2022 Tax Legislative and Regulatory Outlook

If the past two years have taught us anything it is that we must expect the unexpected. Although 2022 is shaping up to be a year defined by an early ambitious Democratic legislative agenda, which includes passing a revised version of the Build Back Better Act (BBBA), before the biannual shift of focus toward the elections, several situations are brewing that may force Congressional action throughout the year, including inflation, the spread of the omicron variant, and geopolitical uncertainty headlined by China and Russia.

While the BBBA negotiations are on hold for the moment, Democratic leaders are hoping to reopen discussions with Sen. Joe Manchin (D-WV) relatively soon in an effort to garner his support for a likely scaled-down package. Reaching an agreement will take restructuring of the bill that passed the House in November and a significant rebuilding of goodwill between the negotiators and Sen. Manchin. Consequently, as discussed more fully below, several spending priorities in the current package will need to be pared back or eliminated. If the size of the package drops as expected, this could provide headroom for some of the tax offsets to be watered down or dropped from the House-passed version.

Before BBBA negotiations advance, however, the Congressional legislative focus will shift from the voting reform package (which failed to move in the Senate) to extending the continuing resolution set to expire on February 18. A supplemental disaster package could also be offered to provide money for COVID and natural disaster relief.

All legislative activity will be conducted against a backdrop of the November mid-term elections, in which Republicans are seeking to take the majority in the House and Senate. The election dynamic will make it challenging for large bipartisan bills and could push expiring provisions until the lame duck session at the end of 2022. In the meantime, Republicans will be working on crafting their own legislative priorities and oversight agenda if they win control of either chamber.

The following document provides background on last year's legislative efforts and an overview of the relevant legislative and regulatory issues that may arise this year.

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2021 LEGISLATIVE RECAP

American Rescue Plan Act

After taking control of Washington and fulfilling a promise made by President Joe Biden ahead of taking office, Democrats quickly moved to pass along party lines a comprehensive COVID relief package through the budget reconciliation process, which President Biden signed into law on March 11. The $1.9 billion American Rescue Plan Act (ARPA) included several items of spending relief, such as extending unemployment insurance through September 2021, another round of economic impact payments, funding for state and local governments, small business grants, funding for K-12 schools, underfunded multiemployer pension relief, rental assistance, and money for various healthcare programs.[1]

The bill also contained several tax items, headlined by a temporary one-year expansion of the child tax credit (CTC) that immediately became a critical extender. The CTC expansion in ARPA made the credit fully refundable, removed the earnings requirement by making it fully refundable, and provided monthly advanced payments through the end of 2021. The amount of the credit was also increased from $2,000 to $3,000 per child, and to $3,600 for children under six years old. Also, the maximum age for an eligible child was increased from 16 to 17. The monthly advanced payments began in the summer of 2021, and the IRS largely used the infrastructure developed through the economic impact payment program to deliver the monthly payments.

Congressional Democrats lauded the CTC expansion as an important policy for reducing child poverty; some estimates estimate that the expanded CTC will reduce child poverty by half.[2] The one-year expansion of the CTC program was estimated to cost $109 billion over the budget window.

After passing ARPA, Congressional Democrats began calling to make the CTC expansion permanent. House Speaker Nancy Pelosi (D-CA) said in a May 17 press release, “We must make this lifeline permanent, which is why Congressional Democrats will continue to champion an expanded Child Tax Credit – because we can only Build Back Better by putting families first.”[3]

In addition to the CTC reforms, ARPA included the following individual tax provisions:

- Expansion of the earned income tax credit, including (i) increased eligibility and maximum credit (from $543 to $1502) for childless individuals (sunsetting after 2021), and (ii) extension to people in territories of the United States;
- Expansion of the child and dependent care tax credit, including making it fully refundable and increasing the maximum credit amount to 50 percent (sunsetting after 2021);
- Temporary extension of the employee retention tax credit and the paid sick and family leave credit; and

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[1] P.L. 117-2, H.R. 1319, March 11, 2021.
[2] “Pelosi Statement on Delivery of Democrats’ Expanded Child Tax Credit,” May 17, 2021, https://www.speaker.gov/newsroom/51721.
[3] Id. Extending the ARPA CTC reforms beyond the end of 2021 has become a major component and sticking point of the BBBA negotiations (discussed further below).

- Expansion of the Affordable Care Act premium tax credit (sunsetting after 2022).

The bill also contained several tax offsets, including:

- Repeal of the worldwide interest allocation election under section 864(f);[4]
- Expansion of the definition of covered employees for purposes of the section 162(m) deduction limitation for excessive employee remuneration to include the next five highest compensated employees (in addition to current law covered employees), effective for tax years beginning after December 31, 2026;
- Reduction of the reporting thresholds for third-party settlement network transactions to $600 per year;[5] and
- Permanent extension of the shortfall amortization period for single employer plans from seven years to 15 years, as well as "fresh start" relief.

The House Ways and Means Committee included a revenue offset that would have prevented cost-of-living increases for maximum contribution (and certain other) limits for defined contribution plans and defined benefit plans (the "COLA freeze"), but this was dropped after concerns were raised by various retirement stakeholders.

President Biden's Tax Plan

After passage of ARPA and throughout the first half of 2021, President Biden released several detailed policy documents describing his Build Back Better agenda, which included two parts: (i) the American Jobs Plan, which included the Made in America Tax Plan,[6] and (ii) the American Families Plan.[7] This two-part plan largely mirrored proposals he supported during the campaign and proposed roughly $3.6 trillion in revenue raisers to offset the costs associated with the multitude of spending and tax priorities.[8] On May 28, 2021, the Treasury Department released its Green Book,[9] which provided more detail regarding the various revenue provisions in both parts of the President's plan.

The Made in America Tax Plan proposed significant investments in housing, infrastructure, and clean energy, which were proposed to be offset primarily by a corporate tax rate increase, imposition of a book minimum tax, and significant changes to the international tax system. The American Families Plan (also referred to as the "human infrastructure package") proposed free public education, universal pre-K, and expanded credits for low and middle-income taxpayers, especially those with children, offset by proposals that would increase taxes on individuals and passthrough businesses, including an increase in the top marginal rate, taxing capital gains at the

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[4] The election under section 864(f) was previously available for the first taxable year beginning after December 31, 2020. Repealing the election increased revenues by $22 billion over the budget window.
[5] Section 6050W third party settlement network reporting was previously required when a participating payee had over 200 transactions and $20,000 of transaction amounts in the taxable year.
[6] FACT SHEET: The American Jobs Plan, March 31, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/.
[7] FACT SHEET: The American Families Plan, April 28, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/.
[8] For a comparison of the President Biden proposal and the various BBBA proposals, see Appendix A.
[9] General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals, https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf.

same rate as ordinary income, taxing gains at death, and imposing the net investment income tax (NIIT) on all active passthrough business income.

The President's two-part plan was the impetus for the bipartisan infrastructure bill and the Build Back Better Act (BBBA), although there are many significant differences in both (described more fully below).

President Biden was firm in his campaign commitment that his proposals would not directly increase taxes on individuals and families earning less than $400,000. This commitment impacted the development and negotiation of the bipartisan infrastructure package and BBBA.

Bipartisan Infrastructure

After months of negotiations, President Biden signed the Infrastructure Investment and Jobs Act (the Bipartisan Infrastructure bill) on November 15, 2021.[10] The Bipartisan Infrastructure bill began as an effort supported by the White House and was largely negotiated by a bipartisan group of Senators headed by the "gang of ten."[11]

The Bipartisan Infrastructure bill contained over $1.2 trillion in spending on items such as public transit, broadband access, water infrastructure, airports and ports, passenger rail, electric vehicle charging stations, and resiliency. The package included a five-year extension of the Highway Trust Fund taxes and spending authorization through September 30, 2026. While the bill was offset with both spending and tax items, CBO projected that it would add $256 billion to projected deficits over the next ten years. The non-tax offsets included changes to prescription drug rebate rules, extending mandatory sequestration through 2031, extending GSE guarantee fees, and decreasing the strategic petroleum reserve.[12] The bill contained several tax revenue raisers, as well, including:

- Reinstatement of Superfund taxes on chemicals;
- Information reporting for brokers of digital assets;[13]
- Acceleration of expiration of the employee retention credit from December 31, 2021 to September 30, 2021; and
- Extension of interest rate stabilization for single-employer pension plans.

Although reports suggested that Senators were considering indexing the gas tax to inflation to pay for part of the infrastructure package, the White House opposed raising gas taxes because of

[10] P.L. 117-58, H.R. 3684.
[11] The "Gang of ten," which is an unofficial designation, has included the following Senators: Sens. Bill Cassidy (R-LA), Susan Collins (R-ME), Manchin, Lisa Murkowski (R-AK), Rob Portman (R-OH), Mitt Romney (R-UT), Jeanne Shaheen (D-NH), Kyrsten Sinema (D-AZ), Jon Tester (D-MT), and Mark Warner (D-VA). The group notably also was instrumental in negotiating the December 2020 Consolidated Appropriations Act, 2021, P.L. 116-260, H.R. 133, December 27, 2020, which combined $900 billion in stimulus relief with a $1.4 trillion omnibus spending package.
[12] Congressional Budget Office, Cost Estimate, "Senate Amendment 2137 to H.R. 3684, the Infrastructure Investment and Jobs Act, as Proposed on August 1, 2021," August 9, 2021, https://www.cbo.gov/system/files/2021-08/hr3684_infrastructure.pdf.
[13] This provision is discussed in more detail below on page 15.

its impact on taxpayers earning $400,000 or less.[14] The White House's position on gas tax increases led to all proposed changes to the gas taxes being off-the-table.

Although the Senate passed the Bipartisan Infrastructure bill on August 10 with 69 Senators voting in favor of the package, including all Democratic Senators, the House delayed floor action for several months due to complex political dynamics regarding interplay between the Bipartisan Infrastructure bill and the negotiations on the BBBA. House Progressives were concerned that passing the infrastructure bill first would give up any leverage they had to convince Senate moderates, specifically Senators Manchin and Kyrsten Sinema (D-AZ), to help move the BBBA. Eventually, because of poor election day results for Democrats and pressure from the White House, the Progressives relented (even though there was not yet a final agreement on the BBBA) and the House finally passed the bill on November 5, by a vote of 228-206 (with 13 Republicans supporting and 6 Democrats opposing).

Build Back Better Act

As the final part of their three-tiered legislative strategy for the first year of the Biden Administration, Congressional Democrats began moving forward on the BBBA during the summer of 2021.[15] Senate Democrats initially agreed to a reconciliation framework on July 13 that would provide up to $3.5 trillion in Democratic policy priorities, including both tax and spending provisions.[16]

House committees marked up their portions during a remote work period in September, with the Ways and Means Committee (which had jurisdiction over most of the bill) marking up their portion from September 6 to September 15.[17]

As initially envisioned by the House Committees, the BBBA broadly would invest in a Federal paid family leave program, Affordable Care Act enhancements, universal pre-K programs, enhanced child tax and other refundable credits, and green energy spending and tax incentives, among other items. The Ways and Means bill also contained over $2 trillion in revenue raisers, headlined by an increase in the corporate rate to 26.5 percent, modifications to international provisions such as GILTI, FDII and BEAT, and increases in capital gains and ordinary rates on individuals earning more than $400,000.[18] The Ways and Means bill largely served as the starting point for the package as it went through changes in the House, reflecting ongoing negotiations with the House, Senate, and White House.

