



# 2022 Post-Election Outlook

**Akin Gump**  
STRAUSS HAUER & FELD LLP

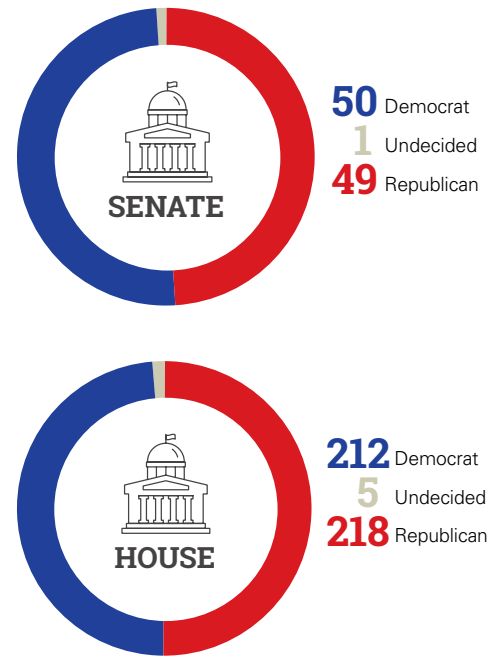
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# Introduction

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With the 2022 midterm elections now over—save for a number of undecided races—and Congress having returned for a lame-duck session, Americans for the third consecutive President have elected a new House majority in a midterm election to disrupt unified government. Democrats will maintain majority control of the Senate, with a December 6 runoff election in Georgia determining whether that majority is 50 or 51 seats. While divided government may suggest forthcoming legislative gridlock, since 1969, just eight of 27 sessions of Congress have seen one party wield full control of both the legislative and executive branches, and such unity has only lasted for consecutive congressional sessions on two occasions. As outlined below, policymaking at the federal level will continue to be active, but legislative success hinges on the ability of Republicans and Democrats to forge agreements given the extremely tight margins in both the House and Senate. Meanwhile, House Republicans will be motivated to increase oversight of the Executive Branch and pursue legislation reflecting conservative priorities, which Democrats will attempt to block in alignment with White House and Democratic objectives, as both parties seek positions of strength heading into the 2024 general election. President Biden also is expected to bypass Congress where possible by pursuing executive agency action to advance his priorities.

This report examines the results of the election and what to expect in the coming weeks in the lame-duck session of the 117th Congress and the new 118th Congress, amidst a divided government and the next election looming where control of both Congress and the White House again will be at stake.



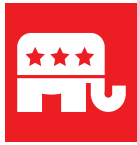
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We are pleased to provide the below analysis and key takeaways:

- ➔ Leadership Elections
- ➔ 2022 Lame Duck
- ➔ Preview of 118th Congress
- ➔ An appendix with a recap of (1) the 2022 election results and (2) potential committee leadership in the 118th Congress

# Leadership Elections

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## Republicans

### House Leadership

For House Republicans, leadership elections took place on Tuesday, November 15.

- Speaker: Kevin McCarthy (R-CA)
- Majority Leader: Steve Scalise (R-LA)
- Majority Whip: Tom Emmer (R-MN)
- Conference Chair: Elise Stefanik (R-NY)
- Policy Committee Chair: Gary Palmer (R-AL)
- NRCC Chair: Richard Hudson (R-NC)
- Conference Vice Chair: Mike Johnson (R-LA)

### Senate Leadership

For Senate Republicans, leadership elections took place on Wednesday, November 16.

- Minority Leader: Mitch McConnell (R-KY)
- Minority Whip: John Thune (R-SD)
- Conference Chair: John Barrasso (R-WY)
- Policy Committee Chair: Joni Ernst (R-IA)
- NRSC Chair: Steve Daines (R-MT)
- Conference Vice Chair: Shelley Moore Capito (R-WV)



## Democrats

### House Leadership

Speaker Pelosi announced that she will not seek another term in leadership as the top Democrat in the House but will continue to serve in Congress. Similarly, Majority Leader Hoyer will remain in Congress but not seek an elected leadership position. Both Pelosi and Hoyer are seeking to usher in a new generation of Democrat leaders in the House.

In addition to those who have already announced their candidacy for top leadership positions in the House, Hakeem Jeffries (D-NY), Katherine Clark (D-MA), and Pete Aguilar (D-CA), along with Jim Clyburn (D-SC), are now expected to be in the mix as well, changing the entire dynamic in a significant way. As a result, we may see some previously declared leadership candidates reassess in the coming days.

House Democrats are expected to begin their leadership elections on Wednesday, November 30.

### Senate Leadership

A vacancy will be created for the Assistant Democratic Leader post as Majority Leader Schumer has nominated Patty Murray (D-WA) as the Senate president pro tempore. With no additional changes in leadership expected, an open question remains about who will be chosen to lead the Democratic Senatorial Campaign Committee (DSCC).

Senate Democrats are expected to hold their leadership elections during the week of December 5.

- Majority Leader: Chuck Schumer (D-NY)
- Majority Whip: Richard Durbin (D-IL)
- Assistant Democratic Leader: Open
- Chair of Policy & Communications Committee: Debbie Stabenow (D-MI)
- Vice Chair of Conference: Elizabeth Warren (D-MA)
- Vice Chair of Conference: Mark Warner (D-VA)
- Chair of Steering Committee: Amy Klobuchar (D-MN)
- Chair of Outreach: Bernie Sanders (I-VT)
- Vice Chair of Outreach: Catherine Cortez Masto (D-NV)
- Vice Chair of Policy & Communications Committee: Joe Machin (D-WV)
- Vice Chair of Policy & Communications Committee: Cory Booker (D-NJ)
- Secretary of the Conference: Tammy Baldwin (D-WI)
- DSCC Chair: Open

# Lame Duck

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The 117th Congress will wind down in the coming weeks with a four- or five-week lame-duck session of Congress, which will provide one last opportunity for members to enact spending and other priorities before the next Congress. Hopes for a lame duck are typically outsized, and what is considered “must-pass” reflects the unique political environment after any given election. Policies that make it over the finish line tend to be bipartisan and fully vetted or representing key priorities that the other side is willing to trade in exchange for one of their “must-do” items. For that reason, many issues are often postponed for future consideration, particularly as the calendar approaches Christmas.

As we enter this lame-duck session, a number of priorities are in play. In addition to Fiscal Year (FY) 2023 appropriations bills, the National Defense Authorization Act (NDAA) and expiring health care provisions and tax extenders, there are a host of legislative priorities on the agenda, including unfinished Food and Drug Administration (FDA) policy riders, electoral count reform, marriage equality and unconfirmed judicial nominees.

Per usual, the Senate calendar will dictate congressional action. Passing even a single broadly supported bill as a standalone vehicle can take the better part of a week (or more). With only a month or so available, a lot to do and a Democratic majority determined to use floor time to confirm nominees, the lame-duck legislative agenda is likely to focus on the NDAA, an omnibus spending package and whatever can be attached to it.

Our forecast for must-pass and high-priority legislative items includes:

- **Fiscal Year (FY) 2023 Appropriations:** Congress passed and President Biden signed a continuing resolution (CR) extending government funding through December 16. Appropriators are optimistic they can pass an omnibus spending package before the deadline. Several factors weigh in favor of an omnibus deal, including that both Senate Appropriations Chairman Patrick Leahy (D-VT) and Ranking Member Richard Shelby (R-AL) are retiring at the end of this year, key members of House and Senate leadership seem to support a deal to clear the decks before the start of the new Congress and the bipartisan desire in both chambers for Ukraine and disaster relief. Nonetheless, short-term funding measures remain a possibility, such as a one-week CR allowing another few days to pass an omnibus bill before Christmas. Alternatively, in the absence of a larger deal emerging, Congress could punt the entirety of the spending debate until next year. Republican leaders already face some pressure from the right flank to delay government funding to the next Congress to strengthen their hands in a negotiation. Whether an omnibus package comes together is critical for the success of the lame-duck session, since it is a necessary but not sufficient condition for other legislative accomplishments (particularly in the tax space) and provides a moving vehicle for other priorities to hitch a ride.
- **NDAA:** Considered must-pass legislation, the annual defense bill, which sets policy and authorizes appropriations for defense-related activities, is expected to move during the lame-duck session. Senators filed more than 900 amendments to their version of the NDAA, 75 of which were incorporated into a modified substitute. In conference committee, conferees will reconcile this modified Senate substitute with the House-passed NDAA with the expectation of finalizing the measure in December—either as a stand-alone bill or attached to the year-end omnibus package. Via the NDAA, Senators may also make another attempt to pass a package of energy permitting reforms, which were dropped from the last CR in September due to partisan disagreement.
- **Tax:** An end-of-year package may present the best chance for major tax changes until 2025. Tax relief for businesses, much of it bipartisan, will be the principal drivers of a late-year tax deal. Specific business-community-backed tax relief includes a retroactive return of expensing for certain research

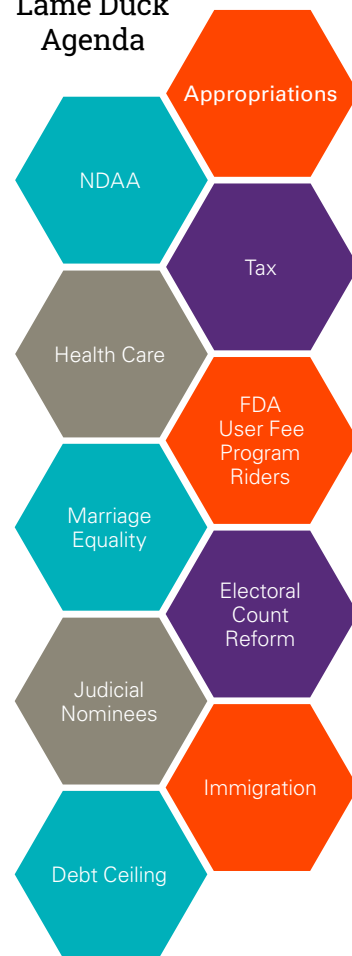


costs, a retroactive increase of the cap on the amount of interest businesses can deduct, an extension of full bonus depreciation and mitigating 1099-K tax reporting requirements for casual sellers and microbusinesses. Democrats are insisting that in addition to business tax relief, some tax relief for individuals is appropriate as well. Specifically, Democrats are seeking to revive an enhanced Child Tax Credit (CTC), an expired COVID-19-era policy. As of today, Republicans are signaling hostility to this trade, concerned about the underlying policy in general, as well as the short-term inflationary impact of an enhanced CTC.

