



Fall 2022
Congressional
Outlook

Dykema

Fall Congressional Outlook 2022

Congress now stands in recess through the midterm elections. Lawmakers will return on November 14 for the lame-duck session that will provide the last opportunity for Congress to enact legislation before the new 118th Congress begins in January. In anticipation of this year-end legislative push, the Dykema Government Policy Team shares details of issue areas Congress is expected to address following the midterm elections.



What's in store for the Lame Duck Session?

Fiscal Year 2023 Appropriations

While final appropriations bills for Fiscal Year (FY) 2023 are still being negotiated, Congress was able to avert a federal government shutdown and pass a Continuing Resolution to maintain current funding until December 16. The temporary funding measure also included additional funds for the Ukrainian War and relief for victims of New Mexico wildfires, as well as as Federal Drug Administration user fee authorizations. Congress is expected to use the time between now and December 16 to reach a compromise on funding levels for the FY 2023 spending package. Supplemental appropriations to respond to the destruction caused by Hurricane Ian will also be a significant part of year-end spending negotiations. Leaders from both parties have expressed the urgency to approve appropriations legislation by the end of the year. The fact that both Senate Appropriations Chairman Leahy (D-VT) and Ranking Member Shelby (R-AL) are set to retire at the end of this Congress could help both parties reach a compromise. The FY 2023 appropriations bills include many of these Senators' priorities and legacy items that would be jeopardized if work on the spending bills is not completed by the end of the calendar year. Should Congress be unable to reach an agreement before the end of the year, they would be forced to start the FY 2023 appropriations process over in the new Congress.

Tax

In the tight timeframe of the lame-duck period, members will be hoping to finish multiple pieces of tax legislation. Tax writers from both parties are working to reach an agreement on retirement savings security enhancements that have advanced in both chambers. Additionally, it is possible a deal could come together on a Republican priority to extend research and development (R&D) tax credits with Democratic efforts to renew the expired child tax credits. Optimism is also growing that Congress may address diminished Social Security payments to public employees by overturning a windfall elimination provision impacting those with government pensions.

Trade

Despite inaction by Congress on trade issues throughout the last two years, lawmakers in both chambers are hopeful they can address the expired Generalized System of Preferences (GSP) and Miscellaneous Tariff Bill (MTB) during the lame-duck period. The GSP, which expired at the end of 2020, eliminates duties on thousands of products imported to the U.S. from developing countries. MTB, which also expired at the end of 2020, suspends duties on more than 3,000 imported products that cannot be sourced in the U.S.

These measures were initially included in early versions of the Senate CHIPS Act but were left out of the final bill. Additionally, House Democrats may renew efforts to approve a reauthorization and modernization of the Trade Adjustment Assistance (TAA) program. Similar to the GSP and MTB, it was included in previous House-passed legislation but left out of the final version of the CHIPS Act. A trade package comprising a combination of these issues and provisions aimed at eliminating products manufactured with forced labor from U.S. supply chains are all candidates for a year-end trade package.

Energy Project Permitting

Senator Joe Manchin (D-WV) and other members of Congress view energy permitting legislation as vital to carrying out many of the Inflation Reduction Act's provisions, particularly concerning domestic critical minerals development to support electrification goals. However, the intent of energy project permitting legislation is also to speed the approval of oil and gas pipelines, as well as electric transmission lines necessary to connect renewable energy projects to the grid. The goal was to attach permitting legislation to the Continuing Resolution Congress passed on September 30, but objections from members on



both sides of the aisle prevented it from moving forward last month. Stakeholders are expected to continue negotiations during the fall, with the lame duck session considered make or break for whether it ultimately becomes law this year.

