deduct a percentage of an asset's purchase price initially rather than over the course of its useful life. If these policies are not included in a 2022 lame duck tax extender package, they will be among the priorities for the Republican members in both chambers and a likely area of bipartisan accommodation.

Republican lawmakers have become increasingly skeptical of the Biden Administration's effort with respect to the OECD Pillar 1 and Pillar 2 rules. With Republican control of the House, the statutory changes necessary for the US to adopt both Pillar 1 and Pillar 2 rules are unlikely to pass. Furthermore, Republican oversight efforts will explore the effects of the Pillar 1 and Pillar 2 rules on a variety of US taxpayers in hearings which are likely to increase opposition to adoption of the rules. Given the extensive guidance required under the *Inflation Reduction Act*, Republican leadership of the Ways and Means and Finance committees is also expected to closely scrutinize Treasury's efforts to implement the bill through the issuance of guidance and allocation of the bill's $80 billion infusion into the IRS.

One area of corporate tax interest regarding the implementation of the *Inflation Reduction Act* (Pub. L. 117-169) involves potential lobbying of the *Financial Accounting Standards Board* (FASB). Under the corporate alternative minimum tax imposed by the IRA, the alternative minimum tax is determined with reference to financial statement, or "book" income, which is determined under rules set by FASB. Thus, for those corporations subject to the AMT, FASB rules will supplant Congress's legislative pronouncements in part. Members of both parties will likely closely monitor developments to understand the policy's effect on information that creditors and investors used to inform financial decisions. The tax could also encourage firms to lobby the FASB for favorable changes to financial statement income reporting guidelines, potentially altering the availability of information across the financial sector.

Individual Tax Measures

Both House Republicans and Senate Democrats will use the 118th Congress to frame their arguments relating to the TCJA provisions that expire in the 119th Congress. Particularly with respect to individual tax, 2025 looks likely to be the most significant year for tax since enactment of the TCJA. That year, 23 provisions are scheduled to expire, notably the reduction in individual income tax rates provided under the TCJA and the 20 percent deduction for pass-through businesses on qualified business income. The increased child tax credit—provided that neither a lame duck or bipartisan change is made during the 118th Congress—the standard deduction and the Alternative Minimum Tax (AMT) exemption are also set to expire in 2025.

House Republicans are likely to undertake a comprehensive effort to tee up extensions of the TCJA provisions affecting individual taxpayers. Republicans will use the upcoming Congress to build a strong legislative record in support of extension or permanence of such TCJA provisions. For instance, during the 117th Congress, Rep. Buchanan introduced the *TCJA Permanency Act* (H.R. 8913) that would permanently extend the 23 expiring provisions.

While many of these objectives will be highly partisan, there are a few areas of possible bipartisan agreement. One such area is with respect to the *Child Tax Credit*. Versions of the credit have received support from Senate Republicans, such as Sens. Marco Rubio (R-FL) who is developing the *Providing for Life Act (draft proposal)* and Mitt Romney (R-UT) who is building support for the *Family Security Act 2.0 (draft proposal)*. Both versions would provide a *Child Tax Credit* capped above the current $2,000 limit.

Given the importance of the tax credit to Democrats, a bipartisan agreement to advance similar legislation is feasible in 2023.

International Tax Measures

Republican lawmakers have become increasingly skeptical of the Biden Administration's efforts with respect to the OECD Pillar 1 and Pillar 2 rules. With Republican control of the House, the statutory changes necessary for the US to conform to both Pillar 1 and Pillar 2 rules are unlikely to be enacted. With the House in Republican hands, it is extremely unlikely that any multilateral instrument necessary for Pillar 1 implementation requiring Senate ratification will advance. Furthermore, Republican oversight efforts will explore the effects of the Pillar 1 and Pillar 2 rules on a variety of US taxpayers, hearings which are likely to increase opposition to the program.

Notwithstanding Republican concerns regarding their perceptions of the Biden Administration's process, Republican members share the administration's desire to foreclose imposition of digital services taxes around the world. Senate Finance Committee Chairman Ron Wyden (D-OR) and current Ranking Member Crapo described digital services taxes as "discriminatory" in a February 2022 bipartisan statement. The Pillar 1 regime would abolish digital services taxes, replacing them with a global profit reallocation framework intended to direct tax revenue to jurisdictions where corporations operate. Key provisions of Pillar 1 remain in flux, and negotiations around the agreement have slowed, resulting in OECD leadership projecting a late 2023 to early 2024 deadline for a final agreement.

US compliance with the Pillar 2 agreement would require statutory changes, including increasing the effective tax rate imposed on so-called "global intangible low-taxed income" (GILTI) and taxing GILTI on a country-by-country basis. Republicans in the House and Senate staunchly oppose these changes. Even Democrats do not have unanimity on the issue, with Sen. Joe Manchin (D-WV) suggesting he will not support adoption of Pillar 2 rules until other nations begin to adopt such rules. Given Republican control in the House and skepticism among some Senate Democrats, the Biden Administration is unlikely to move forward in the 118th Congress on the statutory changes necessary to comply with the Pillar 2 agreement. However, should non-US jurisdictions adopt Pillar 2 rules and begin imposing penalty "top up" taxes on US multinationals as a result of the non-compliance of US tax rules with Pillar 2, domestic corporate pressure may encourage the House Ways and Means and Senate Finance committees to find a bipartisan legislative path toward Pillar 2 compliant provisions.

Retirement and High Net Worth Tax Measures

The Republican Chair of the Ways and Means and Senate Finance Committee Chairman Ron Wyden (D-OR) could continue bipartisan efforts on retirement legislation. For instance, Sen. Wyden introduced the *Enhancing Americans Retirement Now (EARN) Act* (S. 4808), which would: (1) promote the adoption of retirement plans by small businesses; (2) establish penalty-free retirement withdrawals for select groups; (3) make changes to the required minimum distribution rules to increase the age at which distributions must begin and to decrease excise taxes for required minimum distribution failures; and (4) implement a 50 percent government matching policy for the saver's credit, which subsidizes retirement contributions by disadvantaged groups. It is likely that the *EARN Act* will be combined with the House-passed *SECURE 2.0 Act* (H.R. 2954) during the 2022 lame duck session, and could pass Congress with bipartisan support. *The SECURE Act*, *SECURE 2.0*, and related legislation sets a strong example of bipartisan work on retirement legislation, which, if not enacted during the lame duck session of the 117th Congress, may be pursued during the 118th Congress.

Clean Energy Tax Measures

Democratic victories in the midterm elections in the Senate coupled with Republican victories in the House will limit significant legislative developments with respect to clean energy tax measures for the balance of the 118th Congress. While enactment of the IRA was highly partisan and required use of budget reconciliation rules, there are also several overlapping interests in providing incentives for firms transitioning from fossil to cleaner technologies that might receive bipartisan support.

For instance, incentive programs for hydrogen, carbon capture and nuclear energy, have received support from leading Republican tax writers. Sen. Crapo, the ranking member on Senate Finance, introduced the *Energy Sector Innovation Credit Act* (S. 2475), which would provide tax incentives for investments in hydrogen, carbon capture and other emerging technologies.

In addition, there is bipartisan support for using national differences in carbon intensity as a benchmark to achieve a variety of environmental and foreign policy goals. For instance, while the *Clean Competition Act* (S. 4355), introduced by Sen. Sheldon Whitehouse (D-RI), and the *FAIR Transition and Competition Act* (S. 2378), introduced by Sen. Chris Coons (D-DE), remain the leading bills to enact a carbon border adjustment and only feature Democratic cosponsors, Republican interest in similar legislation is growing.

