

SPOTLIGHT REPORT

September 27, 2022

The 118th Congress: United While Divided

What's Happening: Winter is coming. So is the 118th Congress.

Why It Matters: Political polarization is as high as ever. The most liberal Republican is well to the right of the most conservative Democrat. Party leadership has increased in strength and acrimony, leaving few avenues for bipartisan success if the party heads say no. **But the secret of partisan DC is that [most major legislation](#) that passes each year is done on a bipartisan basis. Things get done in divided government. It may not generate headlines but it can impact the bottom line.** This is no exception for the next session of Congress.

Leadership's top priorities will be partisan ones – campaigning for 2024, oversight hearings, showdowns over must-pass bills. But there are other priorities that can survive under the radar. From China to telehealth and tax policies, not everything is black or white, red or blue. There are shades of purple that can go the distance without upsetting leadership's partisan ends.

What's Next: The 118th Congress doesn't begin until January 3rd. The midterms will create the shell of party makeup. It will be filled in with elections for Republican and Democratic leadership, committee assignments, and organizing rules. There will be the lame duck session of this Congress, where legislating is expected to be at full speed. Gleaning legislative priorities for next year – from statements, hearings, and markups – from all the partisan red herrings will be important to understand what stands a chance of getting the votes and floor consideration in the next two years.

GOP Governing in 2023

As the midterms loom, **our base case is that Republicans win back control of the House and Senate.** The second most likely outcome is Republicans winning back the House but Democrats keeping the Senate. Either way, we view a divided government on the horizon.

DC loves to rag on House Minority Leader Kevin McCarthy (R-CA). He's been called "[dumb](#)," "[pathetic](#)," and "[bland](#)." He's a politico but hardly a policy wonk – someone who sails alongside the changing Republican winds. But he is making an earnest go at trying to

be a Republican leader. Not just one who is elected speaker but one who, by his words, can lead a "governing majority." The [Commitment to America's](#) near-term priority is to organize a national House Republican message. Its long-term priority is to create a roadmap for governing. Beyond the boilerplate is input from Republican rank-and-file. That includes legislation that awaits further action.

Plenty of this has no room for passing the House and Senate and being signed by President Biden. McCarthy's number one priority is to keep his party aligned with eyes towards gaining a GOP governing trifecta after the 2024 elections. The 118th Congress is not where he will plant his legislative legacy. McCarthy holds a cordial, but not especially close relationship with Senate Minority Leader Mitch McConnell (R-KY). His relationship with Biden is non-existent. His relationship with Rep. Hakeem Jeffries (D-NY), the likely next leader of House Democrats after House Speaker Nancy Pelosi (D-CA), is not good.

So partisan legislation and subpoenas will be flying out of the House. Hard lines will be taken on must-pass legislation. It could get chaotic. But beyond the partisan ethos, the Commitment to America contains priorities with bipartisan potential in the 118th Congress. Perhaps a McCarthy weakness of lacking policy chops is also a strength in giving his allies in committees, like Rep. Patrick McHenry (R-NC), greater latitude to push the legislative agenda as they see fit. **Not every policy issue is a partisan dog fight that plays an important role in the minds of voters.** The following issues below showcase that legislative agenda and its potential for the 118th Congress.

Crypto Downturn Isn't Slowing Legislators

The bill that we will be watching most closely in the next Congress is a framework to regulate stablecoins. This effort is being primarily driven by House Financial Services Committee (HFSC) Chair Maxine Waters (D-CA) and Ranking Member McHenry. This McCarthy ally is in line to take over the committee if the GOP wins control of the House, which will provide for a smooth transition of power on this issue. **The two are reportedly close to issuing a draft of the bill that could be marked up in the coming weeks. The problem that they are running into is resistance from rank-and-file members in both parties on a number of issues.** Speaking at a [Politico event](#) last week, McHenry made clear he was in no rush to get the bill done in the current Congress and even if the bill gets marked up by the committee, it is unlikely to go much further this year. While the agreement among leadership is useful for the bill to have a chance for real progress, they will have to find revisions that make it acceptable to the rest of their committee members. Addressing stablecoins remains high on McHenry and Waters's respective agendas. The two may not see eye-to-eye on much, but their powers atop HFSC this year and next means momentum will not subside with a changing control of Congress.

