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US Policy Preview 2022

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Federal Overview

Any analysis of legislation, rulemaking, and policies that may be pursued in 2022 must take into account what occurred – and what did not occur – in 2021, as well as the political dynamics in Congress and how the prospects of the 2022 mid-term elections will shape the positions of both parties in Congress as well as the priorities for President Biden. Moreover, no preview of 2022 can ignore how the COVID-19 pandemic has changed the legislative agenda for both parties and will continue to shape policy objectives for Congress, the Administration, and all stakeholders.

The duration and continuing intensity of the COVID-19 pandemic will be the predominant determinant of the economy's prospects in 2022 and likely drive the mood of the voters when they go to the polls in November. Historically, the opposition party picks up seats in mid-term elections, particularly if the incumbent President's approval ratings are low. If the COVID-19 pandemic and high inflation both are brought under control, or at least significantly improved in the coming months, it will be good news for the Democrats, but it may still not be enough to stave off a shift in control of the House to Republicans in line with historical indicators. If the pandemic persists or worsens and inflation remains palpable to voters, control of the House will very likely shift to Republicans, and control of the Senate could also flip.

The enactment of the bipartisan Infrastructure Investment and Jobs Act was not followed by enactment of President Biden's other signature objective – the Build Back Better plan (BBB), also referred to as "human infrastructure," which focuses on climate change and expanding the social safety net. With a 50-50 Senate and a narrow Democratic majority in the House, Democrats chose to use the reconciliation process to move BBB without any Republican support, recognizing that Republicans would not support the ambitious BBB. To the consternation of progressive Democrats and as

many of them had predicted and feared, whatever momentum BBB may have had while married to the infrastructure bill dissipated soon after the infrastructure bill moved ahead on its own, and Senators Joe Manchin (D-WV) and Kirsten Sinema (D-AZ) objected to the BBB funding levels and certain provisions. Their objections remained, even after the President and Democratic leaders reportedly agreed to reduce the cost to about \$1.5 trillion. The Senate Parliamentarian also rejected three proposals for immigration reform included in the House-passed BBB bill, a predictable yet bitter disappointment to many Democrats.

As 2021 came to a close, Democrats' hopes for passing a BBB bill in early 2022 were dashed by Senator Manchin's statement that he would not support the BBB bill, and as of the writing of this preview, no alternatives have been floated by Democratic leaders or the Biden White House. Given the Democrats' need for achievements beyond simply the bipartisan infrastructure bill (and the American Rescue Plan early in 2021) on which to campaign this fall, it remains possible, and likely politically necessary, that — with President Biden's encouragement — Congressional Democrats will consider taking several key components of the BBB bill where there is support of all 50 Senate Democrats and attempt to move these components through reconciliation, which may be done only once without a new budget resolution. These elements could include clean energy, childcare support, universal preschool, expanded health insurance coverage and lowered costs for a limited number of prescription drugs. Should they manage to do so, the question then will become whether House progressive Democrats will swallow their disappointment and vote for the smaller Senate bill or simply refuse to vote for the bill. While some form of a bill is better for Democrats than no BBB bill at all, a radically reduced BBB bill could discourage the Democratic base from going to the polls.

In addition to the difficult political math for Democrats seeking to pass a BBB bill, efforts to end or revise the filibuster rule in the Senate – a change that can be accomplished with 50 votes (with the Vice President breaking the tie) – are stalled as both Senators Manchin and Sinema voted against a move by Senate Majority Leader Schumer to remove the filibuster on a one-time basis in order to pass the voting rights bill.

The parties are polarized and have been for many years. That said, the votes of many Republicans not to certify the 2020 election results, and the January 6, 2021 attack on the Capitol to prevent the certification by violence have only exacerbated the mistrust between the two parties, creating a poisonous atmosphere unlike any that most Members of Congress have experienced, one that is said to have contributed to several retirement decisions.

The 2022 mid-term elections loom large over Congress and the White House. History indicates that the party of a newly elected President will lose seats in the House in the next mid-term election. Other factors that would support such an outcome are rising inflation, the President's low poll numbers, and a number of Member retirements in competitive districts. A decision by the Supreme Court expected by the end of June to overturn *Roe v. Wade* presents a wild card that could upset the expectation that the House will flip to the Republicans, although it is not clear how much such a decision would drive Democratic turnout in November or how many voters, whether pro-choice or pro-life, will be one-issue voters in the fall.

While control of the Senate is hard to predict at this time, no one expects either party to come close to having 60 votes in the Senate. And yet there are key Senate races that could change control, or at least change the composition, of the Senate, such as in Wisconsin, Pennsylvania, and Georgia. The question for the House is simply one of control. For House Republicans, their default position since the inauguration of President Biden to oppose Democratic legislative initiatives will continue and likely harden. As a general matter, many Senate Republicans will also be less likely to join a House-passed bill this year in expectation that a more palatable bill will emerge from a GOP House in 2023.

Do these circumstances translate into nothing being accomplished in 2022?

The short answer is no, although it is quite likely that the second session of the 117th Congress will face many challenges, including a short calendar before the elections intrude. However, even if no major bill gets to the President's desk before the midterm elections, the Biden Administration is poised to promulgate rules, institute programs, and dole out the funds authorized in the infrastructure law; actions the White House, departments, and agencies will vigorously pursue to promote the President's goals on sustainability, resilience, and equity. This policy preview addresses many of these key policy areas.

This preview highlights legislation that may move even under the challenging circumstances outlined above, and also identifies legislative matters not likely to move in this Congress. Many of these bills will be "messaging" bills offered for political purposes with little or no chance of passage by either body, let alone enactment into law, even if they are voted out of committee. Nonetheless, a challenging political and policy landscape in 2022 does not make engagement in the legislative process meaningless, as there will be several "must pass" legislative vehicles that could include essential initiatives that would not be able to pass

in 2022 as stand-alone bills. Further, engagement in the legislative process in 2022, even as it relates to “messaging” bills,” will position stakeholders to begin to shape the legislative and policy landscape under a new Congress in 2023.

As such, it will be imperative that preparation be done this year for a robust agenda in the 118th Congress. The fact that a matter is not likely to get through the House and Senate in 2022 should not be taken as a sign that engagement and advocacy are not worthwhile and can be shelved until next year. Most legislative reforms take more than a year or two in political gestation, as gaining bipartisan support as well as support of the leadership takes time in hearings, markups, negotiations, and compromises. 2022 is likely to be the very time to introduce a legislative concept and build support for passage in 2023.

What is likely to move this year?

- **FY 2022 appropriations.** Funding of the Federal government for FY 2022 is through a Continuing Resolution (CR) that expires on February 18, 2022. While the House passed a package of seven appropriations bills in late July 2021, none of the 12 appropriations bills has passed in the Senate. There is significant impetus for the House and Senate to pass several appropriations bills to enable the National Defense Authorization Act (NDAA)-authorized Department of Defense, Department of Energy, and other related programs to be funded, to fund the programs authorized in the Infrastructure Investment and Jobs Act, and to fund improvements to the security of the Capitol. Expect a short-term CR to allow enough time to pass several appropriations bills in early spring along with a CR funding other departments and agencies, a so-called “cromnibus” bill (CR + omnibus appropriations).
- **FY 2023 appropriations.** As FY 2023 begins October 1, 2022, the appropriations committees will need to begin work on these bills before FY 2022 issues are resolved. Recent history suggests that Congress may opt for a CR before recessing this fall to return to their home states and campaign.
- **Build Back Better.** Although 50 Senate Democrats failed to agree on a BBB bill last year, and no smaller package in cost or scope has yet to be offered, much less agreed to, reconciliation is the only real opportunity this year for Democrats to deliver several highly popular programs without needing Republican votes. It would be a colossal political failure if the Democrats are unable to exploit reconciliation to achieve some of their major policy goals. So, we expect a few significant items eventually to coalesce into a smaller BBB package that will get through the Senate and manage to be accepted by the House.
- **Further COVID pandemic relief.** While the scope and amount of such relief has not yet taken shape, restaurants and other live venues are already seeking relief. The Biden White House reportedly has been skeptical about, and resisting additional relief for restaurants. However, Speaker Nancy Pelosi (D-CA) has made clear that she is supportive of an additional COVID-19 relief package being included in an appropriations bill.




- **National Defense Authorization Act.** The NDAA is Congress' nearly \$800 billion annual defense policy bill. This must-pass annual legislation has been enacted each year for 61 years. Although inter-party and intra-party (Democratic) disputes over the topline defense spending level will once again drive debate on Capitol Hill this year, we have every expectation that the NDAA will be enacted in 2022 for the 62nd consecutive year.
- **Counter-China and supply chain legislation.** A strong bipartisan vote in favor of Senator Schumer's United State Innovation and Competition Act (USICA) last year suggests this legislation could be enacted, especially in light of recent warnings by the US Department of Commerce about the prospect of prolonged semiconductor shortages without Congressional action. The House counterpart bills varied enough from the Senate-passed bill that there was no movement toward a compromise last year. During this time, USICA took a back seat to the infrastructure and BBB bills. It will not face that competition in 2022, and if there is one subject that unites the House and Senate, Democrats and Republicans, it is their concerns

about China as the leading geopolitical and economic competitor to the United States. Speaker Pelosi delivered on her pledge to introduce a counterpart bill in the House, entitled the America COMPETES Act, a bill that may pass the House as early as the first week in February. The many significant differences between the Senate and House bills present a challenge to the House-Senate conference to reach agreement on a bill to will present to President Biden, notwithstanding broad agreement between the parties on the key objectives of this legislation.

- **A Supreme Court Justice Confirmation.** 2022 will also feature a Supreme Court confirmation proceeding in light of the January 26 announcement of Justice Stephen Breyer's intention to retire after the current Supreme Court term. The President is expected to honor his pledge to nominate a woman of color who is likely to be a sitting judge, before the Supreme Court term concludes, so that the Senate Judiciary Committee can hold hearings this summer. Expect Majority Leader Schumer to move to a confirmation vote for the President's nominee before the Supreme Court begins its next term the first Monday in October. Even with the Senate needing only 50 Democratic votes to confirm a new Justice, this schedule is far from certain. What is certain is that the upcoming Breyer vacancy will increase the public's interest in the Court and be used by both parties on the campaign trail.
- **Water Resources Development Act (WRDA).** Congress, over the last decade, has a strong record of reauthorizing WRDA, which authorizes important investments in water projects across the country. The Senate Environment and Public Works Committee and the House Transportation and Infrastructure Committee have already begun work on reauthorizing WRDA.



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- **Sanctions.** As the crisis on the Ukrainian border escalates, with many close observers of the belief that Russian President Vladimir Putin is intent on further incursion into Ukraine in the wake of the 2014 Crimea invasion, Congress could well respond to Putin's malign extraterritorial activities by passing Russia sanctions legislation. On January 12, 2022, with the support of the White House, Senate Foreign Relations Committee Chairman Bob Menendez (D-NJ), along with 38 other Senate Democrats, including Senate Majority Leader Chuck Schumer (D-NY), introduced the Defending Ukraine Sovereignty Act of 2022. This bill would seek to impose sweeping Russia-related sanctions, including banking sector and extractive industries sanctions, in the event of a Russian invasion of Ukraine. Senate Democrats are eager to bring the bill to the floor for a vote, and despite stated opposition from some Senate Republicans, Senate passage of the bill could take place in February 2022. While the fate of the bill in the House were it to pass the Senate is unclear, we anticipate that Congress will coalesce around some form of sweeping Russia-sanctions package if Russia were to invade Ukraine.

What legislation may move but fall short?

- **Section 230 of the Communications Decency Act of 1996.** There is bipartisan support for reforming Section 230. However, the parties largely differ on the remedies. Democrats want internet platforms to increase content moderation to eradicate hate, incitement to violence, and disinformation. Republicans want to address content moderation they believe stifles conservative speech. They may unite to carve out certain subjects from section 230 immunity with a focus on protecting children and their use of the internet.

- **Technology platform regulation: antitrust and competition.** The House Judiciary Committee passed six bipartisan bills last June to great fanfare, and yet none of these bills has been brought to the House floor. The Senate has moved companion bills to only two of the House bills and is likely to mark up one or more of the bills in the coming months. While there is bipartisan support to rein in market dominant internet platforms, Senate and House leadership has been largely quiet about how to accomplish this objective, suggesting that Silicon Valley still has some clout in Washington, notwithstanding the harsh criticism of many of these companies in House and Senate hearings last year.
- **Automated vehicles.** 2017 was the last time the House and Senate pushed for an automated vehicles bill. The House passed a bill by voice vote, and the Senate bill cleared the Commerce Committee on a voice vote. Yet, apart from the fact that neither bill addressed trucks, issues of preemption, arbitration, and labor stalled progress. While many believe that the National Highway Traffic Safety Administration (NHTSA) has not yet taken actions to obviate legislation, the lack of movement on Capitol Hill means that progress will be up to the Department of Transportation (DOT).
- **Housing.** Through vigorous advocacy led by Financial Services Chairwoman Maxine Waters (D-CA), about \$150 billion in new money for housing was authorized and included in the House-passed BBB bill. Should a BBB bill not become law or be radically reduced in cost and scope, it is unclear how much of this money, if any, will be authorized and appropriated. Without a reconciliation option, major housing legislation will not move in this Congress.

What is not likely to move?

- **Immigration.** The difficulty in passing any immigration reform led to strenuous efforts by Democrats to include immigration provisions in BBB. These efforts failed, thereby not moving any Democratic bill to the Senate. Many observers believe there is a deal to be made: dreamers for Democrats and border security for Republicans, but no such deal has been developed. The parties are probably closer together with respect to nonimmigrant visas, but Congress may defer to the Biden Administration as it may follow the Trump Administration's path in DHS. Labor, and State Department rulemakings.
- **Privacy.** Republicans and Democrats both want to protect the privacy of consumers. Businesses want a federal privacy law to supersede the growing patchwork of state privacy laws, with California, Colorado, and Virginia laws on the books and several additional states expected to enact privacy laws this year. But preemption and a private right of action remain sticking points. If any federal privacy bill moves in 2022, it could be an effort to revise the Children's Online Privacy Protection Act (COPPA) to raise the age of protection to include teenagers.

Cannabis

In 2021, New York, Virginia, New Mexico and Connecticut joined fourteen other states, the District of Columbia and Guam, as jurisdictions where recreational cannabis is legal. This means that more than 145 million Americans now live in a state that has legalized cannabis. Combine this with surveys showing that a majority of Americans, both Democrat and Republican, support legalization, and you would expect action at the federal level where distribution of cannabis remains illegal. While the state trend toward legalization will continue in 2022, most efforts to support the industry at the federal level have stalled and prospects for movement of anything but narrowly tailored legislation, appear remote.

Last year dozens of cannabis-related bills were introduced in Congress, including the Marijuana Opportunity Reinvestment and Expungement (MORE) Act (H.R. 3617) authored by House Judiciary Committee Chair, Jerry Nadler (D-NY), which passed the House in 2020. That being said, most cannabis-related bills introduced during this session address a specific issue or policy area, like SAFE banking, de-scheduling, decriminalization, social justice, veterans access or medical research, and found little traction unless attached to other legislation. The exception is the yet to be introduced Cannabis Administration and Opportunity Act (CAOA) led by Senate Finance Committee Chair Ron Wyden (D-OR), Senator Cory Booker (D-NJ) and Majority Leader Chuck Schumer (D-NY). Unfortunately, this latter effort has effectively stalled all other action with the three sponsors all stating their insistence that all issues be addressed at once, leaving prospects for passage of popular bills like SAFE banking without three Democratic votes which it needs for passage.

The Biden Administration has also disappointed cannabis advocates. On the campaign trail, then candidate Biden called for cannabis to be decriminalized and moved from Schedule I to II under the Controlled Substances Act – a small move that would not legalize cannabis but would

allow for more research to be done to understand the benefits and risks of the plant. Once in office, however, the Administration appeared to backtrack on its cannabis agenda when it fired dozens of staffers who admitted to prior marijuana use as part of their background check process. Even Vice President Kamala Harris, a former co-sponsor of cannabis legalization legislation in the Senate, told reporters that the cannabis agenda would have to wait as the Administration focused on more pressing issues like its COVID response.

Two recent Executive Branch actions are more positive: first, the President signed the bipartisan infrastructure bill in November that includes provisions aimed at allowing researchers to study the actual cannabis that consumers are purchasing from state-legal dispensaries instead of having to use only government-grown cannabis; and second, the President's FY 2022 budget also proposes continuing a spending provision to prevent the use of Justice Department funds to interfere in state medical cannabis programs -- the first time a President has called for this rider in his budget proposal.

As with other issues, the upcoming midterm elections pose a threat to the pro-cannabis agenda. As a controversial issue among Republicans in Congress, it is hard to see how legislation, unless targeted, could win the bipartisan support it needs to pass in the Senate. Signals by the authors of CAO that they will not support piecemeal legislation as a substitute for their larger bill, make passage of any new provisions very unlikely in 2022. This will increase pressure on the Administration to act unilaterally if it is to send a signal of support to the cannabis industry that creates more certainty.