Lawmakers were not able to get so-called extenders legislation across the finish line last year, meaning that 41 provisions in the tax code were allowed to expire in 2021.<sup>1</sup> However, nine of them received retroactive reprieves in the Inflation Reduction Act of 2022 (IRA) (either pushing back the expiration of their effective dates or, in the case of the Black Lung Disability Trust Fund, making the provision permanently effective). Another eight tax provisions had been set to expire on December 31, 2022, but the IRA also extended five of those. (Click [here](#) for a listing of expiring programs.) The political appetite for a necessarily bipartisan year-end tax extenders bill remains fluid. That is especially true this year since one of the biggest must-haves for the business community—retroactive return of expensing for certain research costs—remains tied to an enhanced CTC policy that Republicans are thus far rejecting. However, with Congress accustomed to navigating these conflicts, we expect negotiations to begin in earnest following Thanksgiving.

- **Health Care:** Congress is considering whether to extend some COVID-19 public health emergency (PHE) waivers and flexibilities for Medicare (such as for telehealth). Congress also is expected to act to avert looming Medicare sequestration cuts well as cuts to small and rural hospitals and may advance relief to mitigate Medicare cuts to physicians and clinical laboratories. Additionally, the House and Senate might seek in an omnibus package an agreement to include pandemic preparedness provisions, such as the Senate’s PREVENT Pandemics Act ([S. 3799](#)), along with mental health

## Lame Duck Agenda



and substance use disorder provisions, such as the House-passed Restoring Hope for Mental Health and Well-Being Act of 2022 ([H.R. 7666](#)).

Other legislative items that may gain steam during the lame-duck session include:

- **FDA User Fee Program Riders:** In September, Congress passed a so-called “skinny” bill to reauthorize the FDA user fee programs for branded/reference drugs and biologics, medical devices, generic drugs and biosimilars for an additional five years. However, Congress did not include substantive proposed policy riders due to disagreements between the House and the Senate. During the lame-duck session, Congress could revisit riders excluded from the reauthorization, such as provisions related to FDA regulation of diagnostic tests (such as the Verifying Accurate Leading-edge IVCT (in vitro clinical test) Development (VALID) Act), clinical trial design, cosmetics and dietary supplements.

<sup>1</sup> According to the Joint Committee on Taxation List of Expiring Federal Provisions 2021-2031 published Jan. 13, 2022 (JCX-1-22).

- **Marriage Equality:** This week, the Senate passed with a bipartisan, 62-37 vote, the Respect for Marriage Act, a bill that would codify marital equality. The House earlier this year adopted a similar, though not identical, version of the legislation with 47 Republican votes. President Biden praised the Senate vote, urging Congress to adopt it for his signature soon. The bill would require states to recognize two people as married provided the marriage was valid in the state where it was performed. The Senate amended the House-passed bill to address Republican concerns about protecting religious liberty, so expect the House to take up and adopt the amended bill as soon as this week.
- **Electoral Count Reform:** On a bipartisan 14-1 vote, the Senate Rules Committee favorably reported the Electoral Count Reform and Presidential Transition Improvement Act ([S. 4573](#)), which also enjoys support from 14 Republican co-sponsors, including Senate Minority Leader Mitch McConnell (R-KY) and Minority Whip John Thune (R-SD). As such, the bill has the bipartisan support to avoid a Senate filibuster. However, it is unclear whether the House-passed version, the Presidential Election Reform Act ([H.R. 8873](#)), would garner the requisite bipartisan support in the Senate.
- **Judicial Nominees:** A total of 45 of President Biden's nominees for federal judges are awaiting Senate confirmation. Of these, 21 are awaiting cloture and confirmation votes, four have been voted on by the Senate Judiciary Committee but must be discharged to the full Senate, and 12 have appeared before the Committee in hearings but are awaiting markups. In total, there are currently 89 vacancies to be filled. The Democratic Senate is likely to continue to seek to move judicial nominations forward during the lame duck.
- **Immigration:** With the Deferred Action for Childhood Arrivals (DACA) program at risk of being shut down by the courts, Democrats believe the lame duck may be the best opportunity to try to preserve protections for the DACA population before a divided government takes hold. However, any lame-duck deal will have to garner enough Republican support for DACA to be attached to one of the larger legislative vehicles discussed

above, which likely will require a significant concession from Democrats to address the record increase in migrants along the southern border.

- **Debt Ceiling:** The debt ceiling is not likely to be reached until at least mid-year 2023, but some Democrats have floated the idea of addressing the issue in the lame duck to avoid a protracted negotiation with House Republicans next year. We are skeptical that there is sufficient time or political will to address the debt ceiling in the handful of weeks remaining this year.

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# Preview of 118th Congress

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President-elect Biden's agenda and approach for his first 100 days in office will depend to a large degree on which party controls the U.S. Senate. Many of President-elect Biden's major campaign promises—such as comprehensive climate solutions, sweeping immigration reform, infrastructure spending, and tax reforms—would only be possible with a Democratic majority in both the House and Senate. Thus, if Republicans win either of the run-off elections in Georgia and maintain control in the Senate, President-elect Biden's first 100 days in office likely will focus on considerable executive actions and a more limited legislative agenda.



## Agriculture

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- ➔ The next Congress must enact a new Farm Bill, as the current authorizing bill will expire in 2023. With Republicans controlling the House, they are poised to impact the direction of farm policy over the life of the Farm Bill, which is usually in place for four to five years. It will be challenging to draft and enact the Farm Bill within a single year, though Congress managed to do it last time, in 2018.
- ➔ Watch for congressional Republicans to push for cuts to key Biden-Harris administration initiatives, particularly the climate and conservation spending provisions included in the Inflation Reduction Act. The IRA's increase in conservation program spending through FY2026 frustrated some Republicans who believe such decisions should be made in the context of the Farm Bill. Democratic leaders will do everything they can to defend the IRA and, if possible, even extend the higher conservation funding levels for the duration of the Farm Bill in order to establish a higher baseline for the next Farm Bill.

### Analysis

- **Funding authorization.** Before Congress decides what to include in the next Farm Bill, it will first have to decide how much money to make available. If the Agriculture Committee leaders are not given additional funding above the current baseline, they might decide to extend current authority. Otherwise, they will have to face down numerous partisan and intrapartisan efforts to reallocate money away from current programs that are generally popular with their respective constituencies. While the Congressional Budget Office (CBO) has yet to release the baseline for the 2023 Farm Bill, the current baseline projects a cost of just under \$1.3 trillion over 10 years, 85 percent of which is dedicated to nutrition programs. Whatever is left will be used to pay for the rest of the Farm Bill, which encompasses a wide range of policies, including levels of support for major commodities, conservation programs, crop insurance, trade promotion and food aid, rural development, forestry, farm credit, horticulture, bioenergy and research, as well as numerous smaller programs that are authorized in a miscellaneous title.



- **Commodity programs.** High commodity prices have rendered key commodity title programs less useful. Federal crop insurance is now the most reliable part of the federal safety net for many farmers. High input costs, such as fuel and fertilizers, have partially offset the benefit of higher commodity prices, though, and Congress may consider ways to help farmers shoulder the rising costs. Beyond major commodity programs, there is also broad support for increased investment for research and horticulture programs—assuming that Congress provides additional funding. Democrats are also likely to push for increased investment in climate and sustainability initiatives, especially “regenerative” agriculture proposals to improve soil health.

*Contributors: [Filemon Vela](#), [Hans Rickhoff](#), [John Gilliland](#), [Caroline Shrock](#)*

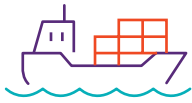


- ➔ Republicans, who campaigned heavily on a platform to secure the southern border, insist that Congress first deal with the crisis at the border before addressing broader immigration challenges.
- ➔ A range of compelling immigration challenges, including action by the courts, supply chain issues and labor shortages across a multitude of industries, may prompt action on broader reform after years of stagnation.