In a December 2021 essay in *Foreign Policy* with Gen. H.R. McMaster, President Trump's National Security Advisor, Sen. Kevin Cramer (R-ND) proposed a joint EU-US carbon fee to counter Russian energy policy. Earlier that year, Sen. Cramer wrote the Biden Administration opposing the EU CBAM, instead encouraging a "common approach to climate and trade policy focused on the real problem—greenhouse gas emissions growth from China." Additionally, during short-lived climate and energy meetings convened by Sen. Joe Manchin (D-WV) this spring, Senator Bill Cassidy (R-LA) indicated that he is working to draft a "carbon border mechanism that would address rising greenhouse gas emissions in China and skirt onerous international trade rules." The two bills referenced above would both tax increased carbon output, in part—the *Clean Competition Act* would impose fees based on emissions above average US emissions, while the *FAIR Transition and Competition Act* would impose a carbon fee to imported steel, aluminum, cement, and other products equal to the cost of compliance with domestic environmental regulations—but bipartisan engagement is likely to change the scope of any potential tax.

Cryptocurrency Regulation and Legislation

The unique nature of digital assets will force tax writers to consider several key policy questions when determining their tax treatment. The first, and most critical, is what digital assets are considered taxable, and when can gains on digital assets be realized. The IRS currently treats cryptocurrencies as property, not currencies, which are subject to tax at point of sale. Several legislative proposals, including the *Virtual Currency Tax Fairness Act* (S. 4608) and the *Responsible Financial Innovation Act* (S. 4356), have sought to create *de minimis* exemptions from tax for small value crypto transactions in order to encourage the use of crypto in everyday transactions. Mined crypto is treated as taxable income at the fair market value of the token when it is mined. These tokens are then subject to tax when sold.

A second is the tax treatment of airdrops or hard forks. Airdrops are the unsolicited free receipt of digital assets and hard forks are the transfer of copies of digital assets from one version of a blockchain to another, which can sometimes result in the generation of new tokens. Both events are currently taxed as ordinary income at fair market value of the new tokens received.

Third is the tax treatment of crypto lending. Traditional lending of crypto tokens from one central party to another is generally not considered a taxable event. The Biden Administration's FY23 *Greenbook* echoes this, proposing to expand 26 USC 1058 nonrecognition treatment to include "actively traded" crypto loans, noting that many crypto loans follow similar terms to securities loans. The proposal would impose additional disclosure requirements on crypto lenders, including income earned on the loaned asset during the loan. This demonstrates the Biden Administration's willingness to work with the crypto industry to establish regulatory clarity despite previous actions that could be perceived as skeptical of the crypto space, including President Biden's *Executive Order on Ensuring Responsible Development of Digital Assets* (EO 14067). Decentralized finance (DeFi) lending complicates this framework, however, because it removes the transaction between two parties associated with crypto lending in exchange for a common pool of assets deposited by lenders, which can be withdrawn in exchange for collateral. The lack of direct lender-borrower relationships in DeFi lending stretch the comparison of crypto lending to traditional securities lending.

Finally, policymakers must determine information reporting requirements for the crypto space. 2021's *Infrastructure Investment and Jobs Act* (Pub. L. 117- 58) expanded cryptocurrency reporting requirements to require "brokers" who enact digital asset transactions on behalf of another person to report transactions and require businesses that receive cryptocurrency transfers exceeding $10,000 in value to file Form 8300 within 15 days of the transaction. The Biden Administration's FY 2023 *Greenbook* would also force brokers to report information on the substantial foreign owners of passive entities and require foreign asset reporting of digital asset accounts holding more than $50,000. These changes have been met with resistance in Congress, inciting legislative proposals including the *Keep Innovation in America Act* (H.R. 6006 and S. 4751), which would narrow the definition of "broker" by excluding miners and exchange providers that do not take custody of customer cryptocurrencies when facilitating transactions.

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Key Takeaways

- Given the slim margins in both chambers, House Republicans and Senate Democrats will have to work together to advance technology-related legislation in the 118th Congress and may find common ground on issues like cybersecurity, broadband and right-to-repair legislation. We also expect additional bipartisan oversight hearings focused on "Big Tech" companies.
- Though both parties agree on the need for Section 230 reform and federal privacy legislation, it remains to be seen whether they will be able to reach the compromises needed to move these issues forward in the next Congress. Any legislation that results, especially on Section 230 reform, likely will be narrow in scope.
- Democrats' slim majority in the Senate will continue to pose a challenge for some of President Biden's controversial nominees, including Gigi Sohn to be a Member of the Federal Communications Commission, which could force the President to select candidates that are more likely to advance in the future.

Overview

With a split Congress and extremely close margins in both chambers, expect limited opportunities for targeted bipartisan legislation and oversight on technology and privacy issues in the 118th Congress. With Rep. Cathy McMorris Rodgers (R-WA) as the likely chairwoman of the House Energy and Commerce Committee, House Republicans will conduct extensive oversight in this space. Rep. Frank Pallone (D-NJ), who currently serves as chairman of the committee, is expected to become the ranking member. With Democrats retaining control of the Senate, Sen. Maria Cantwell (D-WA) will likely continue to chair the Senate Commerce Committee. Sen. Ted Cruz (R-TX), an ardent and vocal critic of the Biden Administration, is expected to serve as the ranking member. His reputation as a political firebrand could make his relationship with Chairwoman Cantwell difficult.

House Republicans will conduct frequent oversight of the Biden Administration's technology and communications policy initiatives. In particular, we expect close

scrutiny from House Republicans of the implementation of the *CHIPS and Science Act* (Pub. L. 117-167), particularly the CHIPS Fund that supports domestic semiconductor manufacturing. Republicans are also likely to continue their efforts to prevent censorship by social media companies and hold "Big Tech" accountable, both of which were recommendations made by the House Republican Conference's Big Tech and Data Task Force and its corresponding *Commitment to America*. Expect Sen. Cruz to lend his voice to some House Republican efforts.

While she opposes many Democratic priorities, Rep. McMorris Rodgers recently partnered with Rep. Pallone and Senate Commerce Committee Ranking Member Roger Wicker (R-MS) to draft a bicameral and bipartisan privacy bill—the *American Data Privacy and Protection Act* (ADPPA, H.R. 8152). With one of the ADPPA's major opponents—Speaker Nancy Pelosi (D-CA)—out of power, there may be renewed interest in pursuing a federal data protection standard; however, the ADPPA is unlikely to advance in its current form as the Senate Commerce Committee will lose Sen. Wicker, and Chairwoman Cantwell has criticized the bill as weak on enforcement. But there may be a glimmer of hope for privacy legislation—Chairwoman Cantwell said she hopes to work with Sen. Cruz on the issue in the 118th Congress.

In the Senate, Sen. Cantwell, a strong ally of President Biden, will continue to advocate for the administration's technology policy priorities and help oversee the deployment of key programs. Senate Democrats will also seek to advance legislation to hold tech companies responsible for the spread of misinformation and regulate the use of social media algorithms to curb hate speech. With Democrats retaining control of the Senate, Federal Communications Commission (FCC) Commissioner nominee Gigi Sohn may be a topic of renewed focus. But should she face continued opposition from Senate Democrats, President Biden may need to nominate someone who is more likely to garner bipartisan support. Sen. Cruz is unlikely to partner with Chairwoman Cantwell on Sohn's confirmation or most other technology policies.