The other major crypto legislation that could go the distance under a divided Congress is a bill to give the Commodity Futures Trading Commission (CFTC) more authority to oversee crypto spot markets. The Senate Agriculture, Nutrition, and Forestry Committee [held a hearing](#) on a draft earlier this month, in which it was well

received by members of both parties. A markup could happen in the coming weeks. Importantly, it has also gained support in the House from Rep. Sean Patrick Maloney (D-NY), who chairs the subcommittee in the House Agriculture Committee that has jurisdiction over this issue. Similar legislation has been introduced by Republican members of the committee as well, though it has not had any related activity. The House Agriculture Committee was supposed to have a crypto-related hearing last week, but it was postponed for unspecified reasons. **While it did not happen, this reinforces our belief that there is bipartisan, bicameral interest in this legislation.** The difficulty will be overcoming opposition, particularly from Democrats, such as current Senate Banking, Housing, and Urban Affairs Committee Chair Sherrod Brown (D-OH), who are more skeptical about digital assets. Brown and the next Republican leader of the committee, Senator Tim Scott (R-SC) will both want to preserve the committee's jurisdiction over as many aspects of crypto markets as possible. At risk for Brown and Scott is losing jurisdiction over crypto if the Securities and Exchange Commission (SEC) is pushed to the side by the new legislation. The legislation carves out any assets deemed securities from the CFTC's oversight, but it leaves it to the SEC and the courts to determine which tokens would get that label.

Big Tech Has Very Few Friends, But Still Avoids Legislative Armageddon

As much as Big Tech will continue to be disliked by members of both parties, the reasons for their frustration are different. Democrats tend to focus more on the size of the companies and the lack of competitors, while Republicans' biggest gripe is with what they feel is the censorship of conservative viewpoints. **Bills to address these respective issues can have enough bipartisan support to experience limited success in committees, as was the case with the antitrust legislation in this current Congress, but lack the votes to advance past that point.** What further complicates the issue among Republicans is that some members are resistant to supporting legislation that they feel could empower Biden's antitrust regulators, an internal divide that could become more prominent if the GOP has the majority in one or both chambers. There is little reason to believe that these dynamics will change going into the next Congress, particularly if the House and Senate are controlled by different parties scrutinizing different issues.

That being said, if there was one bill that we could see coming back in the next session it would be the Open App Markets Act. The bill aims to break **Apple (AAPL)** and **Google's (GOOG)** control on their respective app stores and in-app payments. This bill received the most support of those marked up by the Senate Judiciary Committee, advancing 20-2. **It has not gotten a vote on the Senate floor and we do not expect it to this year.** It has also not been marked up in the House. The reason that the bill was so broadly supported was because both parties feel that it addresses their respective gripes with Big Tech. With the GOP likely to take control of at least one chamber, it may have to be rewritten to pass, but it still seems to be the most feasible. **The big unknown about the bill is whether there are the votes in the House, including senior members of whichever party is in the majority, to support it.** The question will likely remain

unanswered unless there is House committee activity related to the bill, which seems unlikely with the chamber scheduled to be out for the month of October and having only four more weeks of legislative work in the year after this Friday.

Everyone Talks the Talk, But Doesn't Walk the Walk on China

Being tough on China continues to be a bipartisan and bicameral stance, making it ripe for legislating next year. The experience of trying to pass the US Innovation and Competition Act, however, is a reminder that there are still divides beneath the surface ethos of improving America's competitiveness with China. **Of the items left out of the slimmed down CHIPS and Science Act, one of the largest portions was the trade title.** This was always the most contentious during negotiations between the House and Senate and its removal was necessary to get anything passed. **Sponsors are expected to push some of the items, especially those that are less controversial, to be attached to a must-pass legislative vehicle during lame duck.** Some of the measures that are being eyed, in particular, are the renewals of the Generalized System of Preferences and Miscellaneous Tariff Bill, two expired tariff exemption programs. Democrats are also pushing for a reauthorization and expansion of the Trade Adjustment Assistance (TAA) program, though this has historically been renewed when there are trade agreements being signed. Republicans have stuck with this line making inclusion of the TAA doubtful.