## Analysis

- **Border security.** U.S. Customs and Border Protection (CBP) reported a record-shattering 2.77 million enforcement actions against migrants crossing the southern border in FY2022, up from 1.72 million in FY2021. CBP reports that the increase is driven largely by an increased number of asylum seekers from a wide variety of countries. As border state governors struggle to manage the flow of migrants across the border, House Republican Leader Kevin McCarthy (R-CA) has stated opposition to offering a pathway to citizenship for undocumented immigrants or codifying the DACA program in exchange for increased border security. Republicans, who campaigned heavily on a platform to secure the border, insist on dealing with the crisis at the border before addressing broader immigration challenges.
- **Potential action-forcing developments.** Despite these obstacles to progress, a number of factors could force Congress to act after many years of legislative stagnation: a challenge to the DACA program continues to make its way through the courts, and observers believe the Supreme Court eventually will strike it down; the ongoing humanitarian crisis along the southern border could reach an inflection point; the current labor shortage poses problems for employers across nearly all sectors of the economy; and efforts to compete with China require reforms to the immigration system allowing the United States to recruit the best and brightest from around the globe.
- **Agricultural guest worker program.** During the last two Congresses, the House has passed bipartisan legislation reforming the agricultural guest worker program. During this Congress, serious bipartisan Senate negotiations also took place but ultimately did not yield broad agreement to advance legislation in the upper chamber. While agricultural guest worker reform continues to enjoy bipartisan support, the inability of both sides to find compromise on issues related to border security and legalization of the unauthorized immigrant population hinders its progress. Nevertheless, in the context of supply chain concerns and labor shortages, we expect that bipartisan talks will continue into the next Congress with an eye toward an opportunity to move reforms onto another moving legislative vehicle.
- **Employment-based visas.** Manufacturing incentives recently enacted in the Creating Helpful Incentives to Produce Semiconductors for America (CHIPS) Act are expected to spur U.S. job growth in high-skilled engineering positions in numbers beyond what can be filled domestically. Expect bipartisan talks to continue around ways to tailor our employment-based visa system to strengthen international recruiting, such as exempting science, technology, engineering and mathematics (STEM) workers from numerical visa caps and eliminating per-country caps on the number of available green cards.

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## Trade

- ➔ With a Republican-led House, expect a more confrontational stance on China, especially as it relates to export controls and issues involving Taiwan's sovereignty. At the same time, Republicans are also likely to push the Biden-Harris administration to follow through on the China Phase One deal and to clarify its tariff stance.
- ➔ Look for Republicans to pressure the administration for trade initiatives that include new market access negotiations rather than the limited frameworks they have pursued to date.
- ➔ With President Biden's agenda stalled in Congress, and in the context of a Republican House majority, watch for President Biden to lead with executive actions, which could mean seeking to close out framework initiatives like the Indo-Pacific Economic Framework (IPEF) and executive orders on outbound investment screening, data and other China-related issues.

### Analysis

#### Congressional Outlook:

- **Market access.** With Republicans holding the gavel in the House, we can expect an all-encompassing push for a proactive market access agenda that could include free trade agreements for Taiwan, the United Kingdom and Kenya. Some Republicans also could push to add market access components to IPEF or even for a renewed version of the Trans-Pacific Partnership (TPP).
- **Oversight.** Frustration with the Biden-Harris administration's inaction and lack of transparency on trade is top of mind for both Republicans and Democrats. We can anticipate increased oversight on a host of issues including export controls, intellectual property, Section 301 tariff exclusions and trade negotiations that are designed to avoid congressional authority.
- **Outbound investment screening.** Depending on whether the Biden-Harris administration moves on the issue via executive action during the lame-duck session, Republicans may renew their push for a tailored outbound investment screening mechanism. Many establishment Republicans do not support the broad scope of the leading congressional initiative—the Casey-Cornyn National Critical Capabilities Defense Act—but want to address concerns about U.S. investment funding both Chinese indigenous innovation in critical sectors and military capabilities.
- **Trade package.** The chances for a trade package in a lame-duck session appear remote, due primarily to the inability of the two parties to agree on whether and how to extend the Democratic priority of Trade Adjustment Assistance (TAA) and the Republican priority of Trade Promotion Authority (TPA). House Republicans have called on Congress to consider the TAA reauthorization jointly with the TPA legislation, as Congress has done historically. However, Democrats have been resistant to fast tracking both programs collectively. Thus, it is unlikely Congress will either renew the Generalized System of Preferences (GSP) or pass the Miscellaneous Tariff Bill (MTB) without resolving this greater impasse.

## Administration Outlook:

The administration's priorities will consist of strengthening domestic, economic and technological competitiveness while relying on defensive measures and working with U.S. allies to constrain Chinese capabilities.

- **China export controls.** The Biden-Harris administration continues to explore the possibility of new export controls to address other aspects of the semiconductor supply chain that contribute to China's computing power, including quantum computing and artificial intelligence (AI) software.
- **Outbound investment screening.** The administration also continues to develop a complementary executive order on an outbound investment screening mechanism. We expect that an inter-agency agreement will be finalized during the lame-duck session.
- **Personal data.** The administration is also considering action to limit the transfer of bulk U.S. personal data to Chinese actors.
- **Supply chain.** The Biden-Harris administration aims to secure "chokepoint technologies" in the global supply chain, which includes AI and electronic design automation software. Both are increasingly important to the growing and competitive autonomous vehicle industry.
- **IPEF.** The Biden-Harris administration likely will attempt to negotiate solidifying the IPEF, notwithstanding the bipartisan criticism from lawmakers and the private sector on the lack of transparency in the negotiation process. The administration is likely to use the IPEF as a way to force companies to choose between conducting business with the U.S. or with China.
- **Common U.S.-China challenges.** Despite the emphasis on strategic China-U.S. competition, the administration likely will try to find inroads with China to address the shared challenges of pandemics, climate change, supply chain, and food and energy security.

*Contributors: [Clete Willems](#), [Josh Teitelbaum](#), [Steve Kho](#), [Suzanne Kane](#), [Matt Hawkins](#), [Roger Murry](#), [Eric Ettore](#), [Cam Morales](#)*



# Congressional Investigations

- ➔ Even with a narrow majority in the House (as now projected), Republicans would gain subpoena power and the ability to direct that body's investigations and oversight. In fact, with a narrow majority potentially complicating Republicans' ability to move legislation efficiently, the ability to investigate may be one of the largest upsides of this election cycle for Republicans.

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- ➔ Republican control of the House could give corporate America a very rude "woke"-up call in 2023. Incoming Republican committee chairs have made clear that corporate America will be in the crosshairs—with many companies being asked to show why engaging on contentious political issues serves the interests of shareholders and is consistent with their fiduciary obligations.

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- ➔ Regardless of whether a business intends to make a political statement in adopting environmental, social and corporate governance (ESG)-conscious practices or taking stands on social issues, it invariably may be caught in the crossfire between the two political parties and pay a price for taking a position or taking no position at all. This has impacted all industries in all corners of corporate America, with many household corporate names now embroiled in heated political controversies.

## Analysis

- **Republican agenda.** Upon assuming majority control, House Republicans are expected to pursue a broad oversight and investigations agenda. Republicans have already previewed a pronounced investigative focus on corporate interests perceived to have taken progressive stands on issues such as climate change and ESG-conscious investing; abortion rights; immigration; social media content; voting rights; diversity, equity and inclusion; and others. Investigations are likely to focus on perceived progressive-aligned actions taken by leading U.S. businesses and whether such activities conflict with companies' obligations to maximize shareholder value. In many cases, leading Republicans have already begun sending document and information requests, previewing categories of information that would be sought (and with the expectation that companies will be prepared to comply in early 2023). House Republicans also are likely to investigate the four or five most dominant companies in the information technology industry in the United States ("Big Tech") and social media (focusing on content moderation), the COVID-19 pandemic and its origin, and corporate ties to China. Extensive scrutiny of the Biden-Harris administration (including private sector entities with ties to the administration and executive branch stakeholders) also is a certainty.
- **Democratic counter-agenda.** Expect Senate Democratic investigations to effectively "counter-program" Republican oversight and messaging, including on issues such as ESG. The result may cause investigative whiplash—with private sector stakeholders potentially receiving incoming requests and scrutiny from both sides.

Contributors: [Karen Christian](#), [Rafi Prober](#), [Tom Moyer](#),  
[Aisha Mahama-Rodriguez](#)



# American Indian Law and Policy

- ➔ Expect continued difficulty obtaining unanimous consent in the Senate for tribal-specific priorities in the 118th Congress, which will continue to stall major tribal bills unless included in larger must-pass legislative vehicles. The likely disagreement on tribal priorities will continue to require bipartisan agreement, which may prove difficult in a closely divided House and Senate.
- ➔ A Republican House majority can be expected to launch oversight investigations into the Biden-Harris administration's implementation of congressional COVID-19 relief funding programs, potentially focusing on undisbursed funds and potential lapses in tribal reporting.