Legislation to Watch

The SAFE Banking Act: Rep. Ed Perlmutter (D-CO) reintroduced the Secure and Fair Enforcement (SAFE) Banking Act (H.R.1996) to create a safe harbor for financial institutions to provide banking services to cannabis and cannabis-related



businesses in states that have legalized the drug. The bill also allows cannabis and cannabis-related businesses to access traditional banking services like lines of credit, loans and wealth management. The current version of the bill includes a handful of changes from previous versions, including: provisions that extend to the hemp industry, requirements that the Financial Crimes Enforcement Network (“FinCEN”) update its guidance for financial institutions seeking to provide services to cannabis and cannabis-related businesses, modified language that redefines the term “financial service” and clarification that a cannabis business does not need to reside in the same state to engage in legal business activity. The bipartisan House bill is co-led by Reps. Nydia Velázquez (D-NY), Steve Stivers (R-OH) and Warren Davidson (R-OH), has more than 150 co-sponsors and is supported by 33 different financial associations, credit unions, trade groups and nonprofits. Sens. Jeff Merkley (D-OR) and Steve Daines (R-MT) introduced the Senate companion bill (**S.910**), which has 40 co-sponsors: 29 Democrats, nine Republicans and

two Independents. After passing in the House as a standalone bill, the measure was most recently included as part of the House version of the National Defense Authorization Act (NDAA). The language was removed before final passage.

The CAO: Last July Majority Leader Schumer, Senate Finance Committee Chair Ron Wyden (D-OR) and Senator Booker introduced the Cannabis Administration and Opportunity Act (CAOA). Although only a draft, the legislation aims to decriminalize cannabis by removing the drug from the federal list of controlled substances. The bill also looks to resolve issues related to research, public safety, restorative justice and equity, taxation and regulation, public health and industry practices. The measure includes language that addresses impaired driving, establishes health and safety standards under the Food and Drug Administration (FDA) and regulates the industry’s practices through the Alcohol and Tobacco Tax and Trade Bureau (TTB) within the Department of the Treasury.

The MORE Act: On May 28, 2021, House Judiciary Chair Jerry Nadler (D-NY) introduced the Marijuana Opportunity Reinvestment and Expungement (MORE) Act (H.R. 3617). The MORE Act removes cannabis from the Controlled Substance Act (CSA), provides reinvestment opportunities for communities and individuals who have been adversely and disproportionately impacted by the war on drugs and expunges nonviolent, federal cannabis-related convictions. Additionally, the measure would impose a 5% tax on cannabis products and make Small Business Administration (SBA) loans and services available to entities that are legitimate cannabis businesses.

During the markup, members debated legalization, job creation, criminal justice reform, social equity grants, incarceration, drug usage rates and taxes. The Committee ultimately voted to advance the measure in a 26-15 vote, with two Republican members voting in favor, Reps. Matt Gaetz (R-FL) and Tom McClintock (R-CA).

The States Reform Act: Representative Nancy Mace (R-SC) released her cannabis reform bill, the States Reform Act in November. H.R. 5977 recognizes the authority of states to legalize cannabis and does not require any state to change or modify its laws to comply with her bill. The measure supports federal decriminalization and the release and expungement of any nonviolent,

cannabis-only conviction. The stated aim of the bill is to regulate cannabis like alcohol and requires the FDA, the U.S. Department of Agriculture (USDA) and the TTB, which would be renamed as the Alcohol, Tobacco and Cannabis Tax and Trade Bureau, to release guidelines for medical cannabis and policies for growers and producers. The bill would impose a 3% federal excise tax, which would fund law enforcement, small businesses and veteran mental health initiatives. Rep. Mace also included language to ensure veterans do not lose their VA health care benefits for cannabis usage. The legislation protects children and young adults by preventing nationwide advertisements, funding the Substance Abuse and Mental Health Services Administration and making the sale of cannabis to minors illegal; and helps medical cannabis patients by expanding the list of medical conditions to arthritis, cancer, sickle cell and HIV/AIDS. More specifically, for the medical cannabis practice, the bill contains language that ensures the safe harbor of state medical cannabis programs and patient access, allows for medical research and the development and production of medical cannabis products.

The legislation has four Republican co-sponsors, Reps. Tom McClintock (CA), Don Young (AK), Brian Mast (FL) and Peter Meijer (MI), and as of Jan. 4, 2022, has been referred to the House Agriculture Conservation and Forestry Subcommittee.



David C. Quam
Counsel, Washington DC
D +1 202 496 7220
david.quam@dentons.com

About the Author

- David provides clients with comprehensive and coordinated state and federal government relations solutions, strategy and advocacy to achieve their policy objectives.
- Prior to rejoining private practice, David served as a deputy executive director of the National Governors Association and acted as the organization's chief strategist, lobbyist and political advisor on federal and state policy issues.

Education

The most significant Biden education initiative is tied up in the Build Back Better package: federally funded universal pre-K. With Build Back Better now in limbo in the Senate, the focus for 2022 will turn more to regulatory actions that the Executive Branch can take without the passage of legislation by Congress. The Administration has announced a further pause in student loan repayments until May 1st. The lingering COVID pandemic and the rise of the Omicron variant has further exacerbated controversy at the elementary and secondary school level about whether students should be back in school in person or return to virtual settings.

In early January the Treasury Department released final regulations regarding the \$350 billion Coronavirus State and Local Fiscal Recovery Funds (SLFRF), a part of the \$1.9 trillion American Rescue Plan Act (ARPA). The SLFRF was designed to provide funds to state and local governments across the country to support their response to and recovery from the COVID-19 public health emergency. These funds are allocated at the state level and school districts have been and will continue to be recipients of a good portion of these funds. The new Treasury regulations expanded the uses for which the funds could be spent. In addition, the Biden Administration is also reviewing additional ways to be supportive of local school systems through providing more funding for COVID test kits and other tools for dealing with the ongoing pandemic challenges school are facing.

Dentons is closely tracking any developments and helping clients navigate ARPA and its subsections such as the SLFRF program.

In higher education, the Build Back Better proposal contained significant new dollars to fund university-based research facilities and billions of dollars in university research programs to address global warming and climate change. Those funds continue to be strongly supported by the higher education community. The Department of Education is working to unwind or revise numerous regulations promulgated during the Trump years on topics from Title IX program requirements to student debt forgiveness. Obama-era regulations impacting the for profit sector are also being revisited through the unique Department of Education rulemaking process known as Negotiated Rulemaking required by the Higher Education Act. The White House Office of Science and Technology Policy recently released its implementation plan for Presidential Memorandum 33. This memorandum directs federal agencies to “strengthen protection of research and development (R&D) funded by the federal government against interference and exploitation by foreign governments or other actors.” Both the Trump and Biden Administrations have put a high priority on combatting theft of American intellectual property and R&D by actors from China and other countries.

Fully funding the Infrastructure package adopted in 2021 is also a major priority for the education community, particularly funds for broadband expansion in rural areas.



C. Randall Nuckolls

Partner, Washington DC
D +1 202 496 7176
randy.nuckolls@dentons.com

About the Author

- Randy counsels clients on federal legislative, regulatory, and ethics issues and assists in planning their legislative strategy and providing input to Members of Congress and Congressional committees.
- Randy served for ten years in the United States Senate in senior staff positions, including six years as Chief Counsel and Legislative Director for Senator Sam Nunn.

Energy

President Joe Biden has identified climate change as one of the four historic crises facing the US. As such, the Biden administration is moving aggressively to eliminate CO2 emissions from the electricity sector by 2035, while incentivizing the electrification of other portions of the economy. Congress, in last year's bipartisan infrastructure bill, the Infrastructure Investment and Jobs Act (IIJA), provided a down payment on this transition with \$63 billion in supplemental funding for the Department of Energy (DOE). For the Biden administration, the enactment in 2022 of clean energy credits in the Build Back Better (BBB) Act will also be critical to advancing the President's climate change objectives. The Federal Energy Regulatory Commission (FERC), now with a full complement of five Commissioners, will also face a busy docket over the coming year with significant impacts on climate change. This activity is occurring during a period in which the cost of electricity and gasoline are increasing and, thereby, complicating efforts to implement aggressive climate change policies.

Build Back Better Act

After Progressives were unable to advance a Clean Electricity Standard last year, Democrats coalesced around long-term expansions and extensions of clean energy credits as the centerpiece of both the House-passed BBB bill and the current Senate Finance Committee's current clean energy tax title. While there is uncertainty what parts of the broader BBB bill might receive the support of all 50 Democrats, influential moderate Senator Joe Manchin (D-WV) has signaled that he could support the clean energy provisions in the package. With the production tax credit expired as of the end of 2021, and with the investment tax credit (ITC) set to phase out starting in 2023 (only for solar), pressure may grow on lawmakers to extend credits even if a narrower BBB bill does not pass.

Below is a summary of the key climate and clean energy provisions in the House and Senate versions of the BBB bill. In general, both the House and Senate clean tax provisions mirror one another but key differences are noted below.

Production Tax Credit (PTC)/Investment Tax Credit (ITC)

The BBB bill would extend the existing PTC and ITC for renewables for five years under the current regime. After the initial five years, the tax credits would be transitioned to a technology-neutral approach. This approach represents a compromise between House Ways and Means Committee Chairman Richard Neal (D-MA), who advocated for building upon the existing tax regime, and Senate Finance Committee Chairman Ron Wyden (D-OR), who advocated for streamlining current clean energy tax incentives to a technology-neutral approach.

For the PTC, the extension provides a base credit rate of 0.5 cents/kilowatt hour (kWh), and a bonus credit rate of 2.5 cents/kWh, provided that taxpayers meet prevailing wage and apprenticeship requirements.

The ITC base credit rate is 6 percent and there is a bonus credit rate of 30 percent. In addition, the ITC would be extended to include energy storage and new transmission projects.

Hydropower

In the Senate version of the BBB bill, the ITC is expanded to include “hydropower environmental improvement property,” relating to fish passage, water quality, and sediment.

Waste Energy Recovery and Combined Heat and Power (CHP)

The Senate version of the BBB bill reduces the ITC extension for waste energy recovery and combined heat and power property from ten years to three years.

Electric Vehicles (EVs) Tax Credit

The House-passed BBB bill provides a \$7,500 income credit for new EVs with the potential for an additional \$4,500 in value of the credit if the vehicle is manufactured in the US under an union-negotiated collective bargaining agreement. The credit will be lessened depending on the purchaser’s income. The bill restricts vehicles with retail prices above certain levels from qualifying for the credit. In addition, the bill creates a 30 percent tax credit for the purchase of new commercial EVs.

The Senate Finance Committee also includes this bonus \$4,500 credit despite opposition from Senator Manchin, along with Canada and the European Union. If a clean energy tax bill does proceed, changes are likely to this \$4,500 bonus credit for EVs.

Carbon Capture Tax Credit

The BBB bill would extend the Section 45Q tax credit for carbon capture until 2032. To qualify for the credit, the BBB bill sets new requirements. Carbon capture technology employed at power plants must capture at least 75 percent of the CO₂ emitted to qualify for the credit and such technology must capture at least 50 percent of the CO₂ emitted at industrial facilities.

Advanced Manufacturing Tax Credit

Under the BBB bill, Congress would provide an additional \$25 billion over 10 years for the Section 48C advanced manufacturing tax credit. The BBB bill sets aside portions of the funding for auto and energy communities. The credit is available to an advanced energy project which re-equips a manufacturing facility with equipment designed to reduce GHG emission by at least 20 percent.

Other Tax Credits

The BBB bill would establish new production tax credits for existing nuclear plants and hydrogen projects, along with providing tax incentives for energy efficiency and clean fuels.

Methane Fee

Under the BBB bill, excess methane emissions from oil and gas facilities would face a fee of \$900 per ton in 2023. The proposed charge would increase to \$1,200 in 2024 and then \$1,500 in 2025 and subsequent years. Given opposition by Senator Manchin, along with the oil and gas industry, the outlook for this fee is cloudy at best.

Implementation of the Infrastructure Investment and Jobs Act

The IIJA, with \$63 billion in supplemental DOE appropriations, made historic investments in the grid, transmission, cybersecurity, battery, hydrogen, hydropower, traditional renewable energy, nuclear, and carbon capture technologies. Over the coming year, the DOE will work to establish new programs and advancing transformational projects that can support the Biden Administration’s climate and clean energy objectives. This situation provides a notable opportunity for stakeholders to engage with DOE to outline their priorities and preferences for these programs and funding channels.

Federal Energy Regulatory Commission

Incentivizing new transmission is a top priority for Democratic FERC Chairman Richard Glick. Glick is aiming to finalize a final rule related to regional transmission planning, cost allocation and grid connections by the end of 2022. Aside from the rulemaking, FERC is expected to continue discussions through the Joint Federal-State Task Force on Electric Transmission, which attempts to better enable transmission planning, construction, and cost allocation given the diffuse federal and state authority over new transmissions lines.

In addition, FERC is expected to continue to grapple with the extent to which it should consider indirect GHG emissions in considering natural gas projects, such as pipelines or LNG facilities. Glick has consistently argued that FERC should determine the significance of a natural gas project's climate impacts, including both direct and indirect emissions, during the permitting process, while Republican FERC Commissioner James Danly has continued to question this main assumption that FERC may address GHG emissions under its Natural Gas Act authority.

Environmental

The Environmental Protection Agency (EPA) faces a busy 2022 as the Agency moves forward on promulgating major environmental rulemaking, along with implementing the bipartisan infrastructure bill, the Infrastructure Investment in Jobs Act (IIJA), and advancing the Biden Administration's climate change, water and environmental justice objectives. While the majority of the action will be at EPA, Congress may be active as well with the potential reauthorization of the Water Resources Development Act (WRDA).

Climate Change Regulations

The EPA is focused on developing a new Clean Air Act rule regarding CO₂ emissions from existing power plants (Section 111(d) Regulations). Although the Biden-led EPA is working to replace the Trump-era Affordable Clean Energy (ACE) Rule, it will not necessarily attempt to closely replicate the Obama-era Clean Power Plan (CPP), which took a "beyond the fence line" approach to CO₂ emissions allowing the electricity sector to comply by shifting generation to lower-emitting natural gas and renewables. EPA Administrator Michael Regan has directed the Agency to think more broadly about pollution and its effects in order to develop an electric industry strategy for emissions.

The reexamination of EPA's approach to Section 111(d) regulation is arguably due, in part, to concerns about whether a rule, similar to the Obama CPP, could withstand legal scrutiny given that the Supreme Court, in 2016, issued a stay of the Obama-era rule. Notably, this February the Supreme Court is scheduled to consider an appeal by several conservative states and industry stakeholders as to whether EPA maintains the authority under Section 111(d) to regulate CO₂ emissions from existing power plants. The Supreme Court's decision, expected by June, will have a significant effect on EPA's authority to issue updated CO₂ regulations. EPA is aiming to release a draft rule in July with the final rule in July 2023.

In addition to power plant regulations, EPA is scheduled to finalize regulations for methane emissions from existing oil and gas sources. Any final rule is likely to face legal challenges from conservative states and some industry stakeholders, though some oil and gas operators may support the final rule.

Clean Water

The IIJA provided a historic investment in improving our nation's water infrastructure, and EPA will play a critical role in implementing some of the programs

funded by last year's bipartisan infrastructure bill. Under the IIJA, EPA is planning to spend \$3 billion in 2022 (of \$15 billion in total funding) to begin removing lead from water pipelines, focusing initially on underserved communities. EPA is also revising the Trump-era lead and copper drinking rule, though the existing rule will remain in effect in the interim. In addition, the IIJA provided EPA with \$11.7 billion for other non-lead Drinking Water State Revolving Fund projects, \$4 billion to address emerging contaminants through the revolving fund and \$5 billion in grants to address emerging drinking water contaminants in disadvantaged communities.

Beyond the IIJA investments, EPA is likely to continue work on a "durable" solution to the scope of the Clean Water Act (CWA). The Biden-led EPA has stopped enforcement of the Trump-era Navigable Waters Protections Rule, which they argue too narrowly interpreted the scope of the Clean Water Act. In the interim, EPA has returned to a pre-2015 interpretation of what waters are subject to the CWA while they work this year on a new interpretation that can survive inevitable legal challenges.

Water Resources Development Act

The Water Resources Development Act (WRDA) is also a crucial piece of upcoming 2022 environmental legislation. A WRDA bill is traditionally passed every two years, with the last bill passing in 2020. The WRDA bill focuses on investments for, and programs related to ports, harbors, inland waterways, and resiliency.

Congressional activity has already begun on the 2022 WRDA with hearings of both the House Committee on Transportation, the Infrastructure Subcommittee on Water Resources and Environment and the Senate Environment and the Public Works Committee on January 12 with the US Army Corps testifying. In both hearings, it was clear that members, regardless of party, are worried about the condition and resiliency of a critical aging water infrastructure. The hearings also gave the US Army Corps the opportunity to outline the administration's priorities for the 2022 WRDA, including authorizations related to New Orleans' levees and floodwalls, coastal storm risk management projects, and navigation and flood risk projects, among many others.



Andrew Shaw

Partner, Washington DC
D +1 202 496 7116
andrew.shaw@dentons.com

About the Authors

- Andrew uses his knowledge and experience of Congress and the Executive Branch to provide clients with practical guidance on federal legislative and regulatory issues, including hydraulic fracturing, Clean Air Act (CAA) regulations, climate change mitigation and adaptation, clean/renewable energy standards, nuclear power, trade, transportation, tax and the Toxic Substances Control Act (TSCA).
- Previously Andrew worked for the US Environmental Protection Agency (EPA) and for Representative Dennis Moore (D-KS).



