November 10, 2022

2022 Post-Election Legislative Outlook

As of this document's publication, control of Congress is unknown.

In the Senate: Nevada and Arizona are still counting election day votes, mail-in ballots, and provisional ballots, and Georgia will have a run-off election on December 6th. If either party wins two of those states, they will control the chamber.

In the House: Republicans will likely win by a small margin. Many districts remain undecided, however, leaving the actual Republican majority an unknown.

Regardless the outcomes described above, Congress will simultaneously navigate two tasks during the lame duck session, which begins November 14th when Members come back to Washington for the first time following the election:

(1) organizing for the upcoming Congress, including determining key leadership positions, accepting rules packages, placing Members on committees, and rearranging room assignments and budgets; and
(2) attempting to reach a legislative agreement to primarily address an expiring continuing resolution and National Defense Authorization Act; the negotiations will be complex and could lead to a broader and more costly legislation that could include a tax title.

Senate Majority Leader Chuck Schumer (D-NY) said in the final days of the September work period that "Members should be prepared for an extremely – underline 'extremely' – busy agenda in the last two months of this Congress."[1]

As it relates to tax, the "busy agenda" could head in several directions varying in scope and size, and we may not know how it's heading until the end of the legislative session. It is clear now, however, that tax must be attached to a larger bill, and the scope and substance could depend on whether an agreement can be reached between the two sides on child tax credit enhancements and Tax Cuts and Jobs Act expired or expiring provisions.

The following document describes in detail the various dynamics at play for the remainder of the year, as well as items to keep an eye on early in the next Congress.

[1] September 29, 2022, Congressional Record – Senate, S5523.

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Lame Duck Outlook

Lame Duck Legislative Picture

During September's final days, Congress passed a continuing resolution (CR) extending government funding for FY2023 through December 16, 2022. The CR date – or a potential short-term extension - will serve as a backstop to producing a potentially large legislative package headlined by appropriations bills and the National Defense Authorization Act (NDAA). In addition to those two items, there are dozens of other legislative priorities and statutory deadlines that could be addressed during the lame duck session. Senate Majority Leader Chuck Schumer (D-NY) said that he expects an "extremely busy" lame duck given all of the outstanding legislative items.[2]

The Senate may need to take the lead on building a potential lame duck package. Most House Republicans are expected to oppose any legislation that includes more than a temporary extension of government funding into the next Congress, meaning that most House Democrats will need to support any package that is developed. It is also expected that a significant group of Senate Republicans could oppose a package if it becomes too costly.

As generally happens after a midterm election, several key retiring Senators will drive an effort to find a pathway on a legislative package. This starts with the Democratic and Republican chairs of the Senate Appropriations Committee, Sens. Patrick Leahy (D-VT) and Richard Shelby (R-AL), who both want to cap off their tenures with an omnibus spending package.[3] Reaching a broad deal will not be easy, however, as key disagreements remain, such as spending levels for defense and non-defense spending. It is possible that only some of the 12 appropriations bills will be completed and Congress passes a "cromnibus"[4] during the lame duck session.

In addition to the pending retirements, Republicans may want to clear the decks before taking over leadership next year and Democrats may be inclined to reach a broader deal in anticipation of a strengthened Republican negotiating position on certain key priorities if left unresolved until next year. Some of the key areas that could be addressed in a more robust package include Ukraine funding, debt limit, energy permitting reform, election reform, sequestration relief, disaster relief, retirement savings, and extension of expired and expiring tax provisions. Majority Leader Schumer will likely dedicate floor time to confirming judges and other Presidential appointees outside of any omnibus deal, which will affect the time available for other matters.

The following list outlines many of the possible non-tax policy items that could be part of lame duck negotiations:

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[2] CNN, Clare Foran and Ted Barrett, "Democrats predict an 'extremely busy' lame duck. Here's what's on the agenda," October 23, 2022.
[3] Government Executive, Eric Katz, "House Delays Shutdown Threat by 10 Weeks After Approving Stopgap Spending Bill," September 30, 2022.
[4] A "cromnibus" appropriations package is a hybrid that completes some of the 12 appropriations bills and temporarily extends current funding levels for others.