## Analysis

- **Native Americans in Congress.** Four Native American congressional members will likely serve in the 118th Congress. In Oklahoma, Rep. Markwayne Mullin (R-OK-2) (Cherokee Nation) won election to the U.S. Senate representing Oklahoma and will serve as the only member of a federally recognized tribe in the Senate. Incumbent Rep. Tom Cole (R-OK) (Chickasaw Nation) was reelected within his district, continuing his tenure as the longest-serving Native American in the House. In a competitive Kansas race, incumbent Rep. Sharice Davids (D-KS) (Ho-Chunk Nation of Wisconsin) was reelected to her seat. The election results are too close to call in Alaska, but Mary Peltola (D-AK) (Yup'ik) was leading her race with 90 percent of the vote for a seat that she previously took over in a special election after former Rep. Don Young's passing. With Alaska's ranked-choice voting system, if Rep. Peltola does not receive 50 percent of the first-place votes under voters' first-ranked choice, the state will go to the ranked-choice tabulation on November 23 and the outcome may not be known for some time as this process occurs. The House lost two Native American members. Incumbent Rep. Yvette Herrell (R-NM) (Cherokee Nation) lost her seat in New Mexico and former Rep. Kai Kahele (D-HI) (Native Hawaiian) did not run for reelection in order to pursue what resulted in an unsuccessful bid for Hawaii's governor seat.
- **Tribal bills.** During the 117th Congress, tribal bills did not often make it out of their committees of jurisdiction unless they were attached to larger vehicles, and we expect this practice to continue into the 118th Congress. For tribal bills that did move out of committee, nearly all have failed to obtain unanimous consent in the Senate. Tribal priorities are less likely to be enacted with a split Congress, and we expect the key tribal committees to pursue party priorities to oversee and investigate the Biden-Harris administration's implementation and use of congressionally authorized funds in response to the COVID-19 pandemic.
- **Tribal issues.** The 118th Congress and tribes will continue discussions regarding: tribal jurisdiction, in the context of the *Oklahoma v. Castro-Huerta* U.S. Supreme Court decision; political vs. race-based classifications of tribal individuals, in relation to the forthcoming *Brackeen v. Haaland* U.S. Supreme Court decision; and the appropriate role of critical race theory and affirmative action. However, with Congress divided on these social



issues and Indian country lacking a uniform approach for legislating on them, we do not expect Congress to take immediate action or adopt and pass “fixes.” Republican efforts to eliminate critical race theory from school curricula may complicate tribal education reform efforts, in furtherance of self-governance, to ensure flexibility to teach Native American history in schools (many of which are federally funded).

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[Denise Desiderio](#), [Jenny Patten](#)*



# Antitrust

- ➔ Under President Biden's direction, expect a continued focus on enforcement at the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) as well as regulatory rulemaking at the FTC.

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- ➔ Expect the GOP majority in the House to exercise stringent oversight of federal agencies with jurisdiction over antitrust issues.

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- ➔ Watch for waning interest from a Republican-controlled House in overhauling antitrust laws and targeting perceived anticompetitive conduct and mergers by tech platforms. Opportunities for bipartisan agreements, however, will remain in the Senate.

## Analysis

- **Big Tech antitrust overhaul.** On Capitol Hill, stakeholders have closely monitored the movement of bills focused on Big Tech throughout the 117th Congress, particularly the American Innovation and Choice Online Act (AICOA; [S. 2992](#)), which remains at a standstill. Senate Majority Leader Schumer previously indicated a willingness to hold a vote on the legislation, but it remains to be seen whether that will happen during the 118th Congress amidst skepticism that the bill can earn the 60 votes required to break a filibuster in the Senate.
- **Antitrust package.** The House passed a package of antitrust bills before departing for the pre-election recess, which included measures to: (1) increase Hart-Scott-Rodino Antitrust Improvement Act of 1976 (HSR) fees for larger transactions; (2) require disclosure of economic support from certain foreign states/foreign entities and an assessment of such as part of a transaction's antitrust review; and (3) prevent the transfer of litigation brought by state attorneys general. In the absence of adding the bill or parts of it to year-end legislation during the lame-duck session, there likely will be efforts to revive these measures during the 118th Congress.
- **FTC composition/agenda.** Republican FTC Commissioner Noah Phillips has formally stepped down from his post after announcing his intent to resign in August, leaving the Commission with three Democrats and only one Republican. The administration continues to highlight key efforts of the FTC and DOJ, which are currently working to finalize revisions to the merger guidelines, with the FTC also looking to ban or limit noncompete agreements. On November 10, 2023, the FTC also issued a new Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act, in which Chair Lina Khan indicated that the FTC will pursue an aggressive and expansive interpretation of what constitutes an unfair method of competition. The FTC's enforcement of the new Section 5 policy statement almost certainly will be tested in the courts. GOP members will continue to amplify concerns about the FTC's agenda under Chair Khan and, we expect, will exercise stringent oversight of federal agencies with jurisdiction over antitrust issues.
- **Possible Senate bipartisanship.** House Judiciary Committee Ranking Member Jim Jordan (R-OH), who is expected to take the gavel in January, has not demonstrated a willingness to collaborate

with Democrats on antitrust legislation and remains opposed to numerous proposals that advanced through the Committee with some bipartisan backing. Thus, we do not expect antitrust to be a priority for the House in the 118th Congress. However, bipartisan activity is still possible in the Senate, as Sens. Dick Durbin (D-IL) and Chuck Grassley (R-IA), current Chair and Ranking Member of the Judiciary Committee, will retain their respective leadership roles. Sen. Grassley has been active on antitrust issues and demonstrated a willingness to cooperate on a bipartisan basis with Antitrust Subcommittee Chair Amy Klobuchar (D-MN), including on comprehensive tech legislation such as the AICOA. While bipartisan interest will remain in addressing perceived anticompetitive conduct of Big Tech companies, lawmakers on both sides of the aisle will also continue to focus on other sector-specific concerns outside of Big Tech, including those related to agriculture. Other points of focus include the pharmaceutical industry and consumers' right to repair, and these and other narrower efforts could also gain traction next Congress.

- **Court action.** Federal lawsuits against Google and Meta have advanced, and Apple also faces the possibility of a DOJ antitrust suit. The courts likely will remain a constraint on the antitrust agencies' enforcement actions, as both antitrust agencies have experienced significant court losses.

*Contributors: [Ed Pagano](#), [Haidee Schwartz](#), [Taylor Daly](#)*



# Privacy and Cybersecurity

- ➔ Expect continued congressional efforts to advance a federal privacy standard, although in the absence of bipartisan agreement, the FTC will continue to explore a privacy rulemaking, while states will continue to advance their own standards.
- ➔ As the Cybersecurity and Infrastructure Security Agency (CISA) works to implement its landmark cyber incident reporting law, expect continued congressional action on strengthening cyber defenses, including conducting oversight of CISA's efforts, building up the national cyber workforce, collaborating with state and local governments, and advancing a Federal Information Security Modernization Act (FISMA) reform bill.

## Analysis

### Privacy:

- **Three-corners bill.** The introduction of the “three corners” privacy bill—the American Data Privacy and Protection Act (ADPPA; [H.R. 8152](#))—was a significant milestone this Congress, marking the first such proposal to gain bipartisan, bicameral support. While the bill appeared to have traction, having moved through the House Energy and Commerce Committee, it ultimately stalled as a result of California regulators’ (namely, the California Privacy Protection Agency (CPPA)) opposition to preemption language in the legislation as well as the absence of critical support from Senate Commerce Committee Chair Maria Cantwell (D-WA). Lack of consensus at the federal level, however, has not hindered states’ willingness to enact their own standards, with Connecticut mostly recently becoming the fifth state to enact a comprehensive privacy law.
- **Committee leaders on privacy.** There remains bipartisan appetite to address privacy next Congress, and congressional negotiations will continue, albeit under a shifted political landscape, with Rep. Cathy McMorris Rodgers (R-WA) taking the reins of the Energy and Commerce Committee. Rep. McMorris Rodgers closely collaborated with current Chair Frank Pallone (D-NJ) on the ADPPA, although the outlook on privacy will also hinge on the Senate. Sen. Roger Wicker (R-MS), the current Ranking Member of the Senate Commerce Committee, is likely to take the top GOP spot on the Armed Services Committee, leaving Sen. Ted Cruz (R-TX) as the Ranking Member of the Commerce Committee by way of seniority. Sen. Cruz has not been particularly active on privacy, and because his focus on Big Tech largely has been limited to content moderation concerns, it is unclear what role he will take in the broader privacy debate or, more specifically, how he will work with Senator Cantwell, who will likely stay on as the top Democrat on the Committee. Nevertheless, the pair will play a critical role in advancing any privacy bill.
- **Children’s privacy.** Outside of comprehensive reform, there have been efforts to advance children’s privacy bills this year within the Senate Commerce Committee. The first, the Children and Teens’ Online Privacy Protection Act, or the “COPPA 2.0” bill led by Sen. Ed Markey (D-MA), would extend privacy protections to teens 16 or younger that are currently only applicable to children ages 12 and under. The second, the Kids Online Safety Act ([S. 3663](#)), addresses the overall design of platforms and how they operate for young users with regard to harmful behaviors. Both bills generally have bipartisan support, although some Republicans have outlined the need for clarifying changes to the COPPA 2.0 bill. Because these bills are nar-

rower than the ADPPA and have bipartisan support, it is possible they can gain traction next Congress if they remain stalled for the rest of this year.

- **Regulation.** At the regulatory level, and in the absence of legislative movement on a comprehensive privacy standard, the FTC will proceed with its [Advance Notice of Proposed Rulemaking](#) (ANPR) to explore whether a privacy rulemaking is needed. Democratic Commissioner Alvaro Bedoya has stressed that the effort will not interfere with passage of an overlapping comprehensive privacy bill, should one advance. This would be a multiyear process, contingent on how far the agency would like to go. Chair Lina Khan is expected to aim for the rules to be broad in scope. Further, the Department of Health and Human Services (HHS) is also expected to issue new Health Insurance Portability and Accountability Act (HIPAA) rules following its issuance of a [Notice of Proposed Rulemaking](#) (NPRM) in early 2021. However, the U.S. Supreme Court's decision in the Dobbs case earlier this year that overturned *Roe v. Wade* has raised questions about whether and how companies should protect data of users seeking abortions. Any attempt to address any of these concerns within the scope of the ongoing rulemaking will further delay the process.