Lindsay Steves

Senior Public Policy Analyst,
Washington DC
D +1 202 496 7414
lindsay.steves@dentons.com

- Lindsay supports clients in achieving their policy objectives by engaging with federal agencies and congressional staff, conducting research and writing policy updates with an emphasis on energy, foreign affairs and defense issues.
- Previously Lindsay worked at the Bipartisan Policy Center where she analyzed legislation, led the appropriations work, conducted in-depth research and supported the publication of products on carbon management and innovation.

Financial Services

The financial services sector faces several significant questions this year that will drive legislation and policymaking.

- With consumer prices up 7% in December year over year, the highest rate in four decades, can the Federal Reserve (Fed) achieve a soft landing, taming inflation in 2022 without stalling economic growth and risking a recession?
- How quickly and how often will the Fed raise interest rates in 2022?
- With Sarah Bloom Raskin now nominated to play a key role at the Fed as the Vice Chairman of Supervision, will there be a new emphasis on the economic impact of climate change?
- Will President Biden's nominees for the Fed, the Federal Deposit Insurance Corporation (FDIC) and the Federal Housing Finance Agency (FHFA) reflect the demands of progressives for increased diversity among the financial regulators?
- Will the Federal government or the users of blockchain technology lead the development of cryptocurrency rules of the road? Will the Securities Exchange Commission (SEC) or the Commodity Futures Trading Commission (CFTC) be the lead federal regulator? How will this impact innovation and efficiency in the financial markets?
- Will cryptocurrency remain primarily a speculative investment asset or transition to more prominent use in consumer transactions?
- How should stablecoins be regulated? Are they a viable alternative, or do they pose a threat to the banking system?
- With FDIC Chair Jelena McWilliams' upcoming departure, will there be changes to the FDIC's bank merger approval process to limit bank consolidation?

The Federal Reserve's Pivot From Stoking the Economy to Fighting Inflation

Having been widely criticized for his assertions that inflation would be "transitory", in late November 2021 Congressional testimony, Fed Chairman Jay Powell abandoned the use of the term and decisively moved the Fed toward ending its bond buying program by the beginning of March 2022, setting the stage for at least three and as many as four interest rate increases in 2022. This policy shift also could cause the Fed soon after increasing interest rates to begin to shrink its balance sheet.

While many remain out of the job market because of COVID, a 3.9% unemployment rate in December 2021, down from a COVID-induced April 2020 peak unemployment rate of 14.8%, and a rate near to the statutory goal of maximum employment, provides the Fed with more freedom to act than it would in other circumstances.

In his January 11 testimony at his Senate Banking nomination hearing for another term as Fed Chairman, Powell said that inflation poses a severe threat to the job market and the overall economy. He warned that, if inflation is not brought under control in the near term, more aggressive policy responses would be required later, responses that could produce a recession. Conversely, moving too slowly runs the risk of even higher inflation.

The Fed's goal is to get inflation back down to the target of 2% annually while producing a broad recovery that does not adversely impact those least able to weather the effects of inflation. What makes the Fed's efforts even more challenging is that the Omicron variant's adverse impact on the economy is being experienced while much of the economic aid provided by the Congress to respond to the pandemic has been discontinued or exhausted.

Sarah Bloom Raskin's Nomination, if Confirmed, to be the Federal Reserve's Vice Chairman of Supervision Would Mean An Enhanced Emphasis on the Economic Impact of Climate Change

Sarah Bloom Raskin, a former Fed Governor, a one-time Deputy Treasury Secretary, and the spouse of Representative Jamie Raskin (D-MD), has been an aggressive proponent of having financial regulators do more to combat climate change. Ms. Raskin believes that financial regulators already have the authority to help mitigate climate risk and she has repeatedly argued that some of the Fed's market interventions have increased inequality at the expense of people with moderate and low income.

These views put Raskin somewhat at odds with Chairman Powell who has taken a narrower view of the Fed's authorities, arguing that it is not the Fed's role to combat climate change directly, but rather solely to make sure that financial firms are adequately protected from exposure to climate-related risks.

Raskin's candidacy to be the Fed's Vice Chair of Supervision has been strongly supported by House Financial Services Committee Chair Maxine Waters, Senate Banking Committee Chairman Sherrod Brown, Senator Elizabeth Warren, and many progressives, all of whom see Raskin as providing a counterweight to Chairman Powell's more moderate views. When pressed by Senator Warren at a recent hearing, Chairman Powell made clear that he believed it is the statutory role of the Fed Vice Chairman of Supervision to advance regulatory agenda proposals within the Vice Chairman's role and that Chairman Powell would not seek to prevent Federal Reserve Board consideration of any proposals made by the Vice Chairman of Supervision, even if Chairman Powell happened to disagree with such proposals.

President Biden's Nominees for the Fed and His FHFA Director Nominee Respond to the Demands for Racial Equity and Increased Diversity among the Financial Regulators

In addition to the Vice Chairman for Supervision, there are two other open seats on the Federal Reserve Board. Lisa Cook and Phillip Jefferson, two

PhD labor economists who are African American, are the President's nominees for these seats. All of the current Federal Reserve Board governors are white. If confirmed, Cook and Jefferson would be only the fourth and fifth African-American board members ever to serve at the Fed and Cook would be the first woman of color.

At the strong urging of Financial Services Committee Chair Waters, President Biden also recently nominated Sandra Thompson, the Acting Director of the Federal Housing Finance Agency, to be the FHFA's permanent Director. These nominations strongly indicate that President Biden will continue to be responsive to demands for diversity and inclusion among the financial and housing regulators as vacancies become available.

Cryptocurrency - Will Government or the Users Of Blockchain Technology Determine the Rules of the Road?

A blockchain is a digital ledger that allows parties to transact without the use of a central authority as a trusted intermediary. Blockchain allows parties who may not trust each other to agree on the current distribution of assets and who has those assets, so that they may conduct new business.

If blockchain technology is allowed to flourish without excessive restrictions on its use, the benefits to consumers and investors from reduced transaction costs are potentially enormous. Yet the SEC, the CFTC, the financial regulators, including the Federal Reserve, FDIC and the Office of the Comptroller of the Currency (OCC), and even the Internal Revenue Service through taxation of cryptocurrency exchanges, all claim they possess authority to regulate crypto firms and digital assets in ways that could stifle innovation and materially slow the expanded use of cryptocurrency.

However, there are several concerns about expanded use of blockchain technology, such as data portability, private key security, user collusion, and user safety. These concerns require that all aspects of this technology be carefully evaluated.

The central public policy questions currently being answered at the federal and state level are the extent to which government, as opposed to users of the technology with governance tokens, will develop the ground rules for use of blockchain technology, decentralized finance (DeFi) and digital currencies. A related question is whether these issues can be shoe-horned into existing federal and state regulatory structures or whether a new and different approach is required.

Witness, for example, the November 3 speech of Acting Comptroller Michael Hsu, citing a purported need to “level up banking and finance,” in which he called for extending comprehensive bank-like supervision to cryptocurrency companies. See also SEC Chairman Gary Gensler’s November 4 speech to the 2021 Securities Enforcement Forum in which he argued that the SEC possesses clear authority to regulate crypto firms and that crypto trading is a “Wild West” posing clear risks to investors, urging attorneys to get their crypto clients to “come in, get them to register” with the SEC.

Congress and various state governments are exploring whether and to what degree additional regulations and guidance are necessary to govern blockchain’s use in the private sector. Key federal and state agencies are issuing guidance on industry use of blockchain and considering whether the current legal framework adequately governs blockchain’s use. While many states study blockchain, several states are adopting or considering bills that would change the definition of a contract and authorize the use of distributed ledger technology and smart contracts in electronic transactions.

While there are some Representatives and a few Senators with an in-depth understanding of DeFi and blockchain technology, the vast majority of the Members of Congress have little, if any, understanding of cryptocurrency issues. The potential for error is high whenever legislators seek to craft laws addressing issues that they don’t truly understand.

As the adoption of a tax on cryptocurrency exchanges in the recently enacted bipartisan infrastructure law illustrates, the proponents of

blockchain technology and cryptocurrency are late to the public policy debate on these issues.

Some Recent Cryptocurrency Developments

October 28, 2021 – The President’s Working Group on Financial Markets, the FDIC and the OCC issued an interagency report on stablecoins. To address prudential risks associated with the use of stablecoins as a means of payment, the agencies recommend that Congress act promptly to ensure that payment stablecoins are subject to appropriate federal prudential oversight on a consistent and comprehensive basis with respect to stablecoin issuers, legislation should provide for supervision on a consolidated basis; prudential standards; and, potentially, access to appropriate components of the federal safety net.

To accomplish these objectives, legislation should limit stablecoin issuance, and related activities of redemption and maintenance of reserve assets, to entities that are insured depository institutions. The legislation would prohibit other entities from issuing payment stablecoins. Legislation should also ensure that supervisors have authority to implement standards to promote interoperability among stablecoins.

November 15, 2021 – House Finance Services Committee Republicans released central bank digital currency principles. Among the priorities are: maintaining the dollar as the world’s reserve currency and the status of the US payment system; not impeding the development of stablecoins; promoting private sector innovation and addressing privacy and security protections.

November 17, 2021 – Joint Economic Committee holds a hearing on demystifying cryptocurrency: Digital Assets and the Role of Government.

November 18, 2021 – Financial Services Committee Ranking Member Patrick McHenry (R-NC) introduces the Keep Innovation in America Act, a bipartisan bill to exclude hardware and software developers and miners from the definition of brokers of crypto assets included in the digital asset tax reporting provisions of the bipartisan infrastructure law.

November 23, 2021 – The OCC, FDIC and the Federal Reserve announced the completion of their crypto-focused policy “sprint” and issued a joint statement stating that they will provide greater clarity throughout 2022 on whether certain activities by banking institutions, such as crypto asset custody or the issuance of stablecoins are legal and how they fit within existing regulatory standards. They also “will evaluate the application of bank capital and liquidity standards to crypto assets for activities involving US banking institutions.”

November 30, 2021 – FDIC Chair McWilliams told reporters at a press conference that the FDIC is exploring whether stablecoins should be covered by deposit insurance.

December 1, 2021 – SEC Chairman Gary Gensler and former SEC Chairman Jay Clayton spoke at the Digital Asset Compliance and Market Integrity Summit and both confirmed that they believe the SEC has clear authority in the crypto space and that the decentralized quality of certain DeFi products and platforms does not somehow excuse those products from the SEC’s reach.

December 8, 2021 – Financial Services Committee Chair Maxine Waters held a hearing on Digital Assets and the Future of Finance with the CEOs of Circle, FTX, Bitfury, Paxos, Stellar Development Foundation and Coinbase Global Inc.

December 14, 2021 – The Senate Banking Committee held a hearing on Stablecoins: How Do They Work, How Are They Used, and What Are Their Risks?

The Upcoming Departure of FDIC Chair McWilliams, Putting Democratic Appointees in Control of the FDIC Board, Could Mean Changes in FDIC Bank Merger Rules

On December 31, 2021, FDIC Chair Jelena McWilliams, the only Republican currently on the FDIC Board, announced that she would be resigning from the FDIC Board and as FDIC Chair on February 4, 2022, even though her term as Chair does not expire until June 2023, leaving the Board with two vacancies.

McWilliams’ resignation came after an arcane mid-December dispute with Democratic Members of the FDIC, including the new Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra, over McWilliams’ refusal to recognize efforts by Democratic regulators to review FDIC bank merger rules and seek public comment about those rules. The dispute centered in large part around whether governance of the FDIC Board is vested in the FDIC Chair or in the Board as a whole.

McWilliams’ departure will likely open the door to more stringent bank regulation sought by many progressives, potentially clearing the way for a slew of new rules. Many observers predict that Democratic control of the FDIC Board will result in more intensive scrutiny of large regional bank mergers by the Federal Reserve, the FDIC and the OCC, a key priority of Senator Warren, Senate Banking Committee Chairman Brown and House Financial Services Committee Chair Waters.



Gary L. Goldberg
Senior Policy Director,
Washington DC
D +1 202 408 6396
gary.goldberg@dentons.com

About the Author

- Gary advises clients in regard to their federal advocacy efforts with a particular emphasis on financial services, tax and budget-related matters. He provides clients real-time advice on the status of, and prospects for, various legislative initiatives before the US Congress.
- Previously Gary spent 10 years serving Democratic members in the House of Representatives. During his tenure in the House, Gary staffed members of the Financial Services Committee including its Chair Maxine Waters, the Judiciary Committee and the Appropriations Committee.

Health and COVID-19

COVID-19 remains the greatest public policy challenge facing the nation, and in 2022 will continue to shape legislative developments in Congress and Administration policy until the pandemic abates. This preview addresses the COVID-specific developments as well as broader healthcare policies. This preview covers the following issues:

- Will the COVID-19 pandemic be brought under control in 2022?
- Given the court-imposed limitations on mandating COVID-19 testing, what are the public health strategies most likely to help achieve this outcome?
- What are some the key health proposals that will not move forward if the Build Back Better bill fails or is radically reduced in cost and scope before becoming law?
- What is the status of efforts to avoid surprise medical billing?
- Will physician payments and providers who accept Medicare continue to be protected from funding cuts?
- Will the Supreme Court overturn *Roe v. Wade* and uphold a Mississippi law that would ban all abortions after 15 weeks of pregnancy, with certain limited, narrow exceptions?

COVID-19 remains the greatest public policy challenge facing the nation

The COVID-19 pandemic, the greatest public health crisis America has faced in 100 years, has yet to be brought under control in the United States or the rest of the world. The lethal Delta variant that produced hundreds of thousands of hospitalizations and deaths was supplanted beginning in the summer of 2021 by an Omicron variant that is now surging. Omicron, while apparently less lethal to both the unvaccinated and the vaccinated than the Delta variant, has proven to be more widely and easily

transmitted than Delta and led to unprecedented levels of hospitalizations and continuing elevated levels of death among those hospitalized.

America's hospitals, especially their Intensive Care Units (ICUs), are at and beyond their breaking point in many parts of the country. Staffing shortages abound, especially among nurses, as many exhausted and traumatized health care practitioners have fallen prey to COVID-19, in many cases compromising both the willingness and the ability of these practitioners to render urgently needed care.

With the resistance and apparent skepticism of President Trump in early 2020 and thereafter toward claims that America and the world were facing a pandemic, and with the time required to produce and develop vaccines to combat COVID-19, only two million people had been vaccinated in the United States by January 20, 2021, when President Biden was inaugurated. The Biden White House's COVID-19 control strategy has relied heavily on promoting vaccinations and booster shots, masking, and social distancing. As a result of these efforts, over 210 million Americans, 75% of the eligible population, are now fully vaccinated. Yet the limits of this vaccination strategy have become apparent as there is a solid core of million Americans who have not received any vaccinations and appear to have no intention of doing so.

Moreover, in the case of *National Federation of Independent Business, et al., v. OSHA*, decided by the Supreme Court on an emergency basis on January 13, 2022, the Court in a per curiam opinion stayed effectiveness of OSHA's Emergency Temporary Standard mandating vaccines or weekly testing for the unvaccinated for employers with 100 or more employees. The same day in *Biden v. Missouri* the Court upheld the Department of Health and Human Services vaccine mandate for healthcare workers.

In staying the OSHA rule, the Supreme Court held that the applicants would likely succeed on their claims that OSHA had exceeded its statutory authority in issuing this vaccine mandate. It therefore stayed the OSHA rule pending disposition of the applicants' Sixth Circuit claims and their petitions to the Supreme Court for a writ of certiorari if sought.

While various vaccine mandate cases remain pending for disposition on the merits, given the Supreme Court's decision, there is no reason to believe that a vaccine mandate for large employers will ultimately be found to be legal. Without a regulatory mandate, it remains to be seen how many employers with over 100 employees will require their employees be vaccinated or tested if they want to work for such an employer.

Finally, while the federal government opened a website through every individual can request four COVID tests and insurers are now being required to cover at-home testing costs, many have criticized the Biden Administration as being late to the dance when it comes to making COVID-19 testing available. While he pledged to do better and outlined several steps designed to achieve this goal, at his January 19, 2022 press conference, President Biden essentially acknowledged that the White House's efforts to make COVID-19 testing available had been late, haphazard, and inadequate.

Amid questions from many Congressional Republicans about the efficacy of federal COVID-19 prevention funding, the Biden COVID-19 prevention efforts are continuing and are very costly. Many of the funds created to support these efforts have been exhausted or will soon be depleted. Speaker Nancy Pelosi (D-CA) has indicated that she supports additional funding for COVID-19 prevention as necessary and is expected to seek such funding through either a continuing resolution or an agreed subset of appropriations bills before the current continuing resolution expires on February 18, 2022.

Many broadly popular health care provisions will not become law if the Build Back Better bill fails or is radically reduced in cost and scope

There are many significant and broadly popular healthcare provisions, especially with seniors, included in the House-passed and Senate draft versions of the Build Back Better bill that are highly unlikely to become law in 2022 if the BBB bill fails or is radically reduced in cost or scope to win the support of Senators Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ). Such a radical narrowing of the BBB bill to gain the support of these two Senators runs the risk of losing the support of House Democratic progressives, many of whom are already severely disappointed by the earlier substantial reductions in the cost and scope of the BBB bill.

Among the many key provisions at risk are extensions of the Affordable Care Act (ACA) subsidy expansions made by the *American Rescue Plan*, investments in telehealth and home and community-based services, new Medicare hearing benefits including coverage for hearing aids, zero premium ACA plans for people in states that haven't expanded Medicaid, continuous eligibility for children in Medicaid, and a permanent reauthorization of the Children's Health Insurance Program (CHIP).