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[14] AP News, Kevin Freking, "Biden objects to raising gas tax to pay for infrastructure," June 18, 2021, https://apnews.com/article/joe-biden-business-government-and-politics-628666300e1ed0c9ad11c6eb8c608c4f.
[15] ARPA, Bipartisan Infrastructure, and the BBBA make up the Administration's three legislative goals: COVID relief, physical infrastructure, and human infrastructure.
[16] Sen. Bernie Sanders Press Release, August 9, 2021, "NEWS: Senate Budget Chairman Sanders and Majority Leader Schumer Introduce Historic Budget Resolution," https://www.budget.senate.gov/chairman/newsroom/press/news-senate-budget-chairman-sanders-and-majority-leader-schumer-introduce-historic-budget-resolution.
[17] Speaker Pelosi announced late in August that House Committees were to report their portions of the bill to the Rules Committee by September 15, which was the date in the reconciliation instructions. The deadlines in the instructions do not affect the reconciliation bill's privilege and often are not met by the referenced committees.
[18] JCX-42-21, September 13, 2021, https://www.jct.gov/publications/2021/jcx-42-21/.

The changes to the Ways and Means bill were made in Rules Committee amendments released on October 28 and November 3.[19] These changes reflected "pre-conference" negotiations between the House and Senate in an effort to get the bill close to its final form before the full House considered the bill. In response to opposition to rate increases and certain other provisions from Sen. Sinema and others, the offsets in the House bill were significantly modified to remove the corporate, capital gains and ordinary income rate increases, retirement provisions that would have prevented taxpayers from investing in alternative investments in their IRAs, and a significant expansion of the 2017 carried interest provision. To replace the revenue lost from these provisions, several offsets were added, including a 15 percent corporate book minimum tax based on financial statement reported earnings (BMT), a 1 percent excise tax on corporate stock buybacks, and a modified surcharge on high-income individuals, estates, and trusts. The revised House bill also addressed the state and local tax (SALT) deduction limitation, which was a prerequisite for several Democratic moderates to support the bill, by increasing the current law limitation from $10,000 to $80,000 for single and married taxpayers ($40,000 in the case of an estate, trust, or individual filing a separate return).

After receiving CBO estimates for the bill (another precondition for moderate support), the House passed the BBBA on November 19 along party lines, with only one Democrat, Rep. Jared Golden (D-ME), voting against the bill.

The bill was then sent to the Senate. After several weeks, the Senate Finance Committee released a draft of their portion of the bill on December 11 that largely mirrored the version passed by the House. While most changes were relatively minor and technical in nature, the Finance Committee version included a few significant changes, including:

- Amending the BMT to exclude income attributable to certain defined benefit plans from adjusted financial statement income;
- Eliminating the proposed new tax on certain nicotine products and a proposal that would have prevented certain income from prisons as qualifying for purposes of the REIT rules;
- Allowing an election for purposes of the proposed new worldwide interest limitation (section 163(n)) to use adjusted tax basis of assets rather than book EBITDA to measure allocable shares of net interest expense; and
- Adding a modification to the definition of inversions subject to section 7874, both by lowering the post-acquisition ownership thresholds (for measuring owner continuity) and adding a few new categories of transactions subject to the rules. This change was reportedly intended to raise revenue to offset taxpayer-favorable changes to the worldwide interest limitation.

Additionally, the Finance Committee draft opted for an unspecified placeholder for the SALT cap limitation, which was still the subject of difficult negotiations. The politics of fixing the 2017 SALT cap posed challenges of addressing progressive concerns that the repeal would be a tax cut for the wealthy with minimal benefit to working-class taxpayers. Tax-writers must also

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[19] For copies of the various versions of the House BBBA, see H.R. 5376, Build Back Better Act, https://rules.house.gov/bill/117/hr-5376.

ensure that the proposal meets the budget constraints and has a minimal impact on the overall revenue estimate.

For several months, Congressional leaders, and the White House separately, had engaged with Sen. Manchin to help ease his concerns about various provisions in the BBBA. Some stated concerns by Sen. Manchin include the bill's potential impact on inflation, work requirements and means testing for the CTC, adverse effects of certain green energy provisions on his home state, and inclusion of paid family leave. At the time, Manchin said, "Inflation is real, it's not transitory. It's alarming it's going up, not down," adding that "whatever Congress is considering doing we should do it within the limits of what we can afford."[20] Consequently, Sen. Manchin also sought to reduce the BBBA's overall topline number from $3.5 trillion, the original figure tentatively agreed upon by Senate Democrats, and expressed reservations that the true cost of the bill was not being accurately captured due to the short-term nature of some of the spending programs.

Although Majority Leader Schumer was committed to voting on the BBBA before the December recess, Sen. Manchin's concerns were not addressed to his satisfaction and the bill stalled.

"If I can't go home and explain it to the people of West Virginia, I can't vote for it," Sen. Manchin said on a Sunday morning show on Fox News. "And I cannot vote to continue with this piece of legislation. I just can't; I've tried everything humanly possible — I can't get there."[21] The statement came as a surprise to many in Washington, including the White House, which responded with some pointed comments of their own:

> "Maybe Senator Manchin can explain to the millions of children who have been lifted out of poverty, in part due to the Child Tax Credit, why he wants to end a program that is helping achieve this milestone—we cannot."[22]

Sen. Manchin's statements ended negotiations on the BBBA for the remainder of the year and Congress went home.

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[20] Bloomberg News, Laura Litvan, "Manchin Leaves Door Open to Biden Plan, Cites Inflation Worries," December 21, 2021,

[21] Fox News, Ronn Blitzer, "Manchin says he 'cannot vote' for Build Back Better: 'I've done everything humanly possible,'" December 19, 2021, https://www.foxnews.com/politics/manchin-says-he-cannot-vote-for-build-back-better-ive-done-everything-humanly-possible.

[22] "Statement from Press Secretary Jen Psaki," The White House, December 19, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/19/statement-from-press-secretary-jen-psaki-4/.

2022 LEGISLATION

BBBA Outlook

The new parlor game in Washington is predicting whether there is any version of the BBBA that Sen. Manchin will approve. Some observers doubt he will ever get to yes. On the other hand, concerned over the party's prospects if they do nothing, some Democrats have expressed that "failure [to do anything] is not an option."[23]

Clearly, the success or failure of the BBBA rests with Sen. Manchin. As discussed above, Senate passage of the BBBA already was delayed into the new year over his lingering concerns with the bill, including the short-term nature of several spending programs masking their true budget cost, the impact of the package on inflation (bolstered by the recent BLS inflation report which he called "very, very troubling"),[24] the punitive nature of certain climate change policies on his coal-producing state, and concern over specific spending policies included in the bill (e.g., paid family leave). To have any hope of success, the White House and Senate leadership will have to rejigger the spending package significantly to address his concerns. On January 20, Sen. Manchin said in addition to inflation, that he wants to "get a tax code that works and take care of the pharmaceuticals that are gauging the people with high prices."[25]

According to reports, before the December recess, Sen. Manchin had made a $1.8 trillion counteroffer to the White House for the BBBA, which included universal pre-K for ten years, expansion of the Affordable Care Act, and hundreds of billions for clean energy investments.[26] Importantly, Sen. Manchin's offer did not include any expansion of the child tax credit (CTC). Over the subsequent weeks, it appears as though Sen. Manchin has rescinded his offer and has not had subsequent substantive conversations about the BBBA with the White House.[27]

Regardless of whether it remains entirely on the table, the offer provides a roadmap to the confines of any potential deal that could be reached. First, to avoid budget gimmicks that hide the bill's true cost and may encourage inflation, Sen. Manchin wants to limit the number of proposals and fully fund those that remain. This will pose a difficult legislative challenge for Congressional leadership and the White House as they will be forced to choose among priorities and disappoint key constituencies.

Second, from his offer, it appears that Sen. Manchin could support a package that includes long-term funding for childcare and pre-kindergarten, greater subsidies for health care under ACA, and many of the proposals to address climate change. What is unclear is whether he would

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[23] Press Release by New Democratic Coalition Chair Suzan DelBene (D-WA) on Build Back Better Act Negotiations, December 19, 2021, https://newdemocratcoalition.house.gov/media-center/press-releases/new-democrat-coalition-chair-statement-on-build-back-better-act-negotiations-.
[24] Tweet by Manu Raju, @mkraju, January 12, 2022, 10:28am.
[25] Tweet by Manu Raju, @mkraju, January 20, 2022, 12:42pm.
[26] The Washington Post, Jeff Stein and Tyler Pager, "Manchin's private offer to Biden included pre-K, climate money, Obamacare – but excluded child benefit," December 20, 2021, https://www.washingtonpost.com/us-policy/2021/12/20/manchin-biden-child-tax-credit/.
[27] The Washington Post, Jeff Stein, "Manchin's $1.8 trillion spending offer appears no longer to be on the table," January 8, 2022, https://www.washingtonpost.com/us-policy/2022/01/08/manchin-white-house-talks/.

accept substitution of other priorities that he left out of his offer, such as additional EITC for childless workers, low-income housing subsidies, expanding Medicaid to cover hearing costs, etc.

The elephant in the room is whether any version of extension of an expanded CTC[28] would be acceptable to Sen. Manchin if included in the package. This is a key priority for Speaker Pelosi, House Ways and Means Chairman Richard Neal (D-MA), many progressives, and the Biden Administration because they view it as an important tool to reduce poverty and the racial income and wealth gap. After negotiations fell apart at year-end, in addition to the pointed recriminations from White House Press Secretary Jen Psaki (described above), she indicated at the same time that the President was willing to negotiate as to the overall scope of the proposed changes, suggesting that "compromise is not a dirty word." [29]

Sen. Manchin has expressed "qualms" with the structure of the expanded credit, somewhat inconsistently, alternating between outright rejection of any expansion and wanting to impose means testing (i.e., lower income thresholds at the top end) and new work requirements for parents for refundability, worried that "the payments could help fuel opioid use."[30] Like other features of the bill, he has also complained that the proposed short-term extension in BBBA hides the true cost of the expansion, which would cost about $1.5 trillion if extended permanently.

President Biden admitted to this roadmap during a press conference on January 19, stating that "it's clear to me we're probably going to have to break [the BBBA] up."[31] He added, however, that he is confident that "big pieces" of the BBBA can still get signed into law. Specifically, he mentioned climate investment, early childhood education, and the revenue offsets. He suggested that other significant features may prove more difficult, stating: "There's two really big components that I feel strongly about that I'm not sure I can get in the package: one is the Child Care Tax Credit and the other is help for cost of community colleges. They are massive things that I've run on, I care a great deal about, and I'm going to keep coming back at in whatever fora I get to be able to try to get chunks or all of that done."