## Cybersecurity:

- **Implementing cyber legislation.** Since enactment of sweeping cyber incident reporting legislation earlier this year (see prior alert [here](#)), stakeholders have closely monitored CISA's actions to implement the law, as these rules will ultimately determine the effective date of the law's reporting requirement, in addition to the entities that will fall under the scope of the rules and the manner in which reports must be submitted. Under the law, certain companies will be required to report cyberattacks to the federal government within 72 hours and ransomware payments within 24 hours. The agency has [requested](#) stakeholder input on the regulations, which will inform the formal Notice of Proposed Rulemaking (NPRM), which must be published by March 15, 2024.
- **NDAA.** Lawmakers are already in the process of determining cyber priorities for next Congress, although this year's NDAA could serve as

a legislative vehicle for a number of cyber provisions, the most significant of which would create a designation for systemically important entities (SIEs) and require them to report certain information to CISA. While the House-passed NDAA ([H.R. 7900](#)) includes the provision, the modified Senate NDAA ([S. 4543](#)) does not.

The reporting requirements are still a point of contention, and it remains to be seen whether a compromise on this language can be reached, although lawmakers are unlikely to include any controversial provisions in the year-end defense authorization package.

- **Prospective priorities.** In the 118th Congress, cybersecurity will remain a national security priority for lawmakers on both sides of the aisle. Republicans have indicated they will prioritize additional protections, such as federal cybersecurity insurance coverage modeled after the 2002 Terrorism Risk Insurance Act, in addition to other bipartisan issues like cybersecurity workforce development and collaboration with state and local governments. Further, a likely oversight point of scrutiny will be CISA's resources and ability to carry out its mission—a concern that both Republicans and Democrats have voiced. FISMA reform also remains a point of focus for lawmakers on both sides of the aisle, as both the House and Senate approved separate bipartisan FISMA reform bills earlier this year.

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## Defense

- ➔ Expect Democrats and Republicans to find common ground on the importance of protecting supply chain vulnerabilities, improving Taiwan's defense posture and evaluating punitive measures against Russia based on its continued aggression against Ukraine.
- ➔ Republicans are expected to advocate for a different approach to defense and government contracting-related priorities than Democrats have in recent years.

### Analysis

- **Prohibition on purchase of products with Chinese semiconductors.** Among the initiatives added to the NDAA is a bipartisan amendment backed by Senate Majority Leader Schumer and Sen. John Cornyn (R-TX) to prohibit the U.S. government from purchasing products or services containing semiconductors produced by three Chinese microchip companies—Semiconductor Manufacturing International Corporation (SMIC), ChangXin Memory Technologies (CXMT), or Yangtze Memory Technologies Corp. (YMTC)—or any subsidiary, affiliate or successor of such entities. It follows the spirit of the CHIPS Act of 2022 ([P.L. 117-167](#)), which aims to boost U.S. semiconductor manufacturing and tighten U.S. supply chains in the critical technology area, a political focus likely to continue into the 118th Congress.
- **Defending Taiwan.** Also included in the NDAA is a bipartisan amendment with provisions from the Taiwan Policy Act ([S. 4428](#)), backed by Sens. Bob Menendez (D-NJ) and Jim Risch (R-ID), the Chair and Ranking Member of the Senate Foreign Relations Committee. The provisions would accelerate arms transfers to Taiwan and other allies in the region and counter China's "coercion and influence campaigns" targeting the country and its allies while ensuring Taiwan's membership in international organizations. As a result of the bipartisan amendment to improve Taiwan's defense posture, a shift toward a less ambiguous support of Taiwan is likely on the horizon, also indicating that bipartisan common ground can be found in the coming year.
- **National Defense Strategy.** In lead up to the election, President Biden's Defense Department [released](#) a National Defense Strategy (NDS), noting that China presents the most consequential and systemic challenge, while Russia poses acute threats. In his approach to national security, President Biden echoes aspects of former President Trump's views but emphasizes the importance of cooperatively addressing cross-border challenges such as climate change, energy shortages, communicable diseases and food security.
- **Select Committee on China.** During the first two years of the Biden Presidency and Democratic majority in Congress, Republicans have accused Democrats of failing to hold China accountable and adequately counter its rising influence. Even before the midterm elections, Republicans indicated their intent to establish a Select Committee on China, setting the stage for a host of proposed countermeasures to combat Chinese influence. Such actions may include a bipartisan compromise on ending U.S. reliance on Chinese supply chains for critical goods, addressing cybersecurity concerns, theft of intellectual property and human rights violations. The Committee also would focus on outpacing and confronting China's technology ecosystem as well as China's efforts to weaponize space.



- **Further restrictions on business operations in Russia.** Continued Russian aggression against Ukraine is likely to lead to bipartisan support for securing Russian supply chain vulnerabilities, as well as condemnation of Russian attempts to annex any part of Ukraine. As long as the aggression continues, there may be common ground for maintaining economic sanctions on the regime, though the contours of a GOP-led sanctions package remain to be seen. Moreover, as part of the House version of the NDAA, an amendment, the Federal Contracting for Peace and Security Act, requires executive agencies to terminate their contracts with companies conducting business operations in Russia during its ongoing war against Ukraine. Despite its absence in the Senate version, it remains unclear whether the reconciled version of the House and Senate NDAA will include this requirement, with the possibility of the matter being revisited in the next Congress.
- **Appropriations for Ukraine.** Similarly, Republican control of the House is likely to lead to heightened scrutiny over approved aid for Ukraine as well as other defense priorities over the last two years. GOP Leader Kevin McCarthy announced that Republicans will not write a “blank check” for Ukraine, signaling that while additional aid to Ukraine is not off the table, the GOP may be inclined to curtail government spending both at home and abroad.
- **Inflation adjustments for defense contractors.** With mounting concerns over underfunding, insufficient inflation-adjusted spending and emboldened adversaries, Republicans will insist on increasing defense spending in the next Congress. Defense contractors may also benefit from increased spending, in light of Republican criticisms of Democrat underfunding for weapons systems acquisition and modernization. In another indication of their resolve, Republicans secured an amendment to the NDAA that directs the Department of Defense (DoD) to modify contracts in order to address inflation and supply chain constraints.
- **Vaccine mandate.** As part of President Biden’s regulatory agenda to address COVID-19, he signed an executive order requiring all federal workers and contractors to get vaccinated (with limited exceptions). However, the vaccine mandate for federal contractors remains in limbo after a district court judge halted it. There is concern, however, that the administration will continue to push policy goals through government contractor requirements that a Republican House will not support, including vaccine requirements, climate change, minimum wage and stock buybacks.

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# Education

- ➔ Anticipate partisan gridlock—and policy differences even within the Democratic and Republican caucuses—to stymie any substantial legislative action on education in the 118th Congress
- ➔ Culture wars and issues and the parents' rights movement that were prominent in the 2022 election cycle will dominate the House Republicans' education agenda.
- ➔ With legislating on the back burner due to lack of consensus, expect Republicans in the House to shift towards oversight of current Biden-Harris administration education programs.

## Analysis

- **Hill priorities.** House and Senate Republicans are expected to emphasize school choice and local and parental involvement in education and other social issues, a key part of the House Republicans' new *Commitment to America* agenda. The *Commitment* proposes guidelines pertaining to the curriculum children can be taught at school, ensures only women can compete in women's sports and advocates for measures to address learning loss resulting from COVID-19. Republicans strongly objected to school closures and virtual learning during COVID-19 shutdowns and will use the *Commitment* to propose policies or hold hearings to draw attention to the long-term impacts of the closures.
- **Social issues.** While there is a limited federal role on hot-button social issues related to education, expect House Republicans to hold hearings and provide tools to support state and local governments on additional social issues including: bathroom entry; gender in sports; parental notification related to transgender students and related issues; prayer in classrooms and athletic events; curriculum, required reading and library inventory; and other parents' rights movement issues. Congressional Republicans also may continue their campaign against the influence of China across college campuses.
- **Progressive agenda.** The progressive faction of the Senate Health, Education, Labor and Pensions (HELP) Committee, led by Sen. Bernie Sanders (I-VT), will push for expanded loan forgiveness and free public college. The exceedingly different education priorities of the parties will make bipartisan consensus in the Senate on education issues rare.
- **Expected budget.** Despite President Biden's pledges about education funding on the campaign trail, 2022 saw only a modest increase in the budget for education projects. Now, with Republicans winning the majority in the House, education funding is not expected to increase. Some modest Republican restructuring proposals for education funding might be viable, including funding for for-profit colleges, although they would need to be moderate enough not to be rejected by the Biden-Harris administration.
- **Oversight.** House Republicans are likely to conduct rigorous oversight of Biden-Harris administration education programs. Republicans are generally

skeptical of the Biden-Harris administration's executive actions on education, which they view as an overstep of federal authority. This includes the administration's recently launched Federal Student Loan Debt Relief program, against which six Republican-led states have filed suit. Republicans will use the power of the gavel to scrutinize the integrity of this program and other Biden-Harris administration education policies.