For its part, the Biden Administration is likely to continue to keep its technology policy focused on competition, cybersecurity, connectivity, and civil rights, as it did during the prior two years. President Biden addressed competition policy through an executive order promoting competition in July 2021 and principles to guide the administration's technology policy work in September 2022. He also signed into law the *CHIPS and Science Act* to invest $52 billion in the domestic semiconductor supply chain and issued a rule to allow stakeholder participation in international standards setting activities. In the cybersecurity space, President Biden created the Bureau of Cyberspace and Digital Policy and signed into law the *Cyber Incident Reporting Act* (Pub. L. 117-103). President Biden also promoted access to affordable high-speed broadband through the Affordable Connectivity Program (ACP) and developed a framework for artificial intelligence to clarify what rights and freedoms data-driven technologies should respect. With a split Congress, expect President Biden's technology policy to focus on executive action during the 118th Congress.

For additional information about supply chain security issues, please see the Trade section of our analysis.

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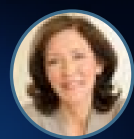
Expected Congressional Committee Leadership

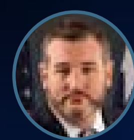
Senate Commerce Committee

Chairman



Sen. Maria Cantwell
(D-WA)
[current chairman]

Ranking Member



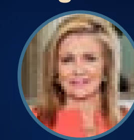
Sen. Ted Cruz
(R-TX)

Senate Commerce Consumer Protection, Product Safety, and Data Security Subcommittee

Chairman

Sen. Richard Blumenthal
(D-CT)
[current chairman]

Ranking Member



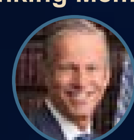
Sen. Marsha Blackburn
(R-TN)
[current ranking member]

Senate Commerce Communications, Media, and Broadband Subcommittee

Chairman

Sen. Ben Ray Lujan
(D-NM)
[current chairman]

Ranking Member



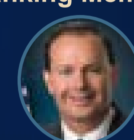
Sen. John Thune
(R-SD)
[current ranking member]

Senate Judiciary Competition Policy, Antitrust, and Consumer Rights Subcommittee

Chairman

Sen. Amy Klobuchar
(D-MN)
[current chairman]

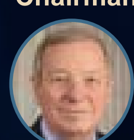
Ranking Member



Sen. Mike Lee
(R-UT)
[current ranking member]

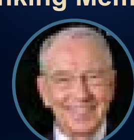
Senate Judiciary Committee

Chairman



Sen. Dick Durbin
(D-IL)
[current chairman]

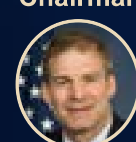
Ranking Member



Sen. Chuck Grassley
(R-IA)
[current ranking member]

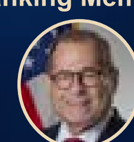
House Judiciary Committee

Chairman



Rep. Jim Jordan
(R-OH)
[current ranking member]

Ranking Member



Rep. Jerry Nadler
(D-NY)
[current chairman]

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Expected Congressional Committee Leadership

House Energy and Commerce Committee

Chairman

Rep. Cathy McMorris Rodgers
(R-WA)
[current ranking member]

Ranking Member

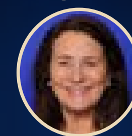
Rep. Frank Pallone, Jr.
(D-NJ)
[current chairman]

House Energy and Commerce Oversight and Investigations Subcommittee

Chairman

Rep. Morgan Griffith
(R-VA)
[current ranking member]

Ranking Member



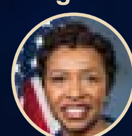
Rep. Diana DeGette
(D-CO)
[current chairman]

House Energy and Commerce Communications and Technology Subcommittee

Chairman

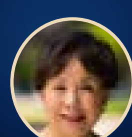
Rep. Rob Latta
(R-OH)
[current ranking member]

Ranking Member



Rep. Yvette Clarke
(D-NY)

Rep. Marc Veasey
(D-TX)



Rep. Doris Matsui
(D-CA)

House Energy and Commerce Consumer Protection and Commerce Subcommittee

Chairman

Rep. Gus Bilirakis
(R-FL)
[current ranking member]

Ranking Member

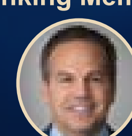
Rep. Jan Schakowsky
(D-IL)
[current chairman]

House Judiciary Antitrust, Commercial, and Administrative Law Subcommittee

Chairman

Rep. Ken Buck
(R-CO)
[current ranking member]

Ranking Member



Rep. David Cicilline
(D-RI)
[current chairman]

Privacy

Congressional interest in federal legislation protecting consumers' online data will continue in the 118th Congress, particularly as more states continue to enact consumer privacy laws. The *ADPPA* (H.R. 8152) is the first broadly applicable privacy bill to gain significant traction in Congress, receiving bipartisan support during its mark-up in the House Energy and Commerce Committee in July. The bill, which also regulates artificial intelligence (AI) and other algorithms, subsequently stalled on the House floor due to concerns from leading California politicians, including Speaker Nancy Pelosi (D-CA), that the bill would preempt allegedly stronger privacy protections adopted by the Golden State. We may see the bill considered during the lame duck session, as discussions to bring the *ADDPA* to the floor are ongoing between the Energy and Commerce Committee leadership and former Speaker Pelosi. If not, the ADPPA will provide the starting point for legislation to address consumer privacy issues in the 118th Congress.

Federal privacy legislation will have champions in Reps. Cathy McMorris Rodgers (R-WA) and Frank Pallone (D-NJ), who led the *ADPPA's* introduction and passage with near-unanimous committee support, but the bill will face the same hurdles that prevented its passage earlier this year. In addition to opposition from the California delegation, Senate Commerce Committee Chairwoman Maria Cantwell (D-WA) vocally opposed the *ADPPA*, taking issue with the preemption provisions that would negate several state consumer privacy laws, the staggered implementation date of the private right of action provisions and what she considered "weak" enforcement mechanisms. She has not ruled out supporting the bill if changes are made to address her concerns, but these changes could risk alienating Republicans needed to pass the legislation in the Senate. Moreover, the succession of Sen. Cruz as the ranking member of the Senate Commerce Committee will add a new challenge. Sen. Cruz is unlikely to engage in a meaningful bipartisan process to pass a privacy bill to the same extent as Ranking Member Roger Wicker (R-MS), who supports the *ADPPA*.

By contrast, the data privacy of children and teens commands stronger bipartisan support. Sens. Richard Blumenthal (D-CT) and Marsha Blackburn (R-TN), two of the most vocal proponents of greater protections for children and teens online, introduced the *Kids Online Safety Act* (S. 3663) in February 2022. Since that time, cosponsors from both parties have been added steadily. Enthusiasm for this issue could gain momentum into the 118th Congress, particularly if efforts to pass a broader federal consumer privacy standard stall.

Absent enactment of a wide-ranging privacy law, the Federal Trade Commission (FTC) also will continue with its "commercial surveillance" rulemaking. Begun in August, with an Advance Notice of Proposed Rulemaking posing 95 questions on privacy, data security and AI and other algorithms, the proceeding could lead to major changes for the digital economy with rules specifying certain practices as "unfair" or "deceptive" in violation of Section 5 of the Federal Trade Commission Act. For additional details, please see our previous Advisory on changes ahead for the digital economy.

Content Moderation

President Biden has repeatedly called for reforms to Section 230 of the *Communications Decency Act,* which shields social media companies from liability for content moderation decisions, among other actions. While the President has criticized Section 230 for allowing hate speech and disinformation to flourish online, his administration has not endorsed any specific legislative fixes. In its recent Tech Platform Accountability principles, the administration calls for "fundamental reforms" to Section 230. With Republicans in control of the House, expect the Biden Administration to continue advocating for reform without endorsing particular proposals, thereby placing the legislative burden on Congress.