Whatever is not done will continue to be a point of focus moving into the next Congress and could form the core of a China-focused bill. **More likely than not there will continue to be measures related to China attached to must-pass legislation, such as the annual defense policy bill, but the prospects for another stand-alone bill focused on US competitiveness is murkier as there is no obvious centerpiece. Just because the provisions are attached to another vehicle does not mean they are insignificant.** The bill creating the semiconductor subsidies program is an example of a measure that hitched a ride. So even if it is done on a more piecemeal basis, we expect that Congress will continue to pass meaningful China-related legislation given the broad support it has across both parties.

Children-Focused Measures More Likely than Comprehensive Data Privacy Reforms

Lawmakers could potentially address data privacy under a divided government. Narrowly focused measures on children's privacy are more likely than comprehensive reforms. **A future version of the American Data Privacy and Protection Act (ADPPA), currently under consideration in the House, could make some headway in a GOP-controlled House in the next Congress.** The ADPPA passed out of the House Energy and Commerce Committee this summer by a vote of 53-2 with substantial GOP support, and the committee's ranking member, Rep. Cathy McMorris Rodgers (R-WA), is an enthusiastic backer of the bill. After House Speaker Nancy Pelosi (D-CA) [threw cold water](#) on the ADPPA earlier this year, McMorris Rodgers responded by reaffirming her support of the

legislation. “I have been clear for years now that federal preemption is essential in order to protect all Americans no matter where they live. Creating one national standard is necessary to achieving this goal [...] I remain committed to working to enact and implement this historic, bipartisan national privacy standard into law,” she said in a [statement](#). **As the top Republican on the Energy and Commerce Committee, McMorris Rodgers is poised to become chair if the GOP retakes the House majority following the midterms, and she could lead a renewed push to pass the ADPPA or similar legislation.**

In some ways, the ADPPA could have an easier time advancing in a GOP House than a Democratic-controlled House because the voices of California Democrats opposed to federal preemption would have less weight. On the other hand, there is no guarantee that comprehensive federal data privacy legislation could make it through a new Republican majority with a farther right center of gravity. The GOP focus on perceived anti-conservative bias by tech platforms could throw sand in the gears of negotiations.

Political dynamics in the Senate are likely to pose a challenge to the chances of a comprehensive data privacy bill next year regardless. If the upper chamber remains in Democratic hands, then Senator Maria Cantwell (D-WA) is likely to continue her tenure as chair of the Senate Commerce Committee. She has consistently opposed the ADPPA this year. **It’s difficult to imagine a compromise bill that could pass a GOP-majority House and earn Cantwell’s support.** The 60-vote threshold for passage imposed by the Senate filibuster also presents a hurdle to passage.

If Republicans retake Senate control in the midterms, the path forward for the ADPPA or a similar bill is not likely to widen either. Senator Roger Wicker (R-MS), ranking member of the Senate Commerce Committee, is a major supporter of the ADPPA like McMorris Rogers. Earlier this month, he renewed his support for the bill in a [statement](#). Wicker will likely not be on the committee next year, however. The Mississippi Republican is expected to take the top GOP spot on the Senate Armed Services Committee in the 118th Congress, taking over for retiring Senator James Inhofe (R-OK). **Based on seniority, Wicker is expected to be replaced as the top Republican on the Senate Commerce Committee by Senator Ted Cruz (R-TX). The deeply conservative Cruz is unlikely to champion comprehensive federal data privacy legislation.**