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## Energy and Environment

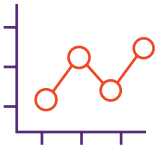
- ➔ With Republicans controlling the agenda in the House of Representatives, the Biden-Harris administration will seek to achieve its climate objectives through executive orders and agency rulemaking rather than through legislation.
- ➔ The administration will continue to focus on the implementation of the Inflation Reduction Act and the Infrastructure Investment and Jobs Act. Republican-controlled House committees will bring a new level of scrutiny to the administration's activities through vigorous oversight hearings and investigations.

### Analysis

- **Permitting reform.** Comprehensive permitting reform remains one of the few opportunities for Democrats and Republicans to find a compromise on legislation. Republicans are expected to focus part of their early 2023 agenda on energy legislation, which may provide an avenue for bipartisan negotiations similar to those undertaken ahead of the passage of the Bipartisan Infrastructure Law.
- **SEC Climate Risk Disclosure Rule.** The Securities and Exchange Commission (SEC) will publish its climate risk disclosure rule. Republicans, who have uniformly opposed the SEC's proposed new rules, will look to beat back the agency's efforts to require additional climate-related reporting, while Democrats will seek to boast support for the rule. We can anticipate particular scrutiny of requirements for disclosing Scope 3 emissions, upstream and downstream, associated with the supply chain and product emissions, respectively.
- **Methane Rule.** Signaling at its earliest opportunity post-election that this administration intends to stay the course on regulatory action to combat climate change, the Environmental Protection Agency (EPA) issued a supplemental proposal seeking to expand the scope of its long-anticipated methane rule to limit emissions of the potent greenhouse gas, which Republicans are likely to oppose. Relatedly, the Inflation Reduction Act included a new methane fee that will take effect on January 1, 2024.
- **ESG programs.** As corporations pursue ESG programs, congressional Republicans will plan to pursue further actions to limit the influence of ESG frameworks in business decisions. Republicans, including key House Financial Services Committee members, have proposed a package of bills that they hope will roll back the influence of ESGs in financial decision making. Proposed reforms include a bill by Sen. Dan Sullivan (R-AK) requiring managers of passive investment funds to vote proxies based on the wishes of individual investors, a proposal by Sen. Marco Rubio (R-FL) that would allow stakeholders with large shares in a company to sue that company for prioritizing ESG guidelines, and Rep. Andy Barr's (R-KY) legislation that would require retirement plan providers to prioritize financial returns over sustainability concerns.
- **Circular economy.** Republicans and Democrats have expressed interest in working within the circular economy and moving legislation pertinent to the plastics industry. However, the two sides are widely divided on the right solution, and it is unlikely they can overcome that partisan divide.

- **RFS reform.** There is bipartisan interest in reforming the Renewable Fuel Standard (RFS) program, and while there might be a collaborative push to expand the program, this has proved challenging in the past, as it requires opening up the Clean Air Act, and the politics around the RFS are highly charged. That said, the RFS is an area ripe for reform, as the technology-forcing nature of the RFS mandate has failed to deliver on either the climate benefits or energy independence goals at the scale envisioned by Congress over 15 years ago.

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## Financial Services

- ➔ Under their House majority, Republicans likely will pursue Congressional Review Act resolutions to unwind the most aggressive of the administration's regulations. Without a presidential signature, however, these will remain messaging votes. The real action will come through aggressive oversight of the agencies and efforts to rein them in through the appropriations process.

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- ➔ With Democrats retaining control of the Senate, current Chairman Sherrod Brown (D-OH) will keep the gavel in the Senate Banking Committee. A Senator Brown-led Committee will continue many of the priorities of the 117th Congress, particularly consumer protection, oversight of large banks and equitable housing. Considering Sen. Brown's overall skepticism of the crypto industry, meaningful legislation on digital asset regulation could be relegated to the Senate Agriculture Committee, which has both jurisdiction over the Commodity Futures Trading Commission (CFTC) (a potential primary crypto regulator) and comparatively crypto-friendly committee leadership.

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- ➔ The crypto industry has been actively pushing Congress to enact legislation that would provide regulatory clarity that will allow the industry to grow and develop here in the United States. This effort will involve multiple committees on both sides of the Capitol and, to date, has been bipartisan. The work done this year will serve as a solid foundation for a lawmaking exercise in the 118th Congress.

### Overview

- **House committee agenda shift.** As incoming Republican Chairman, current House Financial Services Committee (HFSC) Ranking Member Patrick McHenry (R-NC) has outlined an ambitious agenda for the Committee that will diverge substantially from the priorities of the current Chairwoman Maxine Waters (D-CA).
- **Oversight.** The administration should expect intense and ongoing oversight of regulators, particularly SEC Chair Gary Gensler and Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra, with whom Republicans have repeatedly been at odds. As discussed above, House Republicans will certainly push hard against regulators on ESG-related issues, particularly climate-based financial risk. Similarly, GOP lawmakers have expressed serious reservations about the climate and social commitments of private companies. It is normal for a Republican Congress to put pressure on Democratic regulators, but the shift toward oversight and investigations of private companies is a new and significant development.
- **Capital formation.** Rep. McHenry will likely attempt to implement the ambitious capital formation agenda announced by Committee Republicans in September, which builds off of the 2012 Jumpstart Our Business Startups (JOBS) Act to further strengthen public markets, assist new and small businesses, and increase opportunities for private investment.



- **Bank privacy.** House Financial Services Committee Republicans have sought to enact banking privacy legislation for several years, and given the continued interest from senior members of the Committee, there may be an attempt to move legislation under Chairman McHenry.
- **China.** Investment in China and Chinese companies will remain a focus for a Republican House Financial Services Committee. That said, it is clear that the new Chairman will want to make sure that any new law or regulation is carefully targeted.
- **Housing.** We expect a major shift from the House Committee's current focus on equitable housing under Chairwoman Waters. Still, continually rising interest rates and other factors that could lead to volatility in the housing market may demand the Committee's attention.
- **Financial regulators.** Despite increased congressional oversight, executive branch agencies will likely be able to continue their aggressive strategy of regulation by enforcement, since even with divided government, Republicans will have few opportunities to stop the Biden-Harris administration's regulators. Among others, SEC Chair Gary Gensler has pushed an agenda headlined by boundary-pushing rulemakings and strict enforcement actions that we expect to continue.
- **Digital assets and cryptocurrency.** Members of Congress on both sides of the aisle have taken increasing interest in the digital assets space. Crypto legislation introduced during the 117th Congress includes proposals on overall regulatory structure, stablecoins and the tax treatment of crypto transactions, and we expect the focus on crypto to continue into the lame-duck session and the new Congress. House Financial Services Chair Waters and Ranking Member McHenry have been attempting to reach an agreement on stablecoin legislation since the summer. With negotiations still ongoing and the year coming to a close, it seems unlikely that a bill will go to the President this year. Nonetheless, the work already done on this legislation will serve as a foundation for one of Chairman McHenry's top priorities next year. There has been bipartisan support for the task forces established in the Committee this Congress, and

as Chair, McHenry may formalize the Committee's focus on issues related to financial technology, digital assets and artificial intelligence by adding a seventh subcommittee. The Senate Agriculture Committee has also made substantial progress on its bipartisan Digital Commodities Consumer Protection Act. It remains a priority of the Senate Agriculture Committee Chair Debbie Stabenow (D-MI) and Ranking Member John Boozman (R-AR) for the lame duck, but in the absence of action this year, it will be a top Senate priority in 2023. The Senate Banking Committee remains engaged on this front as well, particularly through the Lummis-Gillibrand Responsible Financial Innovation Act and the Boozman-Stabenow Digital Commodities Consumer Protection Act.

*Contributors: [Brendan Dunn](#), [Jason Daniel](#), [Sam Olswanger](#), [Eric Ettorre](#), [Josh Gohlke](#)*



## Health Care

- ➔ The Biden-Harris administration will prioritize implementation of the Inflation Reduction Act, including the law's sweeping drug pricing reforms, as part of their drug pricing agenda.
- ➔ The COVID-19 public health emergency facilitated a number of Medicare waivers and flexibilities, such as those related to telehealth, and the implications for how and when the PHE ends and what happens to these flexibilities going forward will continue to be a key area of focus.
- ➔ House Republicans' oversight efforts are expected to be robust and far reaching and may target relief funds distributed during the pandemic.

