

PRG Pulse 2022 Post-Election Analysis

Update

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The Big Picture

Congressional Overview

By *Liam Donovan*

American voters delivered a decidedly mixed message to Washington on Tuesday, seemingly handing Republicans narrow control of the U.S. House of Representatives and a nominal check on President Biden's agenda. While the Senate remains in flux, with races in Arizona and Nevada too close to call and Georgia bound for a December 6th runoff, Democrats did manage to pick up an open GOP-held seat in Pennsylvania, leaving them just one seat shy of maintaining their bare 50-seat majority.

While the night had its bright spots for the GOP, the absence of the anticipated "red wave" is bound to spark recriminations among congressional Republicans, with immediate implications for the party's strategy heading into the 118th Congress. Presumptive Speaker-in-waiting Kevin McCarthy (R-CA) will have to marshal a conference whose narrow margins are likely to empower conservative gadflies, and the ability work effectively with former President Trump will be put to the test amid the fallout.

The Coming Lame Duck

Before taking up the gavels, Republicans must navigate a busy lame duck session of Congress. In addition to the two marquee "must-pass" items—the National Defense Authorization Act (NDAA) and a government funding bill—a host of loose ends, legacy items, and parochial priorities must be dealt with. Perhaps most notably, the permitting reform legislation sought by Senator Joe Manchin (D-WV) as part of a sidecar deal to the Inflation Reduction Act remains in play, though substantive issues that felled the last attempt have yet to be resolved.

Ultimately the decision to strike an agreement on appropriations that clears the decks heading into the new majority will depend on each party's incentives. The public posture of the House GOP is likely to favor a continuing resolution into the new year under the promise of greater leverage to come, but given the abysmal outcome, McCarthy may be eager to take issues off the table now. Senate Republicans have far less reason to delay, and the chamber's top appropriators, retiring Senators Patrick Leahy (D-VT) and Richard Shelby (R-AL), are keen to pass one last omnibus on their way out. Before negotiations can proceed in earnest, clarity on outstanding races, which determines the incentives at play, must be reached.

Tax Vehicle Potential

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The emerging picture may set up the underlying conditions for a long-term government funding agreement, which in turn could provide a vehicle for a potential tax title. While the ranks of the traditional tax extenders have thinned thanks to recent legislative initiatives, perennial players are joined by a trio of Tax Cut and Jobs Act temporary and transitional policies: amortization of R&D expenses under Section 174; more stringent limits on the deduction for business interest expenses under Section 163(j); and the shift from full expensing to 80 percent bonus depreciation.

Some issues, like the R&D fix and supply chain relief for automobile dealers under Section 473, have strong bipartisan support and a sense of urgency. But a broader tax deal would force negotiators to confront House Democratic insistence on tax relief for working families as a term of any further corporate tax policy, complicating the path for a lame duck tax deal.

While both parties must agree to the terms of a funding deal and anything else that might ride along, Democrats may also consider lifting the debt ceiling, which they can do unilaterally using the budget reconciliation process. While they resisted this approach during last year's fight as a matter of principle and politics, with the election behind them, there will be a desire from the Administration to remove the risk of default or legislative brinkmanship at the hands of the GOP as the U.S. approaches the anticipated mid-2023 X-date.

As ever, with a slew of members headed for the exits and a sour mood among Republicans, the end-of-year "work period" may live up to its name, but a disappointing election night for the GOP nonetheless opens the door to a host of lame duck possibilities.

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White House Response

By Yasmin Nelson

Amidst news of a possible recession and spiking gas prices, the White House and the Democrats went into the midterm elections facing strong headwinds. Democrats hoped to attract enthusiastic support from millennials, Black voters, and women to hold onto power in either house of Congress, betting that their legislative victories, focus on diversity and equity, protection of reproductive rights, and active use of executive orders would carry the day. After Tuesday, and even with some House races and control of the Senate still undecided, the White House clearly emerged from the election feeling vindicated over their policy agenda and election strategies. President Biden hosted a cheery White House press conference the day after the election, declaring that "Democrats had a strong night" and that voters had chosen to "continue addressing the

climate crisis, gun violence, their personal rights and freedoms, and the student debt relief.”

Buoyed by the better-than-expected results, look for the Biden-Harris Administration to take a victory lap about preventing a “red wave.” Going forward, however, it is far less certain how the President will advance his policy agenda. Democratic control of Congress over the past two years enabled the Biden Administration to secure a range of significant legislative victories—including the American Rescue Plan (ARP), Inflation Reduction Act (IRA), the Infrastructure Investment and Jobs Act, the Chips and Science Act, and the bipartisan gun safety law. Those days are over. While Democrats may have prevented a red wave, Republicans are still expected to take control of the lower chamber, making the path forward decidedly more complicated.