Thus, the pathway to any reconciliation deal is tricky for Democrats. They must first decide whether to push Sen. Manchin for a compromise on the expanded CTC, which remains a priority for many other members. They could certainly dial back its cost by adjusting its parameters,[32] but inclusion of an expanded CTC (even on a slimmed-down basis) is likely to crowd out other

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[28] The CTC was expanded for one year as part of the American Rescue Plan in March. It made far more poor families eligible than before by providing full refundability, raised the maximum credit to $3,600 per year for children under age 6 and $3,000 per year for older children up to age 17, and provided for the credit to be paid out monthly rather than just annually.

[29] Press Briefing by Press Secretary Jen Psaki, December 22, 2021, https://www.whitehouse.gov/briefing-room/press-briefings/2021/12/22/press-briefing-by-press-secretary-jen-psaki-december-22-2021/.

[30] The New York Times, Emily Cochrane, "The Policy Debate at the heart of the Biden-Manchin Standoff," Dec. 21, 2021, https://www.nytimes.com/2021/12/21/us/politics/manchin-child-tax-credit-biden.html

[31] The Hill, Brett Samuels, "Biden on spending plan: 'We're going to have to probably break it up'," January 19, 2022, https://thehill.com/homenews/administration/590480-biden-on-spending-plan-were-going-to-have-to-probably-break-it-up.

[32] https://www.crfb.org/blogs/build-your-own-child-tax-credit.

priorities and require other tough choices. As President Biden suggested on January 19, even this might prove too heavy a lift.

Alternatively, Democrats could defer any action on the CTC hoping to pass an extension as part of a negotiation with Republicans on extenders or other matters. Republicans, however, are unlikely to even broach the subject until any action on the BBBA is resolved. This likely leads to any possible bipartisan discussion of the CTC waiting for lame duck, with the possibility of being included in a broader extenders package. If there is an effort to extend the expanded CTC outside of reconciliation, there may also be political pressure to offset that extension, which may prove difficult in a bipartisan environment.

The delay in the BBBA raises questions about whether the SALT cap will be adjusted and to what extent. Soon after the House passed its version of the BBBA, it became clear that the proposed increase in the cap to $80,000 would provide too much relief to higher earning individuals for progressives. Senate Budget Committee Chairman Bernie Sanders (I-VT) called the proposal "beyond unacceptable."[33] Sen. Sanders said he is open to a compromise approach that "protects the middle class in high tax states."[34] Although the details are unclear, Senators were negotiating a scaled-back SALT cap relief provision before the December break. Several House Members, such as Rep. Tom Suozzi (D-NY) and Josh Gottheimer (D-NJ) have been vocal that they would not support a bill that does not include sufficient SALT cap relief. As was done in the House bill, SALT cap relief can be structured so it does not lose revenue.

Compared with the spending side, the revenue offsets in BBBA are well settled. Tax-writers will resist modifying the existing package of offsets unless necessary to garner votes or the size of the overall package shrinks significantly. If the latter happens, there could be headroom to address concerns that have been raised with specific offsets (e.g., the book minimum tax, the high-income surtax, or the treatment of excess business losses) or to even allow some offsets to be dropped entirely.

Alternatively, Senate Democrats could pivot to using the reconciliation vehicle to advance other priorities, such as a stand-alone green energy package or legislation to address inflation concerns. This approach may be favored by those who see it as more critical to gain some momentum for advancement of Democratic priorities rather than see the news cycles continue to be dominated by concerns about BBBA. This would also leave room for Congressional Democrats to pivot toward a bipartisan approach to passing some of their priorities, such as the CTC or other renewable energy credits, both of which expired at the end of 2021. In a bipartisan environment, the Senators involved in negotiating the Bipartisan Infrastructure bill could again be instrumental in ensuring an agreement is met.

Even if BBBA's spending provisions are reduced in size and scope (or if reconciliation is used to advance other priorities), it is likely that the Administration will still prioritize including the House-passed BBBA international tax proposals needed for the U.S. to be in compliance with Pillar Two's GloBE rules. If BBBA flounders (or such changes are not included), the

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[33] Roll Call, Laura Weiss and Lindsey McPherson, "Sanders opposes plan to scrap 'SALT' cap, then restore it," November 2, 2022, https://www.rollcall.com/2021/11/02/sanders-opposes-plan-to-scrap-salt-cap-then-restore-it/.
[34] Id.

Administration will find itself in an awkward position of having led OECD efforts to impose a global minimum tax, but unable to comply at home to secure GILTI coexistence for Pillar Two. It is unclear what other legislative vehicles might exist to advance the international tax changes before the OECD's (and EU's) scheduled implementation deadline. Against a background of other governments moving ahead with implementation, including the EU, UK, and Switzerland, this could pose significant problems for U.S.-headquartered companies. See section below on State of Play on the Global Tax Environment.

It is important to note that all the revenue provisions in BBBA are still subject to review by the Senate Parliamentarian in a bipartisan setting for privilege and Byrd rule violations. This process will likely be completed closer to when the bill will be considered by the Senate. The result of the Parliamentarian review may be that provisions will have to be amended or struck entirely.

Finally, regardless of what happens, the schedule for consideration of BBBA is unlikely to be completed any time soon. Consequently, the effective dates of most provisions will need to be revisited and likely moved forward to avoid many lawmakers' concerns over imposing retroactive tax increases. This would require the legislation to be rescored.

Covid Relief?

With the recent rise of COVID cases related to the Omicron variant, many states, municipalities, and private institutions across the country have been reinstating a variety of mandates designed to slow the disease's spread. Many of these mandates and policies have had a negative impact on small businesses. Members may seek to provide additional, targeted relief for industries negatively impacted by COVID over the past several months. On January 9, Speaker Pelosi suggested additional relief may be needed, saying "it is clear from the opportunity that is there and … the challenge that is there from the resilience from the virus."[35] She added that the February 18 appropriations deadline could be a vehicle for such relief. Further, the travel industry has been under increasing pressure due to the latest variant and may seek additional relief.[36]

The House is unlikely to lead the COVID relief effort and instead will defer to the Senate to determine if a bill can pass and what would be included in that bill.

Sens. Cardin and Wicker have been developing bipartisan legislation aimed at providing additional relief for restaurants and other impacted industries, such as restaurants, gyms, and travel. Cardin said recently, "The restaurant money is a fairness issue. Some restaurants got it and others did not. We started with restaurants but we are prepared to expand it if there is sufficient support." The bill has not yet been publicly released but we understand it would repurpose roughly $50 billion of previously unspent COVID relief money.

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[35] Speaker Pelosi, Face the Nation, January 9, 2022, https://www.cbsnews.com/news/full-transcript-face-the-nation-on-01-09-2022/.

[36] For example, on December 30 the CDC increased the COVID-19 travel health notice to its highest level for cruise ships due to the Omicron outbreak. Reuters, "Avoid cruise travel as Omicron cases surge, says U.S. CDC," December 30, 2021, https://www.reuters.com/business/healthcare-pharmaceuticals/us-cdc-says-avoid-cruise-travel-covid-19-cases-surge-2021-12-30/.

The prospects for a tax title on COVID relief legislation are unclear, but stakeholders and some Members may push to have some targeted tax relief attached to a relief vehicle. Some of these tax items include extending the employee retention tax credit beyond its September 30, 2021 expiration date and providing for tax-exempt treatment of certain grants and other programs that did not receive it in previous bills.

Impacts of the latest variant on global supply chains could also impact whether Congress moves to pass a targeted COVID relief bill this year. On a separate legislative path, there is mounting pressure for the House and Senate to come to an agreement in conference and pass a broad China competition bill.[37]

A White House official recently pushed back on the prospects of additional COVID relief other than a small funding plus-up for restaurants. "…the economy is booming, there are millions of open jobs, and we do not believe people would be sitting at home if they are vaccinated and boosted, as most adults are," an unnamed Biden Administration official said.[38]

New Extenders Landscape

Should the BBBA or similar legislation not pass before the current continuing resolution expires on February 18, or any subsequent continuing resolution expires, there will be mounting pressure to attach tax extenders to the appropriations bill.[39] There are several factors that will impact whether extenders are included, such as the extent to which progress is being made on BBBA, the impact of the omicron variant on the health and economy of the U.S., and Republican interest in engaging and potentially offsetting any extenders.

Extending the expired CTC will be a top priority for Democrats. Sen. Manchin has expressed concerns about the cost of the CTC and lack of the work requirement in the ARPA expansion. Adding the CTC to an extenders package rather than the BBBA would also reduce the amount of spending in the BBBA, providing more room for longer extensions of other provisions. If the CTC is not included in the BBBA, Democrats will likely push to include a CTC extension as part of that package.

There is some bipartisan support for the CTC, however, and if it were to be extended in an extenders package, modifications may be needed to address concerns raised by Republicans, such as the lack of a work requirement, monthly payments, and overall size. Republicans, however, will not likely engage in CTC extension conversations until Democrats resolve the BBBA process.

[37] S. 1260, U.S. Innovation and Competition Act of 2021, Passed the Senate June 8, 2021. The House passed separate bills and an agreement on a final deal has not yet been reached.
[38] The Hill, Choi, Joseph, "US Lawmakers weigh new COVID-19 stimulus funding for businesses," January 5, 2022, https://thehill.com/homenews/senate/588393-us-lawmakers-weigh-new-covid-19-stimulus-funding-report.
[39] For a comprehensive list of expiring tax provisions, see JCX-1-22, "List of Expiring Federal Tax Provisions 2021-2031," January 13, 2022, https://www.jct.gov/publications/2022/jcx-1-22/.

There are also two provisions from the TCJA (R&E expense amortization and section 163(j) EBITDA rollback) that take effect in 2022. Business stakeholders will push to have those included in an extenders package.[40] While Congressional Democrats have been supportive of a fix to R&E expense amortization (as evidenced by its inclusion in the BBBA), it will be challenging for Democrats to support addressing business tax extenders while the enhanced CTC is expired. Similarly, even though Republicans generally support these extensions, they may be challenging to address until Democrats resolve the BBBA process. For purposes of the section 163(j) extender, if the R&E extender is included in the BBBA, the separation of the two TCJA extenders would make passing the section 163(j) provision more difficult.

Adding to the complexity of the interaction between the BBBA and extenders, the wind production tax credit (PTC) expired at the end of 2021. The wind PTC has previously been retroactively extended, with some extensions happening 11 months after the credit expired, which means the industry will likely have some tolerance to see how the BBBA progresses due to its robust extension and expansion.[41] If the BBBA does not pass, or its prospects are dwindling, it is possible that there will be additional increased pressure to move an extenders package before the election.

With that said, action on extenders may well be delayed into the lame duck period after the November elections.