The BBB bill also would make major drug pricing reforms including language that would give the federal government authority to negotiate certain drug prices with pharmaceutical manufacturers. Pharmacy benefit managers and reform of the Medicare Part D program also are included in the bill. The House version of the bill would allow HHS to enter negotiations on a limited number of drugs each year in Medicare and would also modestly impact the private sector. It's an open question whether, under the Senate's procedural rules, the Parliamentarian would or could even permit the drug pricing language to be included in the bill.

Additionally, the BBB bill also would provide major resources for childcare, early childhood education, paid family leave, and revisions to federal tax policies, including a one-year extension of the

expanded child tax credit, a credit said to have lifted nearly one half of all poor children out of poverty. While some of these policies and programs might be able to be pursued through executive orders and administrative action, in most cases, legislation would be required.

House Democrats passed its version of the BBB bill on November 19, 2021 by party line vote of 220-213, with the clear expectation that the Senate would make significant changes to the BBB bill before sending it back to the House for further consideration.

On December 19, 2021, Senator Manchin publicly announced that he would not support the House BBB bill, thereby depriving Senate Democrats of the majority needed to advance the House-passed bill under reconciliation procedures. Senator Manchin did not indicate then or any time thereafter what changes to the bill would be required to gain his support. Senate consideration of the BBB bill has been repeatedly delayed, most recently to allow Senate consideration of Democratic voting rights bills, as President Biden and the Democratic Congressional leadership continue to struggle to identify a set of proposals that would win Senator Manchin's support.

Regulations implementing the No Surprises Act are a source of continuing controversy

Following enactment of the No Surprises Act in December 2020, the regulators spent much of 2021 announcing and implementing regulations to protect patients from surprise medical bills and create a payment dispute resolution process. These regulations generated multiple lawsuits that are still pending in the federal district courts challenging various healthcare provider and payer requirements that became effective at the start of the year.

Medicare physician payments are likely to continue to be protected from funding cuts

On December 10, 2021, the [Protecting Medicare and American Farmers from Sequester Cuts Act](#) became law. The Act provides a 3% increase to 2022 physician payments. The bill also includes a delay of the Medicare and PAYGO sequestration cuts. These changes are authorized only for 2022 and, in the case of Medicare sequestration, will be phased out starting April 1, 2022. Congress will surely be under considerable pressure in 2022 to revisit and provide relief from these cuts.



Telehealth services have been fundamentally transformed and will continue to expand in response to the public health care changes required by the COVID-18 pandemic

To respond to the COVID-19 pandemic, in 2021, Congress enacted legislation granting many additional flexibilities in service delivery by providers, including expanded authority to deliver services to Medicare beneficiaries via telehealth.

These flexibilities have changed healthcare delivery by expanding both telehealth access and the ability to provide homecare. They have also produced several changes in the way that providers are compensated for the services they deliver. Given the popularity of these changes, many patients and providers will seek to extend these changes or even make them permanent.

The Supreme Court is likely to uphold Mississippi's law banning virtually all abortions after 15 weeks of pregnancy thereby effectively, if not formally, overruling *Roe v. Wade*

Nearly 30 years ago in *Planned Parenthood v. Casey*, the Supreme Court reaffirmed the constitutional right to abortion that the court first recognized in *Roe v. Wade*. In *Dobbs v. Jackson Women's Health Organization*, argued on December 1, 2021, it

appeared that the Court's six-justice conservative majority is ready to uphold a Mississippi law that bans almost all abortions after the 15th week of pregnancy, further undermining the reasoning in *Casey* and *Roe* that bars states from banning abortions before fetal viability, the time around 24 weeks of pregnancy when it is believed that a fetus can survive outside the womb. (Advances in medical technology since *Roe* was decided in 1973 suggest that a fetus may now be viable before 24 weeks.)

Believing that the decision in *Roe v. Wade* was "egregiously wrong," Justices Thomas, Alito, and Kavanaugh seemed prepared to overrule *Roe* and *Casey* outright. In contrast, the court's three liberal Justices Breyer, Sotomayor and Kagan emphasized the principle of adhering to precedent except in limited and extraordinary circumstances and the 50 years of reliance by American women on *Roe*. They stressed that the Supreme Court's legitimacy would be undermined if the perception took hold that the court is a political institution whose view of the Constitution turned on the Court's membership.

Chief Justice Roberts appeared ready to uphold the Mississippi law but focused primarily on the law's 15-week ban, rather than on the bigger question of whether to overrule *Roe* and *Casey* entirely. Roberts questioned whether the "viability" standard made sense and asked whether it was feasible for a woman to choose whether to have an abortion before 15 weeks of pregnancy. A decision in the case is expected by July 2022.

About the Author



Gary L. Goldberg
Senior Policy Director,
Washington DC
D +1 202 408 6396
gary.goldberg@dentons.com

Housing and Community Development

The key issues facing housing and community development legislators and policymakers in 2022 are the following:

- If the Democrats' Build Back Better bill (BBB) fails or is radically reduced in cost and scope before enactment, what are the prospects for the \$150 billion in affordable housing funding included in both the House and Senate versions of the BBB bill?
- With federal emergency rental assistance running out and many tenants and homeowners unable to pay their rent or mortgage, will there be a surge in evictions and foreclosures in 2022?
- With the change to Democratic leadership at the Federal Housing Finance Agency (FHFA), have the prospects evaporated to remove Fannie Mac and Freddie Mac from their long-running conservatorships through action by the FHFA? Has FHFA Director Sandra Thompson punted the issue of Government Sponsored Enterprise (GSE) reform to Congress?
- Under Democratic control, on December 15, 2021, the Office of the Comptroller of the Currency (OCC) issued a final rule abandoning its unilateral effort pursued by the Trump Administration to reform the Community Reinvestment Act (CRA). How will this final rule affect CRA enforcement?

The BBB bill provides Congressional Democrats and the Biden White House an unprecedented opportunity to make a more than \$150 billion investment in affordable housing, much of which will be jeopardized if the BBB bill fails or is drastically reduced in cost and scope

The more than \$150 billion in funding provided in the House Financial Services title of the Build Back Better bill to expand access to, and production of, affordable housing represents the single largest investment in affordable housing in our nation's

history, one that can be achieved only through the reconciliation process. Financial Services Committee Democrats estimate that this funding would help 294,000 households afford their rent; build, upgrade, and retrofit over 1.8 million affordable housing units; and help close the racial wealth gap through the first-ever national investments in homeownership for first-time, first-generation homebuyers.

Among its many initiatives, the bill would provide \$24 billion in tenant-based rental assistance to fund Housing Choice Vouchers and supportive services, the largest one-time expansion of the Housing Choice Voucher program since its creation in 1974, and is expected to help more than 260,000 families over the next eight years. It also provides \$1 billion for the first new project-based rental assistance contracts since 1983, funding 7,000 housing units that will be affordable to extremely low-income renters.

The bill includes \$65 billion to repair the nation's public housing, preserving and improving over 500,000 public housing units, making public housing safer and healthier for millions of residents. It also provides \$1.6 billion to revitalize multifamily properties, improving 21,000 severely distressed assisted housing units and \$1.8 billion in funding for the USDA Sections 514, 515 and 516 programs, which will preserve, create, or repair 27,000 rental homes for farmworkers and rural low-income, disabled, and elderly families.

The bill provides \$25 billion to fund the construction, purchase, or rehabilitation of affordable homes for low-income people. \$10 billion will be invested in HOME to create or preserve 173,000 homes for low-income renters and homeowners, as well as provide assistance to 46,000 prospective and current homeowners to purchase or repair their homes. \$15 billion will be used to construct or preserve 141,000 rental housing units for the lowest-income families.

The bill also includes \$750 million for the Housing Investment Fund, which will be used by our nation's Community Development Financial Institutions (CDFIs) to fund the development of 13,000 rental and homeownership housing units.

The bill also makes important investments in housing for seniors, people with disabilities, and Native Americans: \$500 million for seniors, \$500 million for persons with disabilities, and \$1 billion for Native Americans.

The bill requires the Federal Home Loan Banks to contribute 15% of their net income to their Affordable Housing Program, which will lead to the creation, rehabilitation, or purchase of 98,000 affordable rental or homeownership units.

The bill also includes \$2 billion for energy-efficient and climate-resilient upgrades to federally assisted housing, improving 51,000 homes and \$3.05 billion in CDBG funding for affordable housing and community infrastructure upgrades, creating approximately 88,000 homes for low-income families.

The bill provides \$5 billion to address lead-based paint and other health hazards in low-income family housing across the country, making 276,000 housing units safer for families and children.

The bill would provide \$10 billion in first-time, first-generation homebuyer down payment, closing cost, and interest-rate buydown assistance to help an estimated 273,000 individuals become homeowners and begin building wealth. It also includes \$5 billion to provide an estimated 163,000 first-time, first-generation homebuyers with an affordable 20-year FHA or USDA mortgage product so that they can build equity in their homes faster.

The bill provides \$900 million to assist approximately 18,000 rural homeowners with repairing their homes and \$100 million for HUD to carry out a pilot program to expand small-dollar lending options for an estimated 75,000 qualified homebuyers seeking to purchase affordable homes priced at \$100,000 or less.

The bill forgives \$20.5 billion in debt carried by the National Flood Insurance Program (NFIP). Currently, policyholders' premiums are diverted to the Treasury so that FEMA can service its debt. This crucial provision will free up those funds for mapping, claims payments, and other investments that will strengthen the long-term resilience of the NFIP.

Finally, among its various initiatives to promote racial equity, the bill provides \$1 billion for grants to help minority-owned businesses open their doors or expand their operations; \$1.75 billion in competitive grants to states, units of general local government, and Indian tribes to incentivize the elimination of exclusionary, restrictive zoning and land uses to advance fair housing and support the creation of affordable housing in every community; \$3 billion for HUD to establish a competitive grant program to create affordable, accessible housing and economic redevelopment in underinvested, blighted, and abandoned neighborhoods; and \$700 million to strengthen and expand local fair housing oversight and enforcement capacity.

It is unclear how much of this funding would nonetheless be provided through the annual appropriations process if the BBB bill fails or is drastically reduced in cost and scope. What is clear is that whatever funding ends up being provided will be substantially less than the funding that will occur if the BBB bill in its current form becomes law.

With the safety net of federal emergency rental assistance running out and local eviction and foreclosure moratoriums now expiring, there could be a surge in evictions and foreclosures

Congress enacted a \$46 billion federal emergency rental assistance program as a short-term solution to prevent evictions during the coronavirus pandemic, but the program is now distributing cash so quickly that many states are now running out of their share of money from the program. As a result, funds for struggling renters will soon disappear unless Congress renews funding for this program, an outcome that appears to be highly unlikely, despite the fact that the need significantly exceeds the funds that were allocated.

While the Treasury Department had threatened to shift \$1.1 billion from states that had been slow in distributing funds to states that had exhausted their funding, the Department opted instead to push these states to send their funding to cities and counties in their state that needed it most. Thus, only about \$240 million became available for redistribution to states that had sought more funding. Moreover, even where emergency rental assistance remains available, many landlords and tenants complain about very lengthy wait times before receiving these funds.

The exhaustion of emergency rental assistance also calls into question the future effectiveness of various eviction prevention programs that cities and states used such emergency rental assistance to fund. With states that have exhausted their emergency rental assistance finding that only a miniscule portion of their request for additional assistance is being funded, many fear that, unless the COVID-19 crisis is rapidly brought under control, a surge in evictions and foreclosures could be on the horizon this year.

FHFA Acting Director Sandra Thompson has punted the issue of GSE reform to Congress

In September 2008, in response to the deteriorating financial condition of Fannie Mae and Freddie Mac, the U.S. Government and U.S. Treasury undertook a series of actions designed to stabilize Fannie and Freddie, including placing them into a federal conservatorship under which the Federal Housing Finance Agency (FHFA) operates Fannie Mae and Freddie Mac, conservatorships that have now lasted over 13 years. In a further attempt to stabilize the financial and housing markets, the U.S. Government, in December 2009, committed virtually unlimited capital to ensure the continued existence of Fannie Mae and Freddie Mac.

On March 27, 2019, President Trump issued a Presidential Memorandum directing the Secretary of the Treasury to develop a plan for administrative and legislative reforms to achieve the following housing finance reform goals: (i) ending the FHFA conservatorships of Fannie Mae and Freddie Mac upon the completion of specified reforms; (ii) facilitating competition in the housing finance market; (iii) establishing regulation of the GSEs that safeguards their safety and soundness and minimizes the risks they pose to the financial stability of the United States; and (iv) providing that the Federal Government is properly compensated for any explicit or implicit support it provides to the GSEs or the secondary housing finance market.

On April 4, 2019, the Senate confirmed Mark Calabria to serve as Director of the FHFA. Mr. Calabria repeatedly called for the end of the Fannie and Freddie conservatorships, a position that the Trump Administration also adopted in June 2018. When Mr. Calabria was sworn into office as FHFA Director, he expressed his support for President Trump's call to end the conservatorships of Fannie Mae and Freddie Mac, privatize them, and reform the country's housing finance system.

Pursuant to the March 27, 2019 Presidential Memorandum, on September 5, 2019, the U.S. Treasury and Trump Administration issued its plan for reform of the housing finance markets, including reforms to Fannie Mae and Freddie Mac. During his tenure, Director Calabria moved rapidly to take those administrative steps he believed to be within his powers that would facilitate removing the GSEs from conservatorship and returning them to control by private sector shareholders.





On June 23, 2021, the Supreme Court ruled that the FHFA is not constitutionally structured and that the President's inability to remove the FHFA Director violates the Constitution's separation of powers. On the same day, President Biden replaced FHFA Director Calabria with Sandra Thompson as Acting Director. Recently, President Biden also nominated Acting Director Thompson to serve as the permanent FHFA Director.

President Biden has very different housing and housing finance priorities than the Trump Administration. Biden appears to be far more focused on foreclosure and eviction prevention during the COVID-19 pandemic, promoting access to affordable housing and achieving racial equity by eliminating the homeownership and wealth gaps between races, than on whether, and if so when and on what terms, the GSEs will be released from conservatorship.

Acting Director Thompson has made it clear that, if confirmed, she expects to take the FHFA in a very different policy direction than that advanced by Director Calabria, a direction that could very well not involve the exit of Fannie Mae and Freddie Mac from their conservatorships. When asked during her recent confirmation hearing whether she would release two government-sponsored enterprises the agency oversees from conservatorship, Thompson replied: "We would defer to Congress on the exit from conservatorship for the GSEs", asserting that this was a matter for legislators to decide. Thompson went on to state: "We will be working to help in any way that we can facilitate any questions that you have, but we think that this is something that Congress needs to work on."

While Thompson would be willing as FHFA Director to help position the GSEs for an exit from conservatorship, she added that Congress would need to take action on any changes to their structures, which were initially established through legislation.

Given Acting Director Thompson's punt and the challenges of having the Congress pursue matters as complex as GSE reform, especially in an election year, an exit of Fannie and Freddie from their conservatorships seems highly unlikely in 2022.

CRA modernization — the impact of the OCC's December 2021 Community Reinvestment Act (CRA) final rule rescinding the OCC's unilateral June 2020 CRA rule

Congress enacted the Community Reinvestment Act (CRA) in 1977 to encourage insured depository institutions (IDI) to help meet the credit needs of their entire communities, including low- and moderate-income (LMI) neighborhoods, consistent with the safe and sound operation of the IDIs. The OCC, Federal Reserve, FDIC, and the Office of Thrift Supervision jointly made revisions to the CRA rules in 1995.

On June 5, 2020, without the support of the other financial regulators, the OCC unilaterally issued a final Community Reinvestment Act rule that made significant changes to the 1995 rules. On May 18, 2021, the OCC announced that it was reconsidering the June 2020 Rule. At the same time, the OCC announced that it did not plan to finalize the December 2020 NPR issued in connection with the June 2020 OCC final rule and was discontinuing the Information Collection. According to the OCC, these

actions have enabled an orderly reconsideration of the June 2020 Rule and provided banks with the flexibility to deploy resources in response to the COVID-19 pandemic.

On July 20, 2021, after considering (1) the disproportionate impacts of the pandemic on LMI communities, (2) the comments provided on the Board ANPR, and (3) the OCC's experience with implementation of the June 2020 Rule, the OCC announced it would propose to rescind the June 2020 Rule. On the same day, the Agencies announced that they are working together to strengthen and modernize the rules implementing the CRA. The OCC final rule reestablishes generally uniform rules that apply to all IDIs, thereby better positioning the Agencies to identify joint solutions to the common issues affecting IDIs and the communities they serve.

On September 8, 2021, the OCC issued its proposal to rescind the June 2020 Rule and replace it with rules for banks largely based on the 1995 Rules (Proposal or Proposed Rule). The Proposal would align the OCC's CRA rules with the Board's and FDIC's CRA rules, thereby reinstituting the regulatory uniformity for IDIs that existed prior to

the June 2020 Rule and facilitating the ongoing interagency work to modernize the CRA rules. The OCC explained in the proposal that any future interagency CRA rules would replace any final rule(s) the Agency issues pursuant to the Proposal.

The purpose of the Proposed Rule is to: (1) create consistent and transparent CRA rules for banks; (2) limit CRA-related burden on banks, banks' communities, and examiners; and (3) ensure that the OCC continues to encourage banks to help meet the credit needs of their entire communities, including LMI neighborhoods, consistent with safe and sound operations.

