Washington in 2021: Democrats Control White House & Congress

Georgia elections cement Democratic control

7 January 2021

Overview

Democrats Jon Ossoff and Raphael Warnock won the Georgia runoff elections, giving Democrats control of the Senate beginning later this month. With the parties split 50-50 in the Senate, Vice President-elect Kamala Harris will break ties, allowing major priorities like stimulus, climate change, and health care, potentially paid for with tax increases, to be brought up and passed in the House and Senate. The party ratio in the chamber was going to be narrow under either Georgia runoff scenario, requiring bipartisan cooperation for much to get done, but Senate control affords Democrats additional options like budget reconciliation.

With such a narrow margin, Democrats face the choices of: 1) negotiating with Senate Republicans to achieve the 60-vote margin necessary to move most legislation through the Senate; 2) using the budget reconciliation process that allows certain legislation to pass with 51 votes, rather than the 60-vote filibuster threshold; or 3) changing rules regarding the filibuster. Regardless of how legislation is processed, moderate senators like Joe Manchin (D-WV) and Susan Collins (R-ME) will play a huge role in deal-making.

Democrats have potentially two opportunities to employ budget reconciliation if instructions can be approved in the FY2021 and FY2022 budget resolutions – only one reconciliation bill is allowed for each resolution. House Speaker Nancy Pelosi (D-CA) has said a first reconciliation bill will combine pandemic relief with Affordable Care Act (ACA) improvements.

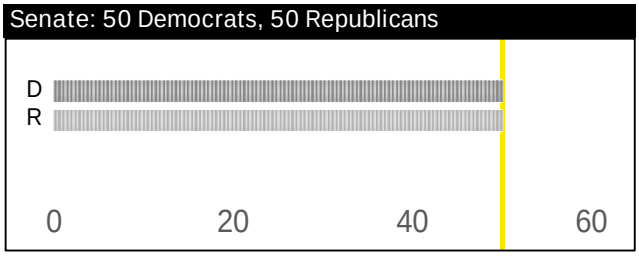
What priorities or combinations would be the target of a second reconciliation bill is unclear. However, each bill is limited in that it must not increase the deficit outside the 10-year budget window. How much of any of the first reconciliation bill would be paid for is unknown now, as is how President-elect Biden will proceed with his intention to raise the statutory corporate income tax rate to pay for changes that can benefit middle-income Americans on "day one" of his presidency.

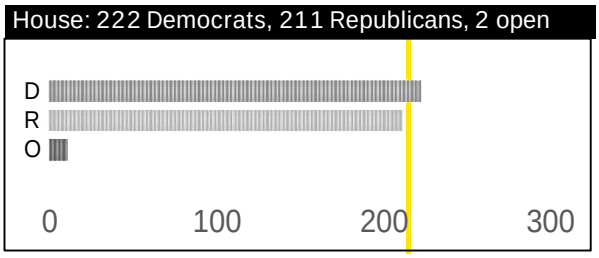
Year-end 2020 legislation (Pub. Law No. 116-260) omitted state and local funding and liability protections, and included smaller direct payments and unemployment add-ons than some wanted. Both parties expect additional virus-related legislation, and Biden has said "Congress will need to immediately get to work on support for our COVID-19 plan."

Beyond full-chamber leadership, Democratic control also means chairmanships of committees, which will determine what bills and issues are considered. The last 50-50 split was after George W. Bush was elected president in 2000 and required Senate leaders to negotiate an agreement on committee ratios and procedures. A similar process is expected this time, but the negotiations could take some time.

Must-pass legislation in 2021 will need to address:

- The federal debt limit reinstated on August 1, 2021.
- Expiration of government funding, and highway authorization & funding on September 30, 2021.





* Two open seats attributable to an undecided race in New York and the passing of Rep.-elect Rep. Luke Letlow (R-LA).

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Expected Senate leadership

Leadership	Democrats	Republicans
	Majority Leader Chuck Schumer (D-NY)	Minority Leader Mitch McConnell (R-KY)
	Majority Whip Dick Durbin (D-IL)	Minority Whip John Thune (R-SD)

Expected Senate committee leaders include

Finance	Democrats	Republicans
	Chairman Ron Wyden (D-OR)	Ranking Member Mike Crapo (R-ID)

Agriculture	Democrats	Republicans
	Chairman Debbie Stabenow (D-MI)	Ranking Member John Boozman (R-AR)

Appropriations	Democrats	Republicans
	Chairman Patrick Leahy (D-VT)	Ranking Member Richard Shelby (R-AL)

Banking	Democrats	Republicans
	Chairman Sherrod Brown (D-OH)	Ranking Member Pat Toomey (R-PA)

Budget	Democrats	Republicans
	Chairman Bernie Sanders (I-VT)	Lindsey Graham (R-SC)