Important Legislative Deadlines

The following are deadlines that may impact the legislative calendar and dictate what policy priorities may be part of any legislation in 2022:

February 10, 2022	House Democratic Caucus virtual messaging summit, January 2022 Consumer Price Index data released
February 18, 2022	Government funding expires, flood insurance program expires, TANF authorization expires
March 1, 2022	State of the Union
March 2022	President releases his Budget, unscheduled House Democratic Caucus Issues Conference (delayed from February 9-11 due to COVID)
March 23-25, 2022	House Republican Issues Conference

[40] Also note that 100 percent expensing, which was enacted in the 2017 TCJA, begins phasing down at the end of 2022. The bonus depreciation phases out 20 percent per year over five years beginning with property placed in service after 2022.
[41] P.L. 113-295, H.R. 5771, Tax Increase Prevention Act of 2014, Enacted December 19, 2014; P.L. 114-113, Consolidated Appropriations Act, 2016, Enacted December 18, 2015.

March 31, 2022	Medicare sequestration suspension expires[42]
June 30, 2022	Trade Adjustment Assistance program phases out
September 30, 2022	End of fiscal year
November 8, 2022	Midterm Congressional elections
December 31, 2022	Expiring tax provisions, such as phase-down of immediate expensing, tax credits for biodiesel and renewable diesel, and the 100 percent meals deduction
January 3, 2023	118th Congress begins

Cryptocurrencies and Digital Assets

To say 2021 was a big year for cryptocurrencies and other digital assets is an understatement. Last year, cryptocurrencies and other digital assets, such as nonfungible tokens, were adopted by mainstream investors and have captured headlines of news outlets across the world. As a new but widely adopted asset class, this year will bring continued development of digital products, ways in which investors can access the value of those assets, and practical uses impacting their value proposition.

As generally happens, mainstream adoption of cryptocurrencies has attracted interest from Washington, which will in turn result in an active agenda this year. Most imminently, stakeholders will need to closely follow the Treasury and IRS's efforts to implement the digital asset information reporting provision enacted with the Bipartisan Infrastructure bill.[43] That provision, which was the first tax legislation directly impacting digital assets and currencies, in part amended the section 6045 broker reporting rules to expand the definition of broker to cover persons who "(for consideration) [are] responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person."

Brokers will be required to report customer information for digital assets acquired on or after January 1, 2023. Further, the provision is generally applicable for returns or statements required to be filed or furnished after December 31, 2023.

Because the provision is not immediately effective, Treasury and the IRS will have some time to issue guidance, though there is Congressional pressure for Treasury to release guidance early in the year and before passage of the BBBA.[44] The language of the provision was arguably drafted

[42] The Medicare sequestration cut will be one percent from April 1, 2022 through June 30, 2022, before reverting to the full two percent sequestration.
[43] Sec. 80603 of the Infrastructure Investment and Jobs Act, amending sections 6045, 6045A, and 6050I. The provision also added a definition of digital assets, requires information reporting for certain transfers between brokers under section 6045A, and includes digital assets under the definition of cash for purposes of cash business transaction reporting under section 6050I.
[44] December 14, 2021 letter from Sens. Portman, Warner, Crapo, Sinema, Toomey, and Lummis to Treasury Secretary Yellen asking Treasury to issue guidance under the Administrative Procedure Act in an "expeditious

broadly and concerns have been raised by the digital asset industry. To ease concerns raised by some market participants that the information reporting provision would cover activities in which the person would have no access to customer information, Sens. Portman and Warner spoke on the Senate floor before the bill passed to narrow the legislative intent of the broker definition.[45] The colloquy largely responded to industry concerns but without the legislative fix, there is no certainty that guidance will impose a narrow definition.

Treasury has been working on guidance implementing the new information reporting provision and is expected to release it early this year. It is expected that there will be informal guidance answering initial questions and requesting comments on specific questions. There will also likely be proposed regulations under the formal APA notice-and-comment process.

Beyond anticipated guidance, there are parallel legislative efforts to further clarify the narrowed intent of the information reporting provision. Sens. Wyden and Lummis introduced a narrow bill in November that would clarify that the new definition of broker would not include persons validating distributed ledger transactions, selling hardware or software allowing persons to control private keys, or developing digital assets.[46] The Wyden/Lummis proposal largely tracks the Senate colloquy during the final days of the Bipartisan Infrastructure bill's consideration. Rep. Patrick McHenry (R-NC), who is the lead Republican on the House Financial Services Committee, introduced a broader rewrite of the broker reporting proposal that would narrow the definition of broker and digital asset, delay the effective date to digital assets acquired after 2024 and returns and statements furnished after 2025, and repeal the cash reporting requirement for digital assets.[47] The McHenry bill is supported by a bipartisan group of members, including lead Ways and Means Republican Kevin Brady, with Rep. Tim Ryan (OH) being the Democratic lead.

Although there are multiple legislative efforts to amend the recently passed reporting rule, there is resistance to addressing these issues legislatively until after administrative guidance is released due to uncertainty around the scope of the guidance, the revenue cost to narrow the provision, and lack of broad Congressional interest to amend a provision before it is effective and implemented.

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manner." The letter also requested informal guidance before the end of 2021. The Senators also requested that guidance reflect an August colloquy clarifying that the "purpose of the provision is not to impose new reporting requirements on people who do not meet the definition of broker."
https://www.portman.senate.gov/newsroom/press-releases/portman-warner-bipartisan-colleagues-urge-treasury-secretary-implement.

[45] Press Release by Sen. Portman, "On Senate Floor, Portman, Warner Conduct Colloquy Clarifying Cryptocurrency Provision in Infrastructure Investment & Jobs Act," August 9, 2021, https://www.portman.senate.gov/newsroom/press-releases/senate-floor-portman-warner-conduct-colloquy-clarifying-cryptocurrency.

[46] S. 3249.

[47] H.R. 6006, Keep Innovation in America Act.

Retirement

Early last year, there seemed to be momentum for a sequel to the bipartisan retirement savings bill passed in the previous Congress.[48] In May, both Chairman Neal and Ranking Member Brady hailed the introduction and markup of a bill referred to as "SECURE 2.0."[49] This bill contains dozens of changes to encourage more workplace savings, including expanding employee retirement plan auto-enrollment, higher catch-up contribution limits and indexing them to inflation, allowing matching programs for student loan repayments, and allowing financial institutions to offer insurance-dedicated exchange-traded fund products. These changes are relatively non-controversial and mostly bipartisan.

House Democrats included other retirement proposals, for which they could not get bipartisan support, in the BBBA.

While SECURE 2.0 was marked up and passed out of the Ways and Means Committee on a voice vote, it has not been brought to the floor yet. It is our understanding that the House is waiting on Senate Finance to put together the companion to this bill and does not want to risk sending a revenue vehicle to the Senate until the Senate is ready to act with this companion.

Energy

Congress and the Administration have long focused on energy tax issues for a variety of non-tax policy reasons, including economic development and national security. In the most recent legislative effort, energy tax proposals have taken a central role in addressing climate change.

The energy tax title in the House-passed BBBA[50] contains a variety of provisions that are designed to move the primary U.S. energy sectors (electricity generation and transportation) toward technologies that reduce or eliminate greenhouse gas (GHG) emissions. The title is a combination of extensions of current-law policies and new initiatives. In addition, the bill transitions the extension of current-law tax credits for clean energy production and transportation fuels the qualifications for which are based on specific inputs (e.g., wind, solar, etc.) to similar credits the qualifications or value for which are based on GHG emissions. This transition should allow the development of new clean energy processes on a technology-neutral basis, a priority of Chairman Ron Wyden (D.-OR), and generally follows the "Clean Energy for America Act," which was advanced by the Senate Finance Committee last spring.[51]

The BBBA also represented a shift in the underlying policy objectives and mechanisms of energy tax provisions for Democrats. The BBBA (similar to proposals in the CEA Act and GREEN Act before that) includes requirements that qualifying projects are constructed with

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[48] The Setting Every Community Up for Retirement Enhancement Act (H.R. 1994, March 29, 2019, Chairman Neal) was included in the FY2020 spending package (H.R. 1865, signed into law on December 20, 2019).
[49] H.R. 2954, Securing a Strong Retirement Act of 2021. The House Ways and Means Committee marked up and passed the bill on May 5, 2021.
[50] The Senate Finance Committee Democrats released a version of the BBBA. The SFC version resembles the House bill but extends some of the credits for slightly longer periods and makes other modifications.
[51] S. 2118, Clean Energy for America Act, introduced June 17, 2021 reflecting amendments made during the Senate Finance Committee markup on May 26, 2021.

labor paid the prevailing wage and that they use apprenticeship programs. Further, to receive the full value of the direct pay election (described below) beginning in 2025 taxpayers must use domestic-sourced inputs for the qualifying activities. These provisions directly address concerns raised by labor advocates that renewable energy jobs are low-paying and have lower levels of union participation than the fossil fuel industries they will be replacing.

Summary of significant features energy tax provisions in the House version of the BBBA

- ***Extensions of wind, solar and other renewable energy credits (Estimated 10-year revenue cost of $150 billion).***[52]**—**Extends production and investment tax credits (PTCs and ITCs) at full value at least until through 2031.[53] Also provides tax credits for any clean energy production (regardless of input source) for facilities completed after 2026 and started at least until through 2031.
- ***Carbon capture and sequestration (CCS) PTC ("45Q") ($2 billion)***.—Extends the CCS construction deadline to January 1, 2032, lowers the thresholds of the amount of CO_2 required to be captured and increases the value of the PTCs (the maximum PTC would be $180/ton of direct air captured CO_2).
- ***Storage and other technologies (Cost included with renewable credits above)*** .—Provides a 30 percent ITC at least until through 2031. Other new technologies that qualify for the ITC (generally, through 2026) include dynamic glass, biogas, microgrid controllers, linear generator assemblies, and qualified grid interconnections.
- ***Nuclear PTC ($23 billion).—***Provides a 1.5 cent/kWh for nuclear power produced from existing facilities. The credit phases out if the nuclear plant generates revenue in excess of 2.5 cents/kWh for the year and is not available after 2027.
- ***New transmission lines ($11 billion).—***Provides a 30 percent ITC for new transmission projects (including superconductivity lines) and upgrades completed before 2032.
- ***Renewable fuel PTCs ($25 billion).—***Extends the current-law refundable PTCs for the production of biodiesel, renewable diesel and other alternative transportation fuels to December 31, 2026. The BBBA would add a PTC of at least $1.25/gallon for sustainable aviation fuel for fuel sold before 2027. After 2026, the BBBA transitions to a technology-neutral clean transportation fuel PTC that is based on lifecycle GHG emissions. The PTC would be available for fuel sold at least through 2031.
- ***Clean hydrogen production ($9 billion).—***Provides a PTC for "green" and "blue" hydrogen for facilities with construction beginning before 2028.
- ***Manufacturing credits ($20 billion).—***Provides $25 billion in credits that can be allocated by Treasury to advanced energy manufacturing facilities through 2031. Also provides an ITC for semiconductor facilities and PTCs for the manufacture of wind and solar facility components.
- ***Energy tax provisions for individuals ($40 billion).***—Modifies and extends (through 2031) current-law provisions for nonbusiness energy property, residential energy property, energy efficient new homes and commercial buildings.