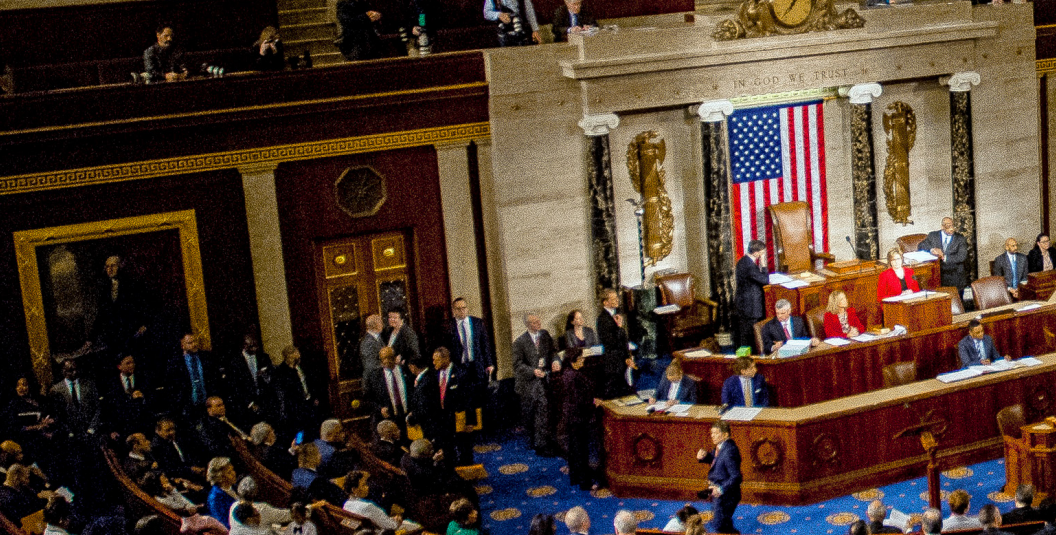
Defense Authorization

Before the 117th Congress concludes, legislators must pass the National Defense Authorization Act (NDAA). For the last 61 years, Congress has consistently approved the NDAA to set yearly defense funding levels and designate the authorities responsible for U.S. military and other critical defense priorities. In recent years, the NDAA has attracted efforts to regulate per- and polyfluoroalkyl substances (PFAS) contamination because of its prevalence at defense installations. The House's version that will need to be reconciled with the Senate's includes several provisions that also address EPA's regulation of PFAS, in addition to requirements targeted at the Defense Department to mitigate the impacts of the substances in the environment and on human health.

The House's bill would require EPA to quickly publish water quality criteria and set industrial discharge limits for certain industrial users of PFAS, as well as clarify the scope of PFAS data reporting to the EPA. As a "must pass" for Congress this year, expect Members to attempt to attach additional legislation to the NDAA before final passage, such as Senator Manchin's energy permitting bill that was pulled from the recent Continuing Resolution and legislation targeting outbound Chinese investments. While the Senate is expected to begin debate on their version of the NDAA in October, final passage will not occur until after the election.

WRDA

Congress is expected to approve a Water Resources Development Act (WRDA) during the lame duck session. This year's WRDA bill strictly addresses Army Corps of Engineers programs and projects, whereas in years passed, it had also focused on water infrastructure programs led by the Environmental Protection Agency (EPA). The focus on Army Corps projects is a result of last year's infrastructure bill reauthorizing and funding water programs at EPA.



SAFE Banking Act

In the early portion of the 117th Congress, the Secure and Fair Enforcement (SAFE) Banking Act of 2021 was reintroduced. The legislation would allow banks, credit unions, and other financial institutions to offer banking services to legally-operating cannabis businesses and has received bipartisan and bicameral support. The House has passed the legislation multiple times, most recently this past July, and supporters of the bill are calling for passage in the Senate before the next Congress. The biggest challenge to getting the bill over the finish to this point has been opposition from supporters of decriminalization of marijuana, who recognize their best opportunity is to link decriminalization with the SAFE Banking Act. Since SAFE Banking enjoys considerable more support in Congress, if proponents of that legislation are able to de-link the two issues, the SAFE Banking Act may finally make it across the finish line.

