

GT GreenbergTraurig

2022 Midterm Elections: Policy Implications

*Prepared by the Greenberg Traurig
Government Law & Policy Team*



Contents

OVERVIEW / ELECTION RESULTS	3
LAME DUCK PRIORITIES	4
AGRICULTURE AND FOOD POLICY.....	9
ANTITRUST, PRIVACY, AND TECHNOLOGY	12
BUDGET AND APPROPRIATIONS	15
CRYPTOCURRENCY.....	18
DEFENSE & FOREIGN POLICY	21
ENERGY AND ENVIRONMENT	25
ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG).....	28
FARA REFORM	31
GOVERNMENT INVESTIGATIONS	33
HEALTH CARE	35
IMMIGRATION	39
TAX	41
TRADE	43
TRANSPORTATION AND INFRASTRUCTURE	47
ABOUT GREENBERG TRAURIG'S GOVERNMENT LAW & POLICY PRACTICE.....	50



Overview / Election Results

Outlook: Republicans Win the House, Senate Remains Up in the Air

With the results of yesterday's election still being counted, it appears that the Republicans will assume the slim majority in the House (with many races still uncalled) while the outcome of the Senate hangs in the balance. In particular, the Senate race in Georgia is heading to a runoff in December. In any case, the makeup of the Senate will be narrowly split.

Divided government will require developing bipartisan consensus to pass legislation, including funding the government and authorizing defense programs. While we should expect to see a partisan divide, over the past two years we have seen Congress work together to pass a number of bipartisan bills, including the Infrastructure Investment and Jobs Act (infrastructure repair and modernization), the Safer Communities Act (updating gun ownership laws), and the CHIPS and Science Act (investing in semiconductor research and domestic manufacturing).

In the House, we should expect to see Republicans focus on highlighting issues with China and the economy, as well as leveraging their control of committees to launch a number of investigations into the administration. Republicans have indicated that they plan to launch investigations into the business dealings of Hunter Biden, the military withdrawal from Afghanistan, the FBI search of Mar-a-Lago, and the Biden administration's border policy. It is also likely that they will take a more active oversight role in examining how federal departments and agencies are administering funds granted to them through the American Rescue Plan, IIJA, and the CHIPS and Science Act.

In the Senate, we will need to see what the outcome is on Dec. 6 in a runoff in Georgia. Democrats will likely focus their efforts on approving President Joe Biden's nominees to executive posts and federal judgeships. They will also need to negotiate with their Republican colleagues on any legislative efforts since the Senate requires 60 votes to pass most legislation.

The 2024 election will also complicate matters in Congress. Legislators will likely begin focusing on campaigning in late 2023, ahead of the early primaries. Biden has said he will run for reelection, and currently, 33 Senate seats will be in play, as well as the entire House. Of those 33 Senate seats, 23 of them are held by Democrats (and 2 independent senators who caucus with the Democrats). Three of those Democrats hold seats in states won by President Donald Trump in 2020.



Lame Duck Priorities

As Congress returns to session following the midterm elections, it will attempt to pass lots of pending legislation with only three or four weeks of session remaining. Here is a list of “must pass” measures, significant expiring programs, and other major legislation that may be considered.

Must Pass

Defense Authorization. The National Defense Authorization Act (NDAA) has passed annually for 61 straight years. In the weeks leading up to the election, leaders of the House and Senate Armed Services Committees have been negotiating an NDAA compromise version that is expected to authorize more than \$840 billion in defense spending. The Senate is expected to debate the bill (H.R.7900) during the week of Nov. 14, after which it will be sent to the House for final passage. In addition to authorizing funding for the Department of Defense and the nuclear programs administered by the Department of Energy, the measure also includes several provisions outside the committees’ jurisdiction. These include the Water Resources Development Act, the Intelligence Authorization Act, the State Department Authorization Act, the Coast Guard Authorization Act, and Taiwan Foreign Military Financing.

Discretionary Program Funding. Congress has not finished work on the annual appropriations bills that fund the discretionary programs making up roughly one-fourth of the federal budget. Congress could only agree prior to elections to extend funding at FY22 levels through Dec.16 (the full fiscal year runs through Sept. 30). Congress will need to pass additional funding legislation – either for the entire fiscal year or through another short-term extension – to avoid a government shutdown.

Programs that Expire Dec. 16

Several programs that were set to expire on Sept. 30 were given a short-term extension through Dec. 16 as part of the discretionary funding legislation described above. These programs are likely to be given another extension during the lame duck session for the length of time covered by the new discretionary funding bill. The following programs will soon expire again:

- **Medicare-related:** (Low-Volume Hospital (LVH) adjustment; Medicare Dependent Hospital (MDH) program)
 - **Medicaid-related:** Federal Medical Assistance Percentage (FMAP) increase for Puerto Rico, American Samoa, the Northern Mariana Islands (CNMI), Guam, and the U.S. Virgin Islands
 - **Drugs and Devices:** Orphan drug grants; Medical Device third-party review and laboratory accreditation; Best Pharmaceuticals for Children program; Pediatric Medical Device Consortia program; Critical Path public-private partnership; Generic Drug priority review application requirements
 - **Low Income:** Maternal Infant and Early Childhood Home Visiting program; Temporary Assistance for Needy Families (TANF) program; Child and Family Services programs authorized under Title IV-B of the Social Security Act
- **Federal Communications Commission** general spectrum auction authority
 - **National Flood Insurance Program**
 - Commodity Futures Trading Commission **Customer Protection Fund**
 - **Homeland Security-related:** Afghan Resettlement Evacuee Benefits; DHS joint task forces
 - **Justice Department:** Domestic Trafficking Victim's Fund special assessment; U.S. Parole Commission; Unmanned Aircraft protection authority
 - **USAID funds**
 - USDA **Livestock Mandatory Reporting** program

Programs That Expire Dec. 31

Several other programs expire at the end of the year and may also be extended, either as part of discretionary funding legislation or another broad legislative vehicle. The following tax and Medicare-related programs are likely to receive significant attention:

- **Research & experimental (R&E) tax expensing**
- **100% business meals tax deduction**
- **Multiemployer pension plan** delay of designations
- **Railroad track maintenance tax credit**
- **Medicare Physician bonus payments**

Other Health Care Issues

Public Health Emergency (PHE). The COVID-related public health emergency will end on January 11, 2023, unless extended by Secretary of Health and Human Services Xavier Becerra. The Secretary has committed to give 60 days' notice if the PHE will be ending. If so, Congress will consider whether to extend various PHE waivers relating to telehealth, behavioral and mental health, and pandemic preparedness to provide for a longer transition.

Medicare Sequestration 4% Cut. Automatic across-the-board Medicare spending cuts will take place in 2023 unless Congress acts to postpone them.

Physician Fee Schedule. A 4.4% across-the-board payment cut in Medicare physician payment rates will occur in 2023 unless Congress acts to prevent the reductions.

Nominations

There are **107 total nominations** pending on the Senate Calendar, of which **30 are judicial nominations**. Senate Majority Leader Chuck Schumer (D-NY) is likely to give high priority to confirm as many as possible before the end of the year.

Other

Respect for Marriage Act

The legislation requires recognition of same-sex and interracial marriages while respecting religious liberty. The House passed the legislation (H.R. 8404) on July 19. The Senate held off on voting prior to elections, with the expectation that a 60-vote margin in the Senate would be easier to achieve during the Lame Duck session.

Trade Issues

The House and Senate passed several trade-related measures as part of semiconductor funding legislation earlier in the congress, but these provisions were not included in the final “Chips and Science Act” that passed in July. There will likely be a push to pass several of these trade proposals during the Lame Duck session as part of broader legislation. Possible elements of a trade package include Miscellaneous Tariff Bill extensions; Generalized System of Preferences program reauthorization; outbound investment review; Trade Adjustment Assistance funding; repeal of the “de minimis rule” for Chinese imports; reinstatement of the section 301 tariff exclusion process; antidumping/countervailing duty successive investigations authority; and enhanced Customs Intellectual Property theft enforcement authority.

Drug and Device Approval Reforms

The House passed comprehensive Food and Drug Administration reform legislation in June (H.R. 7667), followed by the Senate Health, Education, Labor and Pensions (HELP) Committee (S.4348). However, the Senate was unable to reach a bipartisan agreement on many of the drug and device approval provisions in each bill. There will be attempts to revisit these issues during the Lame Duck session.

Electoral Reform Act

In September, the House passed the Presidential Election Reform Act (H.R.8873). Later in the month, the Senate Rules Committee reported the Electoral Count Reform and Presidential Transition Improvement Act (S.4573). The bipartisan Senate bill has 15 Republican cosponsors, which may indicate sufficient support to overcome a filibuster. Attempts will be made to pass the Senate bill and resolve differences.