On December 15, 2021, with different leadership at the OCC, the Comptroller of the Currency adopted a CRA final rule based largely on the 1995 rules. This action rescinds the June 5, 2020 OCC CRA final rule and facilitates the OCC's planned future issuance of updated interagency CRA rules with the Board and FDIC.

Given the apparent harmony with which the OCC, the Federal Reserve, and the FDIC are now working on CRA issues, issuance of a joint future interagency CRA rule is likely during 2022.

About the Author



Gary L. Goldberg

Senior Policy Director,
Washington DC
D +1 202 408 6396
gary.goldberg@dentons.com

Immigration

Visas —Policies, Fees, and Forms

In December 2021, the Biden Administration released its fall 2021 [Unified Agenda of Regulatory and Deregulatory Actions](#) (UA). In the UA, the Administration includes rulemaking proceedings to update or revise existing nonimmigrant visa regulations issued by the Trump Administration and in some cases enjoined by the courts. Scheduled for 2022 are changes to the wage level setting methodologies, H-1B and F-1 visa programs, premium processing, and filing fees. While the actions outlined in the UA are aspirational, meaning they may not come to fruition, these immigration priorities suggest that the Biden Administration is maintaining or progressing several rules and plans that initiated under the Trump Administration. See below for several proposed actions under the UA.

Strengthening Wage Protections

- Agency: U.S. Department of Labor
- Visa(s) Affected: H-1B, H-1B1, E-3, PERM Programs
- Action:
 - Establish a new wage methodology for setting prevailing wage levels
 - This Trump Administration final rule was vacated on June 23, 2021, and remanded to the Labor Department. In December DOL withdrew the Trump Administration rule, restoring the rule in place before the Trump Administration's October 2020 interim final rule.
- Notice of Proposed Rulemaking Timetable: March 2022

Modernizing H-1B Requirements and Oversight & Providing Flexibility in F-1 Program

- Agency: U.S. Citizenship and Immigration Services (USCIS) & U.S. Department of Homeland Security (DHS)
- Visa(s) Affected: H-1B, F-1
- Actions:
 - Revise H-1B “employer-employee relationship” definition
 - Provide flexible policies for F-1 visa-holders waiting to receive a change of status to H-1B
 - Clarification on the visa-holder/applicant requirements related to new and amended H-1B visa petitions
 - Institute employer site visit guidelines
- Notice of Proposed Rulemaking Timetable: May 2022

Premium Processing

- Agency: USCIS
- Visas/Forms Affected: H-1B, L-1, EB-1 and Form I-140
- Actions:
 - Expansion of premium processing service to several forms and visa types. Institute employer site visit guidelines



Filing Fees

- Agency: USCIS
- Actions:
 - Increased petition and application filing fees
 - Trump Administration final rule in August 2020 was preliminarily enjoined in *Immigration Legal Resource Center v. Wolf* (N.D. Cal.) (Sept. 29, 2020). The Government recently informed the court that a proposed rule, if the Biden Administration intends to change the Trump final rule, is projected to be published in July 2022
- Notice of Proposed Rulemaking Timetable as revised: July 2022

Consular Filing Fees – Nonimmigrant and Special Visas

- Agency: U.S. Department of State
- Action: Increase filing fees for applications filed at consulates
- [Notice of Proposed Rulemaking published Dec. 29, 2021](#)
- Comments due: February 28, 2022

9-11 Response & Biometric Entry-Exist Fees for H-1B and L-1 Visas

- Agency: Customs & Border Detection, U.S. Department of Homeland Security
- Action: Clarify that 9-11 Response Fees will apply to all H-1B and L-1 extension petitions
- Notice of Proposed Rulemaking Timetable: May 2022

Legislation

In 2021, many in Congress advocated for immigration reform via BBB, including Representative Joaquin Castro (D-TX) and Senate Majority Whip Dick Durbin (D-IL). Many Democrats saw the passage of BBB as a real chance to successfully pass immigration reform, which proponents suggest is overdue. The House-passed BBB bill included immigration reform provisions such as providing a pathway to citizenship for DREAMers, providing parole for noncitizens that arrived in the U.S. before 2011, recapture of unused family-based green cards, and attempts to prevent employment-based green cards from going unused. However, these provisions were found by the Senate Parliamentarian Elizabeth MacDonough to violate the budgetary requirements necessary for inclusion in a reconciliation bill.

Congressional Democrats will continue to seek avenues for immigration reform legislation in 2022. Bills from both sides of the aisle that remain active in 2022 include, the **EAGLE Act of 2021** (H.R. 3648), sponsored by Representative Zoe Lofgren (D-CA); **Preserving Employment Visas Act** (S. 2828), sponsored by Senator Thom Tillis (R-NC); **U.S. Citizenship Act** (H.R. 1177), sponsored by Representative Linda Sánchez (D-CA); and the **American Dream and Promise Act of 2021**, sponsored by Representative Lucille Roybal-

Allard (D-CA), among others. While the Biden Administration is likely to move regulatory actions focused on employment-based visas, wages, and fees, attempts to revise the American immigration system via legislative action, especially as it relates to non-employment based or non-family based visas, are unlikely to succeed. Given the expectation that Congress will flip, 2022 may pose the only opportunity to enact Democratic immigration priorities before the 2024 Presidential election.

About the Authors



Lara Tennyson

Senior Public Policy Analyst,
Washington, DC
D +1 202 496 7134
lara.tennyson@dentons.com

- Lara works with clients, particularly those in the emerging technology and telecommunications sectors, to progress their policy objectives by actively engaging with Congress and the Administration, advising on strategic planning, and providing in-depth policy research.
- Lara has experience engaging with global organizations which she leverages to best serve clients, including The United Nations Office on Drugs and Crime and the Organization for Security and Co-Operation in Europe.



Michael E. Drobac

Principal, Washington DC
D +1 202 496 7500
michael.drobac@dentons.com

- Michael advises clients from the tech and telecommunications sectors to develop messaging to define and execute outreach strategies, while advocating before Congress and federal agencies in support of policy objectives.
- Previously Michael served as in-house head of government affairs for multiple technology organizations and in the offices of 3 US senators, affording him the ability to provide solutions informed by both viewpoints.



Gregory S. Walden

Partner, Washington DC
D +1 202 496 7436
gregory.walden@dentons.com

- Greg helps a full spectrum of transportation companies, including airlines, air taxi operators and unmanned aircraft operators and manufacturers, to devise proactive strategies to achieve policy goals, maximize opportunities and stay ahead of roadblocks which may get in the way.
- Previously Greg served as chief counsel of the US Federal Aviation Administration, associate deputy attorney general with the US Department of Justice and associate counsel to President George H.W. Bush.

National Security and Foreign Affairs

As in 2021, Congress and the Biden Administration will continue to navigate a diverse range of complex and dynamic national security and foreign policy challenges throughout the course of 2022—from domestic defense spending debates to competing visions concerning US grand strategy in the face of an ever-evolving global geopolitical landscape. Decisions made in Washington in the national security and foreign policy spheres directly and indirectly impact global markets and actors.

We anticipate that much of the action and debate across the Legislative and Executive Branches this year within the defense, security, and foreign affairs arenas will be driven by the following priorities, among others.

Fiscal Year 2023 (FY23) President's Budget Request

While by statute the President is required to submit the Administration's annual budget request to Congress by the first Monday in February, historically, across multiple administrations led by both parties, this deadline is not treated as binding. As such, the Biden Administration is expected to submit its FY23 budget request to Congress in March 2022. Although defense authorizers and appropriators on Capitol Hill will begin early-stage work on their respective annual bills—the National Defense Authorization Act and Defense Appropriations Act—prior to the Administration's submission of its budget request, the contents of the Department of Defense's (DOD's) component of the overall budget request will drive and shape debate among defense policymakers as they draft the aforementioned bills.

National Defense Strategy

The last US National Defense Strategy (NDS) was produced by the Trump Administration in 2018. The Biden Administration is anticipated to release the new NDS in early 2022. While open questions remain regarding how different this new NDS will be from the Trump Administration's 2018 NDS, in line with the Trump-era NDS, we anticipate that US great power competition with China, and a corresponding continued strategic pivot toward the development of an increasingly robust military force posture in the Indo-Pacific region, will serve as a foundational component of the 2022 NDS.

However, a thematic and strategic focus in the Biden Administration's 2022 NDS on climate change as an existential US national security and geopolitical threat will no doubt serve as a stark departure from the 2018 NDS' silence on the issue.



That the Biden Administration has married its climate policy objectives with defense and national security policy strategic considerations has broadened the aperture of opportunity for clean tech and clean energy stakeholders, as well as adjacent interests, to engage with DOD to shape future policy and program funding priorities.

Missile Defense Review and Nuclear Posture Review

Also in early 2022, the Biden Administration is expected to release, likely in tandem, the respective findings of its Missile Defense Review and Nuclear Posture Review—which will be informed by and have significant implications for existing US geopolitical tensions and corresponding considerations vis-à-vis China, Russia, Iran, and North Korea, among other state and non-state actors. A vigorous debate, and corresponding engagement by US and non-US stakeholders in both camps, is underway with respect to whether or not the Biden Administration should adopt a “no first use” policy with respect to US deployment of nuclear weapons.

National Defense Authorization Act (NDAA)

The NDAA, which establishes policy and program funding priorities for DOD, is Congress’ nearly \$800 billion annual must-pass defense bill. Intra-party conflict within the Democratic party and inter-party disputes over the topline defense spending level for FY23, driven by midterm election year political and policy objectives, must be resolved as the House and Senate draft, pass, and then work to reconcile their competing versions of the NDAA. However, Congress has passed, and the president has enacted, the NDAA for 61 consecutive years. We have every expectation that this trend will continue, with the NDAA likely to be enacted following the November 2022 midterm elections, but before the end of calendar year 2022.

In the meantime, given the must-pass nature of the bill, the nearly yearlong NDAA development and consideration process presents significant opportunities for stakeholders across a range of sectors to engage in efforts to shape the future of US defense policy and program funding.

Defense Supply Chain Security and Resilience

In 2022, the Biden Administration will continue to channel considerable policy focus and action, including through the leveraging of its Defense Production Act authorities, to improve supply chain security, and to strengthen and sustain the production and stockpiling of key strategic materials.

As such, US manufacturers and their US supply chain partners, both within and outside of the traditional defense industrial and innovation bases, would be well-served to explore the ever-expanding portfolio of supply chain security and resilience-focused funding and other collaboration opportunities with the federal government.

Sanctions

In line with its sanctions actions in 2021, the Biden Administration will very likely continue to leverage and expand a robust sanctions regime in 2022 to advance US foreign policy objectives, including to punish illicit and corrupt behavior outside of international norms, as well as to deter any such future conduct. Driven by concerns regarding the unintended consequences of US sanctions actions for US and Western allied interests and operations across the globe, Congress established via the Consolidated Appropriations Act of 2021

a Coordinator for Sanctions Policy role with the rank of ambassador, which will reside at the US Department of State. According to the lead author of the provision that established the new role—then Senate Foreign Relations Committee Chairman now Ranking Member Jim Risch (R-ID)—the Coordinator's prescribed role is to harmonize the development and implementation of US sanctions policy within the State Department and across the inter-agency process, and to engage with US allies to ensure the maximum effectiveness of US sanctions while mitigating the unintended second-, third-, and fourth-order effects of such sanctions on US and Western allied interests and operations. We anticipate that the Senate will confirm the nominee for this new Sanctions Coordinator role in the first quarter of 2022.

US sanctions actions can present significant global operational and compliance risks and challenges for US and non-US multinational firms. Therefore, stakeholder engagement in the sanctions policy development process—both on Capitol Hill and within the Administration—can serve as an effective avenue by which to mitigate or eliminate the unintended and / or indirect impacts of US sanctions actions on a given stakeholder's global business operations, assets, and interests.

Foreign Policy Flashpoints

The Biden Administration, under scrutiny from supporters and detractors alike for certain of its foreign policy decisions and actions in 2021, enters 2022 with a host of challenges, threats, and crises in the international affairs arena. From the prospect of another Russian invasion of Ukraine and corresponding war in Europe (still a “prospect” as of this writing); to the potential for exacerbation of tensions with China driven by miscalculations on either side of the US-China competition; to continued instability in the Middle East, including stalled nuclear negotiations with Iran; to humanitarian crises across the globe, such as those in Venezuela, Myanmar, and Ethiopia—nothing less than the US’ global standing and credibility among both allies and foes is at stake as the Biden Administration

seeks to continue to reassert the US as a force for good in its navigation of a geopolitical landscape in 2022 fraught with peril.

US foreign policy actions, and corresponding decisions to provide or eliminate US government support and aid in any number of forms, can have material impacts—and present both opportunities and challenges—not only for sovereign actors, but also for multinational firms, nongovernmental organizations, multilateral institutions, and their respective global operations, activities, and interests. Proactive stakeholder engagement with Congress and the Executive Branch can help shape US foreign policy decisions and aid priorities in the security, trade, and economic spheres, as well as others.



Christopher W.K. Fetzer

Partner,
Washington DC
D +1 202 408 9192
chris.fetzer@dentons.com

About the Author

- Chris develops and leads successful campaigns on behalf of US and non-US companies, from startups to multinationals, including government contractors, across a diverse range of industry sectors, to achieve their business and policy objectives before Congress and the Executive Branch. He routinely advises, and advocates on behalf of, multinational firms in heavily regulated industries in complex, high-stakes national security policy, trade and sanctions policy, and foreign policy matters involving Congress, the Department of Defense, Department of State, Department of Treasury, Department of Commerce, Department of Energy, coalitions, nongovernmental organizations (NGOs), and private sector stakeholders.
- Before transitioning to the private sector, Chris served as an aide on Capitol Hill to a member of the Senate Armed Services Committee and Senate Leadership.

Tax

The major questions that will shape tax policy in 2022 are the following:

- If the Democrats' Build Back Better bill (BBB) fails or is radically reduced in cost and scope, will there be any major tax policy changes in 2022 in the revised package or another legislative vehicle?
- If the Democrats manage to enact some form of the BBB bill, will any tax changes included in the bill be made retroactive to the start of 2022 or will such changes only apply from the date that the bill becomes law?
- The Expanded Child Tax Credit, which is credited with cutting child poverty nearly in half and supported by a majority of the public, expired with the last monthly checks issued on December 15, 2021, despite COVID-19 surging once again. Given Senator Manchin's continuing opposition to extending this credit in its expanded form, will this credit be restored and extended this year?
- Many Democratic House Members and Democratic Senators from high tax states have demanded at least a substantial increase in the current \$10,000 federal limit on the amount of state and local tax deduction available to their constituents (SALT) as their price for support of the BBB bill. With the bill foundering, is SALT tax relief dead?
- With a huge backlog of 2020 paper tax returns remaining to be processed due to COVID-19 related delays, many 2020 refund claims still pending, and no new money currently available to improve IRS operations, is a 2021 tax return processing catastrophe on the horizon? What can be done to avoid this outcome?
- Will House Democrats finally succeed in gaining access to former President Trump's tax returns or will this issue not get resolved until after the November elections when this demand will surely be withdrawn if Republicans win control of the House in 2023?

With the Build Back Better bill's prospects highly uncertain, despite Democratic interest in increasing taxes on the wealthy, there may not be any major tax policy changes in 2022

Congressional Democrats and the Biden White House largely have united around the principle of increasing taxes on wealthy individuals and families and on big business, even if the changes proposed in the BBB bill are far more modest than those championed by Democratic progressives. (The BBB bill does not include such progressive proposals as increases in the tax rates on ordinary income, capital gains or corporations, nor does it modify the stepped-up basis rules that allow an individual to avoid taxes when receiving assets as a consequence of someone's death.) However, with the BBB bill stalled, unless the Democrats reach agreement on some form of a BBB bill, there is a real chance that none of the tax policy changes proposed in the BBB bill will become law in 2022.

The House passed its version of the BBB bill on November 19 and sent it to the Senate, with the expectation that the Senate would make additional changes. The draft Senate texts of its version of the BBB bill, released in mid-December 2021, include most of the House's proposed tax policy changes, but the Senate version of the BBB bill has not yet reached the floor and some key changes that would be made by the House BBB bill are not addressed, or are addressed differently, in the Senate BBB drafts.

Among its many changes to individuals' taxes, the House-passed BBB bill includes an increase to the state and local tax (SALT) deduction cap to \$80,000 (\$40,000 for married taxpayer filing separate) for tax years beginning in 2021 through 2030, lowered to \$10,000 (\$5,000 for married taxpayer filing separate) for tax years beginning in 2031, and the cap would be eliminated for tax years beginning after 2031.

With many Senators of both parties and from lower tax states opposed to the proposed House SALT cap expansion and arguing that any increased cap on the SALT deduction should be for fewer years and limited to taxpayers with individual income less than \$400,000, Senate Democrats have yet to reach any agreement on whether, and if so how, the SALT tax deduction cap should be increased. Many Members of Congress and Senators from high tax states have threatened not to support any BBB bill unless the SALT deduction is adequately increased. If the Senate manages to pass a BBB bill, it remains to be seen whether the House will have the votes to pass such a bill if Members from the high tax states deem the SALT relief to be inadequate.

For tax years after December 31, 2021, individual taxpayers would also be subject to a 5% surcharge on modified adjusted gross income (MAGI) exceeding \$10 million and an additional 3% surcharge on MAGI exceeding \$25 million. The Senate draft BBB bill includes this surcharge on MAGI.