- **Omni/Cromnibus** – Under a continuing resolution (CR) passed in September, government funding for FY2023 expires December 16th. All 12 appropriations bills have passed both the House and Senate. As described above, lead appropriators in both the House and Senate have been working toward reconciling these bills and reaching a deal on an omnibus spending package that would fund the government through the remainder of the fiscal year (ending September 30, 2023). It is also possible that only a partial government spending package agreement could be reached, requiring a short-term CR for the remaining items. Finally, a spending deal could entirely fall apart, causing the need for another CR into early next year.
- **National Defense Authorization Act** – The FY2023 NDAA must pass by December 31st. The House passed its version in July. The package is still under negotiation in the Senate with several proposed amendments focused primarily on procurement restrictions. Senate Majority Leader Schumer may bypass floor action on the NDAA and instead conference it with the House. The NDAA could serve as legislation that will help bring Members onto a larger legislative package, though it is possible that the NDAA could be passed as standalone legislation.
- **PAYGO sequestration**[5] – PAYGO sequestration will cut funding for up to $130 billion of mandatory spending programs, including a four percent cut to Medicare provider payments, beginning in January 2023 if Congress does not act to prevent it from going into effect. Many Members want to prevent a full PAYGO sequestration from taking effect. There are several paths Congress could take to avoid spending cuts, as described below.
- **Debt limit** – The debt limit is expected to be reached at some point next year; the exact timing is unclear, but the current projection is that it will be reached during the second or third quarter. Some Members, as well as the Administration, have indicated an interest in a debt limit deal during the lame duck session to avoid a potential showdown next year with a divided government.
- **Disaster relief** – In response to the devastation caused by Hurricanes Ian and Fiona and other storms and wildfires, there will be an effort to include relief provisions for disasters in an end-of-year package.
- **Ukraine Funds** – Recently, House Minority Leader Kevin McCarthy (R-CA) indicated that a Republican-controlled House may not be willing to provide continued funds to Ukraine on a “blank check” basis.[6] Congress approved over $60 billion in Ukraine funding this year. The Administration and Members who support more Ukraine aid will likely seek to include it on the end-of-year bill.
- **Electoral Count Reform Act** – The House passed the Electoral Count Reform Act earlier this year and the Senate Committee on Rules and Administration passed its version by a 14-1 vote, including Senate Minority Leader Mitch McConnell (R-KY).[7] The bill, which would amend the Congressional procedure related to Presidential elections, has bipartisan support and the backing of several Senators who will be instrumental to the end-of-year legislative package.

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[5] Described in detail below.

[6] AP News, Farnoush Amiri and Kevin Freking, “McCarthy: No ‘blank check’ for Ukraine if GOP wins majority,” October 18, 2022.

[7] S. 4573, Introduced by Sen. Susan Collins (R-ME) on July 20, 2022. See also House companion bill, H.R. 8846.

- **Energy permitting reform –** During September's CR negotiations, Sen. Joe Manchin (D-WV) attempted to find consensus on an energy permitting reform package but was unable to pull together a coalition given opposition from progressives, left-leaning environmental groups, and much of the Republican conference. Sen. Manchin remains committed to attempt to strike a deal during the lame duck, recently stating that he would like to see it included on the NDAA deal.[8] The pathway for a permitting deal being reached is narrow, with Republicans largely opposing the package during the lame duck session.
- **Same sex marriage legislation** – There was an effort during the CR to find a pathway to pass legislation that would Federally recognize same sex marriages.[9] Although there was bipartisan support for the bill, it did not come to the Senate floor for a vote ahead of the midterm election. The House passed the Respect for Marriage Act in July.[10] For broader Republican support, there will need to be changes to address questions about the impact of the measure on religious liberty. Leader Schumer indicated that he is committed to bringing the bill to the floor for a vote before the end of the year.
- **SAFE Banking Act** – There has been an ongoing effort this Congress to find a pathway for preventing banks from being penalized for offering banking services to legitimate cannabis-related businesses. Last year, Sen. Jeff Merkley (D-OR) introduced the SAFE Banking Act, which now has nine Republican cosponsors and 31 Democratic cosponsors.[11] Majority Leader Schumer said in October that he is working on reaching a bipartisan deal and is "very close" to passing legislation.[12]

Items left unfinished in the lame duck legislation will likely be part of the 2023 legislative agenda.

Nominations

Senate Majority Leader Schumer is expected to process judicial nominations during the lame duck session, and the Senate Judiciary Committee held a Nominations hearing during the October recess.[13] Sen. Raphael Warnock (D-GA) will spend most of his time before the December 6th runoff election in Georgia, meaning that contentious nominations will likely need to wait until after that date. Some observers note there may be as many as 30 judges considered if the Senate flips.

IRS Commissioner Chuck Rettig's term expires on November 12, 2022. On November 10, the Administration announced President Biden plans to nominate Daniel Werfel to serve as the next

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[8] E&E News, Nico Portuondo, "Manchin eyes defense bill for stalled permitting reform," November 11, 2022.
[9] See the Respect for Marriage Act, S. 4556, H.R. 8404.
[10] H.R. 8404, Introduced by Rep. Jerry Nadler (D-NY), Passed the House July 19, 2022 by a 267-157 margin.
[11] S. 910.
[12] High Times, Thomas Edward, "Schumer: Senate 'Very Close' To Passing SAFE Banking Act," November 1, 2022, https://hightimes.com/news/schumer-senate-very-close-to-passing-safe-banking-act/.
[13] See Axios, Andrew Solender, "Congress barrels toward 'extremely busy' lame-duck session," September 29, 2022, https://www.axios.com/2022/09/30/lame-duck-session-congress-priorities.