There is a greater chance for more tailored action on children’s online safety and privacy than comprehensive reforms in the 118th Congress. There are two significant bills that touch on this area under consideration in Congress this year, and both have backing from both sides of the aisle. The [Children and Teens’ Online Privacy Protection Act](#), which would build on the Children’s Online Privacy Protection Act (COPPA) and extend that law’s threshold for protections from 12 to 16 years of age, was introduced by Senators Ed Markey (D-MA) and Bill Cassidy (R-LA). The [Kids Online Safety Act](#), which would enact new requirements for platforms to keep children safe on the internet, including protections for children’s personal information, was introduced by Senators Richard Blumenthal (D-CT) and Marsha Blackburn (R-TN). It has gained 10 cosponsors from across the ideological spectrum ranging from Markey to Senator Marco Rubio (R-FL). Both

bills advanced in a Senate Commerce Committee [markup](#) in July. **The substantial bipartisan support enjoyed by these two children-focused bills suggests that they may be strong contenders to advance under divided government.**

Telehealth Connection Murky This Congress, But Not Next Congress

Telehealth is here to stay, it's just a matter of timing. The public health emergency (PHE) for the pandemic is possibly ending in January. President Biden's comments about the pandemic being over on "60 Minutes" gives some reason to believe the PHE won't be extended after that. **A PHE cessation would trigger a five-month countdown clock necessitating passage of a law that would maintain current telehealth flexibilities; otherwise, after that point, telehealth policy would revert to pre-pandemic rules if Congress fails to pass a new law.** Due to this impending cliff, advocates for the sector are working hard to ensure that the Congress acts this year and the lame duck period is their best hope.

The House passed a bill entitled "Advancing Telehealth Beyond COVID-19 Act" this past summer that would extend the current rules around telehealth in Medicare until the end of calendar year 2024. It would also increase the types of providers that are eligible to offer telehealth services, waive in-person requirements for behavioral health, allow audio-only telehealth consultations, and allow telehealth for hospice care. The White House has also weighed in and said that it would support the House-passed bill. That House bill overwhelmingly passed in a bipartisan manner with a 416-12 vote.

Telehealth has been less of a priority for the Senate, and although there are bipartisan supporters of telehealth in the upper chamber, no committee chair or ranking member has raised its profile to be the focus of a committee markup or attempt to attach legislation to another "must-pass" bill. Any telehealth legislation in lame duck must be passed via regular order and will need the support of Senate Finance Committee Chair Ron Wyden (D-OR) and likely that of Ranking Member Mike Crapo (R-ID) and both Senate Majority Leader Chuck Schumer (D-NY) and Minority Leader Mitch McConnell (R-KY), who would need to acquiesce with having either the House-passed bill added to a larger piece of legislation or supporting the Senate's own product, which for the sake of timing would likely be pre-negotiated with the House. None of these important members have taken a strong public stance on a telehealth legislative extension

Therefore, we do not have strong conviction that a two-year extension will be included in a must-pass bill this year. Yet, there's nothing like a looming deadline after the PHE ends to spur advocacy and action in the Senate next year. Investors should look carefully for signs from key senators as to whether this issue becomes a higher priority later this year or early next year.

It's Farm Bill Time

Every five years, Congress is tasked with passing the Farm Bill. The omnibus piece of legislation typically covers nutrition, crop insurance, conservation, commodities, trade, horticulture, research, energy, and forestry. The 2018 farm bill was estimated to cost \$428 billion over five years. While the bulk of funding is again expected to go towards nutrition programs, some other niche issues will likely come up in the latest iteration of the Farm Bill. There has recently been increased partisan fighting over additional funding for climate-focused conservation programs for farmers, which are usually funded by the Farm Bill but received a \$19.5 billion boost in the Inflation Reduction Act (IRA). Some agriculture-focused Republicans have suggested that in their own bipartisan legislation they will want to temper this influence and voiced anger that their programs were included in the IRA. **Another issue is that of hemp regulation, which was included in the 2018 Farm Bill but created uncertainty over CBD products. Lawmakers may look to clarify these regulations and in turn boost the market.** Lastly, lawmakers are discussing including additional funding for rural broadband, also included in the 2018 bill for the first time, as part of the rural development piece of the bill.