Under the House BBB bill, the increased child tax credit (CTC), including monthly advance payments as enacted by the American Rescue Plan Act (ARPA), would be extended through 2022. The full refundability of the CTC, as first enacted by the ARPA for the 2021 and 2022 tax years, is made permanent. The Senate BBB text includes the House provision.

However, Senator Joe Manchin (D-WV) has made it clear that he does not support extension of the expanded child tax credit and that he will not support a BBB bill that includes it. Senator Manchin wants both work requirements and means testing for any extension of the expanded child tax credit and he does not believe that the credit should continue to be refundable for those who do not earn any income. Given the strength of Senator Manchin's opposition, Senate Democrats appear at this time unlikely to include an extension of the expanded child tax credit in any BBB bill that the Senate can pass under reconciliation, an outcome that will be tremendously disappointing to progressives and most Democrats.

For tax years beginning after December 31, 2028, under both the House and Senate versions of the BBB bill, taxpayers with income exceeding \$400,000 for single or married taxpayers filing separately, \$450,000 for married taxpayers filing jointly, and \$425,000 for heads of household, would be prohibited from making any further contributions to a traditional IRA, Roth IRA, or certain defined contribution plans in a year if the total value of the accounts at the end of the prior tax year exceeded \$10 million.

Likewise, under both the House and Senate versions of the BBB bill, taxpayers would also be required to take a distribution from these retirement accounts equal to 50% of the amount that the taxpayer's aggregate account balance that exceeds \$10 million. If these accounts exceeded \$20 million, an additional distribution would be required equal to the lesser of (1) 100% of the excess over \$20 million or (2) the entire balance of any Roth accounts.

Effective for tax years after December 31, 2021, under both versions of the BBB bill, conversions of a traditional IRA or other retirement account into a Roth account would be prohibited for taxpayers with taxable income exceeding \$400,000 for single or married taxpayers filing separately, \$450,000 for married taxpayers filing jointly, and \$425,000 for heads of household.

As to corporations, under both versions of the BBB bill, for tax years beginning after December 31, 2022, a new tax of 15% would be imposed on the financial statement profits of corporations with an average annual financial statement income exceeding \$1 billion over a three-year period ending in the applicable tax year. The Senate version of the BBB text clarifies the types of income considered when determining adjusted financial statement income.

Both the House and Senate versions of the BBB bill would also create or modify several clean energy production credits, including a credit for electricity produced from certain renewable resources, zero-emission nuclear power, clean electricity production and investment, solar and wind production facilities in low-income communities, clean hydrogen

production, advanced manufacturing production, and clean fuel production. It also would create, with varying effective dates, new credits for electric transmission property, qualified commercial electric vehicles, labor costs from installing mechanical insulation property, and investment in certain advanced manufacturing facilities.

To address the persistent tax return processing issues at the IRS and related problems, both the House and Senate BBB bills include Increased IRS funding for enforcement activities through an appropriation of approximately \$80 billion through 2031 for IRS taxpayer services, enforcement, operations support, and business systems modernization. While it's certainly possible that the IRS could receive some additional funding for enforcement through the regular appropriations process, given the hostility of most Congressional Republicans to the IRS, it is highly unlikely that the IRS would receive anywhere near the level of funding that it could obtain through a BBB bill passed through reconciliation.

As many Senators have requested, the Treasury Department is also planning to issue preliminary guidance this month clarifying who will be considered a cryptocurrency broker under the bipartisan infrastructure law that Congress passed last year. The crypto broker reporting provision requires those covered to report customers' names and addresses, gross proceeds from sales, and any capital gains or losses to both the IRS and investors.

Industry groups and many in the Congress have argued that this provision is overbroad and could interfere with innovation by inadvertently covering miners and software providers who lack access to the information sought, making it impossible for many firms to comply. A number of legislators have offered bills to address this issue although their prospects for becoming law are uncertain. Thus, this guidance as to who is a "broker" is important as the Treasury Department and the IRS are more likely than Congress to address these issues in the near term.

Finally, if Democrats can somehow manage to enact some form of a BBB bill, even if further restricted in cost and scope, it remains unclear whether any tax policy changes included in such a bill will become effective on the bill's enactment or whether any of the changes adopted will be made retroactive to the start of 2022.

Unless Democrats succeed before the November elections, their efforts to obtain former President Trump's tax returns will fail if Republicans win control of the House starting in 2023

On December 14, 2021, a federal trial judge appointed by President Trump dismissed Trump's suit to prevent Congress from obtaining his tax returns, finding that the Chairman of the House Ways & Means Committee has broad authority to request any person's tax returns and that his request for such records is a legitimate exercise of Congressional oversight authority. The judge

therefore held that the Treasury Department can provide the returns to the House Ways & Means Committee. but stayed his ruling for ten days to give President Trump time to appeal.

President Trump has appealed this decision to the US Court of Appeals for the DC Circuit which has not yet scheduled argument. However this case is decided on appeal, the losing party is likely to seek review by the Supreme Court. Thus, unless the Supreme Court denies review, it seems more likely than not that this case will still be pending when the November elections arrive.

If the Democrats manage to hold on to control of the House in November, this case will likely be resolved on the merits should Chairman Neal not already have received former President Trump's tax returns. However, should Republicans win control of the House, starting in early January 2023, this request for President Trump's tax returns will surely be withdrawn as Republican leaders will have no interest in exposing President Trump's finances to such scrutiny.

About the Author



Gary L. Goldberg

Senior Policy Director,
Washington DC
D +1 202 408 6396
gary.goldberg@dentons.com

Technology

In 2022, the internet and technology sectors will be a central focus for a divided Congress seeking to find common ground. While Democrats and Republicans may differ on why Congress needs to get involved and what the remedies may be, they are equally concerned about how large some of the companies have become and their dominant market power. Lawmakers are also becoming increasingly concerned that consumers lack the ability to control their experience based on the policies and practices of the largest internet and technology companies. Though there has been more bipartisanship in approaching many of these issues, passage of any freestanding bill or regulatory action seems unlikely. Outlined below are the issues that have piqued lawmakers' interest and will receive consideration in the second session of the 117th Congress as well as in the 118th Congress, regardless of the party that controls Congress.

Digital Privacy

Federal Privacy Law

Congressional discussion on digital privacy will continue to take shape in 2022. This call to action has been heightened by thousands of data breaches in the past year, many of which were highly publicized due to the extent of data obtained and impacts on the industries targeted. Additionally, more robust initiatives related to collection and use of consumer data by internet and technology companies increased awareness among consumers, many of whom are more connected online than ever before as a result of the pandemic. With the momentum for action that grew out of these events, Congress is expected to introduce additional digital privacy bills. Thematically, the majority of these initiatives are focused on enhancing consumer protections through a baseline federal privacy law. These bills also seek to create clarity and certainty for companies that find themselves grappling with a patchwork of state laws and proposals that make compliance

exceedingly difficult, especially as companies continue to work toward full compliance with the European Commission's General Data Protection Regulation (GDPR). The bills that remain active or in discussion in 2022 include the [Setting an American Framework to Ensure Data Access, Transparency, and Accountability \(SAFE DATA\) Act](#) (S. 2499), [Consumer Data Privacy and Security Act of 2021](#) (S. 1494), [Information Transparency and Personal Data Control Act](#) (H.R. 1816), and the [comprehensive digital privacy discussion draft bill](#) released by House Energy and Commerce Committee Minority members. In 2022, Representative Jan Schakowsky (D-IL) and House Energy and Commerce Democrats are expected to introduce a comprehensive privacy bill to counter the draft discussion bill introduced by the minority.

Outlook

A federal privacy law is not expected to be enacted in 2022 despite nearly two decades of significant movement to establish a uniform national standard. However, for the first time in many years, the internet and technology sectors appear more open to working with Congress to supersede the patchwork of state laws by providing a workable federal definition. This noted momentum toward a federal privacy standard should increase the level of engagement by lawmakers and expedite serious conversations about how to address disagreements on the inclusion of a private right of action and whether there would be any form of federal preemption. Though enactment of a federal privacy law is not expected in 2022, it is clear that the increasing concerns about consumer privacy will be addressed through hearings and additional legislation that is likely to receive more aggressive consideration toward the end of this year and into the 118th Congress.

Enforcement

Due to the significant number of major issues facing the Federal Trade Commission (FTC) and its mission to promote enforcement of existing laws and to ensure companies not engage in “unfair or deceptive acts or practices in or affecting commerce” under Section 5(a) of the Federal Trade Commission Act (15 USC § 45), the FTC will be under a great deal of scrutiny to open investigations on proposed mergers and acquisitions and to fulfill its role in oversight of consumer protection.

The FTC was slated to receive \$1 billion in funding from the now stalled Build Back Better Act (BBB) to establish a bureau dedicated to consumer privacy. While BBB is still being negotiated, some Congress members have introduced legislation to strengthen enforcement efforts. Senator Kirsten Gillibrand (D-NY) introduced the [Data Protection Act of 2021](#) (DPA) (S. 2134), which would create an independent federal agency to oversee digital privacy enforcement and protection. While these proposals remain pending, it is unlikely that consumer privacy enforcement will be bolstered in 2022, as BBB is likely to be pared down significantly and the DPA will likely not garner enough support to be successful. Nevertheless, the overwhelming amount of focus that is being placed in reining in the big internet and technology companies will continue to drive conversation and initiatives to increase consumer protection, especially in the privacy space. While efforts to strengthen digital privacy protections at the federal level are not expected to be successful in 2022, the conversation and push to take action will continue into the new Congress.

Amending the Children’s Online Privacy Protection Act (COPPA)

As the focus on privacy continues to grow, one policy area has garnered more bipartisan support than a federal privacy law - the protection of children and teens. Following the revelations from the thousands of documents released by former Facebook (now Meta) employee and whistleblower Frances Haugen, Congress began to give significant attention to the effects big internet and technology companies, especially social media companies, have on children and teens. Bills pending in Congress to update COPPA include the [Children and Teens’ Online Privacy Protection Act](#) (S. 1628), sponsored by Senator Markey (D-MA) and the [Kids PRIVACY Act](#) (H.R. 4801), sponsored by Representative Castor (D-FL). A common objective of these children’s privacy bills is to update the opt-in or consent age to include teenagers, which is seen by proponents of amending COPPA as imperative with teenagers becoming increasingly connected online.

Outlook

Additional hearings will be held in 2022 to examine the effects of the internet and technology platforms on children and teens and to discuss possible solutions. Of the several topics on consumer privacy that will be of interest in 2022, legislation to update and strengthen the privacy rights of children and teens is the most likely to be successful, but if enacted will have only a marginal impact on the larger social media companies, while having a disparate and highly burdensome impact on companies that direct content to children in a responsible manner. While a general privacy bill is unlikely to be enacted in 2022, protecting children and teens is one politically salable initiative on both sides of the aisle.





Content Moderation: Communications Decency Act, Section 230

Efforts to repeal or amend Section 230 of the Communications Decency Act (CDA) continued to gain momentum in 2021 as backlash from both Democrats and Republicans intensified. Democrats believe that Section 230 is utilized by platforms to avoid content moderation, leading to increased disinformation, violence, and hate speech. Republicans argue that Section 230 is being utilized to suppress conservative speech. There are over 25 pending bills to repeal or amend Section 230. Among Democrats, the main theme in these bills is the use of algorithms, especially as it relates to civil liberties, which is outlined in the Algorithmic Justice and Online Platform Transparency Act ([H.R. 3611](#) and [S. 1896](#)). Among Republicans, the main theme is to protect speech or prevent censorship, which is seen in the [PRESERVE Online Speech Act](#) (S. 2500).

The current focus on Section 230 is also amplified by the recent revelations about Meta from Frances Haugen's testimony about her belief that Facebook did not share information with the public that demonstrated how children are harmed on its platforms. The [documents released](#) by Haugen pointed to Meta's research on and understanding of the harms of Instagram's sorting algorithm to children and teens. This exposé has led to a call from Congress and consumers to administer greater scrutiny of the content prioritizing practices of social media. Additionally, through hearings focused on children and teen activity online, Congress focused on children and teens' access to harmful behavior patterns via social media, such as dangerous challenges like eating Tide pods, access to drugs, and online bullying.

Outlook

The focus on content moderation from both Democrats and Republicans will continue to intensify in 2022 as lawmakers learn more about the potentially harmful moderation or non-moderation practices of the online platforms, especially social media platforms. With the partisan divide in Congress, lawmakers are likely to focus on areas that they believe have the most appeal to both parties. In the past, lawmakers amended to Section 230 to address human trafficking and now have shifted their focus to children. Critics suggest that however politically appealing this focus may be, these Congressional efforts create redundancies and all that is truly needed is to enforce existing laws. Proponents of such legislative efforts suggest that there should not be any loopholes for the dominant internet and technology platforms that have grown far too large due to a lack of regulatory oversight. Especially in an election cycle, protecting children and tamping down on technology could find bipartisan support in 2022.

Antitrust

Several antitrust bills are pending in the House and Senate. In the House, six bipartisan bills were introduced on June 11, 2021. The introduction of these bills came in response to the [Investigation of Competition in Digital Markets](#) led by the House Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law between 2019 and 2020. The investigation found that Amazon, Apple, Google, and Facebook (now Meta) participated in anticompetitive behavior through their power as market-dominant platforms and gatekeepers. The House Judiciary Committee approved the six bills over the course of 19 hours, beginning on June 23 and ending early June 24.

Following the Committee markup of the House antitrust bills, announcements were made that the Senate would begin introducing companion bills, with the first, the American Innovation and Choice Online Act ([S. 2992](#) and [H.R. 3816](#)) introduced on October 18 by Senators Amy Klobuchar (DFL-MN) and Chuck Grassley (R-IA). A second companion was introduced by Senators Klobuchar and Tom Cotton (R-AR) on November 4, the Platform Competition and Opportunity Act of 2021 ([S. 3197](#) and [H.R. 3826](#)). While there was notable momentum to enact antitrust legislation, strengthened by the highly publicized marathon mark-up by the House Judiciary Committee, the urgency to combat the anticompetitive behavior of the dominant platforms waned. None of the six House bills have made it to the House floor. This decrease in focus was in large part due to the impetus placed on passing other pieces of legislation such as the Infrastructure and Investment Jobs Act and BBB. In the first half of 2022, negotiations on priority provisions from BBB and government funding will continue to take center stage, impacting efforts to rein in the dominant internet and technology companies.

Outlook

The existing antitrust bills introduced in the House and Senate in 2021 are not likely to be enacted in 2022. If any bill moves, two of the best candidates are a bill providing additional resources to competition enforcement agencies, the [Merger Filing Fee Modernization Act](#) (H.R. 3843) and a bill to ensure that states may pursue antitrust lawsuits in their own state and federal courts, the [State Antitrust Enforcement Venue Act of 2021](#) (H.R. 3460). Given the increasing global motivation to rein in the anticompetitive behavior of the big internet and technology companies, more hearings and the introduction of additional bills to prevent anticompetitive behavior are expected in 2022, including additional Senate bills that are companion to the House bills. The momentum surrounding actions to create more competition in digital markets will continue to take shape in 2022, possibly bringing a focus on consumer rights and expectations into the discussion.

Antitrust regulatory actions and lawsuits are expected to increase in 2022. The FTC under Chair Lina Khan, once Alvaro Bedoya is confirmed, giving Democrats a 3-2 majority, is likely to take regulatory actions and file complaints. In a December 10 statement of regulatory priorities, the FTC listed several rulemakings it would consider initiating, including: the Trade Regulation Rule on Commercial Surveillance, to curtail lax security practices, reduce intrusive surveillance, and ensure that algorithmic decision-making does not result in unlawful discrimination; a petition from Accountable Tech to prevent surveillance advertising; and rules addressing the right to repair and unfair competition in online marketplaces. The FTC found that case-by-case adjudication has been insufficient to address anti-competitive conduct and unfair practices.

Also worth watching is the Biden Administration's review of merger enforcement, especially vertical mergers. The FTC already has withdrawn the Trump Administration 2020 Vertical Merger Guidelines, and DOJ wants to replace those guidelines. The DOJ and FTC kicked off this review on January 18 issuing a joint [Request for Information on Merger Enforcement](#); comments are due by March 21, 2022.

Additionally, there are several pending lawsuits that were filed in 2020 and 2021 by the United States, the FTC, and State Attorneys General against the major internet platforms that may result in injunctions in 2022 to one or more of these companies to take remedial actions similar to provisions in bills introduced in Congress.

About the Authors



Michael E. Drobac

Principal, Washington DC
D +1 202 496 7500
michael.drobac@dentons.com



Gregory S. Walden

Partner, Washington DC
D +1 202 496 7436
gregory.walden@dentons.com



Lara Tennyson

Senior Public Policy Analyst,
Washington DC
D +1 202 496 7134
lara.tennyson@dentons.com

Trade

The conclusion of 2021 resulted in as much opacity for the trade market as the rest of the world economy has endured during the global pandemic. The Biden Administration focused much of its efforts this past year on conflict resolution and mending fences rather than pursuing new trade agreements. The U.S. has trade agreements with roughly 20 nations but has been slow to enter into any new agreements since President Biden took office. President Biden's team committed early on that they would be focused on domestic investment over trade negotiations and would take an approach towards a managed trade model that relies on government regulation of commerce. However, Americans who expected President Biden to reverse President Trump's protectionist trade policies were disappointed in the lack of action.

While there is much prognostication about what is to come in 2022, many world allies are hoping the Biden Administration will take trade policy off the back burner, but there has not been a strong indication it intends to do so.