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[52] All revenue estimates from the Joint Committee on Taxation staff, (November 19, 2021) for the budget period FY 2022-31. Additional costs that would occur outside this budget window are not provided.
[53] The credits will not phase out until the later of 2031 or when U.S. greenhouse gas emissions are reduced by at least 75 percent relative to 2021. The full value of some credits requires the taxpayer to meet certain prevailing wage and apprenticeship requirements. These labor requirements apply to other provisions in BBBA.

- ***Electric vehicles ($26 billion).***—Modifies the electric vehicle credit for vehicles sold before 2032 to:
    - remove the per-manufacturer cap,
    - increase the battery capacity requirements,
    - impose price caps on qualified vehicles,
    - phase out the credit for high-income individuals,
    - make the credit transferrable to dealers,
    - provide bonus credits for vehicles meeting domestic content and union labor requirements,
    - provides tax credits for the purchase of used electric vehicles, commercial-use electric vehicles and electric bicycles, and
    - extends and increases the ITC for alternative vehicle refueling stations.
- ***Direct Pay (Cost included in other provisions).***—The BBBA allows taxpayers to treat various tax credits as payments of tax, in essence making the credits refundable. In some cases, the election is predicated on meeting certain domestic content requirements. The availability of the direct pay feature addresses the concern that the amount of credits available under the BBBA likely will exceed the tax equity market's ability to absorb the credits.

As discussed above, the BBBA is pending in the Senate, subject to further negotiations. It is generally thought that the energy tax title is not a major concern to Sen. Manchin or any others who would like to modify the bill, and that any package that emerges from these negotiations likely will include a robust energy tax title.

If the green energy provisions pass, attention will turn to Treasury and the IRS to implement the bill. Several provisions in BBBA either statutorily require Treasury to issue guidance by a date certain or, as practical matter, will need guidance or IRS systems changes to be operative.

If the BBBA energy tax title does not become law, there will be pressure to address those energy tax provisions that expired at the end of 2021 and will expire in 2022 or soon thereafter. Such an extenders bill will need to move on a bipartisan basis, perhaps limiting the number of items in the BBBA energy tax title that would be included in such legislation. However, this does not preclude the addition of provisions that are not "pure extenders." Previous extenders bills, such as the extenders bill enacted at the end of 2020 on a bipartisan basis, have included some "new starters."[54]

TAX-WRITING COMMITTEES

Senate Finance Committee

Over the course of the upcoming year, Finance Committee Chairman Wyden will seek to continue working on his legislative priorities by improving the legislative text and holding hearings on the various issues. Chairman Wyden's priorities include the billionaires mark-to-

[54] P.L. 116-260, H.R. 133, Consolidated Appropriations Act, 2021, enacted December 27, 2020.

market tax,[55] Modernization of Derivatives Act,[56] partnership tax reforms,[57] oversight of opportunity zones and tax-exempt entities, and small business issues. Wyden has also launched investigations into multinational tax practices.

Three Finance Committee Republican members have announced they are not seeking reelection: including Sens. Pat Toomey (R-PA), Rob Portman (R-OH), and Richard Burr (R-NC). After speculation that Senate Minority Whip John Thune may not seek reelection, he announced on January 8 that he will seek a fourth term.[58]

Ten Finance Committee Members will be running for reelection in 2022: Sens. Ron Wyden (D-OH), Mike Crapo (R-ID), Chuck Grassley (R-IA), John Thune (R-SD), Michael Bennet (D-CO), Maggie Hassan (D-NH), Tim Scott (R-SC), Todd Young (R-IN), Catherine Cortez Masto (D-NV), and James Lankford (R-OK).

House Ways and Means Committee

The Ways and Means Committee will see a significant amount of Membership turnover in the upcoming year. Democratic Reps. Ron Kind (WI), Stephanie Murphy (FL), and Tom Suozzi (NY) have announced they will not be seeking reelection. Republicans not seeking reelection include Ranking Member Kevin Brady (TX) and Rep. Tom Reed (NY).

Rep. Brady's retirement announcement came in advance of the end of his tenure as Republican Leader of the Ways and Means Committee at the end of the 117th Congress. He previously served as Chairman from 2015 to 2019 and has been the lead Republican the past two years.

Rep. Devin Nunes (R-CA) was widely considered the front-runner to replace Rep. Brady next Congress. But in what came as a surprise to many in Washington, on December 6 Rep. Nunes announced he would not be seeking reelection in 2022 and resigned from the House at the end of 2021 to join the Trump Media & Technology Group as CEO.

Since Nunes's retirement announcement, three other senior Republican members, Rep. Vern Buchanan (FL), Rep. Adrian Smith (NE) and Rep. Jason Smith (MO) (currently Ranking Republican on House Budget Committee) have publicly announced they will be seeking to replace Brady as Ranking Republican on Ways and Means. Other Members are privately considering making a run for the Ways and Means Republican Leader position, as well.

On January 18 the House Republican Steering Committee selected Rep. Greg Murphy to be Rep. Nunes' replacement on the Ways and Means Committee. Rep. Murphy, who represents eastern North Carolina, was elected to Congress in 2019 during a special election. Last year, Rep.

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[55] Billionaires Income Tax, released as a discussion draft on October 27, 2021, https://www.finance.senate.gov/chairmans-news/wyden-unveils-billionaires-income-tax.
[56] S. 2621, Reintroduced August 5, 2021.
[57] Press Release from Sen. Wyden on September 10, 2021, https://www.finance.senate.gov/chairmans-news/wyden-unveils-proposal-to-close-loopholes-allowing-wealthy-investors-mega-corporations-to-use-partnerships-to-avoid-paying-tax.
[58] Politico, Marianne Levine, "Senate Minority Whip John Thune to run for reelection," January 8, 2022, https://www.politico.com/news/2022/01/08/senate-minority-whip-john-thune-to-run-for-reelection-526794.

Murphy was vocal in his opposition to the OECD process establishing a global minimum tax. Last year, he also introduced legislation that would move the April 15, 2021 estimated corporate and individual tax deadline to May 17.[59]

On January 19, the Ways and Means Republicans also reassigned their subcommittee membership and leads: Rep. Buchanan is now the lead Republican on Health; Rep. Kelly is the lead on Select Revenue Measures; Rep. A. Smith is lead on Trade; and Rep. Tom Rice (SC) is the lead on Oversight.

STATE OF PLAY ON THE GLOBAL TAX ENVIRONMENT

OECD and DST Developments

At the dawn of 2021, one of the rare areas of bipartisan Congressional alignment appeared to be opposition to digital services taxes (DSTs) and support for continued U.S. engagement in the OECD negotiations regarding the tax challenges of the digitalization of the economy. As the dust settles twelve months later, however, that bipartisan consensus appears to have eroded.

Why the shift? A year ago in our 2021 outlook, we noted that "a key issue to monitor is whether certain Biden campaign tax proposals (e.g., GILTI modifications) will influence the U.S. negotiating posture at the OECD." As it turned out, the two quickly became intertwined as the incoming Treasury viewed the ongoing OECD negotiations as an opportunity to advance their international tax proposals,[60] rather than just as a means of precluding digital service taxes (DSTs) and other unilateral measures. They reasoned that, by providing a more level playing field and ameliorating any competitiveness concerns, a global deal at the OECD would help clear the way for passage of those proposals domestically. This strategy ultimately led to the U.S. Treasury pushing for a 15 percent (or higher) global minimum tax rate at the OECD and backing off of the position that current law GILTI be deemed a compliant minimum tax under Pillar Two.

The Administration also shifted the previous strategy with respect to Pillar One, recognizing that some key countries would not move forward on a global minimum tax under Pillar Two (or drop DSTs) without securing a deal on Pillar One (especially Amount A's reallocation of taxing rights). Thus, to help reach agreement on Pillar One, the Administration proposed two significant changes: (i) drop the Trump Administration's prior position that Pillar One should act solely as a safe harbor and make Pillar One mandatory for in-scope companies; and (ii) replace the two categories of in-scope MNEs (i.e., automated digital services and consumer facing businesses) with quantitative screening criteria based on thresholds of revenue and profitability that aimed to capture about 100 companies. While dropping the safe harbor idea was necessary to show other countries that the U.S. was serious about a Pillar One deal, the scoping change was proposed with the hope that a more formulaic approach could both bring simplicity and assist with securing a political agreement on the Pillar One parameters by focusing on the "largest and

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[59] H.R. 2422, introduced April 8, 2021. Rep. Murphy introduced in the 116th Congress the Tax Deadline Uniformity Act of 2020, H.R. 5979.

[60] In April, the Biden Made in America Tax Plan proposed increasing the GILTI tax rate to 21 percent on a per-country basis (and replacing the BEAT with the much broader SHIELD). See Appendix B for a comparison of the international proposals in the Administration's green book, the House-passed BBBA and OECD pillar two.

most profitable companies" while reducing the opportunities for different sectors to subjectively make their case whether they should be in or out.

OECD -- October Political Agreement

Those proposed changes—in addition to a revised plan to stand still and roll back DSTs (see discussion below)—paved the way for a political agreement on both Pillars announced October 8th among 137 Inclusive Framework jurisdictions (including prior EU holdouts Ireland, Estonia, and Hungary), memorialized in an eight-page statement (the "October Statement"). Under Pillar One, countries agreed to reallocate 25 percent of residual profit (defined as profit before tax (PBT) in excess of 10 percent of revenue) of in-scope multinational groups (i.e., with global turnover above 20 billion euros and profitability above 10 percent PBT/revenue) to market jurisdictions where goods or services are used or consumed.

Under Pillar Two, countries agreed to two interlocking rules (the GloBE rules) that would apply to multinational groups with turnover of at least 750 million euros: (i) an income inclusion rule (IIR) which imposes a top-up tax on a parent entity with respect to low-taxed income (i.e., income subject to an effective tax rate below 15 percent) of a subsidiary entity, calculated on a per-country basis; and (ii) an undertaxed payment rule (UTPR), which imposes a top-up tax by denying deductions or requiring an equivalent adjustment to the extent the low-taxed income of a group member (including the parent entity) is not subject to tax under the IIR.[61] The GloBE rules are not mandatory but rather a "common approach", meaning that countries: (i) aren't required to adopt them, but if they choose to do so, they will implement and administer the rules in a manner consistent with Pillar Two's outcomes; and (ii) will accept the application of the GloBE rules applied by other Inclusive Framework countries.

Importantly, for US MNEs, the October Statement did not give comfort that current-law GILTI would pass muster under Pillar Two; rather, only that, in the context of applying the minimum rate on a per-country basis, "consideration will be given to the conditions under which the US GILTI regime will co-exist with the GloBE rules." In other words, the general understanding coming out of the October Statement was that GILTI would not be deemed compliant until it was changed to be calculated on a per-country basis, as provided in the House-passed BBBA.

