2022 post-election legislative and policy update: Implications of the midterms for the lame duck session and the next Congress

Global Tax Alert

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At this writing, the Senate stands at a 50/50 split, Senator Mark Kelly (D-AZ) and Senator Catherine Cortez Masto (D-NV) having both won reelection. Georgia’s Senate race is still undecided. A runoff will take place on December 6 between Raphael Warnock (D) and Herschel Walker (R). Its outcome will determine whether the Senate remains evenly split or whether Democrats will gain an additional seat.

In the House, just under ten seats are yet to be called, meaning control of that Chamber remains undecided. Regardless of the outcome, control will be very narrow, and as of today the House is expected to flip to Republican control.

Although the House initiates spending legislation, the near-term post-election agenda will take place in the current Congress with Democratic majorities.

With Republicans expected to gain a narrow House majority in the next Congress, it is expected that Democrats in the House will advance a robust end-of-year package in the current Congress, in December, to address outstanding items, among them the December 16 lapse of spending authority for federal governmental operations a host of tax provisions, and some specific policy priorities.
Until we have final indications on which party controls the House, we won’t have certainty on which specific policy goals and priorities may be in any year-end package, other than those mentioned above.

The big picture

Congress returns this week following mid-term elections that produced far different results than many anticipated. Democrats as of now have 50 seats in the Senate, which with the tie-breaking vote of Vice President Kamala Harris provides them with majority control. The runoff election in Georgia on December 6 will determine whether Democrats will have 51 seats in the next Congress or will revert to the 50/50 alignment in the current Congress.

The gain of one seat would allow Democrats to discard the current agreement with Senate Republicans, under which committees have an equal number of senators from each party, to one in which they will have one-seat majorities. Senate leadership posts on the Democratic side are unlikely to change; some committee chairmanships and memberships are expected to change to accommodate retiring and new senators. Senator Ron Wyden (D-OR) will remain chairman of the Finance Committee, with Senator Mike Crapo (R-ID) as ranking member. The outcome of Republican leadership decisions is unclear at this time.

Control of the House remains in doubt pending the outcome of voting on approximately 10 seats. The likelihood is that Republicans will hold a very slender House majority (estimated at 219 seats plus or minus 4; a majority is 218) with Democrats still in contention as of now for an even slimmer majority.

Leadership posts in the House will be determined in the coming days and the outcome may depend on the final election results. If Democrats hold their majority Richard Neal (D-MA) will remain Ways and Means chairman; there is competition for that post if Republicans take the majority.

In the lame duck session

Federal spending authority ends on December 16 and the highest priority of the current Congress before adjourning will be to extend spending well into 2023 and possibly through the end of the current fiscal year on September 30, 2023.

Had Republicans achieved majorities in the House and Senate in the mid-term, it was anticipated that they would have objected to negotiating major legislation with outgoing Democratic majorities during the lame duck session. However, given the mid-term results and the likelihood that it will be extremely difficult to legislate anything significant in the first few months of the new Congress with a very slender House majority, the current expectation is that the lame duck session could produce a robust omnibus spending bill that also will contain tax, healthcare, and some additional policy provisions that have been pending in recent months.

The tax package is likely to contain extensions of the 40 or so provisions that expired in 2021 or will soon expire, as well as provisions providing relief for natural disasters in 2021 and 2022 (such as the employee retention credit).

The tax package also may provide a vehicle for an extension of expensing for R&D expenditures (reversing for a number of years the tax reform treatment requiring amortization) and an adjustment to the interest deduction rules in tax reform. However, progressive Democrats, who are likely to feel more empowered following the mid-terms, may demand a compromise to extend the more generous Child Credit that was partially extended in 2021 and that Republicans are unlikely to accept without some adjustments. The year-end omnibus spending bill will be bipartisan and while Democrats currently have House and Senate majorities, they will need ten Republicans to clear the omnibus through the Senate where 60 votes are needed to advance a spending bill.

The White House and Congressional Democratic Leaders anticipate a major battle next year if Republicans win a House majority over legislation to extend the federal debt ceiling, the upper limit at which the United States may borrow, without which the US could default on its obligations.

Extending the debt ceiling was once a routine matter; these days, the debt ceiling increase has become highly contentious, the party in the minority typically making high demands before agreeing to cooperate on its extension. Although no decisions have been made as yet, White House officials who also served President Barack Obama when Democrats suffered major losses in the 2010 mid-terms are considering an approach to the debt ceiling they then rejected: to use budget reconciliation for fiscal year 2023, legislation that only requires a simple Senate majority, to pass the debt ceiling and possibility some other Democratic priorities that Republicans may not be willing to support.

Reconciliation requires Congress to pass a number of preliminary bills prior to a substantive measure and consumes a
great deal of Senate time factors that are being weighed as Democratic leaders consider their lame duck strategies.

Although a major lame duck omnibus is possible, it is not guaranteed, and taxpayers that are seeking legislative relief in the lame duck session, especially with respect to the R&D issue, should make their views known; members need to hear that there is urgency to act and that waiting until some time in 2023 is not acceptable.

First session, 2023

The legislative landscape in 2023 will consist of either a unified government with Democrats in charge of the Executive Branch and holding slim majorities in the House and Senate, or a divided government with Republicans holding a slim majority in the House.

During 2021 and 2022, Democrats were able to pass significant legislation with slender majorities, but doing so was difficult and time consuming because of internal disputes between moderate and progressive legislators.

Although conventional wisdom would suggest that divided government will produce very little, the historical record suggests otherwise. Divided government tends to force compromise and leaders of both parties use the fact of divided government to bring their more extreme members, left and right, back to the center. President Joe Biden, who served in the Senate for 36 years, earned a reputation for compromise, and has already reached out to House Republican Leader Kevin McCarthy (R-CA) to propose a working relationship in the event that McCarthy becomes the next speaker. As of now, many House Republicans have indicated the 2023 agenda will consist largely of investigations, but Congress must fund government and address other critical issues in any event. Moreover, the mid-term election results suggest that the public want their elected leaders to work together to produce results.

Because the final composition of the new Congress has not been settled and with challenges to some leadership posts ahead, it is difficult to predict what 2023 will bring. However, if the President and Congressional leaders in both parties are willing to compromise, even if after some tough early negotiations, the new Congress may prove to be productive.

Please reach out to DLA Piper for assistance in advancing initiatives in the lame duck session and to discuss strategic planning during the new Congress that will take office in January.

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