China

While the Biden Administration initially said it would review the entire U.S. trade policy toward China, the rollback of Section 301 tariffs imposed on Chinese imports remains untouched. While China lived up to a large number of statutory and regulatory changes from previous agreements, it fell short of its pledged \$200 billion in additional purchases. Criticism of this comes at the same time as a demand from businesses to reopen the exclusion process for Section 301 duties. Conflicting demands to punish China for failing to meet its phase one commitments while also addressing the needs of the U.S. business community to reduce Section 301 liability indicate that President Biden will likely need to directly negotiate with China in 2022. One large caveat is that China would need to take an active role in doing so and there has not been any indication of its intentions.

Asia

After President Trump walked away from the Trans-Pacific Partnership deal in 2017, many hoped President Biden would reopen that door. President Biden however, announced in October of 2021 his intention to propose/announce an Indo-Pacific Economic Framework that will position the U.S. for economic engagement in the region. While specifics are still woefully lacking, it is anticipated to touch upon supply chains, digital standards, decarbonization, worker rights, infrastructure, and trade facilitation. Commerce Secretary Gina Raimondo has said that agencies are now busy filling in the details so they can be shared with regional partners by early 2022 and finalized by the end of the year.

In advance of the midterm elections in November, we may see the U.S. pursue a special trade agreement with the Taiwan as it is one of the few issues upon which both parties agree.

North America

Tensions between the U.S., Mexico and Canada remain despite the 2020 USMCA Agreement. Throughout 2021, trade in autos and auto parts, labor standards, trucking, softwood lumber and agriculture continued to cause friction. USMCA nations have lacked the commitment to resolve many of these long-standing issues and they are expected to continue in 2022. One of the more contentious issues that may have large implications is a provision in the electric vehicle tax credit proposal in the House-passed Build Back Better bill. The tax credit has been accused of directly benefitting segments of the U.S. auto industry relative to vehicle producers in Canada and Mexico. If enacted, this could be viewed as a significant violation of the non-discrimination principle contained in the USMCA and would likely lead to major legal disputes.

Tariffs

Americans who expected President Biden to reverse President Trump's protectionist trade policies were left disappointed last year, as most of the Trump Administration's tariffs on imports from China and our allies remain in effect.

American businesses have grown increasingly irritated that the administration has not done more to ease the Trump-era tariffs. In 2022, some action will have to be taken as key programs that offer tariff exemptions expired more than a year ago. As a result of the expiration of the Generalized System of Preferences and the Miscellaneous Tariff Bill programs at the end of 2020, U.S. importers have reportedly paid an estimated \$1.6 billion in additional tariffs over the past year. Both programs could be renewed as part of the U.S. Innovation and Competition Act, S. 1260 that passed the Senate last year and the House is reportedly work on a compromise with the Senate. Industry groups are lobbying to resurrect the program, and to have its benefits applied retroactively.

Section 301: The United States Trade Representative (USTR) is expected to unveil its plans to reinstate some exemptions to Section 301 tariffs, which President Donald Trump imposed on roughly \$350 billion of Chinese goods. But many industry officials argue the scope of the new exemptions is too narrow and continue to press for them to be lifted entirely.

Section 232: At the end of 2021, congressional Democrats pressed administration officials to eliminate steel and aluminum tariffs on U.S. allies. They believe doing so would help accelerate U.S. competition and ward off additional inflation pressures. While President Biden negotiated a deal with the EU to ease steel and aluminum tariffs, negotiations with Japan remain ongoing and talks with the U.K. have stalled.

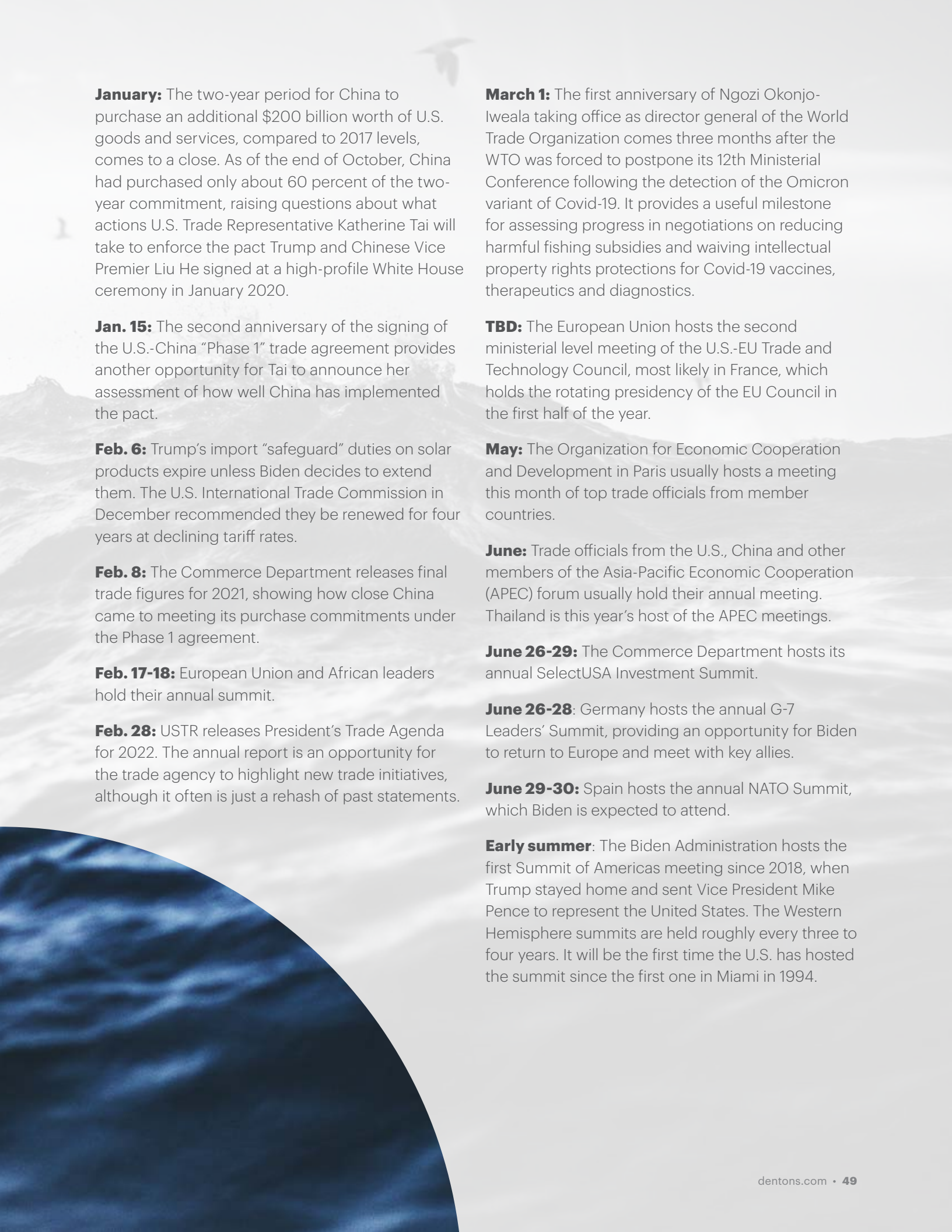
WTO

The World Trade Organization (WTO) which had foundered for years, fell into crisis after the Trump Administration blocked new appointments to the appellate body, which hears dispute settlement appeals. Despite legitimate concerns about WTO disputes and negotiations, no solution was proposed by the U.S. While other members have suggested ways to resolve the deadlock, the United States remains the only holdout and President Biden has not given any indication of changing course. Many have called for the administration to provide an outline for a vision of WTO reform but thus far the U.S. has not taken a leadership role in doing so.

2022 Key Dates

January: The U.S.-EU steel and aluminum deal goes into effect. The United States will lift the 25 percent tariff on steel and 10 percent tariff on aluminum imposed by President Donald Trump in exchange for the EU agreeing to new tariff-rate quotas for both metals. In exchange, the EU is lifting retaliatory duties on a long list of U.S. goods, including agricultural products.

January: The United Kingdom has threatened to take steps this month to increase its trade retaliation against the United States if it has not struck a similar steel and aluminum deal with the Biden Administration. The U.K. has retaliatory duties against American whiskey, motorcycles and some clothing in the nearly four-year-old dispute.



January: The two-year period for China to purchase an additional \$200 billion worth of U.S. goods and services, compared to 2017 levels, comes to a close. As of the end of October, China had purchased only about 60 percent of the two-year commitment, raising questions about what actions U.S. Trade Representative Katherine Tai will take to enforce the pact Trump and Chinese Vice Premier Liu He signed at a high-profile White House ceremony in January 2020.

Jan. 15: The second anniversary of the signing of the U.S.-China “Phase 1” trade agreement provides another opportunity for Tai to announce her assessment of how well China has implemented the pact.

Feb. 6: Trump’s import “safeguard” duties on solar products expire unless Biden decides to extend them. The U.S. International Trade Commission in December recommended they be renewed for four years at declining tariff rates.

Feb. 8: The Commerce Department releases final trade figures for 2021, showing how close China came to meeting its purchase commitments under the Phase 1 agreement.

Feb. 17-18: European Union and African leaders hold their annual summit.

Feb. 28: USTR releases President’s Trade Agenda for 2022. The annual report is an opportunity for the trade agency to highlight new trade initiatives, although it often is just a rehash of past statements.

March 1: The first anniversary of Ngozi Okonjo-Iweala taking office as director general of the World Trade Organization comes three months after the WTO was forced to postpone its 12th Ministerial Conference following the detection of the Omicron variant of Covid-19. It provides a useful milestone for assessing progress in negotiations on reducing harmful fishing subsidies and waiving intellectual property rights protections for Covid-19 vaccines, therapeutics and diagnostics.

TBD: The European Union hosts the second ministerial level meeting of the U.S.-EU Trade and Technology Council, most likely in France, which holds the rotating presidency of the EU Council in the first half of the year.

May: The Organization for Economic Cooperation and Development in Paris usually hosts a meeting this month of top trade officials from member countries.

June: Trade officials from the U.S., China and other members of the Asia-Pacific Economic Cooperation (APEC) forum usually hold their annual meeting. Thailand is this year’s host of the APEC meetings.

June 26-29: The Commerce Department hosts its annual SelectUSA Investment Summit.

June 26-28: Germany hosts the annual G-7 Leaders’ Summit, providing an opportunity for Biden to return to Europe and meet with key allies.

June 29-30: Spain hosts the annual NATO Summit, which Biden is expected to attend.

Early summer: The Biden Administration hosts the first Summit of Americas meeting since 2018, when Trump stayed home and sent Vice President Mike Pence to represent the United States. The Western Hemisphere summits are held roughly every three to four years. It will be the first time the U.S. has hosted the summit since the first one in Miami in 1994.

TBD: Japan has been tapped to host this year's summit meeting of the Quad, which also includes the United States, India and Australia. No date has been set but reports that it could happen as early as January have been knocked down.

TBD: Leaders of the BRICS group of nations — Brazil, Russia, India, China and South Africa — usually meet once a year. China is this year's host for the meeting.

August: The United States holds its annual trade and investment forum with African countries.

Sept. 8-11: The China International Trade and Investment Fair plans to be held in Xiamen.

Sept. 13-27: World leaders gather in New York for the annual United Nations General Assembly and related events.

Sept. 15-16: The Shanghai Cooperation Organization holds its annual summit. Members include China, India, Kazakhstan, Kyrgyzstan, Pakistan, Russia, Tajikistan and Uzbekistan.

November: The Chinese Ministry of Commerce co-hosts the China International Import Expo, which is held every year in Shanghai.

Fall: Chinese President Xi Jinping expects to receive a third term as Chinese Communist Party chair during its 20th Party Congress.

Fall: Indonesia hosts the annual summit meeting of the G-20 group of leading economies from both the developed and developing world. The meeting, if held in person, presents an opportunity for Xi and Biden to hold face-to-face talks.

Fall: Cambodia hosts the East Asia Summit between the 10 members of the Association of Southeast Asian countries and other regional powers such as China, Japan and the United States.

Fall: Thailand hosts the APEC summit, another regional forum that includes China, Japan, and the United States as well as Russia, Canada, Mexico, Chile and Peru.

TBD: Sometime this year, Singapore hosts the annual meeting of the Commission overseeing the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Members are expected to consider China, Taiwan and South Korea's applications to join the regional trade agreement.



Margeaux Plaisted

Senior Managing Director,
Washington DC
D +1 202 408 3239

margeaux.plaisted@dentons.com

About the Author

- Margeaux helps clients develop and execute strategies around federal legislative, regulatory and public policy matters with a specific focus on financial services, health care, energy, appropriations and tax issues.
- Prior to joining Dentons, Margeaux served in the Office of Legislative Affairs for President George W. Bush.

Transportation and Infrastructure

In 2022, most attention will be focused on implementation of the bipartisan infrastructure bill enacted last year, entitled the [Infrastructure Investment and Jobs Act](#). The Department of Transportation (DOT) and its modal administrations such as the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) have more money to dole out than ever before, but the disbursement of this funding for some of the programs included in this Act will not begin until Congress passes a FY 2022 THUD appropriations bill, and grants under new programs must await guidance on the application and review process.

The breakdown in new transportation-related spending over five fiscal years is as follows:

- \$110 billion for bridge, highway, road, and main arterial construction and repair
- \$66 billion for passenger and freight rail
- \$39 billion for mass transit
- \$25 billion for airport improvements
- \$17 billion for ports and inland waterways
- \$7.5 billion for electric vehicle charging stations
- \$7.5 billion for low- or zero-emission buses and ferries

President Biden set up an Infrastructure Implementation Task Force, led by White House Infrastructure Coordinator Mitch Landrieu. Others on the Task Force include Transportation Secretary Pete Buttigieg and the Secretaries of Energy, Interior, Labor, and Agriculture.

Also of significance is the DOT's progress in enabling automated vehicle operations at scale, which includes self-driving cars and trucks as well as drones and air taxis, called advanced air mobility (AAM). The National Highway Traffic Safety Administration (NHTSA) has the lead with respect to the design and manufacture of automated cars and trucks, with the Federal Motor Carrier Safety

Administration (FMCSA) in charge of ensuring the safety of commercial operations. The Federal Aviation Administration (FAA) has the lead on both drones and AAM, for design, manufacture, and operations.

In early 2021 Secretary Buttigieg laid out some general overarching principles, called pillars, that will guide DOT rulemaking and policies. The environment and sustainability as well as equity, in terms of access, are two pillars that will be considered in the Department's implementation of the infrastructure law as well as automated vehicle rules and policies.

Personnel is policy, but only when confirmed.

Eight Presidential nominees for DOT continue to await confirmation, and three other key positions are vacant. After an eight-month wait, Amit Bose was confirmed on January 12 to serve as Administrator of the Federal Railroad Administration (FRA). The infrastructure bill provides \$66 billion for rail, which is advantageous to AMTRAK as well as to high-speed rail. With a Democratic Administration, the California High Speed Rail project is expected to get a significant infusion of funds.

Stephanie Pollack now serves as the Deputy Administrator of the Federal Highway Administration, and thus is acting head of the agency. She has not yet been nominated for the top position.

John Putnam, currently DOT Deputy General Counsel, has been nominated to be General Counsel. Annie Petsonk is still awaiting confirmation to serve as the Assistant Administrator for Aviation and International Affairs; she now is in the deputy position. Senator Rick Scott (R-FL) has put a hold on these and other DOT and Commerce Department nominees until the Commerce Committee agrees to hold a hearing on supply chain issues at which both DOT Secretary Buttigieg and Commerce Secretary Raimondo testify. Marc Nichols was appointed Chief Counsel of the FAA on January 5 – that position does not require Senate confirmation. Steve Dickson

is in the middle of a statutory five-year term as Administrator of the FAA (ends in August 2024), but he serves at the pleasure of the President.

No change in House and Senate leadership, at least through 2022. In the House, Representative Peter DeFazio (D-OR) is retiring at the end of this term but will preside over the Transportation and Infrastructure Committee in 2022. Aviation Subcommittee Chairman Rick Larsen (D-WA) and Highways and Transit Chair Eleanor Holmes-Norton (D-DC) have both expressed an interest in succeeding DeFazio, but their bid to chair the Committee may be foiled if the Republicans win back the House in the 2022 midterm elections.

In the Senate, Senator Maria Cantwell (D-WA) will continue to chair the Senate Commerce, Science, and Transportation Committee, with Roger Wicker (R-MS) as ranking member.

Legislation and oversight. The authorization of Federal aviation programs will expire at the end of FY 2023, leading the House and Senate authorizing committees to begin consideration of a multi-year reauthorization package with hearings in the coming months. Note that FAA reauthorization includes the Department's economic regulatory programs, which includes consumer protection. These hearings are likely to function also as oversight of the DOT's progress in meeting congressional directives from the FAA Reauthorization Act of 2018, FAA's certification program (including the Organization Designation Authority program) in the wake of the two Boeing 737 MAX fatal accidents, NHTSA's progress in developing a regulatory framework for automated vehicles, and DOT consumer protection regulations.

Congress may also review the 5G rollout dispute between airlines (and airports) and wireless carriers, which the FAA and Federal Communications Commission (FCC) are still working to resolve. There may also be hearings on the COVID-19 pandemic's impact on transportation, which includes airline cancellations, delays in providing refunds, vaccine and mask requirements, and a spike in passenger misconduct.

With respect to automated vehicles, the momentum of the fall of 2017, when the House passed the **SELF DRIVE Act** by voice vote and the **AV START Act** cleared the Senate Commerce Committee by voice, has not returned. The thorny issues of preemption and arbitration remain, and trucks were left out of both House and Senate bills in 2017. Congress most likely will not move AV legislation in 2022, and therefore progress will be up to DOT.