Both parties criticize the results of content moderation decisions that Section 230 allows technology companies to make, and largely agree Section 230 should not protect platforms that fail to block certain types of harmful speech. Republicans and Democrats also support requiring platforms to explain their content moderation practices and mandating that large platforms remove court-determined illegal content and activity. Nevertheless, they remain divided on the best approach to amend Section 230. Republicans have argued Section 230 protections should be removed if content moderation leads to censoring conservative viewpoints. Democrats, by contrast, argue content moderation should be used to curb the spread of hate speech, election denialism and other political disinformation.

To this point, House Republicans will continue to advocate for and seek to advance their Big Tech Accountability Platform. The Platform would remove Section 230 protections for companies that "censor constitutionally protected speech on their platforms" and promote greater content moderation to limit cyberbullying, doxing, terrorist content, and the sale of illegal drugs, among other content. The reforms, which are

outlined in a July 2021 discussion draft, would also require companies to maintain an appeals process for content moderation decisions and moderators to submit quarterly filings with the Federal Trade Commission detailing enforcement actions. Rep. Kevin McCarthy (R-CA), who is favored to be the next Speaker of the House, is among the supporters of the Platform.

Senate Democrats, by contrast, may focus their Section 230 reform efforts on targeted legislation like Sen. Mark Warner's (D-VA) *SAFE TECH Act* (S. 299), which would limit the scope of Section 230 protections for paid content and permit legal action against moderators under civil rights, antitrust, stalking, harassment or intimidation, human rights, and civil wrongful death statutes. The Senate also may consider the bipartisan *PACT Act* (S. 797), which would require content moderators to disclose their moderation guidelines publicly.

While reaching consensus on Section 230 will be difficult, the Supreme Court may add pressure for Congress to act. In October 2022, following Justice Clarence Thomas's expression of interest in clarifying the scope of Section 230, the Supreme Court agreed to hear two challenges to the statute involving allegations that social media sites helped facilitate international terrorism. This will be the first time the Court has considered whether there is a distinction between hosted content and content recommended by an algorithm, and the Court's eventual ruling could have a profound impact on Section 230 protections.

Competition

Republican control of the House will likely shift the focus of potential competition and antitrust legislation, from a comprehensive rewrite of the laws affecting fundamental antitrust principles to more enforcement-related and procedural laws with limited applicability. Some House Republicans have supported narrower bipartisan antitrust bills, including the *State Antitrust Enforcement Venue Act of 2021* (H.R. 3460), which would prevent state-brought antitrust actions from being transferred to friendlier courts, and the *American Choice and Innovation Online Act* (H.R. 3816), which would prohibit large online platforms from self-preferencing their products, disadvantaging competitors on the platform or discriminating among similarly situated users.

Subcommittee on Antitrust, Commercial and Administrative Law Ranking Member Ken Buck (R-CO) has been particularly vocal about his support for the *State Antitrust Enforcement Venue Act of 2021* and even led a petition to discharge it to the House floor for a vote. The petition received significant Republican support, including an endorsement from the House Freedom Caucus. House Judiciary Committee Ranking

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Member Jim Jordan (R-OH), however, has staunchly opposed bills derived from the House Judiciary Committee's investigation of competition in digital markets and the resulting report from which he dissented, even relatively non-controversial ones such as the *Merger Filing Fee Modernization Act* (H.R. 3843). Rep. Jordan has characterized these bipartisan bills as a vast expansion of government power that do nothing to address Republican concerns about bias against conservative ideas.

With Rep. Jordan expected to chair of the House Judiciary Committee in the 118th Congress, it is likely the bipartisan antitrust bills that were previously advanced in the House may be sidelined. The Republican antitrust agenda Rep. Jordan released in 2021 focused on more expedited enforcement of existing antitrust laws, empowering state attorneys general to enforce antitrust laws and overhauling Section 230 to proscribe censorship of conservative views. While some antitrust bills may emerge from the House, they are likely to be similarly limited in scope. Indeed, the House Republican Conference's Big Tech Censorship and Data Task Force indicated its focus would be on privacy and Section 230 legislation, not antitrust reform, prompting Rep. Buck to criticize the Task Force's approach as insufficient to "tak[e] on Big Tech."

The Democrats' slim Senate majority likely means continued uncertainty over whether antitrust bills can survive the filibuster. Two bipartisan bills—the American Innovation and *Choice Online Act* (S. 2992), which would establish rules to prevent dominant digital platforms from favoring their own products and disadvantaging rivals, and the *Open App Markets Act* (S. 2710), which would target anticompetitive practices in the app store market—have not been scheduled for a floor vote, despite being voted out of committee in early 2022. Senate Majority Leader Chuck Schumer (D-NY) reportedly believes there are not enough votes to pass the bills. With Democrats' Senate majority remaining very slim, even antitrust legislation with some bipartisan support may not be able to pass.

Cybersecurity

Cybersecurity has been a major policy focus for the Biden Administration and the 117th Congress. President Biden issued Executive Order 14028, titled "*Improving the Nation's Cybersecurity*," which sought to ensure the federal government leads by example in "the prevention, detection, assessment, and remediation of cyber incidents." In addition, the March 2020 Cyberspace Solarium Commission (CSC) report has provided a roadmap for improving cybersecurity that will continue to be influential. Congress will look at the remaining CSC recommendations to determine what else can be achieved legislatively, such as creating an Office of Cyber Statistics at the lead federal civilian cyber

agency—the Cybersecurity and Infrastructure Security Agency (CISA)—and securing "systemically important critical infrastructure" from cyber-attacks.

While a sharply divided Congress will face friction legislating in any domain, cyber issues have generally been bipartisan. Members of Congress likely will continue to find common ground here, particularly in light of growing cyber threats domestically and internationally. At the end of the 117th Congress, a significant number of congressional leaders on cyber policy will leave. Reps. Carolyn Maloney (D-NY), Jim Langevin (D-RI) and John Katko (D-NY) and Sens. Rob Portman (R-OH) and Ben Sasse (R-NE) will not be returning. The departure of these leaders may invite new leadership on cybersecurity. Rep. Maloney's election loss also creates a question of who will advance *Federal Information Security Management Act* (FISMA) reform given her leadership on the issue as chairwoman of the House Committee on Oversight and Reform.

In the past few years, Congress has channeled significant funding towards CISA, increasing its budget from $1.68 billion in Fiscal Year (FY) 2019 to $2.59 billion in FY 2022. House Democrats voted to increase CISA's budget by $417 million more than the Biden Administration's FY 2023 request, to a total of $2.93 billion for FY 2023. While Republicans are likely to be more spending-shy in other areas, increasing cybersecurity funding through CISA may well remain an area of bipartisan agreement in the next Congress.

Following up on its recent Request for Information, CISA will be implementing the cybersecurity incident reporting rulemaking, required under the *Cyber Incident Reporting for Critical Infrastructure Act of 2022* (CIRCIA) in the *Consolidated Appropriations Act* of 2022 (Pub. L. 117-103).

EO 14028 also tasked the Office of the National Cyber Director (ONCD) with developing a National Cybersecurity Strategy. Discussion surrounding the implementation of the strategy will likely be a key cybersecurity issue in the next Congress.

The issue of the *Federal Risk and Authorization Management Program* (FedRAMP), which provides a government-wide, standardized approach to security assessment and continuous monitoring for cloud products and services, will likely remain prominent. In 2021, Reps. Gerry Connolly (D-VA), James Comer (R-KY) and Jody Hice (R-GA) spearheaded House passage of the *FedRAMP Authorization Act* (H.R. 21). The bill would allow the federal government flexibility in upgrading to new cloud technologies. A related bill, the *Federal Secure Cloud Improvement and Jobs Act of 2021* (S. 3099), made it through the Senate Homeland Security and Governmental Affairs Committee, but it stalled before reaching the Senate floor. These efforts will continue.