Congress Will Take Another Swing at Permitting Reform

The once low-key issue of reforming the permitting process for energy projects has become a high-profile one for the 117th Congress. **Still, we do not expect any resolution this Congress, leaving an opportunity for the 118th Congress.** In order to win Senator Joe Manchin's (D-WV) lynchpin vote for the IRA, Senate Majority Leader Chuck Schumer (D-NY) pledged to move Manchin's permitting proposal in the Continuing Resolution (CR) to fund the government. Manchin's legislation, the [Energy Independence and Security Act of 2022](#), would streamline federal permitting and help speed up completion of the Mountain Valley Pipeline in his home state. The pipeline is the sticking point for some progressives, though others have said they would support Manchin's effort because it would also speed approvals of clean energy projects and particularly transmission projects needed to link renewable energy to the rest of the grid.

But without enough Democrats on board as well as Republicans – they remain angry over Manchin's behind the scenes negotiations and support for the IRA and don't want to give him a victory as he contemplates reelection in 2024 – the votes weren't there for permitting in the CR and it was dropped today. This leaves the possibility for permitting legislation in the lame duck session, but its outlook will depend on the results of the midterm elections. Should Republicans take control of both the House and Senate, they will prefer to wait to craft permitting on their own terms. And if Democrats hold on to the Senate, Republicans may still not want to hand them a lame duck win. **But the permitting reform effort will live on because, like infrastructure, many in Washington want it. The question is whether both sides will be able to agree on a package that is also acceptable to party leadership amidst the politics of the day.** For instance, Senator Shelley Moore Capito's (R-WV) [permitting bill](#) that had similar aims to but countered Manchin's – and had 46 Republican cosponsors – contains measures limiting climate regulations outside of permitting that are verboten to Democrats. **Though Capito's bill should be viewed as an**

opening round of negotiations, it also shows how far the negotiations will need to go to reach an agreement.

The Planned and Unplanned Tax Agenda

Cutting taxes is in the Republican DNA. Rep. Vern Buchanan (R-FL), the leading contender to take over the House Ways and Means Committee next year, [last week introduced](#) the TCJA Permanency Act. This would make permanent the individual tax provisions of the Tax Cuts and Jobs Act (TCJA) that are set to expire at the end of 2025 (e.g. individual rates, qualified business income deduction, standard deduction, expanded Child Tax Credit (CTC)). Partisan and temporary reconciliation legislation is often amended in future Congresses on a bipartisan basis (see permanent extension of the Bush tax cuts and elimination of the Cadillac health insurance and medical device taxes). **But the 118th Congress is not the moment for wide-reaching action on the TCJA. We need one more election cycle in 2024 before that comes front-and-center.** Democrats in the IRA added an expiration of the Affordable Care Act subsidies in 2025 to increase the leverage for a deal.

However, the 118th Congress could be ripe for piecemeal action on tax provisions not resolved by this Congress that has a pathway for bipartisan and bicameral support. We laid out in a [Spotlight Report last month](#) tax provisions to watch this year, next year, and in 2025. There are several provisions we expect to be addressed in this year's anticipated tax extenders legislation. If for some reason that doesn't happen, they become prime candidates for action in the 118th Congress. That includes a return to R&D expensing, increasing the 1099-K limit and transaction threshold, and LIFO relief. Additionally, there's bipartisan interest in taking action on further extending Opportunity Zones and tax credits for low-income housing development. Bipartisan support is there among some rank-and-file, it's a matter of elevating it to leadership levels. Finally, there's the more partisan tax policies that are open to some horse trading. It's mostly Republicans advocating for better terms of interest deductibility and bonus depreciation. But it's not something that more moderate Democrats would eschew. To help with progressives, there would need to be some inroads on items like the CTC. That, though, may be a bridge too far for horse trading during normal times.

But the best laid plans are often stripped away during un-normal times. As hopes for a Fed soft landing get squishier, talk around a recession is less "if" but rather "when" and "how bad." Yet, there's hardly a peep around fiscal policy. Usually tax policy is front-and-center in a recession and it works in tandem with monetary policy. That may not be the case in a Fed-induced recession to combat inflation. Still, Congress isn't going to want to just sit on their hands. It may behoove the White House to downplay talk of a recession today, but if we're in the thick of a real recession come next year or 2024, there will be a strong desire to do something. **A recession could be a catalyst for some of this horse trading – giving some sort of debt/capital investment relief to businesses and some sort of household relief to families.**



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