Going forward, bipartisan agreement could be forged on some issues, but a range of stark disagreements between Republican leadership and the White House promises more gridlock and likely battles over the debt ceiling and government funding. In this environment, expect the White House to focus on protecting the legislative achievements secured during the past two years, while turning more to executive orders, regulations, and other executive policymaking tools to advance new policy issues. Use of these authorities will not come without controversy. Look for the White House to contend with a range of legal, practical, and political challenges over the next two years as they explore the boundaries of what can be accomplished in a divided government.

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Congressional Oversight

By Joe Brazauskas

The Republicans’ House of Representatives victory in the 2022 midterm elections will have broad implications for the direction—and intensity—of congressional oversight. With Republicans taking back the House majority, look for significantly enhanced scrutiny of the Biden Administration’s regulatory regime and policymaking. Republican-controlled congressional committees will initiate frequent hearings with senior Biden Administration officials, perform large-scale document and information requests from federal agencies, and likely utilize subpoenas to demand production of testimony and information. Highly motivated congressional overseers will also scrutinize private entities such as companies, trade associations, and other groups that have a real or perceived nexus to federal government policy or funding.

Energy and environmental policy will be one of the major focuses of Republican oversight. As history demonstrates, Republicans are likely to follow the money.

The passage of the Bipartisan Infrastructure Law and the Inflation Reduction Act supports unprecedented levels of funding for “green and renewable” energy projects at the U.S. Department of Energy (DOE), making the Loan Programs Office (LPO) and related offices targets for Republican oversight. Additionally, key Biden Administration environmental policy initiatives such as electric vehicle mandates, a “total Environmental Protection Agency (EPA)” approach to a potential clean energy standard, climate disclosures in financial reporting, and re-opening the debate over the definition of “waters of the United States” will receive increased scrutiny from Republican-run committees.

Republican House leaders are already hitting the ground running on establishing jurisdictional claims to oversight within the energy and environment sector. For example, presumptive House Energy and Commerce Republican Chair Cathy McMorris Rodgers has vowed to find the “next Solyndra” at DOE’s LPO and has already requested documents from the Department; she also recently sent EPA a letter scrutinizing the current regulatory process underway to reconsider particulate matter standards. Meanwhile, presumptive House Oversight and Reform Committee Chair James Comer has requested documents from EPA relating to a pesticide that is under agency review, and he continues to question DOE about releases from the Strategic Petroleum Reserve. We anticipate a flood of letters to federal agencies and other entities in the coming months meant to pave the way for committees to initiate hearings as quickly as possible when the new Congress convenes in January.

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The Key Issues

Clean Energy & IRA Implementation

Hydrogen

By Christine Wyman

Baseline:

- Clean hydrogen is poised to be a key contributor to U.S. decarbonization efforts and the clean energy transition.
- Hydrogen can be produced through several pathways using diverse, domestic resources—including natural gas, coal, renewable electricity, and renewable natural gas—that allow producers the flexibility to leverage available resources and infrastructure.

- Hydrogen supports the decarbonization of a variety of end uses, including transportation, energy storage, power generation, and industrial feedstocks and power sources, which expands the opportunity for hydrogen demand.
- As the hydrogen economy grows, the ability to produce lower-cost clean hydrogen increases.

Status:

- In the last year, Congress has recognized the potential for hydrogen to support the clean energy transition and has enacted several incentives intended to accelerate the production and deployment of clean hydrogen.
- The Bipartisan Infrastructure Law, signed into law last November, provided the U.S. Department of Energy (DOE) with \$9.5 billion in funding intended to accelerate the development of clean hydrogen technology across various value chains of the hydrogen economy. This includes \$8 billion for DOE's Clean Hydrogen Hubs, intended for further development with respect to the production, processing, delivery, storage, and end-use of clean hydrogen.
- Earlier this year, the Inflation Reduction Act created a new clean hydrogen production tax credit, and an investment credit for hydrogen storage, intended to drive investment in new hydrogen facilities.