Broadband

Universal high-speed broadband became a national priority due to the COVID-19 pandemic. Many aspects of American life transitioned to a virtual environment, revealing the extent to which millions across the country lack basic access to broadband, especially low-income, rural and minority and tribal populations.

The 117th Congress acted to expand broadband access and affordability. Congress passed the *Infrastructure Investment and Jobs Act* (IIJA, Pub. L. 117-58), which invests over $60 billion in expanding high-speed broadband to underserved communities. Additionally, the *American Rescue Plan (ARP) Act* (Pub. L. 117-2) funded FCC efforts to build out broadband capacity at schools and public libraries.

Given the number of bipartisan broadband-related programs authorized in its predecessor, the 118th Congress may feel less urgency to act on any major broadband-related legislation. However, the relevant House and Senate committees will likely engage in vigorous oversight to ensure funds are used efficiently. To this point, 13 Senate Republicans wrote to Secretary of Commerce Gina Raimondo in August 2022 to propose changes in the National Telecommunications Information Administration's (NTIA) design of the $42.5 billion *Broadband Equity, Access, and Deployment* (BEAD) program. Among other issues, these lawmakers oppose prioritizing fiber-optic technology over alternatives and imposing requirements they perceive as opening the door to broadband rate regulation.

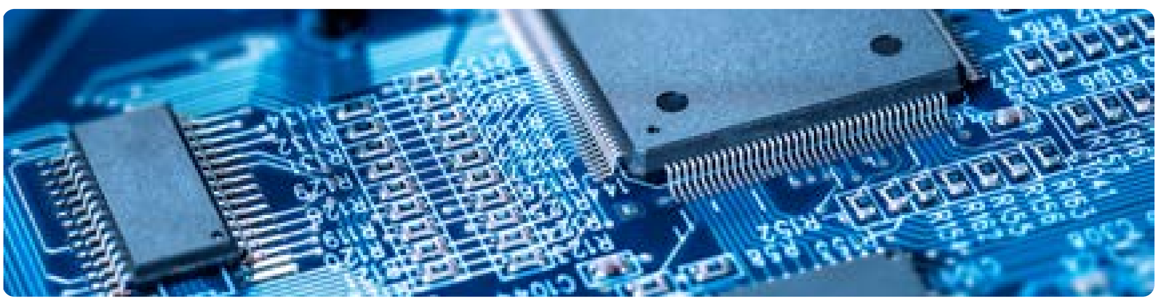
Under Chairwoman Maria Cantwell (D-WA), the Senate Commerce Committee will lead Democrats' oversight efforts of the NTIA's and FCC's broadband programs. Chairwoman Cantwell and Senate Democrats will likely push the FCC and NTIA to prioritize equity in deploying funding for the various broadband programs to ensure low-income communities and communities of color benefit from the programs. Republicans on the committee, including presumed Ranking Member Ted Cruz (R-TX), who is much less supportive of federal broadband spending than current Ranking Member Roger Wicker (R-MS), are likely to ramp up their oversight of the NTIA and FCC.

In the House, Republicans on the Energy and Commerce Committee, led by incoming Chairwoman Cathy McMorris Rodgers (R-WA), also will actively oversee the new programs deployed by the NTIA and FCC. While Rep. McMorris Rodgers did not support ARP or IIJA, she has supported other federal broadband programs, particularly through legislation that would bridge the digital divide in rural areas by improving the broadband mapping process. Under her leadership, the committee's oversight efforts will likely focus on the efficiency of funding deployment, the FCC's mapping process and rural broadband expansion.

Confirmation of Key Presidential Nominees

The Democrats' slim Senate majority could mean confirmation of controversial presidential nominees, like Gigi Sohn for the FCC, will remain challenging or even out of reach. This could narrow the type of proceedings that administrative agencies like the FCC can tackle, steering them away from issues like competition and media concentration, where the parties are split, and handicapping their ability to block high-stakes transactions. For instance, earlier this year, the FTC was unable to challenge Amazon's acquisition of MGM Studios because it was deadlocked 2–2 at the time. The Senate subsequently confirmed Alvaro Bedoya as the third Democratic commissioner. Similarly, the FCC has not initiated its 2022 Quadrennial Review of its media ownership restrictions as well as the widely expected reinstatement of net neutrality rules governing broadband internet access, and its delay in doing so may stem, in part, from the lack of a third Democratic commissioner to create a majority for reforms.

Continued challenges in confirming nominees halfway through his term could affect President Biden's selections going forward. The President might have to nominate less controversial candidates to enable agencies to move forward in areas where they have been stalled.



Right-to-Repair

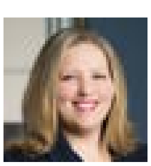
While attempts to create a federal "right-to-repair" date back to the 1970s, these attempts gained little traction until recently. But the movement started gaining momentum in the second half of the 117th Congress and it is one of the few bipartisan issues a split Congress may be able to pursue in the 118th Congress. In July 2021, President Biden issued a sweeping executive order on promoting competition that, among other things, encourages the Federal Trade Commission to enact regulations to prohibit manufacturers from imposing restrictions that "prevent farmers from repairing their own equipment." In January 2022, President Biden tweeted: "When you own a product, you should be able to repair it yourself. That's why I included support for the 'right to repair' in my Executive Order."

In February 2022, Rep. Bobby Rush (D-IL) introduced the *Right to Equitable and Professional Auto Industry Repair (REPAIR) Act* (H.R. 6570) to provide vehicle owners with access to vehicle-generated data related to diagnostics, repair, service, wear, and calibration or recalibration of parts and systems of the vehicle. Since introduction, the *REPAIR Act* has attracted 12 additional cosponsors—six Republican, six Democratic. Other bipartisan right-to-repair bills include the *Save Money on Auto Repair Transportation (SMART) Act* (H.R. 3664) and the Freedom to Repair Act of 2022 (H.R. 6566).

On the Senate side, Sens. Ben Ray Lujan (D-NM), Cynthia Lummis (R-WY) and Ron Wyden (D-OR) introduced the *Fair Repair Act* (S. 3830) in March 2022. The *Fair Repair Act* would require original equipment manufacturers (OEMs) to make diagnostic and repair information, parts and tools available to third-party repairers and owners in a timely manner and on "fair and reasonable" terms. The bill is aimed at "digital electronic equipment," which the bill defines as "any product that depends for its functioning in whole or in part, on digital electronics embedded or attached to the product." Additionally, in March 2022, Sen. Ted Cruz (R-TX) endorsed the right-to-repair movement, saying he "strongly support[s] the right to repair," saying that it is a "fundamental question of individual liberty and individual property rights."

The right-to-repair debate spans many industries, including agriculture equipment, mobile technology and medical equipment. Expect proponents to push for the inclusion of a right-to-repair bill in the Farm Bill, which is set to expire on September 30, 2023.