IRS Commissioner.[14] As described above, time is limited during the lame duck session and it is unclear whether the confirmation will be processed before the end of the year. In the interim, Doug O'Donnell will serve as the Acting IRS Commissioner. O'Donnell, a long-time IRS employee, was most recently the IRS Deputy Commissioner for Services and Enforcement. According to reports, Beth Kaufman, who served in the Clinton Administration's Treasury Department and is a partner at Caplin & Drysdale is likely to be nominated as IRS Chief Counsel.

Possible Tax Items

Several key business tax items - mostly Tax Cuts and Jobs Act (TCJA) [15] provisions (described below) – either took effect at the beginning of this year, creating interest in delaying their effective date, or will begin phasing out next year, spurring interest in postponing the phaseout. While there is strong bipartisan support for some of these changes, extension of these provisions in an end-of-year bill could be contingent on whether Democrats and Republicans can reach an agreement on extending enhancements to the child tax credit (CTC) that were passed in the American Rescue Plan Act (ARPA) or passing some other form of working family relief.[16] Extension of the CTC enhancements is a priority for many senior Democrats. Before the election, House Speaker Nancy Pelosi (D-CA) said that making the House-passed Build Back Better Act (BBBA) CTC provisions law would be a top priority for a Democratic Majority in the next Congress.[17] Other Democrats also expressed more urgency regarding the CTC, such as Sen. Michael Bennet (D-CO) saying that he wants to find a way to amend the CTC during the lame duck session and that he would be "reluctant" to accept a deal on section 174 without such expansion.[18]

Additionally, this year the House and the Senate Finance Committee passed separate retirement tax packages, which could possibly move with the end-of-year package even if no deal is reached on the CTC and business tax provisions. The House passed SECURE 2.0 in 2022[19] and the SFC approved their version, EARN Act, a few months ago.[20] There are some differences between the House and Senate retirement packages, but they are broadly similar, and staff have been working over the past several months toward reaching a bicameral, bipartisan agreement.[21] Enacting this retirement legislation is a priority for several retiring Members, such as Ways and Means Republican Leader Kevin Brady (R-TX) and Sen. Rob Portman (R-OH). Ways and Means Chair

[14] Currently, Werfel is a Managing Director at Boston Consulting Group. Previously, he served as IRS Acting Commissioner in 2013 and Controller of OMB from 2009 to 2013. He began his career at OMB in the Office of Information and Regulatory Affairs (OIRA).
[15] P.L. 115-97, H.R. 1, December 20, 2017.
[16] P.L. 117-2, H.R. 1319, March 11, 2021.
[17] "Pelosi Dear Colleague on Democrats' Fight to Lower the Cost of Living," October 22, 2022 press release, https://www.speaker.gov/newsroom/102222.
[18] Axios, Hans Nichols, "White House and Senate Democrats eye child tax credit Hail Mary," September 8, 2022, https://www.axios.com/2022/09/09/child-tax-credit-democrats-senate-trump-taxes.
[19] H.R. 2954, Securing a Strong Retirement Act of 2022, Passed the House on March 29, 2022, bipartisan vote of 414-5.
[20] S. 4808, Introduced by Sen. Ron Wyden (D-OR) after The EARN Act would reduce deficits by $2.6 billion.
[21] See section below on retirement legislation.

Richard Neal (D-MA) strongly supports finding a pathway to completing this legislation before his tenure as Chair expires.

Below is a list of the key extenders and other items that could be part of the lame duck tax conversation:

- **Child tax credit enhancements** – As described above, Democrats are prioritizing CTC enhancements as part of a tax title on the end-of-year package. The ARPA CTC provision made several changes to the existing credit: (1) expanded the value to $3,600 for children under six and $3,000 for children up to 17 years old; (2) phased out the enhanced CTC at lower income thresholds; (3) made the credit fully refundable; and (4) made the credit advanced refundable for the second half of 2021. The one-year ARPA CTC expansion was estimated to reduce revenues by almost $110 billion. While there is a contingent of Republicans who support modest expansions of the CTC, it is unclear whether a compromise can be reached on enhancing the CTC.
- **EITC expansion for childless individuals** – ARPA increased the EITC for childless workers and lowered the minimum age to 19; those provisions, like the CTC, were only effective for 2021. An extension of the ARPA EITC provision could be part of the lame duck negotiation. The ARPA provision was estimated to reduce revenues by over $11 billion.
- **Section 174 R&D expensing** – The TCJA required that research and experimentation expenses be capitalized and amortized over five years (15 years for foreign expenses), beginning in 2022. While there is bipartisan support for a retroactive delay in requiring amortization, Democratic leaders have viewed it and other business extenders as a trade for favorable CTC changes.
- **Section 163(j) extension** – Section 163(j) as passed in the TCJA transitioned the business interest deduction limitation from being based on a company's EBITDA to EBIT beginning in 2022. The business community is seeking to extend the more favorable EBITDA-based limitation.
- **Full Expensing/Bonus depreciation extension** – 100 percent bonus depreciation (or "full expensing"), which was included in the TCJA, begins to phase out ratably over a five-year period beginning in 2023. Ranking Member Brady has said that a delay of the phase out is a priority of his in the lame duck package.
- **Other expired or expiring provisions** – There are several non-TCJA expiring provisions that are likely to be part of a tax title negotiation, including racehorse depreciation and cover-over of the rum excise tax.[22] Recent tax extender legislation either permanently extended or extended for several years several items that traditionally drove consensus on reaching an extenders deal, so the outlook on extending these remaining items will likely depend on whether there is a larger tax title. Other items adopted as part of COVID relief, such as the 100 percent deductibility of business meals and the charitable deduction for non-itemizers, could be considered as well.
- **Digital asset wash sales** –The House-passed BBBA included changes to the wash sale rules that would expand the asset classes covered by wash sales and the application to