Permitting Reform

Sen. Joe Manchin (D-WV) unveiled comprehensive permitting reform legislation for energy and minerals projects in September. Attempts to attach it to short-term appropriations legislation were unsuccessful. Sen. Shelley Moore Capito (R-WV) introduced alternative legislation (S. 4815), which was supported by 46 other Republican senators. The two West Virginia senators will lead efforts to negotiate a bipartisan solution in the weeks ahead.

Meet the Author:



Robert Mangas
Shareholder
Washington, D.C.
202.530.8507
mangasr@gtlaw.com



Agriculture and Food Policy

What to Watch For

Farm Programs

The administration is expected to advocate for increased conservation spending. Congress could potentially alter allowable hemp THC levels, and there are groups calling for the 2023 Farm Bill to address racial inequities in agriculture, potentially including certain provisions from the Justice for Black Farmers Act. The Biden administration may promote support for beginning farmers (including an expanded microloan program), increased funds for farm operating loans, and the protection of patents developed at land grant universities.

SNAP and Other Nutrition Programs

Authorized through 2023, the Supplemental Nutrition Assistance Program (SNAP) is the largest domestic food assistance program. Negotiations around extending the program will be a major element of legislative process for the Farm Bill. In its National Strategy on Hunger, Nutrition, and Health, the Biden administration called for the removal of the SNAP eligibility ban on people with convictions for drugs or other felonies. This is likely going to be part of the House and Senate Agriculture Committees' work on the 2023 Farm Bill, as well as other partisan SNAP provisions, such as House Republicans' 2018 attempt to advance mandatory state workfare programs for SNAP eligibility. This strategy also outlines the administration's commitment to working with Congress to permanently extend the Child Tax Credit that was enacted through the American Rescue Plan in 2021 and expired in Jan. 2022. Sen. Joe Manchin (D-WV) opposed including this tax credit in the reconciliation package that was passed this year.

The current Farm Bill expires in 2023. Passing a new one will likely be the top agricultural political priority in 2023.

Ethanol and Biofuels

The Renewable Fuels Standard (RFS) requires that renewable fuels like ethanol be blended into the domestic fuel supply. Ethanol production has nearly quadrupled since the RFS was enacted in 2005, and currently just over a third of the U.S. corn crop goes toward ethanol. Small oil refiners can apply for waivers from the blending requirement, but the Biden campaign suggested that fewer waivers would be granted under the new administration. In April 2022, Biden waived a rule preventing the sale of higher ethanol blends, to lower gas prices. Biden will also propose \$400 billion in clean energy research, part of which will be used to “develop the next generation of biofuels.” The Inflation Reduction Act had a provision that extended second-generation biofuel incentives through Dec. 31, 2024.

Agriculture and Climate

As part of comprehensive climate change legislation, Biden has proposed establishing a “voluntary carbon farming market” to make payments for sequestered carbon, funding research for cellulosic biofuels, and expanding the Conservation Stewardship Program. The Inflation Reduction Act allocates \$20 billion for climate-smart agriculture practices.

Agriculture Labor

Biden has expressed support for “compromise legislation between farmworkers and the agricultural sector that will provide legal status based on prior agricultural work history,” with expedited green card processing. H.R. 1603, the Farm Workforce Modernization Act, which passed the House on March 18, 2021, would enable individuals employed in agriculture for 180 days or more to apply for a renewable temporary worker status. With Republicans in control of the House, this provision is unlikely to pass, but important to keep in mind as a priority for some lawmakers.

Defining “Healthy” in Food Labeling

On Sept. 28 FDA issued a proposed rule to update the definition of the nutrient content claim “healthy,” which has come under fire in recent years and received attention from class action plaintiff lawyers challenging companies’ overuse of the term. The term “healthy” was first defined and codified with respect to nutrient content claims in 1994. While FDA requested comments from industry in 2016, discussion of the term was put on hold during the previous administration. The new proposed definition focuses on threshold limits for certain nutrients like added sugars, saturated fat, and sodium which could affect certain foods that otherwise would qualify as “healthy” under the current definition. Comments about the proposed updates to the definition are due by the end of the year, leaving open the possibility for a revised final rule in 2023.

Congressional Leadership Changes

Rep. Glenn Thompson (R-PA) is likely to take over as Chairman of the House Agriculture Committee. Rep. David Scott (D-GA) is the current Chairman of the House Agriculture Committee and is expected to be Ranking Member in the next Congress.

Sen. Debbie Stabenow (D-MI) is the current Chair of the Senate Agriculture Committee and is likely to remain in that position if Democrats hold the Senate. If Republicans take the Senate, Sen. John Boozman (R-AR) is likely to be Chairman of the Senate Agriculture Committee.

Sen. Debbie Stabenow (D-MI) is the current Chair of the Senate Agriculture Committee and is likely to remain in that position if Democrats hold the Senate. If Republicans take the Senate, Sen. John Boozman (R-AR) is likely to be Chairman of the Senate Agriculture Committee.

Meet the Authors:



Justin J. Prochnow
Shareholder
Denver
303.572.6562
prochnowjj@gtlaw.com



Rick L. Shackelford
Shareholder
Los Angeles
310.586.3878
shackelfordr@gtlaw.com



Michael L. Rogers
Assistant Director
Washington, D.C.
202.331.3177
Mike.Rogers@gtlaw.com



Antitrust, Privacy, and Technology

What to Watch For

Online Platforms

Both the House and Senate Judiciary Committees reported versions of the American Innovation and Choice Online Act earlier this year. The legislation would prohibit large online platforms from giving preference to their own products. The Open App Markets Act was also introduced in both chambers and would limit the ability of mobile app stores to require developers to use in-app payment systems and would provide pricing transparency. None of these proposals have advanced beyond the committee stage. There will be efforts to advance them in the next Congress.

Antitrust Enforcement

- **Enforcement Legislation.** Senate Democrats will likely try to revisit the comprehensive Competition and Antitrust Law Enforcement Reform Act. The bill applies a stricter standard for permissible mergers by prohibiting mergers that (1) create an appreciable risk of materially lessening competition, or (2) unfairly lower the prices of goods or wages because of a lack of competition among buyers or employers (i.e., a monopsony). Under current law, mergers that substantially lessen competition are prohibited.
- **Increased criminal trials.** Assistant Attorney General Kanter has stressed that the Department of Justice (DOJ) will begin to take cases to trial as opposed to trying to either settle them or accept plea deals. He wants to put the teeth back into the antitrust laws. So far, only won one of a number of cases across several industries. The Republican gains could impact the enthusiasm with which the regulators pursue their activist roles.

Cybersecurity

The first two years of the Biden administration have put a spotlight on cybersecurity policy, with an uptick in ransomware attacks and major incidents such as the Colonial Pipeline hack. With billions allocated to cybersecurity in the Bipartisan Infrastructure Bill and bipartisan support in both chambers for heightened cybersecurity legislation, growing cybersecurity policy is sure to advance in the 118th congress.

Sens. Gary Peters (D-MI) and Rob Portman (R-OH), as chairman and ranking Republican on the Senate Homeland Security and Government Affairs Committee, have worked closely together to advance significant cybersecurity legislation. Sen. Portman and Rep. John Katko (R-NY), the ranking Republican on the House Homeland Security Committee, are both retiring, which means significant turnover in Congressional cybersecurity leadership. In 2022 these legislators and House Chairman Bennie Thompson (D-MS) played key roles in advancing the Cyber Incident Reporting for Critical Infrastructure Act (CIRCA), which requires breach reporting to CISA within 72 hours of a substantial cyber incident and within 24 hours of paying a ransom. Congress also increased cyber partnership funding and established an intragovernmental cybersecurity information sharing safeguards and a Civilian Cybersecurity Reserve. The next Congress is expected to continue bipartisan efforts to advance legislation such as the Federal Information Security Modernization Act of 2021, and the Federal Secure Cloud Improvement and Jobs Act, which would update cybersecurity posture in the government, and authorize the FedRAMP program to provide improved cloud-based technologies that are secure.

The Biden Administration can also be expected to advance cybersecurity priorities through executive action. The trend of small, defined windows in which disclosures of cybersecurity incidents must be made will continue, including with banking organizations and service providers, publicly traded companies, and registered investment advisers and registered investment companies.

Data Privacy

In July the House Energy and Commerce Committee reported the American Data Privacy and Protection Act by a 53-2 vote. The legislation regulates how companies handle personal data and establishes consumer data protections. It imposes new security practice requirements, including the appointment of a Data Security Officer, but does not authorize a private right of action as under state laws like the California Consumer Privacy Act. The legislation preempts state laws that conflict with certain portions of the bill, and this language likely kept the bill from moving further in the process. However, there will be increasing pressure on Congress to act as other countries and individual states enact their own data privacy standards.