Pulse Check:

- Bipartisan support exists for clean energy investments, particularly clean energy technologies like hydrogen that leverage traditional energy resources and infrastructure. Also, congressional Republicans lack the votes required to override an expected Presidential veto of any anti-clean energy legislation. For these reasons, despite increased GOP influence in Congress, it's extremely unlikely that existing programs like DOE's Clean Hydrogen Hubs or the hydrogen tax incentives will be repealed.
- However, as federal agencies work towards IRA and hub implementation, oversight over how money is allocated, credits are claimed, and programs are implemented is likely to be a significant priority for Republicans. In fact, Rep. Cathy McMorris Rodgers (R-WA), the presumptive chair of the House Energy and Commerce Committee, preemptively sent oversight letters to federal agencies on their implementation of Bipartisan Infrastructure Law programs and IRA, like Clean Hydrogen Hubs, and IRS's implementation of the Clean Hydrogen Production Credit.
- Oversight aside, Congress may turn its attention to advancing bipartisan proposals to further accelerate the hydrogen economy, this time focused on creating demand for hydrogen. Legislation like the Hydrogen Infrastructure Initiative could achieve this goal.

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Offshore Wind and Solar

By George Felcyn and Ihna Mangundayao

Baseline:

- Driven by a Biden Administration with a seemingly insatiable appetite for increasing renewable energy build-out during its tenure, the U.S. has embarked on an aggressive push to curtail greenhouse gas (GHG) emissions in the coming years.
- The 117th U.S. Congress put real money behind the administration's aspirations with passage of the Bipartisan Infrastructure Law and the Inflation Reduction Act, which together account for some \$500 billion in taxpayer dollars directed toward renewable energy investments, grants and tax incentives.
- The U.S. is now on track to triple domestic solar manufacturing capacity while aiming to deploy 30 gigawatts of offshore wind by 2030—by White House estimates enough to power 10 million U.S. homes.

Status:

- The Inflation Reduction Act (IRA) on its own is projected to spur nationwide GHG emissions reductions of roughly 40 percent, yet much of the law's finer points around domestic content, prevailing wage, and eligibility requirements for prospective projects have yet to be ironed out by the federal agencies charged with their implementation.
- House Republicans thirsty for action after being sidelined while the IRA became law through the budget process now relish the opportunity to embarrass the administration and Democratic colleagues alike by uncovering a new "Solyndra" that highlights the pitfalls of government investment in failed private sector undertakings.
- Aggressive oversight in committees of jurisdiction, marked by voluminous requests for information from federal agencies and calls to testify at committee hearings, is likely to make the already complex implementation process proceed even more slowly.
- Yet the potentially narrow margin of victory in the House—and a coming factional struggle within the Republican party—may temper some of the most potentially combative congressional actions in the near term.

Pulse Check:

- Aggressive renewable energy portfolio standards across a variety of states, coupled with ongoing investor demand for carbon reduction initiatives at the corporate level (what some detractors refer to as "woke capital"), will continue to push steady build-out in the solar and wind space over the coming years.

- Ultimately, inflation and supply chain complications may inject some uncertainty into the pace of U.S. renewables growth—particularly in the case of capital-intensive, industrial-scale offshore wind farm construction—more than any prospect of disruptive activity on Capitol Hill.
- Keep an eye on controversial marine crewing provisions that could undermine offshore wind development by sharply limiting who is allowed to work on specialty vessels needed to build out wind farms. If not enacted during the pending lame duck Congress, marine crewing legislation may well be pushed in 2023 by House Republicans like Rep. Garrett Graves (R-LA), who first championed the measure and found significant bipartisan support in the House.

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Carbon Capture & Storage

By *Scott Segal* and *Rebecca Brown*

Baseline:

- Carbon capture, utilization, and storage (CCUS) has the capacity to capture more than 90% of CO₂ emissions from power plants and industrial facilities and is one available solution that addresses emissions from carbon-intensive industries, such as fuel and chemical manufacturing.
- Today, there are 13 commercial-scale carbon capture facilities operating in the U.S., capturing 25 million tons of CO₂.
- The Inflation Reduction Act (IRA) provides significant incentives for the development of CCUS projects. The IRA increases the amount and availability of tax credits by raising the credit amount for facilities that leverage carbon capture for geological storage and enhanced oil recovery, permits smaller facilities to claim credits, and allows direct payments.
- The provisions in IRA are encouraging private sector investment in CCUS and related infrastructure projects, including new CO₂ pipelines.

Status:

- CCUS has a long history of strong bipartisan support. Republicans strongly support three technologies to address climate change: hydrogen, small modular reactors, and carbon capture.
- Despite some pushback from local groups, CCUS is essential to meeting the Biden Administration's carbon reduction goals. Some estimates evaluate the role of carbon capture at as much as one-third of the reductions from Administration-supported initiatives.