[22] For a comprehensive list of expired and expiring provisions, see the JCT "List of Expiring Federal Tax Provisions, 2021-2031," JCX-1-22, https://www.jct.gov/publications/2022/jcx-1-22/.

include transactions by related parties. The provision was not included in the IRA, but has been raised as a possible offset to other potential lame duck legislation, particularly to the extent it expands wash sales to cover digital assets. The provision is complex and impacts many different constituencies. Some Members may resist the need for any offsets or seek to exclude it from an end-of-year package so that it could be used as an offset for potential cryptocurrency legislation next Congress.

- **1099-K reporting thresholds** – ARPA included a provision that expanded third party settlement organization information reporting to cover anyone receiving $600 or more in a tax year; the previous reporting threshold was $20,000 and 200 transactions in a year. Certain stakeholders and taxpayer advocacy groups have argued that the lower reporting threshold will cause confusion to taxpayers who used a variety of mostly online marketplace resources, and the burden will fall mostly on lower-income individuals who rely on such services for their personal financial activity. The new 1099-Ks will be issued to taxpayers beginning in January. JCT estimated that the ARPA provision increased revenues by over $8 billion. There was also a glitch on backup withholding related to this provision that would require withholding at the first dollar rather than at the $600 reporting threshold. This could also be addressed.

Staff will also be hearing from stakeholders about potential drafting issues with the IRA and will continue compiling a list of possible technical corrections. However, it is probably too soon for these issues to be addressed as part of a lame duck package.

Retirement Legislation

This section provides a brief overview of the numerous provisions (currently being informally conferenced by the House and Senate Members) that were part of the House-passed SECURE 2.0, the Senate EARN Act, and the Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg Act (RISE & SHINE Act).

The House and Senate bills include many identical or similar proposals such as:

- Allowing employers to make matching contributions to 401(k) plans on behalf of employees who make student loan payments instead of contributing to their retirement account;
- Updating the cap for transferring former employees’ retirement funds to an IRA from $5,000 to $7,000;
- Requiring all catch-up contributions from older retirement savers to be made as Roth contributions but the bills differ on what age an older saver may make increased catch-up contributions;
- Improving access to qualified longevity annuity contracts (QLAC) by altering the maximum cap for a QLAC by removing an overall 25 percent cap;
- Clarifying rules for recoupment of inadvertent plan overpayments to innocent participants;
- Shortening the time period over which part-timers can become eligible for 401(k) participation; and
- Making dozens of other specific reforms to retirement plans.

Areas on which the bills differ cover many important topics such as:

- Penalty-free early withdrawals for emergencies or federally declared disasters;
- Increasing access to the saver's tax credit through increased income cutoffs and expanding who qualifies for the full credit as well as whether the credit should be fully refundable;
- Whether to mandate automatic 401(k) plan enrollment or periodically re-check employees' opt out elections;
- Raising the required minimum distribution age and reducing the penalty for failure to take a required minimum distribution;
- Requiring lost and found directories to locate missing participants;
- Extending the deadline and modifying the provisions permitting employers to use overfunded pension plans for retiree health and life insurance benefits; and
- Many other specific plan rules, disclosures, and reports.

Ways and Means Committee Ranking Member Kevin Brady (R-TX), who supports including retirement legislation in an end-of-year package, said this month that he does not "see anything that can't be resolved," referencing the House and Senate differences.[23]

Joint Committee on Taxation Bluebook

The Joint Committee on Taxation (JCT) generally releases a technical explanation, referred to as the "Bluebook," of all tax legislation enacted during each Congress. The Bluebook for the 117th Congress should be released at some point during the first few months of 2023. While the Bluebook always serves as an important document for purposes of supplementing the legislative record, given there were no committee reports and very few colloquies establishing legislative intent for the IRA, this year's Bluebook will be an important document and could provide added clarity to various provisions throughout the IRA.