### Analysis

- **Implementing IRA health provisions.** The Biden-Harris administration, through the Centers for Medicare and Medicaid Services (CMS), will implement the health care provisions of the IRA, including price negotiation under Medicare Parts B and D, inflationary rebates, the Medicare Part D redesign and Medicare insulin cost sharing. Congressional Republicans will continue to message their position that IRA drug pricing provisions are detrimental to innovation and patients through rigorous oversight of the law's implementation and introduction of legislation seeking to repeal it. IRA implementation is but one part of the Biden-Harris administration's drug pricing agenda. The Center for Medicare and Medicaid Innovation (CMMI) has been tasked with proposing drug-pricing recommendations to complement the IRA.
- **Ending the COVID-19 PHE.** How and when the COVID-19 PHE unwinds has significant short- and long-term implications in health care given the extensive flexibilities afforded to state and federal programs to waive or modify certain requirements across many areas, including private insurance, Medicaid funding and eligibility, and a host of Medicare provider flexibilities. The Medicare waivers and flexibilities are scheduled to expire following the end of the COVID-19 PHE, or, with respect to certain telehealth waivers, 151 days following the end of the PHE. If not addressed during the lame-duck session, the 118th Congress may pursue a broad one- or two-year extension of certain telehealth flexibilities or may seek to enact more focused changes such as permanently expanding telehealth coverage for mental health and substance use disorder treatment. Stakeholders will be interested in the potential universe of policies Congress may use to offset the cost of telehealth extensions, and given the significant interest in telehealth issues.
- **Pandemic preparedness.** The focus on pandemic and medical and public health preparedness is not limited to the COVID-19 pandemic, as seasonal influenza, respiratory syncytial virus (RSV) and monkeypox have driven recent headlines. The Biden-Harris administration continues to prioritize pandemic preparedness, recently elevating the Office of the Assistant Secretary for Preparedness and Response to an operating division and releasing an updated biodefense, pandemic prepared-

ness and global health security strategy. Regardless of whether Congress enacts the Prepare for and Respond to Existing Viruses, Emerging New Threats (PREVENT) Pandemics Act as part of the lame-duck session, Congress will continue to focus on various pandemic-related issues as part of the reauthorization of the Pandemic and All-Hazards Preparedness Act (PAHPA) next year.

- **FDA policy riders.** Congress may use the lame duck to advance various FDA policy riders, including “super riders” related to the regulation of diagnostics and cosmetics. If enacted, implementing these provisions would be a key area of focus for the Food and Drug Administration. If Congress does not enact various FDA policy riders this year, it may revisit the riders when considering the “must pass” reauthorization of the Animal Drug User Fee Act and Animal Generic Drug User Fee Act, which must be reauthorized by the end of this fiscal year given the bipartisan and sustained focus on various FDA-related issues.
- **Medicare coverage of breakthrough medical devices.** In early 2023, CMS is expected to release a new regulation regarding an expedited pathway for Medicare coverage of breakthrough medical devices. This rulemaking will be carried out against the backdrop of the House GOP seeking to advance an innovation agenda as part of the Healthy Future Task Force.
- **Provider payments.** Concerns regarding Medicare solvency and a tight budget environment may prompt greater scrutiny of provider payments. House Republicans have signaled an interest in advancing a variety of policies designed to lower costs, such as site-neutral payments.
- **GOP oversight.** GOP oversight efforts are expected to be robust and could target relief funds distributed over the course of the pandemic. Oversight is also expected in connection with taxpayer dollars that have gone toward funding what GOP lawmakers consider to be progressive causes.

Contributors: [Anna Abram](#), [John Jacob](#), [Kelly Cleary](#), [Nate Brown](#), [Louis Agnello](#), [Julie Nolan](#), [Matt Hittle](#), [Sean Feely](#), [Josue Silva](#)



### What Next? Complying with Post-Election Contribution Rules

- ➔ While attention will shift to the 2024 elections once the November 8 midterm election results are finalized, contributors may still receive solicitations related to the 2022 elections. Those interested in making post-election federal campaign contributions may do so under certain circumstances.
- ➔ The Federal Election Commission (FEC) will announce within the next months increased limits on contributions to federal candidates and national party committees for 2023 and 2024.

#### Analysis

- **Georgia run-off.** Runoff elections are considered separate elections under FEC rules. Contributors are therefore permitted to make contributions to the campaigns of Senator Raphael Warnock (D) and Herschel Walker (R) for the Georgia runoff election on December 6 even if they previously maxed out contributions to the candidates' general election campaigns. An individual may contribute up to \$2,900 and a multicandidate political action committee (PAC) may contribute up to \$5,000 to each candidate.
- **Candidate recount funds.** Federal candidates are permitted to establish separate accounts to pay the costs of recounts and other expenses related to contested elections. Much like contributions for runoff elections, donations to recount funds are not aggregated with contributions to a candidate's primary or general election campaigns—meaning that an individual may contribute up to \$2,900 and a multicandidate PAC may contribute up to \$5,000 to each candidate's recount fund even if they previously contributed to that candidate this election cycle.
- **National party recount funds.** National party committees such as the Democratic National Committee (DNC) and Republican National Committee (RNC) are also permitted to establish accounts and raise funds specifically for election recounts, contests and other legal proceedings. These recount accounts are subject to separate contribution limits. Accordingly, an individual may contribute up to \$109,500 and a multicandidate PAC may contribute up to \$45,000 per year to these accounts, even if they have previously contributed to a national party committee's principal campaign account.
- **Debt retirement.** Federal candidates may accept contributions after the general election if their campaigns have net debt outstanding (i.e., a campaign's unpaid debts exceed its cash on hand). Contributions for debt retirement after an election occurs are only possible if the contributor has not already made the maximum contribution to the candidate for that election. For example, if Jane Doe contributed \$2,500 to Senator Smith's general election campaign before Election Day, she can only contribute an additional \$400 toward the campaign's general election debt retirement after November 8 assuming the campaign has net debt outstanding. Contributions toward a campaign's debt retirement may only be made if the campaign has net debt on the date the contribution is made. Further, any contribution for debt retirement must be designated for the election for which the

campaign is retiring debt. If the contribution is not correctly designated, it will be applied toward the limit for the candidate's next election.

- **2024 general election cycle.** As the focus now turns to the 2024 election cycle and the presidential election, the FEC will announce within the next months increased limits on contributions to federal candidates and national party committees for 2023 and 2024. Every two years, the FEC raises contribution limits to keep up with inflation. Next year's increase may be larger than in recent cycles given the recent rates of inflation in the United States.

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## Tax

- ➔ The highest priority business tax changes that could drive an end-of-year tax bill are: (1) allowing for expensing for certain research costs (doing away with mandatory five-year amortization of research and experimentation (R&E) under Section 174); (2) raising the Section 163(j) cap on the amount of interest businesses can deduct (i.e., returning the cap to 30 percent of earnings before interest, taxes, depreciation and amortization or earnings before interest, taxes, depreciation, and amortization (EBITDA)); and (3) extending full bonus depreciation under Section 168(k). If successful, short-term extensions of the first two provisions will likely also be retroactive so that businesses benefit in 2022.

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- ➔ House Ways and Means Committee Chairman Richie Neal (D-MA) will be able to negotiate compromise retirement legislation in the coming weeks—legislation that could be enacted without unrelated tax add-ons (i.e., without negotiating a tax extenders package). The House already passed the Securing a Strong Retirement Act of 2022 (“SECURE (Setting Every Community Up for Retirement Enhancement) 2.0”), and the Senate Finance Committee marked up its own companion retirement legislation, the Enhancing American Retirement Now (EARN) Act, in June. The Committees should be able to work through their differences to arrive at a compromise proposal.

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- ➔ Bipartisan support is also building for amending a provision included in the American Rescue Plan Act that drastically reduced the 1099-K tax-reporting threshold from \$20,000 and 200 transactions to \$600 and one transaction. This tax effort to close the tax gap is creating significant confusion and uncertainty, which will culminate in millions of 1099-K forms being sent out in early 2023, often to individuals who do not owe any taxes.

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- ➔ Enacting significant tax law changes in the next Congress will be extremely challenging.

### Analysis

- **Extensions.** Almost two years of work by Democrats to craft tax and spending reconciliation legislation culminated in the August 16 enactment of the Inflation Reduction Act of 2022—a bill that focused on deficit reduction, investing in clean energy and reducing health care costs. However, Democrats were unable to secure an extension of the expanded and fully refundable Child Tax Credit, which increased to as much as \$3,600 per child in the American Rescue Plan Act of 2021 but has since reverted to \$2,000 for 2022. Continued concerns over income inequality and the economy—particularly as working class Americans struggle with the impact of inflation on their grocery and gas bills—have only firmed the commitment of Democrats to pair any year-end extension of corporate tax breaks (including the three outlined above) with an extension of the expanded CTC. While the full cost of the CTC could run to more than \$100 billion per year,

Congress has a long track record of slimming down proposals and restricting effective dates in order to reduce costs and get to a win-win bipartisan deal. Keep in mind that for Chairman Neal, this would be his last tax package negotiated in the majority, and for retiring Ranking Member Kevin Brady (R-TX), this is his last hurrah as well. It seems likely that they will be working overtime to get to a negotiated agreement.

Other common tax extenders that remain in the mix include the New Markets Tax Credit (NMTTC in Section 45D(f)(1), which is set to expire at the end of 2025); the Work Opportunity Tax Credit (WOTC in Section 51(c)(4), which is also set to expire at the end of 2025); three-year depreciation for racehorses in section 168(e)(3)(A), which expired at the end of 2021; and the Low-Income Housing Tax Credit (LIHTC, the increased state ceiling in Section 42(h)(3)(I) expired at the end of 2021).

Independent of other possible tax extenders legislation, there may be a chance for a particularly bipartisan tax provision to find its own way to enactment. We expect there could be enough support among both Republicans and Democrats to retroactively extend the \$300 (or \$600 for joint filers) charitable contribution deduction for non-itemizers in Section 170(p) that expired at the end of 2021.