The October Statement was accompanied by an ambitious implementation schedule under which both Pillars would be effective in 2023 (with Pillar Two's UTPR coming into effect in 2024). Pillar One would be implemented by a multilateral convention, with text finalized by "early 2022" so that it can be available for countries to ratify it "as soon as possible" and it can "enter into force and effect in 2023 once a critical mass" have so ratified. The multilateral convention (MLC) would require countries to remove all DSTs and other relevant similar measures as well as commit not to introduce any such measures in the future. On Pillar Two, model rules were released late last year, and "by the end of 2022 an implementation framework will be developed that facilitates the coordinated implementation of the GloBE rules." DSTs and other similar unilateral measures would be held in abeyance until 2024, with countries committing not to

[61] Also, under Pillar Two, there is a treaty-based rule (the subject-to-tax rule (STTR)) that allows source jurisdictions to impose limited source taxation on certain related party payments subject to tax below a minimum rate. According to the October Statement, the STTR will be creditable as a covered tax under the GloBE rules.

implement new unilateral measures between now and then to provide an opportunity for Pillar One to be implemented. Notably, this has been interpreted thus far as permitting countries to introduce or adopt DSTs now that do not take effect until 2024, which some countries like Canada have argued are a needed backstop to the OECD agreement.

The OECD political agreement was endorsed by the G20 leaders at their summit in Rome. Indeed, the fruits of the Administration's OECD leadership were celebrated by foreign trading partners across the globe and this international tax policy making, according to Treasury Secretary Yellen, fulfilled Biden's call for "foreign policymaking for the middle class."

Domestic Reaction to the OECD Deal

Domestically, however, the reaction was a bit more muddled. Harkening back to our 2021 outlook, we observed that "given any potential [OECD] agreement will require Congressional implementation, it remains to be seen whether, and how much, the Administration will involve Congress to develop and embrace a new strategic position."

Whether Treasury's new strategic position has been appropriate appears to break now along party lines. Congressional Democrats—at least with respect to Pillar Two—applauded news of the OECD political agreement; Chairmen Neal and Wyden "congratulate[d] Secretary Yellen and the Biden Administration" for the "administration's tenacious leadership" that led to October's "landmark agreement to stop the race to the bottom in corporate tax and find consensus on a global minimum tax rate." The Neal/Wyden statement, however, appeared to hold back on giving a full throttle endorsement to the entire political deal. Perhaps in a nod to many unknowns around aspects of Pillar One, they noted that "they look forward to reviewing the entire OECD agreement and its impact on U.S. workers, business, and taxpayers."

Congressional Republicans criticized Treasury's Pillar Two pivot, which they believed forfeited protecting U.S. interests (by not defending present-law GILTI co-existence) to instead push for higher taxes on U.S.-headquartered companies. Ranking Members Crapo and Brady claimed the OECD political deal "confirm[ed] the Biden Administration has overshot the mark in its race to raise the U.S. global minimum tax to the highest in the world, putting America at a serious disadvantage and making it better to be a foreign company or worker than an American one."

Republicans have raised many questions and concerns, both with respect to the deal's impact on the U.S. as well as Treasury's proposed path for implementation (particularly, the notion suggested by Secretary Yellen that the MLI need not be implemented by a treaty). Many of those lingering issues were outlined in a mid-December letter to Secretary Yellen signed by all 14 Finance Republicans, expressing their concern that Treasury had not provided them with sufficient detail to evaluate the impact of the OECD agreement on the U.S. nor provided information on Treasury's proposed approach for domestic implementation of that agreement. The letter asserted that "any opportunity for a bipartisan outcome will require greater transparency and engagement." Ways and Means Republicans also sent a letter to Secretary Yellen in January raising similar issues, saying "We are concerned by the Administration's unilateral effort to commit the United States to global tax policies that could diminish the United

States' competitiveness on a global scale and have grave consequences to our domestic economy."

Given the tenor of that letter, prospects for Pillar One implementation in the U.S. in 2022 appear murky, at best. This could be viewed by other countries as a reason to slow down the OECD (or at least their own) implementation process.

OECD Model Rules and EU Directive on Pillar Two

The skepticism regarding U.S. implementation, however, did not put the brakes on the OECD and EU from moving forward on Pillar Two in December, with the UK and Switzerland following suit in January.

Five days before Christmas, the OECD released Model Rules on Pillar Two. Comprised of about 50 pages of technical provisions, along with 15+ pages of definitions, the model rules were developed by Inclusive Framework members and "agreed and approved by consensus." Notably, the FAQs to those Model Rules acknowledged that the all-important commentary to the rules—normally issued simultaneously—wouldn't be released until "early 2022." The OECD nonetheless scheduled a public consultation on the implementation framework in February. With respect to the treatment of GILTI as a compliant regime, given the uncertainty of BBBA enactment, the FAQs merely stated that "GILTI co-existence will be considered in the new year. Changes to the GILTI rules as the result of US legislation, such as the Build Back Better Act, will be incorporated into this process to the extent those changes are enacted."

Within 48 hours of the Pillar Two Model Rules release, the European Commission issued a draft Directive based on those Model Rules, with changes to conform to EU legal requirements regarding sovereignty and non-discrimination. Specifically, the Directive extends the scope of the Model Rules to include purely domestic groups, resulting in not only foreign subsidiaries but also all constituent entitles in a member states being subject to the top-up tax. The Commission's goal is for EU member states to approve the directive in the Spring. If unanimously approved by the EU member states, the Directive's provisions would be implemented into their domestic laws effective in 2023, except for the UTPR regime, which would not apply until a year later (i.e., the same staggered schedule provided in the October Statement). Note, however, that Estonia, Hungary and Poland have pushed back on this timetable and linked EU implementation of the Pillar Two rules to implementation of the global agreement, including Pillar One, by other countries (e.g., the United States). Sweden has also raised concerns that the Directive's proposed timeline for implementation is too ambitious.

The EC Explanatory Memorandum introducing the Directive also punted on the prospects for GILTI co-existence to the OECD, stating that the "Inclusive Framework will establish conditions under which the US GILTI regime will co-exist with the GloBE rules." Notably, however, the Directive did provide a list of conditions needed to satisfy the equivalence standard, including (i) an effective tax rate of at least 15 percent; (ii) only allowing blending on a jurisdictional basis (i.e., country-by-country); and (iii) providing relief for top-up tax paid in an EU member state.

On January 11, the UK released a consultation document stating its plans to implement the Pillar Two rules "as closely to the OECD Model Rules as possible". That UK consultation also provided for consideration of adopting a domestic minimum tax, based on the GloBE rules, which would impose a top-up tax on UK-based entities of a multinational group. With respect to whether GILTI can co-exist with GloBE rules, the UK noted it is still under consideration at the OECD and identified four specific issues which need to be addressed: (i) how both the IIR and UTPR will apply to entities within U.S.-headquartered groups; (ii) how GILTI will apply to U.S. subsidiaries of a non-U.S.-headquartered company that is subject to a qualifying IIR in the foreign parent's country; (iii) whether agreed-upon ordering rules should differ for partially-owned intermediate entities as contemplated in the Pillar Two framework; and (iv) how tax paid under BEAT should be taken into account in the Pillar Two framework and in the calculation of jurisdictional ETRs. UK anticipates IIR implementing legislation to be effective April 2023, with the UTPR and domestic minimum tax rules introduced no earlier than April 2024.

Two days later, Switzerland announced its plans to implement a 15 percent global minimum tax, as provided by in the Pillar Two rules, first through a temporary ordinance, and subsequently through a constitutional amendment, with an aim for the rules to be effective January 1, 2024. The top-up tax, which would not apply to purely domestic companies (unlike the EU and in the UK), is proposed to be assessed and collected by the cantons, given that the federal rate is capped at 8.5 percent in the Swiss constitution.

2022 Road to Implementation

While 2021 set a high bar for twists and turns in global tax developments, 2022 promises more as the OECD Inclusive Framework members seek to stick ambitious landings in implementing the Two Pillars. Here is a preview of what is potentially on the mat for 2022.

Pillar One (Amount A) Building Blocks

In early December, Pascal Saint-Amans, director of OECD's Center for Tax Policy and Administration, confidently stated "there is political will," and that "we need to turn what is a high-level political agreement" on Pillar One into a "technical apparatus."

Even with that apparatus still under development, the OECD still aims to finalize a MLC for Pillar One Amount A in the first half of the year so countries can participate in that "high-level signing ceremony" in "mid-2022." But key questions remain before completing that instrument: the largest of which may be deciding on the biggest losers (i.e., which countries will surrender the taxing rights on income to be reallocated to other countries). While some countries may prefer a more formulaic approach that looks to entities with the highest profit margins (i.e., "investment hubs"), other countries may prefer an approach more closely tied to where residual profits currently reside from a transfer pricing perspective.

The business community has been dissatisfied with opportunities for feedback since the scope change to Pillar One last year. These gripes culminated in a mid-November public letter from Business at OECD (BIAC) complaining about the lack of engagement on many of the technical issues. Pascal Saint-Amans referred to these complaints as "legitimate grumpiness," and, in

response, the OECD signaled informal consultations in the coming months to address various discrete issue sets that, according to Saint-Amans, will be "extremely efficient." Specifically, in late December 2021, the OECD announced they planned to release "Secretariat Working Documents" on the "separate building blocks of Amount A." Unofficially, and very preliminarily, we understand that the general timeline being considered is:

- Mid-January: initial guidance for public consultation on revenue sourcing and nexus issues, and guidance/consultation on how to measure tax bases and treatment of losses;
- February: guidance around scoping (revenue thresholds) and which industries are excluded;
- March: guidance concerning tax certainty (processes for taxing jurisdictions and companies); and
- April: guidance on elimination of double taxation/surrendering jurisdictions; guidance on proposals for the marketing and distribution safe harbor (MDSH), including whether and how withholding taxes would be considered within the MDSH.

Given that this timeline slides into Q2 2022, meeting their October Statement goal of "a high-level signing ceremony" for a MLC by mid-2022 will be challenging. Note, however, that the EU has set an anticipated release date of their proposal to implement Pillar One in late July 2022, which would presumably follow OECD release.

U.S. Implementation of Pillar One

Speculation has swirled in recent months around how the U.S. might fully implement the Pillar One agreement. While it seems clear that legislative changes to the effectively connected income, source, and foreign tax credit rules would be needed, the crux of the question is whether full U.S. implementation would require the MLC to move through the traditional treaty ratification process (which requires a 2/3rds vote in the Senate), or whether it could be fully implemented through the legislative process, potentially one that would only require a majority vote in reconciliation (or 3/5ths vote through regular order), or perhaps other means that do not require congressional action at all.