Pulse Check:

- While some mutual interests are important for CCUS support and policy after the midterms, all IRA-assisted projects may nevertheless be subject to oversight of program administration. Even so, the underlying statutory and funding support for CCUS should remain robust.
- Ancillary issues related to CCUS that garner Republican support, such as permitting reform and steel procurement, may facilitate continued investor confidence by further clarifying policy and logistical hurdles for new project development.

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Critical Minerals

By Scott Segal and Anna Karakitsos

Baseline:

- Critical minerals – particularly nickel, copper, cobalt, lithium, and rare earth elements – are an integral component of the clean energy transition. The sourcing of these scarce compounds is receiving increased focus.
- President Biden has committed to turn the federal fleet to electric vehicles (EVs) by 2035. However, without sufficient, secure access to the critical minerals that are key inputs for EV batteries, these commitments will be simply aspirational. The EV tax credit is now conditioned on critical minerals action. California and federal regulatory policy are pushing EV mandates despite strong legal objections.
- Critical minerals are a key area for bipartisan agreement, as evidenced by the bipartisan success of the Inflation Reduction Act (IRA), the Bipartisan Infrastructure Law (BIL), and the CHIPS and Science Act (CHIPS)– all of which included various sources of funding for securing critical mineral supply.

Status:

- This week's changes in the composition of Congress should not undermine the push for more robust critical minerals policy as it is a key area for bipartisan agreement.
- The House Natural Resources Committee is anticipated to be lead by Representative Bruce Westerman (R-AR), and the House Energy and Commerce Committee gavel will likely be held by Representative Cathy McMorris Rodgers (R-WA). Reps. Westerman and McMorris Rodgers worked together recently on the Securing America's Mineral Supply Chains Act of 2022.
- The Senate Energy and Natural Resources Committee remains under the largely collegiate leadership of Senators Joe Manchin (D-WV) and John

Barrasso (R-WY) who have scrutinized critical mineral sourcing and permitting processes.

- Federal agencies will continue to implement the new BIL, IRA, and CHIPs laws. Pressure is building for development of new approaches including permit reform and are developing an effective ocean minerals strategy, consistent with recent Congressional oversight on more secure critical minerals supply chains.

Pulse Check:

- A divided government does not undermine the clean energy transition and the important role critical minerals play. The United States is increasingly determined to break our dependence on materials sourced from China and Russia, and there is an emerging consensus that conventional mining alone is insufficient to meet the supply demand pressure the government is placing on critical minerals. Look for active policy development on permitting, recycling, multilateral discussions with allies, and seabed nodule collection.
- In This next Congress, we will see an increased focus on permit streamlining for domestic sourcing of critical minerals from the House Republicans, and a unified support for securing a reliable supply chain for critical minerals.

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Oil & Gas

By Scott Segal

Baseline:

- When the Biden Administration came into office in January 2021, it took a strongly anti-fossil fuel posture publicly. The administration initially slow-walked the issuance of new oil and gas leases on federal lands and waters, placed a “pause” on new offshore oil and gas leasing, and pulled a key permit needed for the development of the Keystone XL pipeline.
- As Russia’s attack on Ukraine disrupted global energy supplies and drove gasoline prices sharply higher, Republicans blamed the Administration for discouraging development of domestic oil and gas supplies and leaving the nation vulnerable to global oil market swings.
- The Biden Administration subsequently focused on gas prices in the months leading up to the election, seeking to deflect blame toward oil companies, charging them with refusing to “invest in America” by increasing production and refining capacity while enjoying profits that represent “a windfall of war.”

Status:

- Less than 3 weeks before the mid-term elections, President Biden made a high-profile announcement in which he outlined several steps intended to demonstrate action to reduce the price of gasoline, including:
 - Directing the U.S. Department of Energy to sell 15 million barrels from the Strategic Petroleum Reserve (SPR), on top of the 165 million barrels already drawn from the SPR this year;
 - Announcing an eventual government repurchase of crude oil to replenish the SPR when prices average \$67-\$72 per barrel; and
 - Calling on companies to “pass through lower energy costs to consumers right away.”
- Just one week before the election, President Biden went further, floating the possibility of a windfall profit tax on fossil fuel companies and restrictions on the export of crude oil and other fossil fuel products. Many experts have noted that windfall profit taxes and export bans can result in reduced production with worse outcomes for consumers.
- Republicans have responded in kind, promising aggressive inquiries into the Biden Administration’s reluctance to issue new oil and gas leases when they take back control of Congress.