Congressional Leadership Changes

Rep. Jim Jordan (R-OH) will likely become the new Chairman of the House Judiciary Committee, which could have significant implications for antitrust enforcement. In late September Rep. Jordan led the opposition on the House floor to a package of bills that would reform the merger filing fee structure to provide greater resources to the Federal Trade Commission and Department Of Justice to review mergers, require greater disclosure of foreign adversary subsidies relating to mergers, and allow state attorneys general greater flexibility in selecting the venue for enforcing antitrust laws. Rep. Jerry Nadler (D-NY) can be expected to remain in Democratic leadership on the House Judiciary Committee as the Ranking Member.

In a Democrat-controlled Senate, Sen. Dick Durbin (D-IL) is likely to remain in his post as Chairman of the Senate Judiciary Committee. Sen. Chuck Grassley (R-IA) is expected to remain the Republican leader.

Rep. Jim Comer (R-KY) is likely to hold the Chair position on the House Oversight Committee. With Rep. Carolyn Maloney (D-NY) not returning after losing her primary, there will be a campaign for the Ranking Member position. Active candidates for the leadership role include Reps. Jamie Raskin (D-MD), Gerry Connolly (D-VA), and Stephen Lynch (D-MA).

As referenced above, in the Senate, Sen. Maria Cantwell (D-WA) will likely hold her post as Democratic leader of the Commerce, Science and Transportation Committee. Sen. Thune (R-SD) is the likely Republican leader.

Meet the Authors:

Andrew G. Berg
Shareholder
Washington, D.C.
202.331.3181
berga@gtlaw.com



Gregory J. Casas
Shareholder
Austin
512.320.7238
casasg@gtlaw.com



Robert Mangas
Shareholder
Washington, D.C.
202.530.8507
mangasr@gtlaw.com



Gretchen A. Ramos
Shareholder
San Francisco
415.655.1319
ramosg@gtlaw.com



Jena M. Valdetero
Shareholder
Chicago
312.456.1025
Jena.Valdetero@gtlaw.com



Budget and Appropriations

What to Watch For

Despite the unified government in Biden's first two years as President, the budget and appropriations process has not been without challenges. With a narrow House majority and a 50-50 Senate, Democrats have used the reconciliation process to pursue budget-related legislation. In lieu of full Fiscal Year 2023 funding, Congress passed a continuing resolution to temporarily fund the government into December. Under conditions generally conducive to a productive Congress, appropriations legislation has not always been easy. With Republicans in control of at least one chamber of Congress, future appropriations processes may be more challenging.

Fiscal Year 2023 Funding

In the near term, Congress must pass legislation that will fund the government for the remainder of FY 23. Prior to its adjournment at the end of September, Congress passed a continuing resolution, which extended funding for government programs through December 16th and averted a government shutdown. The Republican House victory and the Senate being up in the air will likely complicate this, as some Republicans have already called for another short-term continuing resolution to wait until a newly elected Republican majority is sworn in. This would provide Republicans more control over spending levels and various programs for the remainder of FY23. Should they decide to wait, in addition to having to simultaneously work on both FY23 and FY24 spending bills, all of the House and Senate earmarks (dubbed "Community Funding Projects" and "Congressionally Directed Spending") currently included in the House and Senate bills, would be lost. See below for more information on earmarks.

In his FY23 appropriations request, President Biden sought major funding increases to the Department of Commerce, Department of Veterans' Affairs, and Environmental Protection Agency.

Debt Limit

The government is expected to hit the current debt ceiling of \$31.4 trillion sometime early next year. Raising the debt limit is necessary to allow the Treasury to pay bondholders on debt incurred by the federal government. President Biden and legislators will need to negotiate a deal to avoid the risk of the federal government defaulting, which would have serious economic consequences.

Some House Republican leaders have voiced support for using the debt limit negotiations as a way to gain concessions aimed at limiting federal spending. Similar negotiations took place during the Obama administration, which resulted in the Budget Control Act of 2011, which raised the debt limit and instituted budget caps on discretionary spending. It is worth noting that Congress subsequently passed bills to raise those budget caps. Democrats will likely push for consideration of the debt limit during the lame duck session.

Ukraine Support Funding

Republicans are divided over continued funding for the Ukrainian war effort. Several Republicans, including current Minority Leader Kevin McCarthy (R-CA), have suggested that continued funding for the Ukrainian war effort may be more challenging in a GOP-controlled House. Others, including Senate Minority Leader Mitch McConnell (R-KY) and Mike McCaul (R-TX), Ranking Member of the House Foreign Affairs Committee, disagree and support continuing to fund Ukraine.

Earmarks

Democrats brought back earmarks in 2021 (for FY22) for the first time in a decade and in a vote of 102-84, House Republicans also removed their own ban on earmarks. For FY22, only 109 Republicans requested earmarks, but the process became more appealing to Republicans this year with over 120 Republicans requesting earmarks for FY23. With the House changing control, there will be calls from parts of the GOP to ban earmarks yet again. However, we are thinking it is likely that earmarks, in some form or another, will remain given the allure for Members to control direct funding to their districts/states. The return of earmarks came with greater transparency and in turn less criticism as in years past.

Congressional Leadership Changes

The Senate Appropriations Committee will undergo major changes in the 118th Congress, as both Chairman Patrick Leahy (D-VT) and Ranking Member Richard Shelby (R-AL) are retiring. Each has served time as chairman in recent congresses. They will leave behind a track record of bipartisan dealmaking and collaboration. Sen. Patty Murray (D-WA) is expected to be the top Democrat on the committee. On the Republican side, Sen. Susan Collins (R-ME), will become the top Republican on the entire committee, as well as the Subcommittee on Defense.

In the House, the top Republican on the Committee on Appropriations is likely to be Rep. Kay Granger (R-TX). She has served as Ranking Member since 2019. The top Democrat will be Rep. Rosa DeLauro (D-CT), who has served as Chair since 2021.

Meet the Authors:



Diane J. Blagman
Senior Director
Washington, D.C.
202.331.3121
blagmand@gtlaw.com



Robert C. Jones
Shareholder
Washington, D.C.
202.331.3183
Bob.Jones@gtlaw.com



Michael L. Rogers
Assistant Director
Washington, D.C.
202.331.3177
Mike.Rogers@gtlaw.com



Rodney Frelinghuysen
Senior Director
Washington, D.C.
202.331.3171
frelinghuysenr@gtlaw.com



Monica P. Schulteis
Director
Washington, D.C.
202.530.8556
schulteism@gtlaw.com



Cryptocurrency

What to Watch For

With Republicans taking control of the House, Rep. Patrick McHenry (R-NC) is expected to take over as Chairman of the House Financial Services Committee in the new congress. He has called for legislation to regulate stablecoins as a “first step,” followed by broader legislation defining and regulating digital assets. President Biden issued an Executive Order in March to promote the responsible development of digital assets, which produced multiple administration reports in September on different aspects of digital asset regulation. However, the administration has not yet taken positions on several key issues.

Stablecoins

Congress may reach bipartisan agreement on stablecoin legislation in 2023. Presumed incoming Chairman McHenry has indicated that there is bipartisan agreement on several aspects of stablecoin regulation, including requiring one-to-one backing of stablecoins using a narrow range of qualifying assets, allowing stablecoins to be issued by more than traditional banks, and requiring federal regulation and a special charter. The Biden administration has called for requiring stablecoin issuers to be insured depository institutions. It also supports a comprehensive framework that addresses market integrity, investor and consumer protection, and payment system risks (including entities that perform services related to stablecoins).

SEC and CFTC Jurisdiction

With respect to broader regulation, Congress must agree on a definition of “digital asset” and on the appropriate roles for the Securities and Exchange Commission and the Commodity Futures Trading Commissions. Sens. Cynthia Lummis (R-WY) and Kirsten Gillibrand (D-NY) introduced comprehensive legislation in the 117th congress that attempted to clarify jurisdiction and define when digital assets should be treated like a security or a commodity. However, incoming Chairman McHenry (R-NC) has said that “I think you have to have a separate regulatory sphere for digital assets that is neither the SEC nor the CFTC ... we have to give [digital assets] a regulator, or a home.” The Biden administration has not taken a position on this issue, and SEC Chairman Gary Gensler has suggested that he already has ample authority under existing law to regulate the “vast majority” of digital assets as securities. The administration also proposes creating authority for federal regulators to supervise the activities of “affiliates and subsidiaries” of crypto-asset entities.

Central Bank Digital Currency

At least two of the Biden administration reports examined technical and design issues related to the establishment of a Central Bank Digital Currency (CBDC), but no specific recommendations were made. The Treasury Department recommended that a CBDC Working Group be formed and encouraged the Federal Reserve to “continue its research and technical experimentation on CBDCs.” A group of eleven Republicans who serve on the House Financial Services Committee told Attorney General Garland on October 5th that “the Federal Reserve does not have the legal authority to issue a CBDC absent action from Congress.” Federal Reserve Chairman Powell has indicated that the Fed is looking closely at both policy and technological issues relating to a CBDC but suggested that he would work with Congress, and it would be “a process of at least a couple of years.”