Statutory PAYGO Sequestration

Breaking historical precedent, Congress carried over the PAYGO scorecard balance from 2021 into 2022, rather than zeroing it out as it has in years past.[24] The nearly $740 billion scorecard balance is primarily due to spending in the 2021 ARPA legislation. As a result, beginning in 2023 non-exempt mandatory spending programs, such as Build America Bonds, certain farm support programs, and some defense programs, could face a significant funding cut. Payments to Medicare providers will also be subject to a four percent reduction. The total amount of programs subject to sequestration could exceed $120 billion.[25]

Since its enactment in 2010, Congress has never allowed PAYGO sequestration to reduce Federal payments. Most Members do not support allowing the PAYGO sequestration to go into

[23] Reported in Politico Pro Morning Tax, Bernie Becker, November 10, 2022.
[24] OMB 2021 Statutory Pay-As-You-Go Act Annual Report, January 2022, https://www.whitehouse.gov/wp-content/uploads/2022/01/annualpaygoreport2021.pdf.
[25] Note that Statutory PAYGO sequestration is a separate spending cut program from the Budget Control Act mandatory sequestration, which reduces payments under non-exempt, non-defense programs by 5.7 percent through FY2031.

effect and will likely seek to find a solution to the impending cuts. Technically, PAYGO sequestration would begin after the Office of Management and Budget releases their PAYGO report; OMB is required to produce the report within 14 days after the legislative session.

An agreement on PAYGO could take several paths. A non-exclusive list of possible options includes: (1) following previous precedent, the scorecard could be reduced to zero; (2) following last year's precedent, the score could be carried over into FY2024; (3) the date the report is required to be released could be delayed, and thus delaying when Congress would have to address it; or (4) Congress could not act in the lame duck session, leaving the issue to have to be addressed in early January. Further, Congress could agree to suspend PAYGO sequestration for some non-exempt programs while allowing others to be sequestered.

2023 Legislator Reshuffle

House of Representatives

If projections hold firm, Republican control of the House will kick off a series of organizing events, such as filling leadership positions, committee chairmanships, and committee assignments. The process for Republicans begins the week of November 14th with the adoption of a Conference rules package, election of the leadership team, and selection of the new steering committee districts and representatives. Minority Leader Kevin McCarthy (R-CA) is currently expected to receive the support of the Conference to be the next Speaker.[26] Minority Whip Steve Scalise (R-LA) is assumed to take the Majority Leader position, and Elise Stefanik (R-NY) will be the Conference Chair.

The Majority Whip position is the highest-level contested race, with current National Republican Congressional Committee chair Tom Emmer (R-MN), Republican Study Committee Chair Jim Banks (R-IN), and Chief Deputy Whip and Ways and Means Member Drew Ferguson (R-GA) vying for the position.

Other high-profile races involving current Ways and Means Republicans include Kevin Hern (R-OK) running for Republican Study Committee chair, which is expected to be unopposed, and Darin LaHood (R-IL) running for NRCC chair against Rep. Richard Hudson (R-NC).

Beyond the above leadership elections, the highest profile Committee chairman race is for the Ways and Means Committee. Reps. Vern Buchanan (R-FL), Adrian Smith (R-NE), and Jason Smith (R-MO) are in a tightly contested race. Committee Chair steering committee presentations are expected to occur the week after Thanksgiving. Rep. Jason Smith is the current Budget Committee ranking member, and if he were to be selected as the next Ways and Means chair, current Ways and Means Members Reps. Jodey Arrington (R-TX) and Lloyd Smucker (R-PA), as well as Rep. Buddy Carter (R-GA), will likely run to replace him as Budget chair. It is also possible that the Budget Committee hopefuls will run against Rep. Jason Smith on the first day rather than wait for resolution on the Ways and Means Committee race.

[26] Note that the Speaker election will occur on January 3, 2022 and will require a House majority.

All three Ways and Means Committee Chair hopefuls are in general agreement on their tax policy goals and the need for oversight of Treasury and the IRS.

Also during the lame duck, House Republicans and Democrats will seek to reach an agreement on committee ratios. There are currently 17 Republicans on the Ways and Means Committee and 25 Democrats. To maintain current ratios, there would be eight to nine new Committee Republicans. Alternatively, Republicans could shrink the Committee size. The Committee will be populated early next Congress.

At the same time, House Democrats will also be electing their leaders and making new committee assignments. It has been speculated that Speaker Pelosi might retire if the Democrats do not retain control of the House (although she did decide to stay on as Minority Leader after the last time the Democrats lost the House while she was Speaker, arguing there was no one better to lead the Democrats back to a majority). Recently, she stated that the attack on her husband, Paul Pelosi, would weigh on her decision whether to stay. Unless and until that decision is announced, it is expected that the current leadership team would remain on the Democratic side. Similarly, Chairman Richie Neal (D-MA) is expected to remain the leader on the Democratic side at Ways and Means.

Senate

Although control in the Senate has not yet been decided, Sens. Ron Wyden (D-OR) and Mike Crapo (R-ID) will remain the ranking Democrat and Republican respectively in the upcoming Congress.