Key Contacts



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Trade

David Skillman, Marne Marotta, Lynn Fischer Fox, Brian Bombassaro, Vincent Brown, Adrienne Jackson, Christina Poehlitz, Scarlett Bickerton, Drew Benzaia

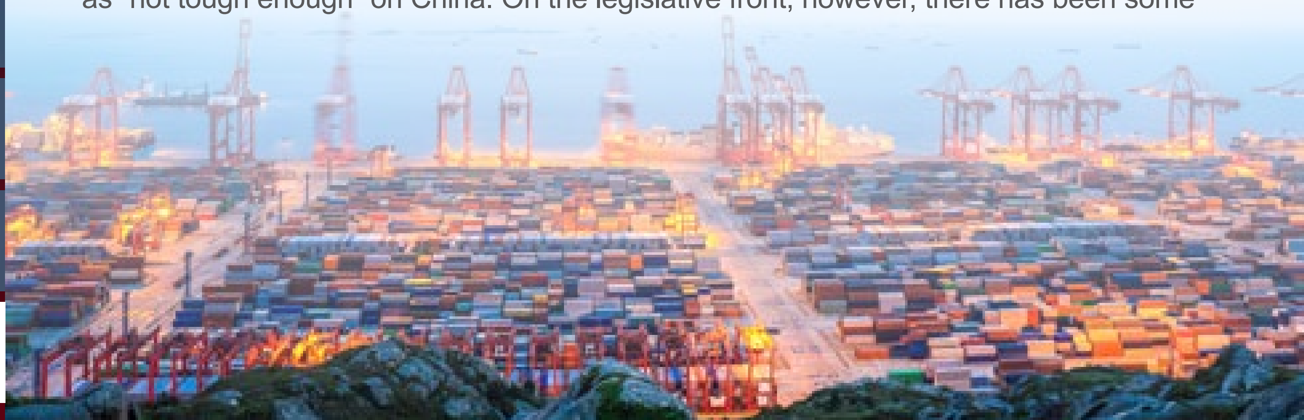
Key Takeaways

- The Biden Administration will continue to focus on industrial policy focused on reshoring manufacturing and strengthening organized labor. The administration is unlikely to take up traditional market access focused trade negotiations, but will continue non-traditional negotiations including the US/EU Trade and Technology Council (TTC), the Indo-Pacific Economic Framework for Prosperity (IPEF) and the Americas Partnership for Economic Prosperity (APEP).
- House Republicans will create a Select Committee on China to build a "tough on China" narrative for the 2024 elections, with little legislative movement expected.
- Expect some of the less controversial trade provisions that were excluded from the *CHIPS and Science Act* (Pub. L. 117-167) to be included in the end-of-year funding package.
- Look for the administration to continue targeting China's economic policies through export controls and potentially an outbound investment mechanism through executive action.

Introduction

On the campaign trail, President Biden vowed to move away from the Trump Administration's "America First" trade policy by focusing on coordination with allies and a multilateral strategy, but also promised not to pursue new trade deals prior to undertaking substantial domestic investment to make American workers more competitive. While the tone of discussions with trading partners has become significantly more polite and certain trade frictions have been removed with key allies, progress on building a multilateral approach to China remains fraught with challenges. The Trump Administration's China tariffs remain in place and a multilateral approach to China has yet to emerge.

The Biden Administration continued to act unilaterally and has taken increasingly aggressive actions against China's economic policies, including expansive export controls on key semiconductor technology. Nevertheless, Republicans criticize President Biden as "not tough enough" on China. On the legislative front, however, there has been some



success in garnering bipartisan support for administration policies on China. Both the *Uyghur Forced Labor Prevention Act* (UFLPA, Pub. L. 117-78) and the *CHIPS and Science Act* (Pub. L. 117-167) passed with strong bipartisan support. Despite these successes, the *CHIPS and Science Act*, which was originally meant to be a wide-ranging competitiveness package, passed with many of the trade, foreign policy and export provisions omitted from the final bill. Those legislative initiatives remain pending. Hopes that the Biden Administration would unwind the Trump Administration's tariffs on Chinese imports have waned; while the Biden Administration may remove some of the Trump-era tariffs, it may impose new ones as well. Similarly, the administration has demonstrated little interest in pursuing traditional trade negotiations, declining to restart negotiations with the United Kingdom or Kenya, and instead pursuing efforts in the Indo-Pacific, Latin American and European Union arenas, which do not include traditional market access commitments.

While some Senate Republicans have indicated an interest in renewing Trade Promotion Authority and pushing the Biden Administration to undertake traditional negotiations, House Republicans are more likely to use their new majority to build their "tough on China" narrative for the 2024 election cycle. House Republicans are likely to create a Select Committee on China focused on (1) performing oversight of the administration's actions and policies related to China; (2) seeking to increase support for Taiwan; and (3) investigating the origins of the COVID-19 pandemic. One area where we expect to see bipartisan support: potential legislation and oversight of American companies investing or operating in China. Interest in an outbound investment mechanism continues to build not only in Congress, but also within the Executive Branch. The White House is likely to issue an outbound investment executive order by the end of this year.

Aside from China, we may see bipartisan efforts in several trade-related areas. First, senators from both sides of the aisle may move to create a carbon border adjustment mechanism (CBAM), but a Republican House is unlikely to support this effort. Without a clear legislative path, the administration will continue to forge ahead on climate change policy through executive action, including multilateral efforts through the US/EU Trade and Technology Council (TTC), the Indo-Pacific Economic Framework for Prosperity (IPEF) and the Americas Partnership for Economic Prosperity (APEP). House Republicans and Senate Democrats' divergent views on trade will likely limit trade-related legislation, but expect bipartisan support for targeted export controls aimed at countries of concern. Customs modernization also may be an area where bipartisan legislation is feasible, although issues such as "de minimis" threshold for duty exemptions and expedited customs processing could be an obstacle.

In the rest of the 117th Congress, the end of the year funding package may be targeted as a vehicle for some of the trade provisions that were dropped from the CHIPS and Science Act. Still pending are renewals of: the generalized system of preferences (GSP), the *miscellaneous tariff bill* (MTB) and the *trade adjustment assistance program* (TAA). Since the House previously passed Sens. Sherrod Brown (D-OH) and Rob Portman's (R-OH) controversial *Level the Playing Field 2.0* bill as part of the *America COMPETES Act* (H.R. 4521), expect Sens. Brown and Portman to push for their bill to be included as well. Consensus on the details of each proposal has been elusive and would require a breakthrough among congressional leaders, such that some or all of them may remain as unfinished business for attention in the next Congress.

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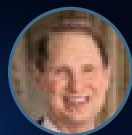
Tax
Technology
Trade

Expected Congressional Committee Leadership

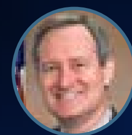
Senate Committee on Finance

Chairman



Sen. Ron Wyden
(D-OR)
[current chairman]

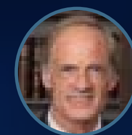
Ranking Member



Sen. Mike Crapo
(R-ID)
[current ranking member]

Senate Finance Trade Subcommittee

Chairman



Sen. Tom Carper
(D-DE)
[current chairman]

Ranking Member

Sen. John Cornyn
(R-TX)
[current ranking member]

House Ways and Means Committee

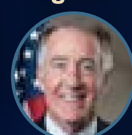
Chairman

Rep. Vern Buchanan
(R-FL)

Rep. Adrian Smith
(R-NE)

Rep. Jason Smith
(R-MO)

Ranking Member



Rep. Richard Neal
(D-MA)
[current chairman]

House Ways & Means Trade Subcommittee

Chairman

Rep. Vern Buchanan
(R-FL)

Rep. Adrian Smith
(R-NE)

Ranking Member

Rep. Earl Blumenauer
(D-OR)
[current chairman]

China

Early in his administration, President Biden called China “our most serious competitor,” saying China is challenging “our prosperity, security and domestic values.” Similar to the Trump Administration, the Biden Administration has continued to use trade as a tool to fight perceived threats from China. The Biden Administration has not removed the panoply of tariffs imposed by the Trump Administration on imports from China. The administration, however, has expanded efforts by focusing on building complementary industrial policy, at times with allies, and imposing export controls to stifle China’s access to technological advancements. In a recent speech, US Trade Representative Katherine Tai criticized China’s “state-directed industrial dominance policies” and said “[t]raditional trade tools and the multilateral trading system” have failed to address China’s policies. She argued trade liberalization “cannot come at the cost of further weakening our supply chains, exacerbating high-risk reliances, decimating our manufacturing communities, and destroying our planet.” Instead, Amb. Tai said we need trade policy to be durable and help “rebuild trust with our communities and rebuild confidence in the fairness of the global economy.”