As discussed above, the Administration has previously suggested the normal treaty process may not be the only avenue available for implementing the agreement. Recent comments, however, appear to indicate that that prior position is softening as Treasury has indicated it will be working on a bipartisan basis with Congress as this process unfolds. Because the Administration has yet to reveal its precise plans to Congress, we have included a discussion of the various possibilities for a path forward that have been suggested by Treasury officials and other commentators in Appendix C. All of this could prove highly theoretical as the timeline that the U.S. could begin moving forward with implementing Pillar One is likely to be close to, or beyond, the 2022 election, when control of the House or Senate may change. A flip in either house would seem to preclude the Administration pursuing an approach that does not involve the treaty process.

Pillar Two Implementation

While the Pillar Two Model Rules were released in late December, the associated Commentary to those rules (which will provide guidance on the interpretation of the Model Rules) will not be released until early February. Also, in February, a public consultation on the implementation framework will be held, focusing on the particular issues to be agreed by the end of 2022 (i.e., administration and compliance).

Furthermore, for the Subject to Tax Rule (STTR) of Pillar Two, the draft model provision and its commentary will be released in March 2022 with a defined set of questions set for input. The multilateral instrument to facilitate implementation of the STTR is also scheduled to be released for comment at the same time.

Overall, on Pillar Two, the elephant in the room continues to be the details of whether the GILTI regime is deemed a compliant IIR—and, especially if BBBA's GILTI changes fail to get enacted, the consequences of non-compliance to U.S. headquartered companies. That said, if BBBA's GILTI changes (especially with respect to country-by-country) fail to reach enactment by mid-2022, it would not be surprising if implementation on both Pillars by OECD Inclusive Framework members (including EU members) is delayed to evaluate whether the U.S.—a necessary party to the critical mass of Pillar One implementing countries—can follow through on the commitments agreed to in the October Statement. However, recently an EU representative seemed to indicate that he both expected changes to GILTI to be adopted and that such changes proposed would cause GILTI to be a compliant IIR. Benjamin Angel, director of direct taxation at the European Commission's Directorate General for Taxation and Customs Union, expressed that while the proposed GILTI reforms have experienced a setback, "It's important to stress that this setback is not linked to GILTI." He also indicated the commission expects the United States to adopt GILTI regime reforms in time for the EU Council to grant equivalence.[62]

Wait, what about DSTs?

The original rationale in 2018 for bipartisan Congressional support of Treasury's negotiating efforts at the OECD was to secure an international agreement to eliminate discriminatory DSTs.

In 2021, the Biden Administration—as part of the larger OECD political agreement and through bilateral negotiations—secured commitments to put the brakes on the proliferation of DSTs. According to the October Statement, the Pillar One MLC will require countries to remove all DSTs and "relevant similar measures," and prohibit new measures from October 8, 2021 until the earlier of December 31, 2023 or the coming into force of the convention. A detailed definition of what constitutes "relevant similar measures" is expected to be finalized as part of the adoption of the MLC and its explanatory statement.

In the month following the October Statement, U.S. Treasury (with support from USTR) entered into agreements with Austria, France, Italy, Spain, and the UK (and later Turkey) regarding the treatment of DSTs during an "interim period" prior to the anticipated full implementation of

[62] Stephanie Johnston, "Commentary on OECD minimum Tax Rules Expected by Early February," Tax Notes Today (Jan. 18, 2022).

Pillar One (defined as between 1/1/22 and 12/31/23). A similar agreement was also reached with India in late November with respect to their equalization levy on e-commerce supply of services, with an interim period beginning April 1, 2022 and lasting until either implementation of Pillar One or March 31, 2024.

This set of transition arrangements generally stated that countries need not withdraw their unilateral measures until Pillar One takes effect, but that DSTs (or equalization levies) paid by U.S. companies during the interim period would be credited against their tax liability arising from the Amount A tax under Pillar One. In exchange for this crediting feature, the U.S. agreed to terminate section 301 trade actions and committed not to impose further trade actions with respect to existing DSTs during the interim period. Notably, this solution may be of little comfort to companies who owe DSTs but are not expected to be subject to Pillar One.

Given Pillar One and Pillar Two implementation timeframes are still politically linked, if BBBA's GILTI changes are not enacted in 2022, there may be pressure to modify these transitional agreements (substantially).

Canada's DST

Despite the apparent progress on the standstill and rollback of DSTs made in the October Statement, in mid-December, Canada proposed introducing a DST which would be effective on January 1, 2024, but would have retroactive application to cover revenue that in-scope companies earn as of January 1, 2022. USTR expressed strong concern and said that, if a Canadian DST were adopted, it "would examine all options, including under our trade agreements and domestic statutes."

EU Digital Levy

Finally, it appears as if the EU's efforts to move forward on a digital levy have halted—at least for now. After first delaying its implementation in connection with the October Statement—while still staunchly attempting to distinguish it from the DSTs that the agreement at the OECD was designed to supplant and secure the repeal of—in late December, the EC announced that 15 percent of tax payments reallocated to EU countries under the Pillar One deal should be paid into the EU budget. That 15 percent reserve of the Pillar One payments to the EU budget, according to an EC spokesman "replaces what we referred to formerly as the digital levy." [63] Unsurprisingly, however, the EC has left room to revive the digital levy if Pillar One falters. It is unclear what is contemplated if, for example, the U.S. fails to successfully implement Pillar One.

Treaties

In 2019 the Senate approved protocols to U.S. tax treaties with Japan, Luxembourg, Spain, and Switzerland. Those approvals were notable, as it had been nearly a decade since the Senate had ratified any treaties or protocols, in large part related to Sen. Rand Paul's (R-KY) privacy-related objections. While those four protocols sailed through the Senate once receiving floor time, three

[63] Stephen Gardner, "EU Eyes Global Tax Pact Implementation, Rules Revamp in 2022", Bloomberg Daily Tax Report: International (Dec. 30, 2021).

pending tax treaties with Chile, Hungary, and Poland remained stalled over concerns regarding whether the BEAT violates articles 23 (double taxation relief) and 24 (nondiscrimination) of the U.S. model income tax treaty. Specifically, these treaties have been hung up over whether a treaty reservation would be necessary to clarify that treaty approval would not affect application of the BEAT. We understand the Treasury Department is seeking to move the tax treaty with Chile through the Senate early this year, and it is expected to include a BEAT reservation.

REGULATORY OUTLOOK

Treasury and the IRS published their 2021-2022 priority guidance plan (PGP) in September 2021.[64] It included 193 guidance projects, including nearly 30 international projects. The PGP includes a number of unfinished TCJA guidance projects, as well as other longstanding projects, such as guidance under sections 871(m) and section 1256. While Treasury and IRS typically issue quarterly updates to the plan, they did not do so in 2021 and thus it is not clear whether they will so this year.

If the BBBA passes, the Treasury Department and IRS will likely have to revisit the PGP, assess their resource allocation and quickly shift their efforts toward undertaking an expansive effort to implement the broad bill. Throughout the legislative process, Congressional Democrats have been engaging with Treasury and IRS officials to better understand how the proposals would be administered and to solicit feedback on the proposals.

Due in part to this coordination, Treasury officials have been outlining the various guidance projects needed and when those projects will need to be completed to implement the BBBA. Projects relating to provisions that are immediately effective (e.g., corporate stock buyback excise tax, BEAT) will generally take precedence over projects relating to provisions that have a delayed effective date (e.g., book minimum tax, GILTI and related foreign tax credit rules).

Treasury and IRS will also have to consider whether there are any directives in the bill to provide guidance or if guidance is necessary to make a particular provision operative. They will further consider whether there are open issues in the legislation that require clarification and how the legislation affects already published guidance and pending projects. Treasury and IRS staff with common subject matter responsibilities will coordinate to identify topics that guidance will be needed, the form and substance of such guidance, whether and how tax forms will need to be modified, what information taxpayers will need to provide the IRS with respect to their tax filings, whether any other new administrative procedures are needed, and the sequence in which guidance will be published.

As a recent example of this process, the Bipartisan Infrastructure bill imposed new reporting requirements on cryptocurrency brokers to disclose customer names, gross proceeds from sales and certain other information. Stakeholders have been asking Treasury and the IRS to clarify who is considered a crypto broker under the requirements. Consequently, Treasury and IRS prioritized work on this issue and interim guidance could be issued early this year.

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[64] Department of the Treasury, 2021-2022 Priority Guidance Plan, September 9, 2021, https://www.irs.gov/pub/irs-utl/2021-2022-pgp-initial.pdf.

Finally, if BBBA fails to move or does not contain certain of the Administration's priorities, it is possible that Treasury might seek to address some of these issues through guidance, as the Obama Administration did in some cases (e.g., section 385 regulations, estate & gift tax valuation discounts). For example, some practitioners have surmised that Treasury could address grantor trust and other wealth transfer tax issues through guidance if legislation fails to do so.[65]

STATE AND FEDERAL

State Legislative Activity

Although many fiscal forecasts for 2021 assumed there would be large state and local budget deficits, most states enjoyed budget surpluses in 2021 due to a combination of substantial federal COVID aid provided by ARPA – an aggregate distribution of $350 billion to state and local governments – and higher than anticipated revenue collections from increased income and sales taxes. These surpluses have led many states to consider additional spending or tax relief this year, including reducing or eliminating personal income taxes,[66] and eliminating sales or excise taxes on basic commodities such as groceries and gas.[67] Numerous other tax relief measures are being considered, as well. For example, recently enacted legislation in North Carolina eliminates the state corporate income tax, phasing it out between 2025 and 2029.[68]

These tax relief efforts are not without controversy, however. The language authorizing the ARPA relief funds included a prohibition on using the funds for certain purposes, including lowering taxes, which led states to file lawsuits in federal courts challenging whether the provision is constitutional. Federal district courts in Ohio, Kentucky and Alabama granted permanent injunctions regarding the tax mandate, while district courts in Missouri and Arizona denied equitable relief. There is ongoing litigation in one district court and five circuit courts.[69]

Although few states appear likely to consider broad-based tax increases on businesses, a few states may consider state and local tax proposals that would impose higher taxes on wealthy individuals and targeted taxes on specific industries. States are likely to reconsider imposing digital taxes, such as the Maryland gross receipts tax on digital advertising services and the New York digital data tax proposal. Others are considering the taxation of digital services and cloud computing under existing sales and excise taxes. Some states may also focus on the taxation of nonfungible tokens and cryptocurrency. Implementing these taxes will be challenging, however, raising similar issues to those encountered in the Federal government's expressed opposition to DSTs and similar taxes in OECD negotiations. These tax increases, however, will likely be tempered by the 2022 election year political landscape, with 36 gubernatorial and numerous other states races.

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[65] Curry, "A Look Ahead: Estate Planners' Victory Dance Could Be Short-Lived," Tax Notes (December 22, 2021).
[66] For example, Mississippi and West Virginia have proposals to phase-out the personal income tax.
[67] For example, Kansas and Virginia Governors have proposed eliminating the tax on groceries.
[68] S.B. 105, 2021 General Assy., Reg. Sess. (N.C. 2021).
[69] A case filed by the Texas AG remains in federal district court, while the OH, KY, AL, MO, and AZ federal court decision are all subject to appeal in U.S. Court of Appeals for the fourth, sixth, eighth, and ninth Circuit Courts.