Commerce, Science & Transportation	Democrats	Republicans
	Chairman Maria Cantwell (D-WA)	Ranking Member Roger Wicker (R-MS)

Energy & Natural Resources	Democrats	Republicans
	Chairman Joe Manchin (D-WV)	Ranking Member John Barrasso (R-WY)

Environment & Public Works	Democrats	Republicans
	Chairman Thomas Carper (D-DE)	Ranking Member Shelley Moore Capito (R-WV)

Foreign Relations	Democrats	Republicans
	Chairman Robert Menendez (D-NJ)	Ranking Member Jim Risch (R-ID)

Health, Education, Labor & Pensions (HELP)	Democrats	Republicans
	Chairman Patty Murray (D-WA)	Ranking Member Richard Burr (R-NC) or Rand Paul (R-KY)

Homeland Security & Governmental Affairs	Democrats	Republicans
	Chairman Gary Peters (D-MI)	Ranking Member Rob Portman (R-OH)

Judiciary	Democrats	Republicans
	Chairman Dick Durbin (D-IL)	Ranking Member Chuck Grassley (R-IA)

Small Business	Democrats	Republicans
	Chairman Ben Cardin (D-MD)	Ranking Member Rand Paul (R-KY) or Tim Scott (R-SC)

House leadership

Leadership	Democrats	Republicans
	Speaker Nancy Pelosi (D-CA)	Minority Leader Kevin McCarthy (R-CA)
	Majority Leader Steny Hoyer (D-MD)	Minority Whip Steve Scalise (R-LA)

House committee leaders include

Ways & Means	Democrats	Republicans
	Chairman Richard Neal (D-MA)	Ranking Member Kevin Brady (R-TX)

Agriculture	Democrats	Republicans
	Chairman David Scott (D-GA)	Ranking Member Glenn Thompson (R-PA)

Appropriations	Democrats	Republicans
	Chairman Rosa DeLauro (D-CT)	Ranking Member Kay Granger (R-TX)

Budget	Democrats	Republicans
	Chairman John Yarmuth (D-KY)	Ranking Member Jason Smith (R-MO)

Education & Labor	Democrats	Republicans
	Chairman Bobby Scott (D-VA)	Ranking Member Virginia Foxx (R-NC)

Energy & Commerce	Democrats	Republicans
	Chairman Frank Pallone (D-NJ)	Ranking Member Cathy McMorris Rodgers (R-WA)

Financial Services	Democrats	Republicans
	Chairman Maxine Waters (D-CA)	Ranking Member Patrick McHenry (R-NC)

Homeland Security	Democrats	Republicans
	Chairman Bennie Thompson (D-MS)	Ranking Member John Katko (R-NY)

Judiciary	Democrats	Republicans
	Chairman Jerry Nadler (D-NY)	Ranking Member Jim Jordan (R-OH)

Natural Resources	Democrats	Republicans
	Chairman Raul Grijalva (D-AZ)	Ranking Member Bruce Westerman (R-AR)

Oversight & Reform	Democrats	Republicans
	Chairman Carolyn Maloney (D-NY)	Ranking Member James Comer (R-KY)

Rules	Democrats	Republicans
	Chairman Jim McGovern (D-MA)	Ranking Member Tom Cole (R-OK)

Joint Economic Committee	Democrats	Republicans
	Chairman Don Beyer (D-VA)	Ranking Member Sen. Mike Lee (R-UT) or Sen. Tom Cotton (R-AR)

Policy overview

Democrats will have potentially two opportunities to employ budget reconciliation next year if instructions can be approved in the FY2021 and FY2022 budget resolutions – only one reconciliation bill is allowed for each resolution. What priorities or combinations will be the target of reconciliation is unclear, as is how Biden will employ the suggested rule from his campaign that short-term stimulus will not require tax increases to offset revenue. Beyond stimulus, the Biden/Democratic policy agenda has tax increases as a common thread: plans on health care, climate change, education, housing and other areas envision tax changes like rolling back parts of the Tax Cuts and Jobs Act (TCJA) and otherwise turning tax rate dials, and those hikes could be used to fit a bill within whatever revenue constraints Democrats decide. The political calculus of how bills move, including through reconciliation or not, will involve assessing the difficulty of winning support from some Republicans and not losing moderate Senate Democrats.

Reconciliation is generally easier to do when raising taxes than cutting taxes since reconciliation originally was designed as a deficit reduction measure, and there is no worry about 10-year sunsets or fitting the contents of the bill within a revenue constraint. If a budget agreed to by the House and Senate has "instructions" to provide for items like infrastructure investment or health care changes, and spending targets to the appropriate committees of jurisdiction, items being discussed by Biden would likely be able to be considered under the procedurally advantageous reconciliation process. Two major limits on a reconciliation bill are that the policy provision must have a budget impact or be material to the spending or tax provisions and that it does not increase the deficit beyond the budget window.