Energy Use

The White House Office of Science and Technology Policy has proposed limiting or eliminating the use of high energy intensity consensus mechanisms for crypto-asset mining. It has also proposed enabling the Department of Energy and encourage other federal regulators to promulgate and regularly update energy conservation standards for crypto-asset mining equipment, blockchains, and other operations.

Criminal Enforcement

Attorney General Merrick Garland issued a [report on digital assets](#) proposing to expand anti-tip-off provisions of 18 U.S.C. 1510(b) to virtual asset service providers (VASPs) that operate as money services businesses (MSBs); strengthen penalty provisions of 18 U.S.C. 1960 relating to unlicensed money transmitting businesses; amend 18 U.S.C. 3293 to provide a 10-year statute of limitations to all crimes involving the transfer of digital assets; strengthen provisions of federal law relating to gathering evidence of digital asset crimes, including laws requiring record preservation; clarify criminal law venue provisions to “permit prosecution in any district where the victim of a digital assets related offense or other cybercrime is found”; add forfeiture authority to criminal fraud statutes involving commodities (18 U.S.C. 1348; 7 U.S.C. 13(a)(2)); lift the monetary limit on administrative forfeiture of cryptocurrency, currently capped at \$500,000 in 19 U.S.C. 1607.

Congressional Leadership Changes

Rep. McHenry is expected to take over as Chair of the Financial Services Committee, which has jurisdiction over cybersecurity. Rep. Maxine Waters (D-CA) is expected to serve as Ranking Member. On the Senate side, Sen. Ron Wyden (D-OR) is expected to remain the Democratic leader of the Finance Committee, with Sen. Mike Crapo (R-ID) leading the Republicans.

Meet the Authors:



Barbara A. Jones
Shareholder
Los Angeles
310.586.7773
BarbaraJones@gtlaw.com



William B. Mack
Shareholder
New York
212.801.2230
mackw@gtlaw.com



Kyle R. Freeny
Shareholder
Washington, D.C.
202.331.3118
freenyk@gtlaw.com



Robert Mangas
Shareholder
Washington, D.C.
202.530.8507
mangasr@gtlaw.com



Defense & Foreign Policy

What to Watch For

Defense

National Defense Authorization Act

After Congress finalizes the FY22 National Defense Authorization Act during the Lame Duck session, FY 23 work will begin, which will likely exceed \$840 billion. Lawmakers want include greater DOD contracting flexibility, inflation adjustments for military personnel, abortion-related language relating to military health care services, and various proposals governing the nuclear stockpile.

Space & Missile Defense

National security challenges and commercial opportunities in space will continue to attract attention and funding. Expect Congress to continue the evolution of the Space Force and funding of critical technologies including hypersonics, secure optical communications, counter-UAS, and missile defense. NASA will continue to urge development of commercial capabilities in space communications, launch, human space flight, and more, to support government and commercial needs.

Foreign Policy

Ukraine

Congress has already provided \$28 billion in supplemental appropriations for security assistance to Ukraine (on top of more than \$30 billion in economic and food security assistance). Some House Republican leaders have suggested there will not be a “blank check” for this going forward, but strong bipartisan support remains as the U.S. leads the international coalition against Russian aggression. Congress will likely focus increasing attention on efforts by foreign adversaries like China and Iran to assist Russia.

China and Taiwan Policy

Incoming House Foreign Affairs Committee Chairman McCaul (R-TX) will make assistance to Taiwan a top priority, including increasing Taiwan's military capabilities, strengthening U.S.-Taiwan bilateral relations, and supporting Taiwan internationally. The NDAA contained new authority for foreign military sales to Taiwan, and the Senate Foreign Relations Committee earlier passed a broader Taiwan Policy Act. Bipartisan support for these initiatives is expected in 2023.

Afghanistan Oversight

House Republicans early in 2023 likely will initiate a series of hearings on events surrounding the U.S. withdrawal from Afghanistan in Aug. 2021, and focus on events leading up to withdrawal, implications for the region of Taliban rule, budgetary implications, and the impact on future U.S. military policy.

Pacific Islands

The Biden administration has invested political capital and diplomatic resources into strengthening relations with Pacific Islands nations, in the hopes of countering China's presence in the region. Look for this trend to continue as the U.S. continues to press China on myriad fronts.

NATO

The U.S. has worked extensively with NATO allies in dealing with Russia's invasion of Ukraine. Sweden and Finland have sought NATO admission, which will bolster NATO. On Aug. 3 the Senate approved Protocols to the North Atlantic Treaty of 1949 on the Accession of both countries, as ratified by President Biden on Aug. 9.

Iran Nuclear Deal

Diplomatic efforts to renew an arms control agreement that involves Iran thus far have failed. Recently, the White House has said that a deal is not imminent, though diplomatic efforts will continue.

Iran/Iraq Unrest Following Sept. 16, 2022

Under Republican leadership, the next Congress will be laser-focused on Iranian activities targetting U.S. interests and allies in the Middle East, including in Iraq, particularly in light of Saudi Arabia's recent report of a potential imminent attack by Iran on the kingdom, as well as the Sept. 16 murder of a Kurdish-Iranian woman (Mahsa Amini), whose murder has spawned widespread protests.

Congressional Leadership Changes

Rep. Mike McCaul (R-TX) is expected to chair the House Foreign Affairs Committee, with Rep. Greg Meeks (D-NY) as Ranking Member. The majority party of the Senate is currently undetermined. If Democrats retain control of the chamber, Sen. Robert Menendez (D-NJ) is expected to keep his post as Chair of the Foreign Relations Committee. A Republican majority would make Sen. James Risch (R-ID) the likely Chairman. The House Armed Services Committee will likely be chaired by Rep. Mike Rogers (R-AL), with Rep. Adam Smith (D-WA) as Ranking Member.

A Democratic majority in the Senate would likely mean that Sen. Jack Reed (D-RI) will continue to serve as Chairman of the Armed Services Committee. If Republicans win control of the chamber, Roger Wicker (R-MS) would likely serve as Chairman.

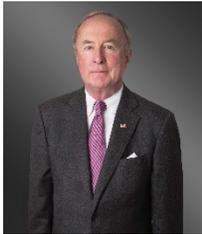
Meet the Authors:



Maj. General John D. Altenburg Jr.
Of Counsel
Washington, D.C.
202.331.3136
altenburgj@gtlaw.com



Jeffery M. Chiow
Shareholder
Washington, D.C.
202.331.3149
Jeff.Chiow@gtlaw.com



Rodney Frelinghuysen
Senior Director
Washington, D.C.
202.331.3171
frelinghuysenr@gtlaw.com



Joe R. Reeder
Shareholder
Washington, D.C.
202.530.3125
reederj@gtlaw.com



Robert Mangas
Shareholder
Washington, D.C.
202.530.8507
mangasr@gtlaw.com



Energy and Environment

What to Watch For

During the first two years of President Biden's tenure, Congress passed the Infrastructure Investment and Jobs Act (IIJA) and Inflation Reduction Act (IRA). IIJA includes limited energy and environment provisions targeted at infrastructure (environmental remediation, low emission buses and ferries, charging stations). The IRA is projected to provide between \$741 billion and \$1.9 trillion in climate-related incentives by 2050. Key provisions include solar panel, wind turbine, battery, and critical minerals processing manufacturing tax credits, zero-emission nuclear power production credits, the Greenhouse Gas Reduction Fund, Methane Emissions Reduction Program, and more.

Energy

Oversight of the Department of Energy

Energy and Commerce (E&C) Committee Republicans have voiced concerns about potential wasteful spending on renewable energy projects and other Department of Energy (DOE) initiatives authorized by the IRA. On October 10, E&C Republicans requested details of DOE loan programs, including lists of all current loans, explanations of review processes, and risk assessments. There will likely be heightened oversight of the DOE and use of IRA funds over the 118th congress.

Domestic Energy Production

Inflation's impact on rising energy prices could lead to policies aimed at increasing domestic fossil fuel production and boosting exports of U.S. liquefied natural gas.

Permitting Changes

West Virginia Sen. Joe Manchin (D-WV) and Sen. Shelley Moore Capito (R-WV) will likely try to negotiate an energy permitting reform bill before the end of the 117th Congress. Part of the agreement in Manchin's support for the IRA was that Leader Schumer would bring energy permitting reform to a vote. We can expect to see this happen during the lame duck session.