Pulse Check:

- With Election Day now past and the need for public posturing sharply diminished, look for less emphasis on the Administration’s threats to take action against oil companies. The new numbers in Congress make adopting punitive politics less likely in any event.
- Substantive action to intervene in the oil markets with a major government purchase to replenish the SPR would likely only drive up the price of gasoline, and a ban on the export of crude oil, liquefied natural gas (LNG), and / or other refined products could substantially harm European allied nations already straining for energy supplies as winter hits in earnest.
- Fossil fuel producers and refiners stand to be more interested in events in the judicial and regulatory space than legislative, with active litigation over California’s Clean Air Act waiver, Corporate Average Fuel Economy (CAFE) standards, and greenhouse gas emissions standards set by the EPA for light duty cars and trucks, also known as the EPA tailpipe rule.
- With a narrower than expected Republican majority and bipartisan motivation to improve the permitting regime for infrastructure projects of all stripes, look for renewed Congressional interest in engaging on a permit reform package.

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Permitting Reform and Energy Infrastructure

By Christine Wyman

Baseline:

- The development of energy infrastructure—including the build-out of new infrastructure as well as the maintenance and expansion of existing infrastructure—often requires an environmental review and permitting process involving multiple federal and state authorities.
- Multiple agency reviews, authorizations, and processes have produced a permitting process that can be lengthy, inefficient, and ripe with opportunities for opponents to delay the process.
- This is particularly so for linear energy infrastructure (like pipelines and transmission lines) whose routes may cross multiple states, landowners, and environmental resources.
- Permitting delays jeopardize investment in energy infrastructure as well as the ability to build out projects that are critical to supporting the U.S. clean energy transition.

Status:

- There is a recognition by both the Biden Administration and many in Congress that reforming the environmental review and permitting of energy infrastructure is critical to unlocking investment in energy infrastructure.
- Earlier this year, Senate Energy and Natural Resources Chairman Joe Manchin reached an agreement with Democratic leadership to advance permitting reform.
 - On September 21, 2022, Sen. Manchin released the Energy Independence and Security Act of 2022 (EISA), permitting reform text that he hoped to be included in an anticipated Continuing Resolution.
 - That legislation was intended to improve coordination among permitting authorities, advance energy infrastructure projects viewed as critical to the clean energy transition, and significantly alter Clean Water Act and transmission line permitting.
 - Although ultimately permitting reform was not included in the Continuing Resolution, Sen. Manchin and others remain committed to advancing permitting reform in the near term.
- The Biden Administration, supportive of congressional efforts to advance permitting reform, has advanced its own administrative reforms of permitting and environmental review regulations, including changes to the National

Environmental Policy Act (NEPA), Clean Water Act, and authorizations on federal lands.

Pulse Check:

- While bipartisan support to advance permitting reform does exist, there is not yet consensus between Democrats and Republicans, or even within the respective parties, on the finer points of a bill. There are fundamental disagreements on the types of changes necessary to improve permitting, and how reforms should apply to conventional energy versus new clean energy technologies.
 - For example, Sen. Manchin's EISA included revisions to Clean Water Act Section 401 that would have clarified the process but expanded the scope of state authority; however, these revisions proved too controversial for consideration in the subsequent Continuing Resolution.
 - Reforming the approval of interstate transmission lines—infrastructure critical to decarbonizing the electricity sector and maintaining reliability—also lacked consensus from Congress, as well as support from industry.
- With Republicans taking control of the House, there could be a renewed sense of urgency among Democrats in moving a permit reform package that helps meet the Administration's clean energy goals before the end of the year. Sen. Manchin has suggested using a must-pass defense bill as a vehicle.
- However, with a divided government, particularly if Republicans take control of the House and Democrats retain control of the Senate, the priorities of each chamber could align to find an opportunity to advance permit reform in the next Congress.
- Regardless of congressional action, the Biden Administration is likely to carry through with executive action on permitting reform to both ensure leverage in negotiating with Congress and also to advance what it views as an appropriate regulatory framework to energy infrastructure.

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Energy and Tax:

By Tim Urban, Yasmin Nelson and Liam Donovan

Baseline:

- On August 16 of this year the President signed into law the Inflation Reduction Act of 2022 (IRA), the most significant climate and clean energy law in at least a decade.

- Subsequent to enactment of IRA, Administration officials, companies, and trade associations embarked on the negotiation of the implementing regulations to allow taxpayers to qualify for the various incentives. The highly involved and complex guidance process could take up to 18 months to complete.
- Congressional Republicans did not vote for the IRA, which was passed on a strictly party-line vote under the budget reconciliation process, and thus do not feel compelled to help the Democrats fix or enhance it absent a negotiated deal to address their policy priorities.