Respect for Marriage Act

The majority opinion issued by the U.S. Supreme Court in their decision overturning *Roe v. Wade* this summer has led Democratic members of Congress to call for legislation to codify the right to same-sex and interracial marriage. The House approved the Respect for Marriage Act with strong bipartisan support in July, but the Senate did not act on the measure prior to adjourning for the fall. When they return, the measure will require the support of at least 10 Republican Senators in order to



overcome an expected Senate filibuster. Senate authors of the legislation have continued to press their colleagues to support the measure, and with reduced political risks for Republican Senators after the midterms, the measure has a high probability of passing before the end of the year.

Electoral Reform

In light of the events of January 6, 2021, and ongoing accusations of election fraud by supporters of President Trump, legislation aimed at clarifying the role of the Vice President and raising the threshold for challenging a state's popular vote and Presidential electors has been introduced in the House and Senate. The House passed its version of the legislation in September. The Senate Rules Committee approved its version of the legislation just before they adjourned by a decisive bipartisan vote of 14 to 1, including the support of Senate Minority Leader Mitch McConnell (R-KY), who is a member of the Committee. With Senator McConnell's public support of the legislation, most anticipate a final package will ultimately be approved following the November elections.

Tech Policy Issues

While key members and committees have been pushing legislation to regulate tech companies and protect consumer rights, Congress faces significant challenges in passing legislation to address these issues before the end of the year. If Republicans were to take over the House after the midterm election, they might oppose any legislation

advancing before the year's end. Instead, they would prefer to use their new majority to craft legislation that would reflect their priorities and exercise greater authority over how federal funds could be spent to regulate big tech companies.

Regarding data privacy, House Speaker Nancy Pelosi (D-CA) has expressed concern that current House data privacy legislation would pre-empt state laws, including a stricter standard already in place in her home state of California. In the Senate, Senator Maria Cantwell (D-WA), who chairs the Senate Commerce Committee, which has jurisdiction over data privacy issues, has indicated her opposition to the measures introduced in the House and Senate. With the long list of items on the agenda for the lame duck, there simply may not be enough time to resolve the wide range of different views regarding these complex issues.

Looking Ahead to the 118th Congress

Farm Bill

Among the items Congress must address during the new 118th Congress will be the Farm Bill. Passed roughly every five years, the Farm Bill is the package of legislation directly impacting significant aspects of agriculture, farming commodities, and land conservation. The first White House Conference on Hunger, Nutrition, and Health in more than 50 years, held last month, has helped to raise the profile of a wide range of food insecurity and nutrition issues. Many proposals from the Conference are expected to be included as part of the farm bill, along with the more traditional agriculture policies. The current program expires at the end of 2023, so no matter which party controls the next Congress, they will need to pass a new farm bill.

Debt Ceiling

By the third quarter of 2023, Congress will face the need to address the debt ceiling in order for the U.S. to avoid default by the federal government. Should Republicans take back the majority in the next Congress, the debt limit could pose a significant challenge. Historically, the minority party has put the burden of lifting the debt limit on the party in power. Many Republicans have regularly voted against raising the debt limit in the past and would be forced to reverse themselves in 2023. Republicans would likely also demand significant spending cuts in exchange for an increased debt limit. President Biden would unlikely sign a measure that guts the spending for his agenda and past legislative success. All of this will set the stage for a standoff over spending, entitlements, and budget priorities between Democrats and Republicans just as the 2024 Presidential campaign starts to heat up.

Tax

Following any tax developments possibly secured during the 2022 lame-duck session, members of the 118th Congress will continue to act on many unresolved tax-related items. If no agreement is reached in lame-duck, we expect R&D and the child tax credit to continue to take center stage, along with revisions to the 2017 tax reform bill.

If Republicans Take Over Congress

Oversight of Biden Administration

If history serves, Republicans are likely to gain seats in one or both chambers of Congress. In the event of GOP control of the House and/or Senate, Republicans have forecasted there will be investigations into the operations and management of the Biden Administration. Republicans will use their oversight authority to review the Biden Administration's handling of the COVID-19 pandemic, investments in clean energy, environmental, social, and governance (ESG) reporting, the withdrawal

of troops from Afghanistan, and much more. Furthermore, Republican leadership has announced plans for a committee investigating U.S. trade relations with China.