Environment

Oversight of the Department of Interior

On October 17, House Committee on Natural Resources Ranking Member Bruce Westerman (R-AK) released a statement on plans to investigate the Department of Interior. According to the statement, “the oversight team on our committee has requested 193 documents or pieces of information from the Department of the Interior (DOI) and received only 32 substantive responses, leaving 161 outstanding requests.” This will likely remain a priority of the Committee once the GOP is in the majority.

WOTUS

In November 2021, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers announced the signing of a proposed rule to revise the definition of the “waters of the U.S. (WOTUS),” putting back into place the pre-2015 definition updated to reflect consideration of Supreme Court decisions. A new Navigable Waters Protection Rule took effect in June 2020. During the 2020 presidential campaign, the Biden team indicated that the new rule would be reviewed, and “previous exemptions and exclusions upon which the agricultural community” relied upon will be maintained. The proposed rule will also need to be consistent with the ruling in *Sackett v. Environmental Protection Agency*, a case challenging the jurisdictional test for WOTUS, for which a decision is expected by the Supreme Court by July 2023.

Congressional Leadership Changes

While House Minority Leader Kevin McCarthy (R-CA) has not publicly said he will disband the Select Committee on the Climate Crisis, it will likely look different under GOP leadership. There are reports the Select committee would likely have a different name such as the Select Committee on Energy Security and Independence and focus on boosting America’s oil and gas production.

Rep. Cathy McMorris Rodgers (R-WA), current Ranking Member, is seen as the most likely person to take over as Chair of the Energy and Commerce Committee, with current Chair Frank Pallone (D-NJ) serving as Ranking Member.

The balance of power in the Senate is currently uncertain. If Democrats retain their majority, it is expected that Sen. Joe Manchin (D-WV) will continue as Chair of the Energy and Natural Resources Committee, with Sen. John Barrasso (R-WY) remaining Ranking Member. If Republicans win the majority, Barrasso will be Chairman.

Meet the Authors:



Steven G. Barringer
Shareholder
Washington, D.C.
202.331.3108
barringers@gtlaw.com



Demetrius G. McDaniel
Shareholder
Austin
512.320.7203
mcdanield@gtlaw.com



Michael L. Rogers
Assistant Director
Washington, D.C.
202.331.3177
Mike.Rogers@gtlaw.com



Kerri L. Barsh
Shareholder
Miami
305.579.0772
barshk@gtlaw.com



Steven C. Russo
Shareholder
New York
212.801.2155
Steven.Russo@gtlaw.com



Environmental, Social, and Governance (ESG)

What to Watch For

ESG extends beyond commitments to reduce greenhouse gas emissions, but the primary area to watch will be the potential direct impact to use of ESG principles in funds and capital markets.

Climate Disclosures

In March 2022, the Securities and Exchange Commission (SEC) proposed an extensive set of climate-related disclosure requirements for public companies that call for disclosure of greenhouse gas emissions from the companies as well as from products and supply chain. In May 2022, the SEC announced proposed amendments to rules and reporting forms aiming to address disclosures of funds and advisors' incorporation of environmental, social, and governance factors.

The SEC is in the process of evaluating the many comments to its proposed ESG disclosure regulations. In June 2022, a bipartisan group of 117 lawmakers sent a letter to SEC Chair Gary Gensler challenging the impact the proposed rules would have on farmers and the already adversely impacted supply chain. Republicans in both chambers have vowed to use congressional oversight authority and challenge the agency's rules. While we expect Republicans to continue their anti-ESG efforts regardless of which party has control of Congress, Republican control of at least one chamber will give them significantly more influence over the agenda.

Anti-ESG legislation, Increased Scrutiny

Republican lawmakers are not solely focused on the SEC regulations. Texas was the first state to enact what has been labeled anti-ESG legislation, modeled on the anti-boycott format to stop policies the state contends discriminate, exclude, or extend special privileges. Multiple states have since followed suit. As noted above, Republicans have made clear that if they take control of one or both chambers, which they have, Congressional oversight on ESG efforts will be a top priority. Businesses should expect increased scrutiny through Congressional hearings and investigations. Additionally, the Republican majority in at least one chamber will increase the likelihood of various federal legislative endeavors that seek to curtail nationwide the use of ESG practices for capital funds and investments.

Regardless of what happens with SEC disclosures and regulations or anti-ESG statutes, many companies and industries will likely continue to implement strategies tied to business case and performance, whether those programs remain labeled as ESG and tied to disclosures or fall under the more general category of corporate social responsibility. However, businesses and industries should be mindful of the increased scrutiny in the determined Republican led House, and potential Republican-led Senate.

Congressional Leadership Changes

As noted previously, the House Financial Services Committee is expected to be chaired by Patrick McHenry (R-NC), but it is important to note that Rep. McHenry is also the backup candidate for Speaker of the House. Congresswoman Maxine Waters (D-CA) is the likely Ranking Member.

If Democrats retain control of the Senate, Sen. Wyden (D-OR) will be the Democratic leader of the Senate Finance Committee, with Sen. Crapo (R-ID) as the Republican leader. Crapo would become Chairman in a Republican Senate.

As previously noted, Rep. Jim Jordan (R-OH) will likely become the new Chairman of the House Judiciary Committee. Rep. Jerry Nadler (D-NY) can be expected to remain in Democratic leadership on the House Judiciary Committee as the Ranking Member.

In a Democrat-controlled Senate, Sen. Dick Durbin (D-IL) is likely to remain in his post as Chairman of the Senate Judiciary Committee. Sen. Chuck Grassley (R-IA) would become become Chairman in a Republican-controlled Senate.

Meet the Authors:



Libretta Stennes
Shareholder
Minneapolis
612.259.9733
Libby.Stennes@gtlaw.com



Steven G. Barringer
Shareholder
Washington, D.C.
202.331.3108
barringers@gtlaw.com



Demetrius G. McDaniel
Shareholder
Austin
512.320.7203
mcdaniel@gtlaw.com



Monica P. Schulteis
Director
Washington, D.C.
202.530.8556
schulteism@gtlaw.com



FARA Reform

What to Watch For

In recent years, the Foreign Agents Registration Act (FARA) has come under heightened scrutiny from Congress and the Department of Justice (DOJ) with a focus on modernizing the arcane law, which governs the disclosure of foreign influence in the United States. FARA and its accompanying regulations provide limited guidance on many of its provisions, and while DOJ's Advisory Opinions are helpful, there remains considerable confusion and uncertainty about the boundaries of FARA's often broad or vague exemptions. With DOJ enforcement on the rise, many are left with questions on how to navigate FARA's complexities.

DOJ Rulemaking

In late 2021, DOJ issued an Advance Notice of Proposed Rulemaking and request for public comments regarding modernizing FARA, including some of FARA's most commonly-invoked exemptions, such as the "commercial exemptions," the "Lobbying Disclosure Act" exemption, and "legal exemption." The potential changes to these exemptions could have far-reaching implications on foreign-owned companies, public relations and government affairs firms, political consultants, non-profit organizations, law firms, and many others who rely on the current exemptions. The Department is expected to release its proposed rule by the end of this year, which will then be open for another round of public comments.

Bipartisan Congressional Activity

In addition to the Department's rulemaking, Congress has introduced several bipartisan proposals targeting FARA, largely focused on FARA's enforcement mechanisms and the various loopholes that exist under the current regime. One such proposal, which passed committee, would require companies that utilize FARA's LDA exemption to indicate so on their federal lobbying disclosure reports. Other legislation would eliminate both the LDA and commercial exemptions where a foreign principal is considered a foreign adversary, while a different bill would require non-profits and think tanks that are engaged in lobbying or public relations efforts to disclose funding received from foreign principals.

DOJ is expected to release its proposed rule by the end of this year, which will then be open for another round of public comments.

Meet the Authors:



Katie P. Reed
Director
Washington, D.C.
202.530.8564
reedkatie@gtlaw.com



Juliana Laurello
Of Counsel
Washington, D.C.
202.530.8505
laurelloj@gtlaw.com



Government Investigations

What to Watch For

In the current conditions, the turnover in the House and possibly the Senate may be even more meaningful for the course of congressional investigations than for legislation over the next two years. For most investigations, the majority party alone decides which issues to investigate, what subpoenas to issue, and the type of hearing and report structure to pursue. On the other hand, to enact legislation, the majority party certainly has advantages, but it still must count votes and overcome procedural obstacles, particularly onerous when the majority is a slim one.

As a result, it is no surprise that congressional investigations are anticipated to dramatically change after the midterms. Republican-controlled committees will target Democratic political issues, policy achievements, and initiatives, along with Democratic supporters and past disputes. Republican lawmakers, including Rep. James Comer (R-KY), are already dividing up the issues, bargaining over which committee will take the lead on certain issues, and taking preliminary steps such as sending document preservation letters.