Status:

- The anticipated loss of control of at least the House of Representatives will preclude a repeat of the use of the reconciliation process by President Biden and Democratic congressional leaders in the 118th Congress. Any energy and tax legislation processed in 2023 and 2024 will be vulnerable to a Senate filibuster, thus necessitating bipartisan support to make it to the President's desk.
- With passage of the IRA, much of the Administration's laundry list of priority energy-related tax proposals has been enacted into law. Yet, the Democrats' much-prized child tax credit and other individual tax item priorities remain unaddressed.

Pulse Check:

- The possible congressional processing of an end-of-year tax extender package during the so-called lame duck period leading up to Christmas may provide clues as to how smoothly the two parties work together in 2023.
- Both parties have provisions they would like to see approved in a 2022 end-of-year bill, including extensions of the 2017 Tax Cuts and Jobs Act for Republicans, and Child Tax Credit extensions for the Democrats.
- The expected publication by the IRS in late 2022 of guidance on critical IRA tax incentive issues such as prevailing wage labor, apprentice labor, sustainable aviation fuel (SAF), and clean hydrogen incentives is also of great interest to many businesses.
- The President's transmittal of an FY 2024 Budget package to Congress early in 2023 will constitute the official start of the tax legislative process for the first session of the 118th Congress.
- While the newfound need for bipartisan consensus in Congress will possibly preclude the enactment of another far-reaching climate bill in the next Congress, it will also likely prevent the passage of significant new tax increases.

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Environment

Plastics & Recycling

By Anna Karakitsos

Baseline:

- Plastic waste and strategies to manage it through recycling are receiving significant attention on a global scale, including from the U.S. government.
- Earlier this year, the UN embarked on an effort to develop an international treaty on addressing plastic pollution within two years. This treaty is primed to match the Paris Climate Accord in its environmental significance.
- Federal agencies across the Biden Administration are implementing Executive Order (EO) 14057 to reduce waste, support recycled products, and transition to a circular economy. Meanwhile, the U.S. Environmental Protection Agency (EPA) is beginning to develop programs to support community recycling and waste programs per the Bipartisan Infrastructure Law, starting this summer with the Grant Program and Model Recycling Toolkit.
- Congress is playing its part by conducting oversight and legislating on waste reduction and recycling programs, introducing more bills on these issues in the 117th congress than ever before.

Status:

- Because the vast majority of plastic use and recycling activity is led by agencies across the Biden Administration, the current level of intense scrutiny will not change much with a Republican House.
- A divided government changes the tone of the discussion surrounding plastic use. Newly demoted House Democrats will continue their efforts to drastically reduce the use of plastic, and Members in both chambers will continue to introduce bills aimed at addressing concerns about waste. The major difference in this Congress is that controversial legislation will end up being primarily messaging in nature.
- Ultimately, bipartisanship will be the only method for advancing any plastic waste-related legislation.

Pulse Check:

- Congress will not lead the charge on plastic waste issues, but neither will it by any means be dormant. With a divided government ahead, expect continued bipartisan support for less divisive legislation, such as boosts for community recycling programs. Attempts to prevent plastic use, like resin taxes and product bans, are unlikely to see floor action.

- The bulk of the work over these next two years will come from the Administration. Federal agencies, from the Department of State and the EPA to the Food and Drug Administration and the Federal Trade Commission, are actively responding to concerns surrounding the use of plastic products. Biden Administration initiatives to reduce plastic waste will continue to relay across the agencies in response to EO 14057.

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PFAS

By Anna Karakitsos

Baseline:

- The persistent presence – and resulting remediation challenges – of per- and polyfluoroalkyl substances (PFAS) are under intense scrutiny by the federal government and the public writ large. While the Biden Administration continued the slogging regulatory process to permanently regulate forever chemicals, the 117th Congress introduced a spate of cleanup legislation designed to fill in perceived gaps in agency action.
- Members of Congress introduced over 80 bills in the 117th Congress to provide financial assistance to localities and states to upgrade existing infrastructure, set strict requirements limiting the use of PFAS, and establish mandates on environmental remediation.
- Major legislation such as the Bipartisan Infrastructure Law and the National Defense Authorization Act of FY22 also included provisions to address concerns surrounding PFAS chemicals, implementation of which are now the responsibility of the Biden Administration. Additionally, the Administration is in the early stages of its multi-agency approach to regulating PFAS, guided by EPA's PFAS Roadmap containing specific goals for agencies including the Department of Homeland Security, the Department of Defense, and the Food and Drug Administration. Most recently, EPA proposed to designate PFOA and PFOS as hazardous substances under CERCLA.