Rulemakings

DOT – Office of the Secretary (OST).

OST has authority to issue regulations to protect consumers, and a few consumer protection rulemakings are listed below. OST is also in charge of setting policy throughout the DOT as well as tackling the most challenging issues. In 2022, pressure on the DOT to act to address the COVID-19 pandemic may continue. While the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) mandates have now been decided by the Supreme Court, the DOT has to date refrained from exercising its safety authority to mandate vaccines, masks, or tests, whether for international or domestic travel. The mask requirement for airline and AMTRAK passengers was imposed by the Transportation Security Administration (TSA).

OST is expected to ensure that DOT rules and policies consider climate impacts, sustainability, equity in access, and impacts on local and tribal communities. The Transportation Secretary and other senior Department officials will continue to play a role in seeking to resolve supply chain problems, especially at ports.

Surface transportation

Highway, road, and bridge programs. **Internal FHWA guidance** in December 2021 suggests that states should place priority on repairing and improving existing infrastructure over new projects included in the infrastructure legislation. With that in mind, the infrastructure law provides funding for three key existing programs, and several new programs:

- Highway Trust Fund contact authority for highways, roads, and bridges: \$273.15 billion over five years. President Biden announced on January 13 over \$5 billion in FY 2022 funding for bridge repair and replacement: \$5.3 billion to the states and \$16.5 million to tribal governments.
- Surface Transportation Block Grant (STBG) program: \$72 billion over five years
- Nationally Significant Freight and Highway Projects (INFRA) grant program: \$8 billion over five years

New programs:

- National Infrastructure Project Assistance Grants: \$15 billion over five years
- Bridge Investment Program: \$40 billion over five years, \$27.5 billion of which is formula funded; \$12.51 billion to be awarded through competitive grants
- Reconnecting Communities Pilot Program: \$1 billion over five years
- Wildlife Crossings Pilot Program: \$350 million over five years
- Threats to Pedestrians competitive grant program: \$25 million over five years
- Rural Surface Transportation Grant Program: \$2 billion over five years
- Strengthening Mobility and Revolutionizing Transportation (SMART) grant program: \$500 million over five years

The legislation subjects infrastructure projects to domestic content (Buy America) preferences, with a waiver provision that comes with transparency and review requirements.

Electric vehicles. In November 2021, the FHWA issued a notice seeking comment on guidance for two new electric vehicle (EV) charging station programs. [Development of Guidance for Electric Vehicle Charging Infrastructure Development](#), 86 Fed. Reg. 67782 (Nov. 29, 2021)(comments due by January 28, 2022). The National Electric Vehicle Formula Program will provide funding to States to



create an interconnected highway charging station network. The Charging and Fueling Infrastructure Discretionary Grant Program will be a competitive grant program for projects that “improve public accessibility to electrical vehicle charging and hydrogen, propane, and natural gas fueling stations, along designated alternative fuel corridors or other community locations accessible to drivers.” 86 Fed. Reg. at 67783.

Automated vehicles. The Biden Administration has yet to publish an AV policy statement, which the Obama Administration initiated in 2016 and the Trump Administration continued, issuing [version 4.0](#) in 2020. The one action taken by the Biden Administration came in June 2021, when the NHTSA issued an unusual Standing General Order directing automated vehicle manufacturers to report accidents and incidents. In re: [Standing General Order 2021-01 – Incident Reporting for Automated Driving Systems \(ADS\) and Level 2 Advanced Driver Assistance Systems \(ADAS\)](#)(June 29, 2021)(amended Aug. 5, 2021). The NHTSA issued this Order to “evaluate whether specific manufacturers . . . are meeting their statutory obligations to ensure that their vehicles and equipment are free of defects that pose an unreasonable risk to motor vehicle safety[.]”

Highly publicized accidents in the last couple of years involving cars with automated driving features likely prompted this Order.

Key DOT rulemakings pending are the following:

- NHTSA — [Occupant Protection for Automated Driving Systems, Notice of Proposed Rulemaking](#) (NPRM), 85 Fed. Reg. 17624 (Mar. 30, 2020), final rule scheduled for February 2022
- NHTSA — [Facilitating New Automated Driving Systems Vehicle Designs for Crash Avoidance Technology](#)—Advanced Notice of Proposed Rulemaking (ANPRM), 84 Fed. Reg. 24433 (May 28, 2019), with no timetable for a proposed rule
- NHTSA—[Framework for Automated Driving Safety](#)—ANPRM, 85 Fed. Reg. 78058 (Dec. 3, 2020), with no timetable for a proposed rule
- NHTSA – [Pilot Program for Collaborative Research on Motor Vehicles with High or Full Driving Automation](#) – ANPRM, 83 Fed. Reg. 50872 (Oct. 10, 2018), expected to be withdrawn and included in a NHTSA rulemaking entitled Expansion of Temporary Exemption Program to Domestic Manufacturers for Research, Demonstrations, and Other Purposes
- FMCSA—[Safe Integration of Automated Driving Systems-Equipped Commercial Motor Vehicles](#)—ANPRM, 84 Fed. Reg. 24449 (May 28, 2019), final rule scheduled for June 2022
- FHWA – [Manual on Uniform Traffic Control Devices for Street and Highways](#)—NPRM, 85 Fed. Reg. 80898 (Dec. 14, 2020), final rule scheduled for September 2022
- NHTSA—[Considerations for Telltales, Indicators, and Warnings in Vehicles Equipped with Automated Driving Systems](#) — ANPRM scheduled for September 2022

Legacy vehicles. The Biden Administration is expected to move forward with tougher safety rules for cars and trucks. For example, the NHTSA plans to publish an NPRM to require and/or standardize equipment performance standards for automatic emergency braking on heavy trucks.

Transit. Public transportation will receive \$69.9 billion in contract authority from the Highway Trust Fund over five years; far eclipsing the annual funding of mass transit. The significant influx in funding follows funding infusions in laws enacted to combat the pandemic. Congress provided an increase in funding to seven major FTA programs, including the Urbanized Area Formula, State of Good Repair, and New Starts programs, and created four new competitive grant programs, each of which received appropriated funds that address accessibility and environmental concerns in rural locations.

Aviation – safety

In 2022, the FAA will continue to be confronted with several challenges. In response to the two fatal accidents involving the Boeing 737 MAX aircraft, Congress directed the FAA to reform its aircraft certification process, with particular emphasis on the Organization Designation Authority (ODA) program. The Department of Justice (DOJ) is now under scrutiny for entering into a deferred prosecution agreement with Boeing, allegedly without involving the families of passengers on the two flights. It is unknown whether the DOJ will file charges against any Boeing executive or FAA employee.



The mask requirement for travelers on aircraft or in airports, and on AMTRAK, has resulted in a dramatic increase in unruly passengers, who are subject to civil fines and, in egregious cases, criminal prosecution. Air rage is not new, but the airlines and the FAA were not prepared for the recent spike in passenger misconduct.

Drones and Advanced Air Mobility. The FAA will proceed with additional regulation of drones, drone operators, and drone operations. Most anticipated is a rulemaking to authorize operations beyond the visual line of sight of the remote pilot (BVLOS). A report from the BVLOS Aviation Rulemaking Committee (ARC) is expected to be sent to the FAA Administrator this soon, with a proposed rule to follow without any timetable.

The remote identification **final rule** issued at the end of 2020 was the most significant drone rulemaking to date. While the FAA and drone industry are busy working to implement and comply with the final rule, the U.S. Court of Appeals for the District of Columbia Circuit heard argument in December on a challenge to the remote ID final rule. If the D.C. Circuit issues a ruling, expected in the spring of 2022, that vacates the final rule, the FAA will need to revise the rule to comply with the court's decision (unless the government seeks rehearing by the D.C. Circuit or review by the Supreme Court).

Key drone rulemakings expected to move in 2022:

- Section 2209 NPRM – protection of critical infrastructure: section 369 of the FAA Reauthorization Act of 2018 required FAA to publish a proposed rule by March 31, 2019; a proposed rule was expected to be published before the end of 2021, and thus is expected soon
- Air carrier definitions NPRM, no scheduled date for publication
- 14 CFR 91.113 NPRM – FAA intends to propose revisions to the right-of-way rules to accommodate drones. 14 C.F.R. 107.37 requires small drones to give the right of way to all legacy aircraft.

- **Modernization of Special Airworthiness Certification (MOSAIC)** – standards and airworthiness NPRM scheduled for publication in August 2022, to be followed with a carriage of property NPRM in the 2023-2024 timeframe. This rulemaking is required by sections 345 and 357 of the FAA Reauthorization Act of 2018. The air carrier rulemaking is required by section 348 of the 2018 law.

Two other aviation safety rulemakings to watch:

- **Domestic Noise Certification of Supersonic Aircraft** – NPRM, 85 Fed. Reg. 20431 (April 13, 2020); no scheduled date for a final rule
- **Safety Management Systems (SMS) for Parts 21, 91, 135, and 145** – NPRM scheduled for September 2022; FAA will propose requiring manufacturers, repair stations and on demand air carriers to adopt and comply with an SMS.

Aviation – economic

Consumer protection. The DOT will move a number of rulemaking projects in 2022, spurred on by President Biden's Executive Order 14036, **Promoting Competition in the American Economy**.

Key rulemakings:

- **Airline Ticket Refunds and Consumer Protections**—NPRM scheduled for March 2022
- **Enhancing Transparency of Airline Ancillary Service Fees** –NPRM scheduled for June 2022
- **Refunding Fees for Delayed Checked Bags and Unused Ancillary Services** – NPRM, 86 Fed. Reg. 38420 (July 21, 2021), final rule scheduled for July 2022
- **Modernizing Payment of Denied Boarding Compensation**, NPRM, 84 Fed. Reg. 11658 (Mar. 28, 2019), final rule scheduled for December 2021

It remains to be seen whether Executive Order 14036 prompts the DOT to take additional actions to protect consumers.



International code-sharing alliances. Over the last three decades, the DOT has approved code-sharing agreements and granted antitrust immunity to U.S. and foreign air carriers that are parties to such agreements, in some instances over the objection of the DOJ. DOT has the final word on whether to grant antitrust immunity, while the DOJ provides its recommendations to the DOT. This statutory allocation of responsibility does not apply to joint ventures between two U.S. carriers, which are subject to the Sherman Act. In September 2021, the DOJ, six states, and the District of Columbia sued under section 1 of the Sherman Act to block the American-JetBlue Northeast Alliance covering American and JetBlue operations at JFK, LaGuardia, Newark, and Boston Logan airports. A decision in this case could result in a reevaluation of the DOT's policy and practice in reviewing code-sharing agreements and requests for antitrust immunity.

Rail

Rail is a big winner in the funding from the infrastructure law. Funding for existing programs includes:

- Federal-State Partnership for State of Good Repair grant program: \$42 billion over five years (\$7.5 billion authorization and \$36 billion appropriation)
- Expanding the Rebuilding American Infrastructure with Sustainability and Equity (RAISE), formerly the BUILD and TIGER programs to authorize \$7.5 billion for rail projects over five years
- Nationally Significant Freight and Highway Projects (INFRA) grant program: \$3 billion over five years
- Expands eligibilities under Consolidated Rail Infrastructure and Safety Improvements (CRISI) program: \$5 billion over five years
- Extends Restoration and Enhancement Grant (REG) program project timelines: \$250 million over five years



New programs include:

- Infrastructure competitive grant program: \$10 billion over five years
- Competitive grant program for at-grade rail-highway crossings: \$2.5 billion over five years
- Culvert removal replacement and restoration grant program: \$1 billion over five years
- Railroad crossing elimination grant program: \$3 billion over five years
- Safe Streets and Road for All grant program: \$5 billion over five years

Smart Cities

The IIJA made new investment in Smart Cities. In addition to the funding for EVs and AVs described above, the IIJA establishes a new DOT program - Strengthening Mobility and Revolutionizing Transportation (SMART) grant program, which authorizes \$100 million for communities to conduct demonstration projects focused on advanced smart city or community technologies and systems that can improve transportation efficiency and safety.

About the Authors



Gregory S. Walden

Partner, Washington DC
D +1 202 496 7436
gregory.walden@dentons.com



Andrew Shaw

Partner, Washington DC
D +1 202 496 7116
andrew.shaw@dentons.com



Michael E. Drobac

Principal, Washington DC
D +1 202 496 7500
michael.drobac@dentons.com



Lara Tennyson

Senior Public Policy Analyst,
Washington DC
D +1 202 496 7134
lara.tennyson@dentons.com

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Solutions at hand	How can we provide support?
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Solutions at hand	How can we provide support?
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Meet our team



Eric J. Tanenblatt
Chair, US Public Policy,
Atlanta and Washington DC
eric.tanenblatt@dentons.com



Thurbert Baker
Partner,
Atlanta and Washington DC
thurbert.baker@dentons.com



Michael E. Drobac
Principal,
Washington DC
michael.drobac@dentons.com



Steven J. Labovitz
Partner,
Atlanta
steven.labovitz@dentons.com



Tobin McClamroch
Managing Partner,
Dentons' US Region, Indianapolis
toby.mcclamroch@dentons.com



Heather (V. Heather) Sibbison
Partner,
Washington DC
heather.sibbison@dentons.com



Michael E. Zolandz
Office Managing Partner,
Washington DC
michael.zolandz@dentons.com



Dan Baskerville
Senior Policy Director,
Atlanta
dan.baskerville@dentons.com



Ashley D. Bell
Partner,
Atlanta
ashley.bell@dentons.com



Tim R. Coonan
Special Counsel,
Des Moines
tim.coonan@dentons.com



Samuel Daughety
Counsel,
Washington DC
samuel.daughety@dentons.com



Christopher W.K. Fetzer
Partner,
Washington DC
chris.fetzer@dentons.com



Sydney J. Gangestad
Special Counsel,
Des Moines
sydney.gangestad@dentons.com



Sharon A. Gay
Senior Counsel,
Atlanta
sharon.gay@dentons.com



Daniel C. Gibb
Partner,
Washington DC
dan.gibb@dentons.com



Gordon D. Giffin
Partner,
Atlanta and Washington DC
gordon.giffin@dentons.com



Gary L. Goldberg
Senior Policy Director,
Washington DC
gary.goldberg@dentons.com



William M. Kaneko
Partner,
Honolulu
william.kaneko@dentons.com



Polly Lawrence
Senior Policy Director,
Denver
polly.lawrence@dentons.com



Edward H. Lindsey Jr.
Partner,
Atlanta
edward.lindsey@dentons.com



Bill McCollum
Partner,
Washington DC
bill.mccollum@dentons.com



Ceasar C. Mitchell, Jr.
Partner,
Atlanta
ceasar.mitchell@dentons.com



C. Randall Nuckolls
Partner,
Washington DC
randy.nuckolls@dentons.com



Samuel S. Olens
Partner,
Atlanta
samuel.olens@dentons.com



David C. Quam
Counsel,
Washington DC
david.quam@dentons.com



Suzanne R. (Susi) Schaeffer
Counsel,
Washington DC
suzanne.schaeffer@dentons.com



Andrew Shaw
Partner,
Washington DC
andrew.shaw@dentons.com



David W. Tandy
Partner,
Louisville
david.tandy@dentons.com



Gary R. Thorup
Shareholder,
Salt Lake City
gary.thorup@dentons.com



Robert A. Vescio
Principal,
Pittsburgh
rob.vescio@dentons.com



Gregory S. Walden
Partner,
Washington DC
gregory.walden@dentons.com



Nicholas W. Allard
Senior Counsel,
Washington DC
nick.allard@dentons.com



Debra Atkins
Policy Research Director,
Washington DC
debra.atkins@dentons.com



Chan Creswell
Senior Public Policy Analyst,
Atlanta
chan.creswell@dentons.com



Howard B. Dean
Senior Advisor,
Washington DC
howard.dean@dentons.com



John Fox
Senior Advisor,
Washington DC
john.fox@dentons.com



Thomas E. Hampton
Senior Advisor,
Washington DC
thomas.hampton@dentons.com



Anamaria Hazard
Managing Associate,
Atlanta
anamaria.hazard@dentons.com



Ron Kaufman
Senior Advisor,
Washington DC
ron.kaufman@dentons.com



Matthew La Crue
Managing Director,
Denver
matthew.lacruel@dentons.com



Gary LaPaille
Senior Advisor,
Washington DC
gary.lapaille@dentons.com



Michael Nutter
Senior Advisor,
Washington DC
michael.nutter@dentons.com



Bill Owens
Senior Advisor,
New York and Washington DC
william.owens@dentons.com



Andrew M. Paris
Senior Policy Manager,
Harrisburg
andrew.paris@dentons.com



Margeaux Plaisted
Senior Managing Director,
Washington DC
margeaux.plaisted@dentons.com



James A. Richardson
Senior Managing Director,
Washington DC
james.richardson@dentons.com



David Skaggs
Senior Advisor,
Denver
david.skaggs@dentons.com



Darry A. Sragow
Senior Counsel,
Los Angeles
darry.sragow@dentons.com



Elmer Stancil
Senior Policy Advisor,
Atlanta
elmer.stancil@dentons.com



Lindsay Steves
Senior Public Policy Analyst,
Washington DC
lindsay.steves@dentons.com



Lara Tennyson
Senior Public Policy Analyst,
Washington DC
lara.tennyson@dentons.com





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