The issues targeted by Republicans may include Hunter Biden, Department of Homeland Security border policies, the U.S. withdrawal from Afghanistan, the baby formula shortage, the formation of the January 6 committee, and the causes of inflation. Other investigations may focus on aggressive oversight of how Democratic policies are being implemented, including the stimulus and infrastructure initiatives, climate change legislation, and a variety of new financial policies and regulations.

Less certain is the steam behind issues like alleged fraud in the 2020 election, COVID-related issues, and impeachment proceedings against President Biden or his cabinet. These types of inquiries are expected in any period of leadership change, but it remains uncertain the amount of support they will receive leading up to the next presidential election.

Congressional Leadership Changes

Rep. Comer is likely to take over the House Oversight Committee, reportedly already discussing topics with other investigative committees. But the abundance of committees in both chambers means there is virtually no limit on the type or volume of investigations, particularly in the current political atmosphere.

Meet the Authors:



Pamela J. Marple
Shareholder
Washington, D.C.
202.331.3174
marplej@gtlaw.com



Michael L. Rogers
Assistant Director
Washington, D.C.
202.331.3177
Mike.Rogers@gtlaw.com



Robert C. Jones
Shareholder
Washington, D.C.
202.331.3183
Bob.Jones@gtlaw.com



Health Care

What to Watch For

With the change in control in the House, the new Republican majority will likely emphasize its oversight role, including in issues of health care, COVID response, and implementation of the drug negotiation provisions of the Inflation Reduction Act.

Prescription Drug Pricing Reform

House Republicans have made it clear that they will focus on modifying the recently enacted drug negotiation law, which is likely to be the focus of oversight hearings in the new congress. Some House Republicans have indicated support for a vote to repeal the new measure, although such attempts would be certain to face a Senate filibuster.

Affordable Care Act

The three Committees in the House with jurisdiction over the Affordable Care Act (ACA) (Ways and Means, Energy and Commerce, Education and Labor) will likely evaluate the process and any potential changes to the ACA to ensure there is affordable coverage without excessive oversight. Changes are likely to be proposed to permit more flexibility at the State and local level and reduce the complexity of the three Agency requirements at the federal level.

Oversight and Investigations

The House, under Republican leadership, will likely evaluate several health and the Food and Drug Administration (FDA) issues as “oversight” efforts to highlight various irregularities and overreach. The expected areas to be covered include FDA actions in expediting drug approvals, interpreting legal and scientific requirements with bias and CMS actions to continue proposing guidelines in various areas that are not based on law or regulations.

These include:

Rural Health Care

The House, under Republican leadership, will raise issues regarding access to health care services in rural America. A majority of the rural hospitals in these communities are having financial difficulties and many individuals are having to

travel distances to obtain appropriate health care services. Given the strength of the rural vote in the election, we anticipate this issue to be a high priority.

Medicaid Oversight

House Republicans will likely evaluate the Medicaid program and State flexibility in establishing programs. There are several States that have not expanded Medicaid because of the cost and some Republicans are likely to seek alternative avenues to permit States to cover certain individuals outside of Medicaid. The Medicaid waiver process, for many States, is complex and will likely be under scrutiny.

Health Care Workforce

The Republican House will likely propose efforts to increase and support education and training for health care professionals because of the shortage of physicians, nurses, and other providers.

COVID funding and response

Incoming Energy and Commerce Chairwoman Cathy McMorris Rodgers (R-WA) has indicated that the committee will focus on the COVID response and lessons learned that can be helpful in addressing the “next” pandemic. One of these focuses will likely be a review of the Centers for Disease Control and Prevention (CDC). The Biden administration has requested \$22 billion for the U.S. and global COVID response. This pending request is unlikely to be funded during the Lamé Duck session, and its prospects in 2023 will be even more uphill and will depend upon facts on the ground.

Mental Health

In June the House passed the Restoring Hope for Mental Health and Well-Being Act by a 402-20 vote. The Senate Finance Committee released discussion draft text for segments of a comprehensive mental health bill, but the full package never reached the Senate floor. These issues will be revisited by the new congress.

Drug and Device Approvals

Last June the House passed Food and Drug User Fee Reauthorization legislation. The Senate Health, Education, Labor and Pensions Committee passed its version of the bill later that month, but it did not reach the Senate floor. As a result, a simple extension of user fee authority for drugs, devices, biosimilars, and generics was enacted in September, but other reforms remain pending. These additional reforms may be considered by the new congress. Both bills contained accelerated approval process reforms that need to be negotiated. The House bill also included clinical trial diversity requirements. The Senate committee

product included provisions related to cosmetics, dietary supplements, and authority to regulate laboratory-developed tests, which was in the House version.

Lame Duck Issues – Expiring Programs

Several expiring health programs were given short-term extensions as part of the continuing resolution that funds discretionary programs through Dec. 16. These programs and others that expire at the end of the year are likely to be extended again. These include the following:

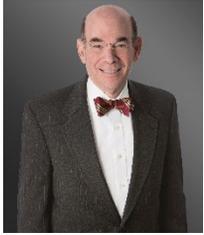
- 4% Medicare sequestration
- Medicare extenders for rural hospitals (Low-volume Hospitals and Medicare Dependent Hospitals)
- Physician fee schedule cuts eliminated 4.4% reduction
- Various Public Health Emergency waivers likely to be extended if Sec. provides the 60-day warning letter – these include telehealth, behavioral and mental health and pandemic preparedness.

Congressional Leadership Changes

The House Energy and Commerce Committee has jurisdiction over public health care programs. Rep. Cathy McMorris Rodgers (R-WA), current Ranking Member, is seen as the most likely person to take over as Chair of the committee, with current Chair Frank Pallone (D-NJ) serving as Ranking Member.

Control of the Senate remains uncertain. Should Democrats retain control of the chamber, Sen. Patty Murray (D-WA) is expected to continue as Chair of the Health, Education, Labor, and Pensions Committee. After current Ranking Member Richard Burr's (R-NC) retirement, Sen. Rand Paul (R-KY) is seen as the most likely candidate to be Chairman if Republicans win a majority.

Meet the Authors:



Robert P. Charrow
Shareholder
Washington, D.C.
202.533.2396
charrow@gtlaw.com



Nancy E. Taylor
Shareholder
Washington, D.C.
202.331.3133
taylorn@gtlaw.com



Robert Mangas
Shareholder
Washington, D.C.
202.530.8507
mangasr@gtlaw.com



Immigration

What to Watch For

Key Republicans are signaling that there will be no immigration reform during the lame duck session without meaningful border reform. Meanwhile, Democrats continue to push for Deferred Action for Childhood Arrivals (DACA), Afghan Adjustment, Temporary Protected Status (TPS) reform, and other immigration reform in the omnibus or National Defense Authorization Act (NDAA). The outlook before even looking at the election results appears to be the same – no significant immigration reform over the next two years. The slim margins of control regardless of who controls either of the chambers of Congress appear to foreclose any significant opportunities for immigration reform.

Omnibus Spending Bill

We expect congressional leaders to push for passage of the FY 2023 omnibus funding bill in Dec. 2022. The Continuing Resolution passed on Sept. 30 which extended funding for the government through Dec. 16. There will need to be an Omnibus passed during the post-election lame duck session before the end of the calendar year. Democrats continue to push for immigration additions to the Omnibus, which may include EB-5 technical corrections; immigrant visa exemptions for foreign students who obtain a PhD in the United States; DACA relief to counter the Fifth Circuit and Texas Federal District Court decisions; Afghan Adjustment Act; and TPS relief.

National Defense Authorization Act (NDAA)

Sen. Durbin (D-IL) is attempting to attach the the recapture of unused immigrant visas from previous fiscal years for up to 40,000 nurses and physicians. It is unclear whether this amendment will survive, but, if so, it could help reduce some immigrant visa backlogs. There are other immigration provisions that have been suggested and then rejected in this legislation.

Deferred Action for Childhood Arrivals (DACA)

The Fifth Circuit held that the new DACA rule from the Department of Homeland Security was illegal but maintained the stay for existing DACA recipients and will allow DACA renewals. Democrats continue to push for DACA legislation, but the maintenance of the stay will most likely keep Congress from acting as harm is not imminent.

Legislation being Contemplated

It's possible that Congress may consider migrant farmworker legislation and/or a bill that may eliminate the per country immigrant visa quota. We believe that there will be efforts by Republicans to push for border control and there may be some effort to pair that reform with minor legal immigration reforms. However, it appears that from a legislative perspective, the status quo will be the policy du jour in the next Congress.

Congressional Leadership Changes

In both the House and the Senate, the Judiciary Committees have jurisdiction over immigration matters. In the House, Rep. Jim Jordan (R-OH) is expected to be the chair this committee. Rep. Jerry Nadler (D-NY) can be expected to remain in Democratic leadership on the House Judiciary Committee as the Ranking Member.