If the Democrats keep the majority in the Senate, Sen. Wyden, who just won reelection in Oregon, is expected to remain as Chairman of the Finance Committee. His agenda for the Committee is expected to continue largely intact. While he supports an extension of R&D expensing, he has said it has to be matched with CTC enhancements, saying “"I am for both the child tax credit and I'm for the R&D." He also has several Democratic members on the Committee, including the lead sponsors Sens. Bennet and Brown, for whom the CTC enhancements are a critical priority. Senator Brown warned in an interview this fall, “No more tax breaks for big corporations and the wealthy unless the child tax credit is with it… I will lay down in front of a bulldozer on that one.” Chairman Wyden also has an interest in conferencing and completing the retirement savings bill. Finally, he has written a letter to Treasury Secretary Yellen and Commissioner Rettig regarding funding priorities for the Internal Revenue Service. Chairman Wyden said that he believes that the increased IRS funding under Inflation Reduction Act should be used to:

- improve customer service, including reducing and preventing future backlogs of returns, letters, or unanswered calls;
- invest in technology to improve service and enforcement;
- rebalance audit rates;
- crackdown on offshore tax evasion;
- reduce the tax gap; and
- rebuild the IRS Criminal Investigation Division.

Secretary Yellen and Commissioner Rettig were asked to respond this week on how they plan to implement these recommendations. We can expect Chairman Wyden to continue to monitor how the new IRS funding is used.

Should Republicans win the Senate, Sen. Crapo will likely seek to continue the work he's been doing on the Committee as the Ranking Member. Primary areas of focus this Congress for the Republicans on the Committee have been on the status of the economy and inflation, and the impact of various legislation on them. [27] Sen. Crapo has also been active seeking enhanced oversight of the $80 billion IRS funding boost.[28]

Sen. Crapo will also likely lead an ambitious oversight effort, which could carry-on his work on highlighting last year's IRS leak in which tax returns of America's wealthiest individuals were acquired and published by ProPublica.[29]

Sen. Crapo has also been supportive of the TCJA and extending its expiring provisions. During the 117th Congress, Sen. Crapo introduced several tax bills, including bills providing for robust oversight of the IRS to prevent the use of the IRA enforcement dollars to audit taxpayers with incomes below $400,000[30] and requiring the IRS to issue tax gap reports.[31] In 2021, Sen. Crapo introduced the Energy Sector Innovation Credit Act, which provides for technology neutral tax credits for investments in energy projects that meet certain carbon emissions and innovation goals.[32]

Several Finance Committee Republican Members are retiring or lost their election and will not be returning next Congress; they are:

- Richard Burr (R-NC)
- Rob Portman (R-OH)
- Patrick Toomey (R-PA)
- Ben Sasse (R-NE)

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[27] For example, see October 28, 2022 press release, "Crapo on Inflation: No Signs of Slowing," https://www.finance.senate.gov/ranking-members-news/crapo-on-inflation-no-signs-of-slowing. See also September 30, 2022 press release, "Crapo: Stagnant Economy Needs Pro-Growth Policies," https://www.finance.senate.gov/ranking-members-news/crapo-stagnant-economy-needs-pro-growth-policies.

[28] See letters sent to the Treasury Inspector General for Tax Administration and Government Accountability Office regarding oversight of IRS spending. "Finance Committee Republicans: IRS Funding Boost Lacks Emphasis on Oversight," October 12, 2022, https://www.finance.senate.gov/ranking-members-news/finance-committee-republicans-irs-funding-boost-lacks-emphasis-on-oversight. "Finance Committee Republicans: IRS Requires Unbiased Oversight of Unprecedented Funding Boost," October 20, 2022, https://www.finance.senate.gov/ranking-members-news/finance-committee-republicans-irs-requires-unbiased-oversight-of-unprecedented-funding-boost.

[29] Brady, Crapo Demand Update on Criminal Breach of Taxpayer Data, April 18, 2022, https://gop-waysandmeans.house.gov/brady-crapo-demand-update-on-criminal-breach-of-taxpayer-data/.

[30] S. 4817.

[31] S. 2721.

[32] S. 2475. Other SFC cosponsors include Sens. Whitehouse (D-RI), Barrasso (R-WY), Bennet (D-CO), and Cassidy (R-LA). There is a House companion bill, H.R. 4720, which was introduced by former Ways and Means Member Tom Reed (R-NY).

Senator Catherine Cortez Masto's (D-NV) race is close against Adam Laxalt and has not been called yet.

As the final breakdown in the Senate is not yet known (pending the results in Arizona, Nevada and Georgia), the Finance Committee ratio for the upcoming Congress has not been determined. The Committee ratio will be unclear until Majority Leader Schumer and Minority Leader McConnell agree, which may take time. Regardless, there will likely be at least three or four new Republican Members on the committee. Several Senators have privately expressed an interest and the new Members will likely be determined in early January.