Nearly two years into the Biden Administration, the US trade relationship with China is still defined by the Trump Administration’s Section 301 tariffs on approximately $360 billion of goods. Although the Section 301 tariffs are currently undergoing a statutorily-required quadrennial review, which many hoped would pave the way to removing some of the Section 301 tariffs, the review has barely begun and it seems unlikely we will see meaningful changes. Even if the review results in USTR removing some of the Trump-era tariffs, the Biden Administration may impose its own Section 301 tariffs targeted at addressing Chinese industrial practices. We do not expect the Biden Administration to make meaningful changes to the Section 232 steel and aluminum tariffs and quotas, which apply to imports from almost every country. Although the Biden Administration negotiated a modest relaxation of these Section 232 measures for imports from the European Union, United Kingdom and Japan, no further agreements of this type appear to be forthcoming.

With Republicans winning control of the House, removing the Section 301 tariffs without imposing new ones will be politically risky and difficult. Not only would President Biden have to overcome disagreement within his administration, he would also have to weather House scrutiny and oversight. Nevertheless, there may be one aspect of the Section 301 tariffs on China where the Biden Administration and House Republicans may find common ground—creating a fairer and more transparent exclusion process for the Section 301 tariffs, which has bipartisan support in both chambers. Similar to the administration, we do not expect Congress to make meaningful changes to the Section 232 steel and aluminum tariffs.

Despite the slow progress, the Biden Administration has started moving away from the Trump Administration's "America first" trade policy by building alliances through the US/EU Trade and Technology Council (TTC), the Indo-Pacific Economic Framework (IPEF) and the Americas Partnership for Economic Prosperity (APEP). While these efforts are nascent, the administration hopes to use platforms like these to build complementary trade policies with our allies and parties. But doing so will be difficult—trading partners that have joined these new engagements do not all see these efforts as excluding or diminishing their trade relationships with China, despite the Biden Administration's apparent hope. And although multilateral alignment helped shape our allies' response to Russia's invasion of Ukraine, it does not appear our allies have the same motivation to stand up to China.

Over the past two years, President Biden has worked to find consensus in a sharply-divided Congress to address China. In December 2021, President Biden and Congress enacted the Uyghur Forced Labor Prevention Act (UFLPA, Pub. L. 117-78), which creates a presumption that products from the Xinxiang region of China are made with forced labor, and therefore prohibited from importation into the United States. The Biden Administration also worked with Congress to pass legislation that is intended to promote domestic industry and foster international cooperation to gain a competitive edge over China through the *CHIPS and Science Act* (Pub. L. 117-167), which President Biden signed into law in August 2022. But members were unable to reconcile differences in trade provisions that were included in previous versions of the competitiveness packages, including legislation to create a new Section 301 tariff exclusion process, make changes to antidumping and countervailing duty calculations and reauthorize trade preference programs. We expect some of these outstanding trade provisions to be subject to legislative efforts in the remaining weeks of the 117th Congress and likely again in the 118th Congress.

We also expect policies that focus additional scrutiny on foreign investment—particularly Chinese investment in the United States and US investment in China—to remain a bipartisan priority. In September 2022, President Biden signed an executive order providing formal direction on the risk factors the Committee on Foreign Investment in the United States (CFIUS) should consider when reviewing a covered transaction. In October 2022, House Republicans called for a federal investigation into foreign investment in US farmland, as concern grows over Chinese acquisitions that lawmakers say pose a threat to national security. On the outbound investment side, there is a bicameral and bipartisan push to create a mechanism to screen outbound investments. While legislative efforts to include an outbound investment mechanism in what became the *CHIPS and Science Act* failed, supporters of outbound investment screening legislation urged the administration to take executive action to create a screening mechanism in September. But interest in an outbound investment screening mechanism is not limited to members of Congress. For example, the administration's National Security Strategy mentions creating an outbound investment screening mechanism as an example of a targeted, new approach to trade. The administration is rumored to be working on an outbound investment screening executive order, which we expect in the near term.

While we do not expect Senate Democrats to publicly challenge the administration's trade priorities, House Republicans are likely to convene congressional hearings on China's unfair trade practices, intellectual property theft and COVID-19. One area where the administration may be able to work with a divided Congress is Taiwan policy, whether it be through continued rhetoric or legislative efforts, including possibly pushing for a comprehensive free trade agreement, to show US support for Taiwan.

Trade Trends

United States-Mexico-Canada Agreement (USMCA)

US Trade Representative Katherine Tai was instrumental to including a rapid-response mechanism in the USMCA to allow a participating country to impose tariffs if a covered facility is found to violate worker-rights. To date, the United States has used the mechanism to resolve six cases with Mexico without imposing tariffs on goods from the facilities named in the complaints. In the 118th Congress, we expect the administration to continue using the rapid-response mechanism frequently and we expect similar mechanisms to be incorporated into U.S. trade policy moving forward.

World Trade Organization (WTO) Issues

The United States has blocked appointments to the Appellate Body 58 times since 2017, and the last three US administrations have criticized the dispute settlement process. US Trade Representative Katherine Tai believes the dispute settlement process must undergo fundamental reform to reflect the interests of all WTO members, including members that have not traditionally used formal dispute settlement. While Amb. Tai recently celebrated the WTO moving away from a push to relaunch the Appellate Body to a discussion of systemic problems, Sens. Chuck Grassley (R-IA), Tom Cotton (R-AK) and Marco Rubio (R-FL) criticized Amb. Tai for "indicating American cooperation in reassembling the WTO's appellate body."

With Republicans in control of the House, expect oversight hearings on the WTO *Trade-Related Aspects of Intellectual Property Rights* (TRIPS) waiver for COVID-19 vaccines, which members of the WTO agreed to in June 2022. Should efforts to expand the waiver to include therapeutics and diagnostics gain momentum, we would expect strong opposition from Republicans.

CHIPS and Science Act, Supply Chain, and "Friendshoring"

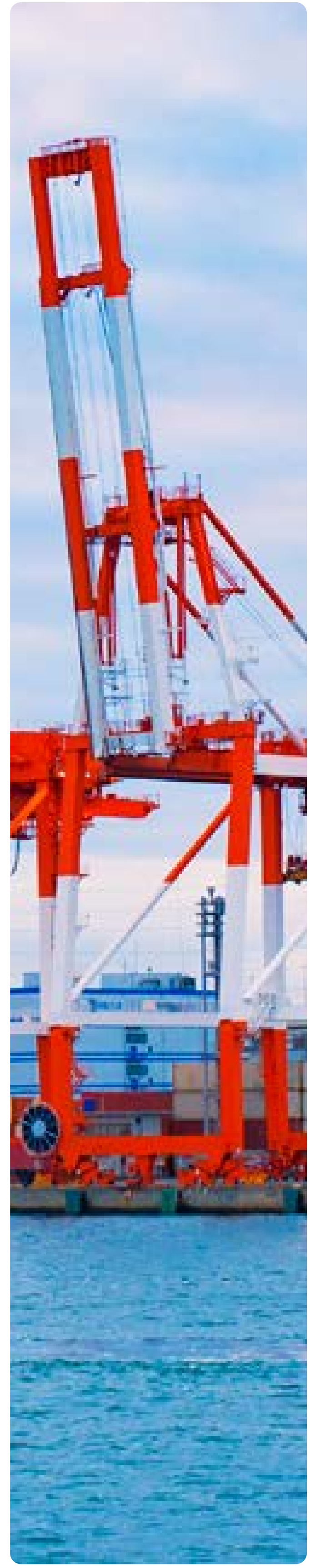
The COVID-19 pandemic revealed significant vulnerabilities in US reliance on global supply chains that prioritized costs reduction and just-in-time production over resilience. In response, efforts to reshore critical supply chains—particularly for (1) semiconductors, (2) medical supplies (including pharmaceuticals), (3) personal protective equipment (PPE), and (4) food production—are increasingly popular among members of Congress on both sides of the aisle.