Status Update:

- With Republicans controlling the House of Representatives, the onslaught of new Members means new priorities for powerhouse committees like Energy and Commerce. While PFAS cleanup will still receive some attention, it likely will not be a top-line issue for Republicans looking to reassert control of the room.
- Passionate congressional Democrats will continue to push PFAS-focused legislation, banking on support from the upper chamber and White House, but divisive initiatives will end up as mere messaging bills.

Pulse Check:

- A divided government does not mean the end of congressional oversight and legislation on PFAS, but it does mean the focus on Capitol Hill will sway more toward scrutiny of agency budget requests and regulations.
- Incoming Republicans in the House will have their own agendas to advance in the 118th Congress that may not consider PFAS in quite the same way as the previous majority. Democratic proponents who may have enjoyed the messaging leeway a unified Congress provided will have no choice but to shift closer to the middle in order to keep the issue top of mind.
- Federal agencies will take the lead these next two years on regulating PFAS chemicals, making slow but steady progress to implement the EPA Roadmap. However, the regulatory process is complex, burdensome, and time intensive. Congress will have numerous opportunities for agency oversight, but PFAS will continue to remain a priority issue overall.

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Supply Chain

By Paul Nathanson and Josh Zive

Baseline:

- Supply chain disruptions that started during the COVID 19 pandemic and were further jolted by the Russian invasion of Ukraine peaked over the past year are starting to ease but continue to contribute to inflationary pressures on consumer and industrial prices.
- International supply chains are also still being burdened by the continuation of the Section 232 tariffs on steel and aluminum and the Section 301 tariffs on most Chinese products.
- Rather than removing tariffs, the Biden Administration and Congress have focused on strengthening domestic supply chains and securing domestic supplies of critical components and minerals.

Status:

- “Free trade” is no longer on the table in Washington, with both political parties focused on competition with China as well as securing essential manufacturing components and resources such as critical minerals.
- The Biden Administration has largely continued the trade policy of the Trump Administration, keeping the Section 232 tariffs on steel and aluminum (with the exceptions of replacing steel tariffs with tariff rate quotas for the

European Union, United Kingdom and Japan) and the Section 301 tariffs on most Chinese products.

- The bipartisan CHIPS and Science Act, passed by Congress and signed into law by President Biden in August 2022, demonstrates that supply chains are one issue on which the White House could find common ground with the newly Republican-led House.
- Similarly, critical minerals issues are a key area for bipartisan agreement, as evidenced by the bipartisan success of the Inflation Reduction Act, the Bipartisan Infrastructure Law, and the CHIPS and Science Act.

Pulse Check:

- Halting the trade war with China was not the issue in this election. No politician wants to be perceived as soft on China, so it is unlikely that there will be significant rollback of Section 301 tariffs despite the announcement of the statutorily required four-year review of the tariffs that starts on November 15.
- Trade liberalization through diplomacy or legislation is difficult to foresee. On the diplomatic front, the Biden Administration has indicated that remaining Section 232 tariffs on countries outside of the EU, the United Kingdom, and Japan are here to stay. On the legislative front, with Republicans in control in the House, bipartisan agreement on trade issues is unlikely and there is little chance for the Biden Administration to finalize any treaties or trade actions requiring ratification or other congressional action.
- Executive action will need to be creative and limited in scope. The Biden Administration will continue to work through non-treaty diplomacy such as the President's Indo-Pacific Economic Framework (IPEF) which does not include negotiations on market access or tariff reductions.
- Consensus is possible in Washington—if the topic is competing with China. While most trade legislation is going to be politically unworkable, legislation supporting manufacturing and the sourcing of components and resources domestically could achieve bipartisan support, as well as legislation on China-focused export controls and limits on companies working with sensitive industries including data and semiconductors.
- Leadership changes do not undermine any progress on the clean energy transition, as it is increasingly dependent upon critical minerals that are not sourced from China or Russia, and securing a reliable supply chain within the constraints of limited availability of the minerals is of paramount importance.

Top

Consumer Product Safety

By Ed Krenik, Christine Wyman, Paul Nathanson and Dylan Pasiuk

Baseline:

- The Consumer Product Safety Commission (Commission), an independent agency, has the authority to protect consumers from “unreasonable risks” of injury through a wide variety of regulatory and enforcement tools.
- The five-member commission, is currently comprised of three Democratic Commissioners and one Republican Commissioner. There is one vacancy.
 - The three Democratic Commissioners—Chair Alex Hoehn-Saric, Commissioner Richard Trumka Jr., and Commissioner Mary Boyle—were nominated by President Biden.
 - Commissioner Peter Feldman, the lone Republican, was nominated by President Trump.
- President Biden has yet to nominate a Republican Commissioner to fill the vacant seat left by the departure of former Commissioner Dana Baiocco last month.