On the Senate side, Current Chairman Sen. Dick Durbin (D-IL) is likely to remain in that position if Democrats retain the majority in the Senate. If Republicans manage to take control of the chamber, Sen. Chuck Grassley (R-IA) is expected to remain Ranking Member.

Meet the Authors:



Laura Foote Reiff
Shareholder
Northern Virginia
703.749.1372
reiff@gtlaw.com



Rebecca B. Schechter
Of Counsel
Northern Virginia
703.903.7578
Rebecca.Schechter@gtlaw.com



Tax

What to Watch For

Lots of Activity, Little Action Expected

With the House majority shifting back to Republicans, tax policy issues can be expected to receive significant attention in 2023. However, little if any tax legislation is expected to be enacted, as it will require the support of House Republicans, a bipartisan coalition of senators, and President Biden. In the months ahead House Republicans can be expected to consider legislation to extend expiring provisions of the Tax Cuts and Jobs Act of 2017 (TCJA) and to repeal provisions of the Inflation Reduction Act (IRA). Many Democrats will seek to promote provisions that were included in the Build Back Better Act (BBBA) that passed the House in Nov. 2021 but stalled in the Senate. A short description of major provisions can be found below.

Tax Cuts and Jobs Act

House Republicans will be interested in legislation to extend the following TCJA provisions:

- **Top individual tax rate** of 37% (expires in 2025, increasing to 39.6%)
- 20% deduction on **pass-through income** (expires in 2025)
- Doubling of **standard deduction** (expires in 2025)
- \$10,000 cap on deductions for **state and local taxes** (expires 2025)
- Full **research & experimentation** (R&E) expensing (expired at end of 2021)
- 100% **business meals** deduction (expires at end of 2022)

Inflation Reduction Act

House Republicans will also be interested in repealing the following provisions of the IRA:

- **15% minimum tax on corporate book income**
- 1% excise tax on **stock repurchases**
- \$80 billion in **IRS enforcement** funding

Build Back Better Act

Many Democrats will seek to pass provisions included in the BBBA:

- Extend the expanded **Child Tax Credit** and refundability
- Extend the expanded **Earned Income Tax Credit**
- Repeal **carried interest** deduction
- Cap **Roth or traditional IRA contributions** if accounts are over \$10 million
- Impose a **high-income surcharge** of 5% on incomes over \$10 million, 3% over \$25 million

Congressional Leadership Changes

With the retirement of Rep. Kevin Brady (R-TX), there is a three-way race to become the new Chairman of the House Ways and Means Committee in the next Congress. The leading contenders are Reps. Vern Buchanan (R-FL), Adrian Smith (R-NE), and Jason Smith (R-MO). Rep. Buchanan has the most seniority of the three. The decision is expected to be made by the House Republican Steering Committee in early December.

Meet the Authors:



Robert Mangas
Shareholder
Washington, D.C.
202.530.8507
mangasr@gtlaw.com



Marvin A. Kirsner
Shareholder
Fort Lauderdale
954.768.8224
kirsnerm@gtlaw.com



Trade

What to Watch For

Congress has a lengthy list of “leftover” trade issues that will likely carry into 2023. As part of broader “China competitiveness” legislation (H.R. 4521; S. 1260), both the House and Senate passed significant trade proposals. However, none of the trade sections were included in the compromise version of these bills, which provided funding for semiconductor manufacturing and research. These proposals as well as other potential trade legislation are described below.

Proposals in House or Senate China Competitiveness Bills:

Miscellaneous Tariff Bill (MTB)

MTBs make temporary reductions or suspensions of duties on specified imports. The House and Senate passed slightly different MTB legislation as part of China competitiveness legislation, although both bills included more than 1,300 product lines. The last round of MTB tariff adjustments expired at the end of 2020.

Generalized System of Preferences (GSP)

GSP eliminates tariffs on more than 3,500 product lines from roughly 120 developing countries. This program also expired at the end of 2020. Both the House and Senate passed GSP extensions, although the House legislation included additional provisions relating to labor rights and environmental obligations.

Outbound Investment Review

There are advocates in both the House and Senate for legislation that would require a review of “outbound investments” in countries like China that may threaten national security (H.R. 6329; S. 1854). The House passed its version and has been engaged with leading Senate advocates and the White House to reach a compromise version.

Trade Adjustment Assistance (TAA)

House Democrats are insisting on extending the TAA program as part of any larger deal on trade. The TAA program expired in 2021, and the House passed an expansion of the program and extended it through 2028. Some House Republicans have contended that TAA has only been extended in the past in conjunction with Trade Promotion Authority (discussed below) and have sought to link the two.

De Minimis Rule

Current Customs rules allow imports of less than \$800 to enter the U.S. duty-free. The House passed legislation to remove this exemption for imported goods from non-market economy countries that have violated intellectual property standards – requirements that currently would apply to China. The Senate has not supported such legislation.

AD / CVD Successive Investigations

The House also passed legislation to allow concurrent and successive investigations of violations of antidumping and countervailing duty and authorize investigations of cross-border subsidies. The “Leveling the Playing Field Act” has bipartisan support, but it is unclear if there will be enough Senate Republican support in the new congress.

Section 301 Tariff Exclusions

The Senate passed legislation to create a statutory procedure to grant exclusions to the section 301 tariffs against imported Chinese goods that were imposed during the Trump administration. The Biden administration thus far has not established an administrative process to grant such exclusions. Previous exclusions expired at the end of 2021.

Additional Proposals and Considerations:

Trade Promotion Authority

House Republicans are expected to advance legislation to reinstate Trade Promotion Authority, which creates a “fast track” procedure for approving new trade agreements without amendment. This authority expired on July 1, 2021. The Biden administration, which to date has not pursued any new trade agreements requiring Congressional approval, has not sought an extension of this authority.

Additional Russia or China Sanctions

Since Russia's invasion of Ukraine in February 2022, Congress and the White House have worked together to impose broad sanctions on the Russian government and Russian individuals and entities. These actions, some of which involved legislation, have targeted Russian government assets, international trade, economic sectors, and specified individuals and entities. It is possible that additional legislation will target Russia in the 118th congress, as well as China, Iran, Burma, and other foreign adversaries.

USTR

The increasingly bellicose relationship between the United States and China may impact the Biden administration actions on the Section 301 tariffs on products manufactured in China and imported into the United States. The U.S. Trade Representative has announced that it will accept comments on the impact of the additional tariffs on Chinese products since they were imposed in July 2018. The USTR portal will be open Nov. 15 – Jan. 1, 2023. Biden's USTR will continue to push for trade policy focused on benefits for U.S. workers and equity. Any free trade agreement will use the worker provisions of the USMCA as a model.

Forced Labor

Forced labor is the number one enforcement issue for US Customs and Border Protection and numerous other partner government agencies including the State Department, Department of Labor, and Commerce Department. There is also bipartisan support for the protection of the Uyghurs in the Xinjiang region of China with the implementation of the Uyghur Forced Labor Prevention Act. It is expected that the government's focus on forced labor will extend beyond Xinjiang to other regions of China and to other countries.

Solar

While Biden continues to push his environmental agenda, his administration has maintained additional Section 201 tariffs on solar products.

Congressional Leadership Changes

The House Ways and Means Committee is responsible for overseeing trade matters. It is up for debate who could lead this committee. It is between Rep. Vern Buchanan (R-FL), Jason Smith (R-MO), and Adrian Smith (R-NE). Rep. Richie Neal (D-MA) is expected to be Ranking Member.

The Senate's balance of power remains uncertain. If Democrats retain control of the chamber, Sen. Ron Wyden (D-OR) is expected to continue as Chairman of the Finance Committee. Mike Crapo (R-ID) is expected to serve as Chair if Republicans have a Senate majority.

Meet the Authors:



Kara M. Bombach
Shareholder
Washington, D.C.
202.533.2334
Kara.Bombach@gtlaw.com



Cyril T. Brennan
Shareholder
Washington, D.C.
202.533.2342
brennanct@gtlaw.com



Robert Mangas
Shareholder
Washington, D.C.
202.530.8507
mangasr@gtlaw.com



Laura Siegel Rabinowitz
Shareholder
New York
212.801.9201
rabinowitzl@gtlaw.com



Transportation and Infrastructure

What to Watch For *Infrastructure Spending*

Over the past two years, Congress has approved increases in federal transportation and infrastructure spending. A major bipartisan accomplishment of the past two years was the Infrastructure Investment and Jobs Act (IIJA). The law, which was a campaign priority for Biden, authorized approximately \$1 trillion in transportation and infrastructure funding over five years, including \$550 billion in new federal money for infrastructure projects. That new money includes \$120 billion for upgrading repairs and maintenance of roads and bridges; \$66 billion for Amtrak; \$42 billion for airports and ports and \$39 billion for mass transit. Additionally, the recently enacted Inflation Reduction Act did include some transportation-related provisions, albeit primarily focused on reducing carbon emissions from vehicles and ports.