Focus on Spending Cuts

Republican control will mean an immediate focus on government spending. GOP lawmakers have spent the 117th Congress challenging the massive spending packages of the Biden Administration. As showcased in the House Republican’s “Commitment to America” document, the GOP will focus on inflation reduction policy and decreasing federal spending. Their “Commitment to America” package was released last month, which is a list of policies they have pledged to pursue if they win a majority.

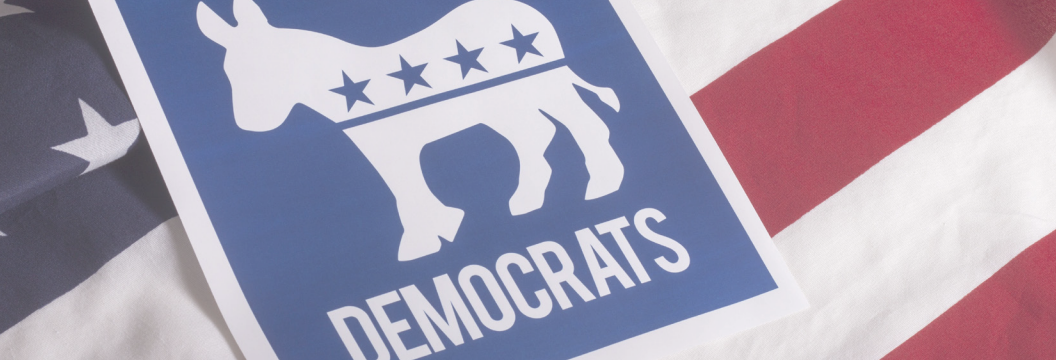
Tax Permanency of TCJA

The Tax Cuts and Jobs Act (TCJA) of 2017 was one of the signature pieces of legislation created by the Trump Administration during Republican control of Congress and is consistently considered a legislative success by the party. The TCJA holds a number of tax provisions and expenses that expire over the course of the decade. In the event of Congressional control, GOP lawmakers will use the opportunity to attempt to make the various provisions permanent and make fixes and corrections to improve the law.

If Democrats Retain Control of Congress

Advancing the Biden Agenda

As Democrats have appeared to gain some momentum in recent months, there is a possibility to buck historical trends and retain control. If Democrats remain in control of Congress following the midterm elections, they will continue their efforts to advance President Biden’s agenda. This will include a renewed effort to advance legislative priorities that were included in original Build Back Better proposals but have since expired or were left out of legislation that ultimately became law during the 117th Congress. This would consist of policies like the



renewal of the Child Tax Credit that was included in the American Rescue Plan but expired at the end of 2021 and enhanced family and medical leave for private sector workers that was proposed but eventually excluded from the final legislation.

Reproductive Rights

The Supreme Court's decision in the Dobbs case to overturn Roe v. Wade has made the protection of reproductive rights a top priority of Democrats. If Democrats retain their Congressional majority, it should be expected they will again attempt to codify women's reproductive rights, including access to contraception and protection of abortion rights. Democrats have further pledged support for a policy to expand health care options for pregnant women.

Additional Gun Control Legislation

Lawmakers passed the first significant gun safety legislation in 30 years during the 117th session of Congress, and if Democrats retain control, they will continue gun control efforts. The party is committed to addressing gun violence and will push for additional policies such as expanding background checks and banning assault weapons.

Contact for more information



James Brandell, Ph.D.
Government Policy Advisor
(202) 906-8633
jbrandell@dykema.com



Andrew Buczek
Government Policy Advisor
(202) 906-8655
abuczek@dykema.com



Mary Beth McGowan
Government Policy Advisor
(202) 906-8631
mmcgowan@dykema.com



Peter Butkovich
Legislative Specialist
(202) 906-8616
pbutkovich@dykema.com



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