Several Finance Committee Senators are up for reelection in 2024, which may have an impact on the agenda in the upcoming Congress and the outcome of the lame duck negotiations. The mostly Democratic slate includes:

- Debbie Stabenow (D-MI)
- Maria Cantwell (D-WA)
- Bob Menendez (D-NJ)
- Tom Carper (D-DE)
- Ben Cardin (D-MD)
- Sherrod Brown (D-OH)
- Bob Casey (D-PA)
- Sheldon Whitehouse (D-RI)
- Elizabeth Warren (D-MA)
- John Barrasso (R-WY)

Priorities for a House Republican Majority[33]

The 118th Congress begins on January 3, 2023. On the first day, the House is expected to vote for a rules package and legislation that would amend and repeal the $80 billion IRS funding that was included in the IRA. The IRS funding bill will be largely a political exercise, and House Republicans would not expect President Biden to support such an effort. House Republicans are also expected to open the House office buildings to the public; if the plan proceeds, this would be the first time since March 2020 that the public could enter the buildings without a Congressional office escort.

House Republicans will also commit to a robust oversight agenda, primarily focused on the current Administration's implementation of ARPA, IRA, and Covid-relief funds. In part the oversight efforts are expected to continue the work when Republicans filed dozens of Resolutions of Inquiry this summer.[34]

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[33] Capitol Tax Partners will release a Legislative Outlook in the new year that will go into deeper detail on the priorities and dynamics of the new Congress.
[34] For example, on September 20, 2022, the House Ways and Means Committee marked up six resolutions of inquiry. A resolution of inquiry is a process in which a House resolution seeking information from the Administration would have floor voting privilege if the Committee of jurisdiction doesn't process the bill within 14

House Minority Leader McCarthy in September unveiled a policy agenda, called the "Commitment to America," which provides an outline of potential items the upcoming Republican House will prioritize to begin the Congress. Developed through Member-led task forces, the Commitment to America focuses on four themes: (1) an economy that is strong; (2) a nation that is safe; (3) a future that is built on freedom; and (4) a government that is accountable.[35]

The economy theme primarily focuses on battling inflation through building strong supply chains, unleashing American energy, rebuilding the American workforce, combatting the influence of China, and supporting American innovation.[36] The Jobs and the Economy Task Force, which led economic policy development for the Commitment to America, outlined several tax priorities that will be part of the agenda.[37] These include:

- Permanently extending expiring TCJA provisions;
- Expanding retirement savings and 529 plans;
- Providing additional middle-class and estate tax relief;
- Expanding research and development tax credits; and
- Providing small business and innovation tax incentives.

Incoming Financial Service Committee Chair Patrick McHenry (R-NC) said that he will make digital asset legislation a priority. Though tax is outside the Financial Services Committee's jurisdiction, a large digital asset legislative package could be a vehicle for tax provisions impacting digital assets.[38]

Important Dates

The following are deadlines that may impact the legislative calendar and dictate what policy priorities may be part of any legislation in the lame duck session and heading into 2023:

November 14, 2022	Congress returns to session following midterm elections
December 16, 2022	End of FY2023 continuing resolution
December 31, 2022	Medicare physician payment cuts, various expiring tax provisions
January 3, 2023	First day of new Congress, Vote for Speaker of the House
Early January 2023	Statutory PAYGO Sequestration OMB report due

legislative days. Through a coordinated effort, this summer House Republicans introduced dozens of resolutions of inquiry within most Committees.

[35] For more information on the Commitment to America, see https://www.republicanleader.gov/commitment/.

[36] For more details about the Commitment to America's economic policies, see https://republicanleader.house.gov/an-economy-thats-strong/.

[37] For details on the tax agenda items in the Commitment to America, see https://republicanleader.house.gov/wp-content/uploads/2022/09/JETF-Growth-Through-Innovation-3-pager-v.2.pdf.

[38] Note that in September, Sens. Cynthia Lummis (R-WY) and Kristen Gillibrand (D-NY) introduced the Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, which would broadly reform digital asset regulation. The proposal contained a tax title with many proposals impacting digital assets. They are expected to continue refining that legislative package, including the tax provisions.

2nd or 3rd Quarter	Debt limit expiration (note that this timing is uncertain and represents conventional wisdom on when extraordinary measures will expire)

Also, if the end-of-year package fails to include an omnibus spending deal, a CR into next year will force Congressional action. Similarly, depending on how Congress disposes of the PAYGO sequestration issue, there may be an action-forcing time frame in the first half of next year. Whether these items will need to be addressed next year will be clear over the next several weeks.

Regulatory Agenda

On November 4th, the Treasury Department and IRS released their updated priority guidance plan (PGP) for the upcoming year with over 200 projects listed as priorities. Not surprisingly, the focus of their ambitious regulatory agenda largely centers around implementation of the tax provisions in the IRA and CHIPS Act, as well as other recently enacted tax legislation.

According to senior Treasury officials, guidance on the clean energy provisions enacted in IRA is the top priority but may also prove the most challenging to issue as there are numerous other interested agencies (e.g., Energy, Labor, Commerce, Council on Environmental Quality, etc.) weighing in and many affected constituencies that are often less familiar with the guidance process. In an effort to stay on track by soliciting public input, Treasury and the IRS have issued nine notices requesting comments on a laundry list of specific questions regarding the various clean energy incentives. Comments on the first six notices[39] were due November 4 with numerous comment letters already posted. Initial guidance on several of these provisions is due by the end of the year.