Over the next two years we expect to see the administration continue to dole out funds for infrastructure projects across the country. As the administration works on implementation, counties and cities as well as airports will be able to access transportation funds. Secretary of Transportation Pete Buttigieg has prioritized awarding 166 grants to local communities from a \$2 billion discretionary budget and other fiscal support for rail, road and bridge improvements over the past year. Given the huge financial support the President has promised to the Environmental Justice movement in minority neighborhoods throughout the country, much fiscal support is earmarked to improve transportation systems that damaged minority neighborhoods in the past. One project delivered a \$105 million grant for removal of a segment of Interstate 375 that cut through a Black neighborhood in Detroit.

Transit will continue to be a major focus for the administration. Biden's team will continue to use the funding increases authorized by the IIJA to achieve electrification and emissions goals (the IIJA increases annual funding for bus and bus facilities grants and the low/no emission bus grant program to \$1.2 billion and \$80 million by FY26 respectively). DOT will use those funds to help state and municipal transit systems around the country invest in hybrid and electric buses, as well the infrastructure necessary to sustain them.

The administration's efforts to support domestic manufacturing of batteries and EVs will also be the subject of highly anticipated rulemakings, especially with regard to the domestic content requirements required by the IIJA and IRA.

Possible Rollbacks

While the IIJA was a bipartisan bill, it only had the support of 13 House Republicans. With Republicans back in control of the House, they may try to roll back certain infrastructure provisions contained in this legislation. Rep. Sam Graves (R-MO), who is expected to become chair of the House Transportation and Infrastructure Committee, did not support the bill. However, we anticipate that the administration will thwart any efforts as much of the funding is discretionary funding passed on to states, meaning it has already been appropriated. In FY 2023, the IIJA allocates nearly \$60 billion to states for programs that flow through the Department of Transportation. Once this money is in the hands of the states, it will be up to each state how they will use it.

Congress will continue to play an important role in transportation and infrastructure funding via the annual appropriations process. We should also expect to see an increase in oversight of existing spending by committees with jurisdiction over transportation and infrastructure programs.

Ecosystem Restoration

Congress may consider issues associated with new authorizations and increased funding for ecosystem restoration under the Infrastructure Investment and Jobs Act (IIJA). Such Programs are funded under the Army Corps of Engineers, DOT, NOAA, and the EPA. This may include federal and nonfederal entities who can quickly and effectively obligate restoration funding,

Over the next two years we should expect to see the administration continue doling out funds for infrastructure projects across the country.

Congressional Leadership Changes

It is widely assumed that Rep. Sam Graves (R-MO) will take over as Chair of the House Transportation and Infrastructure Committee, with either Rep. Eleanor Holmes Norton (D-DC) or Rep. Rick Larsen (D-WA) serving as Ranking Member.

The balance of power in the Senate is undecided. Should Democrats retain control of the chamber, Sen. Maria Cantwell (D-WA) will likely hold her post as Chair of the Commerce, Science, and Transportation Committee. If Republicans wrest control from the Democrats, Sen. John Thune (R-SD) is the likely Chairman, with Cantwell serving as Ranking Member.

Meet the Authors:



Franklin D.R. Jones, Jr.
Shareholder
Houston
713.374.3530
FranklinJones@gtlaw.com



John Voorhees
Shareholder
Denver
303.685.7465
voorheesj@gtlaw.com



Diane J. Blagman
Senior Director
Washington, D.C.
202.331.3121
blagmand@gtlaw.com



Michael L. Rogers
Assistant Director
Washington, D.C.
202.331.3177
Mike.Rogers@gtlaw.com



Robert C. Jones
Shareholder
Washington, D.C.
202.331.3183
Bob.Jones@gtlaw.com

About Greenberg Traurig's Government Law & Policy Practice

Greenberg Traurig's [Government Law & Policy Practice](#) combines the capabilities of its Federal Practice in Washington D.C. with its state and local practices across the country. The firm's national team of governmental affairs professionals and attorneys spans major political and commercial capitals throughout the United States, including: Albany, Austin, Denver, New York City, Philadelphia, Sacramento, Tallahassee, and Washington, D.C. Most recently, Greenberg Traurig's Government Law & Policy team was "Top Listed" for Government Relations in Best Lawyers in America's 2018 edition. The team was also named "Law Firm of the Year" for Government Relations by the U.S. News-Best Lawyers 2014 edition of "Best Law Firms." The practice also received the most first-tier Government Relations rankings in the U.S.

Meet the Team and Contributors:



Robert C. Jones
Co-chair,
Federal Government Law & Policy Practice
Washington, D.C.
202.331.3183
Bob.Jones@gtlaw.com



Demetrius G. McDaniel
Co-chair,
Federal Government Law & Policy Practice
Austin
512.320.7203
mcdanield@gtlaw.com



Maj. General John D. Altenburg Jr.
Of Counsel
Washington, D.C.
202.331.3136
altenburgj@gtlaw.com

Andrew G. Berg
Shareholder
Washington, D.C.
202.331.3181
berga@gtlaw.com



Steven G. Barringer
Shareholder
Washington, D.C.
202.331.3108
barringers@gtlaw.com



Kara M. Bombach
Shareholder
Washington, D.C.
202.533.2334
Kara.Bombach@gtlaw.com



Gregory J. Casas
Shareholder
Austin
512.320.7238
casasg@gtlaw.com



Barbara A. Jones
Shareholder
Los Angeles
310.586.7773
BarbaraJones@gtlaw.com



Cyril T. Brennan
Shareholder
Washington, D.C.
202.533.2342
brennanct@gtlaw.com



Robert P. Charrow
Shareholder
Washington, D.C.
202.533.2396
charrowr@gtlaw.com



Jeffery M. Chiow
Shareholder
Washington, D.C.
202.331.3149
Jeff.Chiow@gtlaw.com



Marvin A. Kirsner
Shareholder
Fort Lauderdale
954.768.8224
kirsnerm@gtlaw.com



William B. Mack
Shareholder
New York
212.801.2230
mackw@gtlaw.com



Pamela J. Marple
Shareholder
Washington, D.C.
202.331.3174
marplej@gtlaw.com



Laura Siegel Rabinowitz
Shareholder
New York
212.801.9201
rabinowitzl@gtlaw.com



Laura Foote Reiff
Shareholder
Northern Virginia
703.749.1372
reiff@gtlaw.com



Robert Mangas
Shareholder
Washington, D.C.
202.530.8507
mangasr@gtlaw.com



Justin J. Prochnow
Shareholder
Denver
303.572.6562
prochnowjj@gtlaw.com



Gretchen A. Ramos
Shareholder
San Francisco
415.655.1319
ramosg@gtlaw.com



Rick L. Shackelford
Shareholder
Los Angeles
310.586.3878
shackelfordr@gtlaw.com



Libretta Stennes
Shareholder
Minneapolis
612.259.9733
Libby.Stennes@gtlaw.com



Jena M. Valdetero
Shareholder
Chicago
312.456.1025
Jena.Valdetero@gtlaw.com



Juliana Laurello
Of Counsel
Washington, D.C.
202.530.8505
laurelloj@gtlaw.com



Charles F. Bass
Senior Director
Washington, D.C.
202.331.3132
bassch@gtlaw.com



Nancy E. Taylor
Shareholder
Washington, D.C.
202.331.3133
taylornt@gtlaw.com



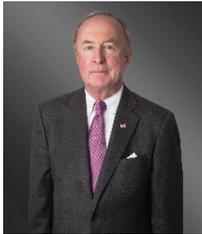
John Voorhees
Shareholder
Denver
303.685.7465
voorheesj@gtlaw.com



Rebecca B. Schechter
Of Counsel
Northern Virginia
703.903.7578
Rebecca.Schechter@gtlaw.com



Diane J. Blagman
Senior Director
Washington, D.C.
202.331.3121
blagmand@gtlaw.com



Rodney Frelinghuysen
Senior Director
Washington, D.C.
202.331.3171
frelinghuysenr@gtlaw.com



Katie P. Reed
Director
Washington, D.C.
202.530.8564
reedkatie@gtlaw.com



Monica P. Schulteis
Director
Washington, D.C.
202.530.8556
schulteism@gtlaw.com



Albert Wynn
Senior Director
Washington, D.C.
202.530.8531
wynna@gtlaw.com



Joe R. Reeder
Shareholder
Washington, D.C.
202.530.3125
reederj@gtlaw.com



Michael L. Rogers
Assistant Director
Washington, D.C.
202.331.3177
Mike.Rogers@gtlaw.com

Special thanks to the hard work of Caroline McKinley, Emma Powell, and Stephen Richardson for their support on this project.