- **Other year-end opportunities.** If the politics of a year-end tax bill turn out to be favorable, then other tax provisions that might hitch a ride include: changing the Base Erosion and Anti-Abuse Tax (BEAT) in Section 59A so that foreign tax credits and general business credits can reduce BEAT liability dollar-for-dollar; amending or retroactively delaying the 2022 change in Section 6050W that requires third-party payment networks such as Venmo, PayPal and Etsy to issue Forms 1099-K for aggregate transactions exceeding \$600 for the year; providing Last-In First-Out (LIFO) accounting relief under Section 473 for auto dealers given recent inventory issues; enacting legislation to revitalize homes in distressed neighborhoods (Neighborhood Homes Investment Act); making the Section 23 adoption tax credit fully refundable; and (less likely) retroactively extending the Section 3134 Employee Retention Tax Credit (ERTC), which expired in October 2021.

- **118th Congress.** The chance that any significant tax law changes will be achieved in the next Congress is fairly slim. Although industry and practitioners continue to press lawmakers and congressional staffers for fixes to both the wholly Democratic IRA and the wholly Republican Tax Cuts and Jobs Act of 2017, technical corrections legislation needs to be bipartisan. Each party remains unwilling to help the other fix mistakes in their respective reconciliation bills. The fact that the midterms delivered a divided government does not help this dynamic.

*Contributors: [Zach Rudisill](#), [Jeff McMillen](#), [Amy Elliott](#), [Eric Ettorre](#), [Cam Morales](#)*





# Technology and Communications

- ➔ Expect the Senate early next year to confirm a fifth Federal Communications Commission (FCC) Commissioner and give Democrats a 3-2 majority at the FCC.

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- ➔ Expect the FCC and National Telecommunications and Information Administration (NTIA) to take major steps this year and in the coming year to implement the broadband funding programs contained in the Infrastructure Investment and Jobs Act (IIJA) and for Congress to step up its oversight of those programs.

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- ➔ Expect Congress to take action to reauthorize the FCC's spectrum auction authority and for Congress and the FCC to continue to pursue efforts to make more spectrum available for commercial use, including for 5G.

## Analysis

- **FCC nominee.** For the first two years of the Biden-Harris administration, the FCC has been deadlocked with two Democrats and two Republicans. This has made it impossible for the FCC to advance major Democratic priorities, such as adopting net neutrality regulations. Gigi Sohn, a progressive activist and former FCC advisor, was nominated to be the third Democrat on the Commission in October 2021. With Democrats maintaining control of the Senate in the 118th Congress, the Democrats should gain an FCC majority in the near future, most likely early next year. The White House will need to assess whether Sohn has the votes to be confirmed in the new Senate. If not, President Biden likely will nominate a more moderate Democrat to the FCC early next year, who would likely be confirmed.
- **Broadband maps.** The FCC announced that it will release a preproduction draft of new nationwide broadband maps on November 18 as required by the Broadband Deployment Accuracy and Technological Availability (DATA) Act. These new maps are critical to allocating funding for the \$42.45 billion Broadband Equity, Access, and Deployment (BEAD) Program contained in the IIJA. Congress, among other parties, is likely to subject these maps to rigorous scrutiny. State and tribal governments and other stakeholders will have until early January to challenge the new maps. If the maps are well received, this will make it easier for NTIA to move forward with implementation of the BEAD Program in the coming months. If, however, the maps are subject to widespread criticism for being inaccurate, then pressure will be placed on NTIA to delay implementation of the BEAD Program until the FCC takes steps to fix the maps. NTIA announced that it will allocate BEAD state grant amounts no later than June 30, 2023.
- **Commercial spectrum.** Congress and the FCC will continue to pursue policies to free up more spectrum for commercial use, including for 5G. With the FCC's spectrum auction authority currently scheduled to expire on December 16, it is very likely that Congress will include at least a short-term extension of this authority in its lame-duck government-funding bill while a longer-term extension might need to wait for a new Congress. Over the next two years, a major focus of spectrum work for the FCC, DoD, NTIA and Congress will be attempting to make the 3.1–3.45 GHz band available for 5G, with the IIJA requiring the FCC to hold an auction for spectrum licenses

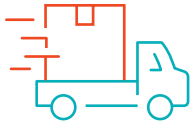
in the band no earlier than November 30, 2024. The FCC will also continue looking at making other spectrum bands available for 5G, including the 12.7–13.2 GHz band.

- **Big Tech and social media.** Republicans in Congress will increase focus on concerns about the conduct of large technology companies and social media platforms and their content moderation policies. In particular, there will be renewed efforts to reform the liability shield contained in Section 230 of the Telecommunications Act of 1996. While it is unlikely that Section 230 reform will be enacted into law during the new Congress, we expect that Congress will hold hearings to highlight this issue and place pressure on companies to stop what Republicans perceive to be their anti-conservative bias. We also expect that Congress will give more consideration to requiring large technology companies to contribute to the FCC's Universal Service Fund, given the Fund's current financial challenges.
- **Chinese technology.** Concerns about threats posed by Chinese technology companies will continue to be a major focus of Congress, the FCC and the executive branch. There will be a bipartisan push in Congress to provide additional funding for the FCC's Secure and Trusted Communication Networks Reimbursement Program, which reimburses telecommunications carriers for the costs of replacing equipment from suppliers, such as Huawei, that the FCC has determined to be a threat to national security. In addition, we expect the FCC to implement new rules prohibiting the future authorization of equipment from companies that the FCC has determined to be a threat to national security, effectively banning its use in the United States. Congress and the executive branch will also focus on the future of TikTok in the United States and concerns about what TikTok is doing with the data that it collects from Americans.
- **Digital discrimination.** The IIJA requires the FCC to adopt regulations by November 15, 2023, to combat digital discrimination and facilitate equal access to broadband internet access service. The FCC issued a Notice of Inquiry seeking comment on this topic in March and will need to issue a Notice of Proposed Rulemaking soon in order to meet the deadline for issuing final rules. One key question that the FCC must resolve is how to

define digital discrimination. Does it refer only to intentional discrimination or does it encompass business practices that have a disparate impact on members of a disadvantaged group? If the FCC opts for the latter definition, which is more likely if the FCC has a Democratic majority next year, these rules could have a far-reaching impact on broadband service providers.

- **Universal Service Fund.** Currently, there are challenges pending in the U.S. Courts of Appeals for the Fifth Circuit and Sixth Circuit to the constitutionality of the manner in which the FCC's Universal Service Fund (USF) is funded and administered. Over \$8 billion a year is distributed through the USF to promote universal access to telecommunications and advanced services across the United States, including through the high-cost, Lifeline, E-Rate and Rural Health Care programs. Were the FCC to lose this litigation, it could have an enormous impact and place substantial pressure on Congress to take legislative action to address any constitutional infirmities identified by the courts and preserve the programs currently funded by the USF.

*Contributors: [Jennifer Richter](#), [Matthew Berry](#), [Steve Rowings](#), [Galen Roehl](#), Peter Rowan*



## Transportation and Infrastructure

- ➔ The Republican House is expected to conduct oversight of the Biden-Harris administration's implementation of the IIJA.
- ➔ With the Federal Aviation Administration (FAA) authorizing law set to expire at the end of fiscal year 2023, expect a bipartisan effort to reauthorize the law.
- ➔ Congress has tried and failed to pass autonomous vehicle legislation over the years and may try again in the new Congress to pass legislation to enable broader deployment of autonomous vehicles.

### Analysis

- **Infrastructure.** With the 2021 passage of the IIJA, the Biden-Harris administration is working to implement its various programs. The IIJA authorizes funding over five years—2022 through 2026, including funding for many discretionary programs. We expect Republicans will seek to conduct vigorous oversight over the Biden-Harris administration's implementation of the law, including its award of grants and loans, and focus on more controversial initiatives, including climate change and equity.
- **FAA reauthorization.** The FAA Reauthorization Act of 2018 authorized funding of the FAA and its various programs, including airport infrastructure and FAA operations, through September 30, 2023. The FAA reauthorization generally has bipartisan support, although typically Congress has struggled to pass the law on time. Issues that may be addressed in the reauthorization include new airspace entrants, including drones and advanced air mobility; airline consumer issues; training requirements for commercial pilots; the Airport Improvement Program; and passenger facility charges. Additionally, the reauthorization may adjust fees that generate revenue for airport infrastructure projects, as the fees have not increased or adjusted for inflation since 2000.
- **Autonomous vehicles.** We also may see autonomous vehicle (AV) legislation in the 118th Congress. Reps Debbie Dingell (D-MI) and Bob Latta (R-OH) launched the Congressional Autonomous Vehicle Caucus in September 2022 and welcomed 15 bipartisan members to educate members and staff on AV technology deployment. The Caucus hopes to address concerns about self-driving vehicle production, federal regulations and consumer and legal protections. The House Energy and Commerce Committee has jurisdiction over vehicle safety and would take the lead on autonomous vehicle legislation with the Senate Commerce Committee.

*Contributors: [Ryan Thompson](#), [Susan Lent](#), [Dominique Wardell](#), [Leila Fleming](#)*

# Additional Resources

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## [2022 Midterm Election Results](#)

An overview of the Senate and House race results as of date of publication. This includes an update on the current vote status of any outstanding races.



## [118th Congress: Potential Committee Leadership](#)

A chart of potential committee leadership for the 118th Congress. This chart captures the full field of potential chairs/ranking members based on those who have expressed interest in leading various committees.

Contributors: [Sam Olswanger](#), [Rachel Robinson](#)

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