Status:

- Under Chair Hoehn-Saric’s direction over the last year, we’ve seen the Commission acting at an accelerated pace in approving mandatory standards and issuing unilateral press releases.
- Though the Commission’s statutory authority to act when there is a voluntary standard in place is limited to situations in which the voluntary standard is not effective in addressing the risk or there is not substantial compliance with the voluntary standard, we’re seeing the Commission advance mandatory standards even for product categories that have a long history of robust voluntary standards.
- Moreover, the mandatory standards that the Commission has advanced are aggressive, with short compliance periods and a preference for banning products rather than minimizing risk.
- So far, this Commission’s actions have been met with little oversight from Congress.

Pulse Check:

- Oversight of the Commission is likely to be a priority for a Republican-controlled House Energy & Commerce Committee. In fact, earlier this year, House Energy and Commerce Committee Ranking Member Cathy McMorris Rodgers (R-WA) previewed this oversight in a letter that warned the Commission not to overstep its constitutionally mandated authority.

- With oversight top of mind, it is unlikely that we'll see a significant legislative agenda on consumer product safety.
- With the House Appropriations Committee in Republican hands, it is likely that Republicans will attempt to assert their oversight authority over the Commission with the power of the purse. This could include pressure from Congress to return to normal procedure at the Commission.

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Healthcare

By *Yasmin Nelson*, *Ed Krenik*, *Anna Karakitsos* and *Dylan Pasiuk*

Baseline:

- In 2020, the incoming Biden-Harris Administration campaigned on ending the COVID-19 pandemic, lowering prescription drug prices, expanding the Affordable Care Act while reducing healthcare costs, expanding maternal health, and ensuring that healthcare is a “right for all.” The burden of delivering on these promises was alleviated by Democratic control of both the House and Senate, allowing for the successful expansion of the Affordable Care Act by the American Rescue Plan through increased subsidies that made health insurance more affordable.
- While the Inflation Reduction Act included comprehensive drug pricing reform, President Biden and Congressional Democrats have not succeeded in pushing a government-run “public option” within the Affordable Care Act across the finish line.
- The Administration released the Maternal Health Blueprint that delivers for women, mothers, and families earlier this year, setting the stage for future agency action.
- In June 2022, the Supreme Court of the United States overturned the constitutional right to an abortion, going against precedent that began with *Roe v. Wade*.

Status:

- Appropriations legislation has stalled in Congress. Republicans, in anticipation of taking over the House, could wait for the 118th Congress to finalize federal funding. A short-term continuing resolution to carry over funding until January will better allow Republicans to protect their interests.
- Final funding levels for medical research and Advanced Research Projects Agency for Health (ARPA-H), the new federal entity that has yet to be authorized, become more uncertain with a divided government.

- The bipartisan Cures 2.0 Act, comprehensive medical research legislation introduced by Representatives Fred Upton (R-MI) and Diana DeGette (D-CO) that builds upon the success of the 21st Century Cures Act, has stalled in the House of Representatives with little likelihood of being considered before the start of a new Congress.

Pulse Check:

- Although divided government will make it difficult to enact broad healthcare legislation, the Republican-led House will be keen to advance mental health legislation and conduct oversight of the U.S. healthcare system in response to recent expansions of the Affordable Care Act.
- With Rep. Fred Upton's (R-MI) retirement and no clear Republican champion, the future of the Cures 2.0 Act now hangs in the balance. In the absence of a new Republican lead cosponsor, its future could idle indefinitely, as partisan legislation with a big price tag is unlikely to progress through the Republican-controlled House.
- While the overruling of *Roe v. Wade* was a key driver of turnout during this election, Democrats' campaign promises to protect reproductive rights face an uphill battle in the divided 118th Congress. Divided power limits legislation opportunities to middle-of-the-road initiatives, and it is unlikely that Republicans and Democrats could reach a consensus on any sort of reproductive rights legislation.
- With a split Congress looming on the horizon, many Democratic priorities will languish unless President Biden exerts executive authority. However, with the President heading into the second half of his term, executive discretion could be tightly controlled by a Congress with at least one house controlled by Republicans seeking to thwart executive action. That said, healthcare issues are a priority for the Administration and Democratic Party alike, so look for President Biden to use every available executive tool (including executive orders and regulations) to protect reproductive rights, and to expand both maternal health and access to healthcare for underserved communities.

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