The remaining three notices were issued November 3 requesting comments on the credits for qualified commercial clean vehicles and alternative fuel vehicle refueling property,[40] the credit for carbon oxide sequestration,[41] and the credits for clean hydrogen and clean fuel production.[42] Comments on these three notices are requested by December 3, 2022. Thus, as comments on these issues have not been submitted yet, guidance on these three issues is not expected until sometime next year.

Unlike the energy provisions, Treasury and the IRS are not expected to issue notices soliciting comments on the stock buyback excise tax, the corporate alternative minimum tax or the investment tax credit in the CHIPS Act. That is because Treasury and the IRS are already receiving significant input on issues that need to be resolved and the Treasury and IRS staff are already busy meeting with those constituencies on the many issues that have been raised. While

[39] The six notices cover energy generation incentives, various requirements for credit enhancements (e.g., prevailing wage and apprenticeship), incentives for energy efficient homes and buildings, consumer vehicle credits, advanced manufacturing credits and credit monetization, as described and linked in this press release.
[40] Notice 2022-56.
[41] Notice 2022-57.
[42] Notice 2022-58.

the PGP only lists one project with respect to each, we understand that the guidance on these issues could be issued in several tranches. They will try to expedite guidance on what they view as "day-one" issues, probably in the form of notices by the end of the year, but realistically they could slip until early next year.

New foreign tax credit (FTC) proposed regulations are expected to be released as soon as this month. In response to criticisms of the final regulations, Treasury and the IRS are expected to offer relief in three primary areas: (1) cost recovery – by offering examples of foreign laws that meet the test; (2) royalty withholding taxes – by providing a safe harbor where the foreign sourcing rule, while different than the US sourcing rule, reaches the same result; and (3) some limited relief under the sec.1.861-20 rules that apply the tax book value (TBV) of assets method to allocate foreign dividend withholding taxes imposed on disregarded remittances. With respect to the latter, Treasury officials have said that the larger issue of using an earnings approach, rather than the TBV method, will not be resolved in the proposed regulations and will need to wait for another day.

Finally, digital asset information reporting regulations could be issued in proposed form before the end of the year. We understand they may include a delay in the date that information reporting becomes applicable.

OECD, EU, and Other Countries

Given Hungary's continued objection to adoption of the Pillar 2 GloBE rules in the EU and the US's adoption of IRA without any changes to GILTI, progress on adopting the global tax deal including Pillars 1 and Pillar 2 has slowed to a crawl. If Hungary maintains its objection, some EU members have suggested use of "enhanced cooperation" to bypass the unanimity rule and overcome Hungary's block, but that seems to be unlikely at least in the near term. It is possible, however, that EU and other countries (e.g., France, Germany, Italy, Spain, the Netherlands, the United Kingdom, Switzerland) will decide to go forward on their own in adopting or proposing an income inclusion rule (IIR), undertaxed profits rule (UTPR), and qualified domestic minimum tax (QDMT) before year end.

We also expect the OECD to release the implementation framework on Pillar 2 by year end. Among other things, this is expected to answer questions regarding the proposed treatment of various credits and potentially the "co-existence" of GILTI and the new US corporate alternative minimum tax.

Also, with respect to Pillar 1, we expect the OECD to release a document that outlines a draft definition of digital services taxes and relevant similar measures by the end of the year. It is expected to list existing measures, as well as set forth various criteria to determine whether future measures would be considered "relevant similar measures" for purposes of the OECD agreement's promise to eliminate digital services taxes and other unilateral measures. The OECD is also making progress on Amount B and is planning to release a public consultation document by year-end.

Finally, the OECD released the model rules for the Crypto-Asset Reporting Framework and proposed amendments to the Common CARF and proposed amendments to the Common Reporting Standard in October and intends to release an implementation plan within the next several months.[43]

State Election Overview

Thirty-six states held races for the Governor's office. In most states, incumbent party won the Governor seat, including high profile races in Michigan, New York, Wisconsin, and Kansas where incumbent Democrats held on to their seats. Two traditionally blue states – Massachusetts and Maryland – shifted back to Democratic leadership. Three states are still counting election day votes, including Nevada and Arizona.

133 ballot measures were considered, focusing primarily on issues such as abortion, recreational marijuana, and election administration. There were several tax measures with mixed results. Voters in two states weighed in on tax hikes on the wealthy – a proposed 4 percent surcharge on individual incomes over $1 million in Massachusetts passed, while a proposed surcharge on individual incomes over $2 million to fund climate initiatives in California failed. Most other ballot measures involved property tax exemptions, rates, and assessment methods.

[43] October 10, 2022. See "OECD presents new transparency framework for cypto-assets to G20," https://www.oecd.org/tax/exchange-of-tax-information/oecd-presents-new-transparency-framework-for-crypto-assets-to-g20.htm.