States legislatures and state tax authorities will continue to focus on conformity with or decoupling from changes made by Congress to the federal tax code in recent years. States have different procedures regarding conformity with changes to federal tax law and have recently decoupled from provisions related to depreciation, interest deduction limitations, international tax provisions, NOL limitations, excess business losses, and PPP loan deductions. If Congress enacts tax legislation in this Congress, such as the BBB bill, states will likely take different approaches regarding conformity with or decoupling from such changes.

Some recently enacted industry-specific taxes that have been enacted are already being litigated. The Maryland digital advertising tax is subject to litigation in both Federal and state court, alleging violations of Federal law (e.g., Internet Tax Freedom Act[70]). The Washington State Supreme Court recently ruled that a surtax on large financial institutions is constitutional; the taxpayers may appeal to the Supreme Court.[71] Two State Supreme Courts reached opposite conclusions regarding the constitutionality of local billboard taxes enacted in Baltimore and Cincinnati – litigants in both cases have filed cert petitions with the Supreme Court.

Concerns regarding state and local tax compliance burdens and retroactive taxation of small remote sellers post-*Wayfair*[72] have also led to increased litigation. Federal courts in Illinois, California and Pennsylvania dismissed cases involving small online businesses subject to pre-*Wayfair* sales tax assessments involving inventory unknowingly stored in such states because the courts lacked jurisdiction under the Tax Injunction Act.[73] There is also increasing concern that states will expand their efforts to impose state income taxes on online businesses without physical presence that sell over the Internet following the Multistate Tax Commission (MTC)'s recently revised guidance,[74] in which the MTC recommends limiting the scope of Public Law 86-272's long-standing protections with respect to Internet commerce. As Congress focuses on issues beyond pandemic relief and infrastructure, they may revisit concerns raised in 2020 regarding the challenges faced by small businesses selling goods nationwide over the Internet. With the substantial increase in controversies involving taxpayers engaged in interstate commerce, access to federal courts is needed to provide guardrails, ensure consistency, and reconcile inconsistent state tax policies.

Remote Work

Workers and employers face increasing uncertainty and confusion regarding how to tax compensation earned by employees in hybrid and full-time remote work arrangements. These

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[70] 47 USC §151.
[71] *Washington Bankers Association v. State of Washington, Department of Revenue*, No. 98760-2 (Sept. 30, 2021) (en banc).
[72] *South Dakota v. Wayfair, Inc*., 585 U.S. ___ (2018). The Supreme Court held that states may require remote sellers to collect sales tax even when a seller has no physical presence in the state, overturning its prior decision in *Quill*.
[73] *Rubinas et al v. Maduros*, U.S. District Court for the Northern District of Illinois, No. 1:2023-cv-00096 (Sept. 16,2021); *Online Merchants Guild v. Maduros*, U.S. District Court for the Eastern District of California, No. 2:20-cv-01952 (October 13, 2021); *Online Merchants Guild v. Hassell*, U.S. District Court for the Middle District of Pennsylvania, No. 1:21-cv-00369 (May 28, 2021).
[74] Statement of Information concerning practices of the MTC and supporting states under P.L. 86-272 (Aug. 4, 2021).

work arrangements increased significantly at the beginning of the COVID pandemic and are expected to continue for the foreseeable future.

Conflicting state tax policies and expiring emergency guidance issued by state and local governments in 2020 could result in double taxation of employees and increased litigation. Last year the Supreme Court declined to hear New Hampshire's request for a ruling on whether Massachusetts could tax New Hampshire residents employed by Massachusetts companies who were temporarily working from home.[75] As a result, these cases will have to be brought by individuals in state courts. Cases have already been brought with respect to local income taxes in Ohio and St. Louis, MO. As employees continue to work remotely, the related issue of whether employees working remotely create business nexus, and the impact of remote work on income tax apportionment, is also a growing concern for many businesses. A bill introduced in the Senate, the Remote and Mobile Worker Relief Act of 2021, would address some of these issues during the pandemic, but guidance is still needed on a going forward basis.[76] The Mobile Workforce bill that was reintroduced in the House does not address remote work.[77]

SALT Workarounds

There has been substantial attention paid to the SALT deduction limitation at both the federal and state levels. While negotiations continue regarding the possibility of SALT relief being included in the BBBA, states enacted legislation providing "workaround" relief to certain taxpayers. Following the release of IRS guidance in November 2020 approving state pass-through entity (PTE) tax workaround regimes,[78] states acted quickly to enact PTE tax workaround legislation. The guidance allowed states to impose an entity-level tax election, effectively allowing the PTE partner/shareholder (owner) a deduction for the PTE tax on the distributive share of the owner's income. Twenty-two states have enacted PTE tax workaround regimes using a variety of approaches. Significant complications remain due to a lack of uniformity between the methods adopted by different states and uncertainty regarding how these regimes apply to multistate PTEs. In addition, any changes made by Congress to the Federal SALT limitation could lead to additional changes in the state PTE workaround provisions.

[75] *New Hampshire v. Massachusetts*, Docket no. 220154, Order List, 594 U.S. (June 28, 2021).
[76] S. 1274, Remote and Mobile Worker Relief Act of 2021, Introduced by Sen. Thune on April 21, 2021.
[77] H.R. 429, Mobile Workforce State Income Tax Simplification Act, 2021.
[78] IRS Notice 2020-75, November 9, 2020.

Appendix A - Comparison of President's Budget to House Bills

	Current law	President's Budget	Ways and Means Bill	House Bill
Corporate rate (Federal)	21%	28%	26.5%	Retain current rate
Individual Tax Rate/SALT	37%; SALT cap at $10,000	39.6%, no change in SALT	39.6%; cap 199A deduction; no change in SALT	Retain current rate; no 199A cap; increase in SALT
CG Rate	20%	39.6% (above $1 million)	25% (above roughly $500,000)	Retain current rate
Book minimum tax	None (Corp. AMT repealed in 2017)	15% on large corporations ($2 billion)	None	15% on large corporations ($1 billion)
Estate tax/gains at death	$11,700,000 exclusion amount	Impose tax on gains at death & gifts.	Reduced to about $6,000,000; grantor trust changes	Retain current thresholds; grantor trust provisions dropped
Treatment of excess business losses	Limit on EBLs under TCJA sunsets after 2025; treated as NOLs	Make permanent.	Make permanent and require retesting each year.	Same as W&M bill.
AGI Surtax on High Income	None	None	3% on MAGI above $5 million (Trusts $100,000)	5% on MAGI above $10 million; extra 3% above $25 million (Trusts $200,000/ $500,000)
3.8% NIIT	Does not apply to certain active business income	Expands to apply to active business income	Same	Same

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Appendix B – Comparison of House Bills to OECD Pillar Two

	Current law	Ways and Means Bill	House Bill	OECD/Pillar Two
Corporate rate (Federal +state)[79]	25.8% (Federal rate 21%)	30.9% (Federal rate 26.5%)	25.8% (Federal rate 21%)	23.5% (26.3% weighted)
Global Minimum Tax Rate	10.5% (13.125% with FTC Haircut)	16.56% (17.4% with FTC Haircut)	15% (15.8% with FTC Haircut)	15% top-up tax on adjusted financial statement income; deferred taxes for timing differences.
Substance-based carveout	10% return on physical assets (QBAI)	5% return on physical assets (remains at 10% in territories)	5% return on physical assets (remains at 10% in territories)	8% (phasing down to 5% after 10 years) of physical assets and 10% of payroll (phasing down to 5% over 10 years)
FTC Haircut	Only 80% of FTCs are creditable	95% of FTCs are creditable (100% in territories)	95% of FTCs are creditable (100% in territories)	100% of foreign taxes reduce top-up tax
Country-by-country	No	Yes	Yes	Yes
Treatment of losses; expense allocation	No loss carryforwards; expense allocation	Allows future tested losses (post-2021) to be carried forward; removes expense allocation (but 163(n))	Allows future tested losses (post- 2022) to be carried forward; removes expense allocation (but 163(n))	Allows all losses to be carried forward; no expense allocation required
Effective Date	N/A	Tax years beginning after 12/31/2021	Tax years beginning after 12/31/2022	Intent to bring into law in 2022, to be effective in 2023 (except UTPR in 2024)

[79] Assumes average state rate of 6% and deduction at Federal level. For these purposes, the OECD includes state corporate tax rates.

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Appendix C - Potential Paths Forward on Pillar One to Avoid the Treaty Process

While the Administration has not firmly committed to a particular path forward, several possibilities that do not involve the treaty process have been suggested by Treasury officials and other commentators. These include the following:

A *congressional-executive agreement* (such as certain trade agreements passed under fast-track authority) would rely primarily on implementing legislation enacted by Congress. It is not clear whether a congressional-executive agreement would be eligible to advance through the reconciliation process. Other congressional-executive agreements that have been affirmed by Congress through simple majority votes have generally relied on fast-track processes put in place legislatively – such as Trade Promotion Authority (the mechanism used to pass implementing legislation for the U.S.-Mexico-Canada Agreement on a majority vote). Notably, a hallmark of a congressional-executive agreement is that Congress sets forth negotiating objectives designed to guide the Administration's engagement culminating in the agreement, which is a condition that is not yet present in this instance.

Legislation to override existing treaties, which would rely on the later-in-time rule. Whether such legislation could be accomplished through reconciliation is unclear. Treaties are outside of the Finance Committee's jurisdiction, so reconciliation instructions for an explicit treaty override would need to involve the Foreign Relations Committee, and it is unclear whether such an instruction would comply with the Byrd rule. Moreover, regardless of the legislative process, explicit treaty overrides of this magnitude may face resistance from Foreign Relations Committee members reluctant to cede their committee's jurisdiction.

Inter-governmental agreements (IGAs), which would not require Congressional ratification or legislation. Whether such agreements could be used to fully implement key parts of Pillar One is unclear. IGAs are entered into by Treasury, typically to carry out the intent of legislation as enacted by Congress. For example, IGAs have implemented information exchange pursuant to the Foreign Account Tax Compliance Act (FATCA). However, they have not been used to make substantive law changes regarding actual imposition of taxes or surrender of taxing rights. Accordingly, use of IGAs to implement a multilateral agreement such as this one would be significant expansion both in substance (due to the actual policy changes) and in process (because Congress has not set forth a policy to be implemented through the IGAs). Additionally, there is an outstanding question of whether or how taxpayers could invoke IGAs to address disputes between countries on their tax liability – the governments would be bound by the IGA, but it's not clear whether taxpayers would be able to enforce their rights if the two countries do not agree.

Legislation authorizing Treasury to enter into the agreement, either the multilateral agreement (via a congressional-executive agreement, as discussed above) or individual bilateral agreements (more akin to the FATCA agreements as discussed above). See also, section 274(h)(6), which Treasury has used to enter into tax information exchange agreements.

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