Oversight of the implementation of the *CHIPS and Science Act* (Pub. L. 117-167), which provided $52 billion to increase domestic semiconductor manufacturing, along with other semiconductor supply chain measures, will be at the forefront of efforts to address supply chain security. The *CHIPS and Science Act* included first-of-their-kind "guardrails" provisions that condition funding and the investment tax credits included in the package on recipients' commitment to halt investment in most Chinese semiconductor manufacturing for a period of ten years. Expect House Republicans to closely monitor the Department of Commerce's implementation of the *CHIPS Fund program* as well as the guardrails provisions.

A Republican-controlled House will likely hold several congressional oversight hearings on other supply chain issues, highlighting port congestion and labor issues that have increased since the beginning of the COVID-19 pandemic. Watch for House Republicans to create a Select Committee on China to focus these oversight efforts.

The Indo-Pacific Economic Framework

The Biden Administration devoted two years to establishing the Indo-Pacific Economic Framework for Prosperity (IPEF) initiative. While fourteen nations participated in the inaugural ministerial meeting in July 2022, it is unclear what impact the framework, if concluded, will have in the region. We expect a Republican-led House to prioritize vigorous oversight of IPEF efforts and to pressure the administration to include market access commitments in the framework. Republicans expressed concern early on that market access was not included in the framework's trade pillar and argued that a framework without market access commitments cannot serve as a credible counterweight to China's Belt and Road Initiative, China's application to join the Comprehensive and Progressive



Agreement on Trans-Pacific Partnership (CPTPP) and the entry into force of the Regional Comprehensive Economic Partnership (RCEP). We expect House Republicans to use their oversight authority to question the Biden Administration's commitment to trade and to paint the administration as weak on China.

The Biden Administration has avoided traditional market access negotiations in the IPEF because the administration does not have—and is not seeking—Trade Promotion Authority (TPA), which would provide a fast-track procedure for Congress to consider free trade agreements. The administration also argues that traditional trade agreements have resulted in undesirable outcomes for American workers. The administration hopes instituting labor and environmental standards in the Indo-Pacific region through IPEF can address some of the root inequalities that have generated those undesirable outcomes in the past. With prospects for TPA bogged down by its own political issues, the Biden Administration is trying to advance trade policy through alternative means that do not require approval from Congress.

We also expect continued bipartisan support to include Taiwan in the IPEF or to seek a more traditional free trade agreement with Taiwan. Currently, Taiwan is on track to have a bilateral agreement with the United States that appears likely to resemble IPEF in substance. In addition, the leaders of the Senate Finance Subcommittee on International Trade, Sens. Tom Carper (D-DE) and John Cornyn (R-TX), are likely to continue to push the administration to rejoin the CPTPP.

Export Controls/Sanctions Policy (China)

Since the passage of the *Export Control Reform Act of 2018* (ECRA), a large portion of US export control policy has focused on addressing concerns related to China's pursuit of commercial and military leadership in advanced technologies, particularly through access to US companies and universities.

In a split Congress, Republicans may call for the placement of additional technology and telecommunications companies on the Commerce Department's Entity List. However, the Biden Administration continues to add to the list and has committed to rigorous action to prevent emerging technology from getting into Chinese government hands. Expect House Republicans to conduct aggressive oversight of actions that have been taken, or not taken, at the Department of Commerce's Bureau of Industry and Security (BIS). Republicans have characterized BIS as too "friendly" toward large US businesses over the last two years, accusing the agency of failing to implement export control laws such as the ECRA as a matter of national security. In October, Rep. Michael McCaul (R-TX), who is expected to become chairman of the House Foreign Affairs Committee in the 118th Congress, announced he would launch a 90-day review of the BIS next year if Republicans won control of the House.

A split Congress and the Biden Administration may be able to find common ground on limiting the data Chinese tech companies can collect about US citizens. Over the summer, TikTok faced bipartisan scrutiny that culminated in Sens. Mark Warner (D-VA) and Marco Rubio (R-FL) asking the Federal Trade Commission (FTC) to investigate TikTok and ByteDance for misrepresentations about the company's data security, data processing and corporate governance practices. Depending on what the FTC determines, we may see additional congressional and executive action aimed at Chinese tech companies' data practices.

In October, the Biden Administration issued an interim final rule aimed at restricting the export of sensitive technology, specifically with respect to advanced computing, supercomputing and semiconductor capabilities, to China. This expansive rule builds on the Biden Administration's previous regulatory and enforcement actions and it is part of a larger policy to address China's use of these technologies to the detriment of US national security and foreign policy interests. Expect the administration to use this expansive rule as a model for future export controls aimed at biotechnology.

Export Controls/Sanctions Policy (Russia)

After Russia's invasion of Ukraine in February 2022, BIS began imposing significant export controls on Russia and Belarus. Under these new controls, the export from the US, as well as the reexport from abroad, of any commodity, software, or technology subject to the Export Administration Regulations (EAR), whether US- or foreign-made, now requires a license if it is destined for Russia or Belarus. License applications will generally be denied. These export controls are designed to allow consumer goods to flow to Russia and Belarus, while cutting the governments off from any Western technology that could support their militaries. These tools, in conjunction with financial sanctions, appear to have had a rapid and harsh effect on the Russian economy and military.

We expect Republicans in the House to call for tighter export controls on microelectronics and other necessary military items to hamper Russia's war effort in Ukraine. The party may also call for more unilateral sanctions against Russia and humanitarian and military aid to Ukraine if the war continues. However, some Republicans are growing wary of additional aid packages to Ukraine, citing concerns over increased spending.

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Both Republican and Democratic members of Congress have been critical of President Biden's trade policy throughout his term, calling upon the President to end his moratorium on new trade agreements and collaborate with Congress on trade promotion authority (TPA) legislation. Republican members have been the most vocal: the House Ways and Means minority routinely calls for TPA renewal and concerted efforts to find new markets for American goods. We expect pressure to negotiate free trade agreements to continue in the 118th Congress. As TPA reauthorization faces political hurdles, we do not expect it to be fully reauthorized in the 118th Congress. Instead, we expect Republicans to paint the Biden Administration as anti-trade and soft on China.

Congress and the administration may find common ground on a limited TPA reauthorization allowing the administration to negotiate free trade agreements potentially with the United Kingdom, Kenya and Taiwan. Sens. Chris Coons (D-DE) and Rob Portman (R-OH) pushed to empower the President with five years of fast-track authority to negotiate a comprehensive trade deal with the United Kingdom during the 117th Congress, but those efforts fell apart when the trade title was dropped from the competitiveness package earlier this year. Although Sen. Portman is retiring at the end of the 117th Congress, we may see a limited TPA reauthorization included in the end-of-year funding deal.

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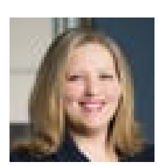

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