If a determination is made that major Democratic priorities like climate change seem likely to bump up against reconciliation rules and are more conducive to being enacted outside of the reconciliation process, that likely will require filibuster repeal. Democrats are split on this issue but former President Obama and former Senate Democratic leader Harry Reid, who both saw their ability to move policy changes hobbled by the filibuster, are among significant Democratic forces pushing for the change. Democrats might need to utilize both options through budget and filibuster changes to pursue their broad agenda.

Use of budget reconciliation requires two steps:

- Both the House and Senate must pass the same concurrent Budget Resolution (requiring only a simple majority in the Senate) that contains reconciliation instructions to committees of jurisdiction to change the spending or revenue numbers;
- Reconciliation bills that adhere to the reconciliation instructions from the budget resolution would then, like other legislation, be passed by both chambers of Congress and signed into law by the President.

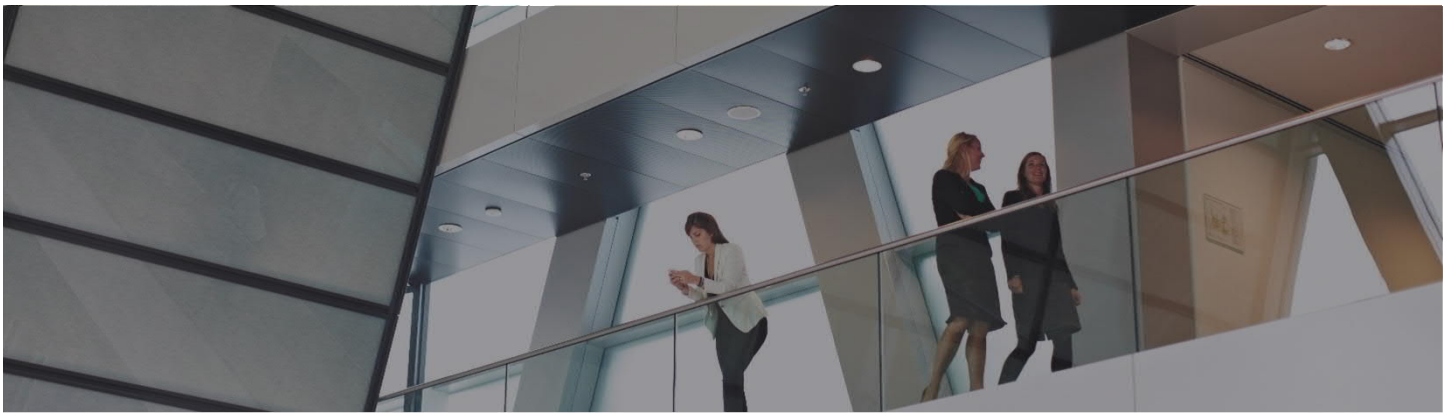
While only a simple majority is required for passage in the Senate, 60 votes are required to waive a point of order against potential violations of the so-called "Byrd rule," which among other things prohibits the inclusion of provisions that increase the budget deficit for the period outside the budget window. There are six tests for matters to be considered extraneous:

Byrd rule deems extraneous proposals that:

- Do not produce a change in outlays or revenues;
- Produce changes in outlays or revenue that are merely incidental to the non-budgetary components of the provision;
- Are outside the jurisdiction of the committee that submitted the title or provision for inclusion in the reconciliation measure;
- Increase outlays or decrease revenue if the provision's title, as a whole, fails to achieve the reporting committee's reconciliation instructions;
- Increase net outlays or decrease revenue during a fiscal year after the years covered by the reconciliation bill unless the provision's title, as a whole, remains budget neutral; or
- Contain recommendations regarding Social Security.

It is the Byrd Rule prohibition against provisions that have no revenue effect that could trip up stimulus legislation or high-profile Democratic priorities like climate change. During the ACA repeal debate, non-revenue aspects like eliminating essential health benefits and permitting insurers to sell policies across state lines were found to violate the rule. During the TCJA, the budget impact of a policy to expand 529 savings accounts to home-school expenses was challenged by Democrats and found to be incidental to the non-budgetary policy around education.

In the climate change context, reconciliation is seen as likely precluding performance standards like those on fuel economy or building standards. However, many of the goals of climate change policy could be, with some creativity, designed with a revenue impact. Many HEROES Act provisions have a revenue impact.



Tax

President-elect Biden's proposed tax increases are intended to be enacted as revenue sources for major priorities like climate change, health care, education and housing. A first bill sought by Biden and congressional Democrats is likely to be pandemic relief and health care changes. How much of that bill will be paid for is unknown now, as is how Biden will proceed with his intention to raise the statutory corporate income tax rate to pay for changes that can benefit middle-income Americans on "day one" of his presidency. "If you raise the corporate taxes back to 28%, which is a fair tax, you'd raise [$1.3 trillion] by that one act…" he said Oct. 15. Some Biden advisors and congressional Democrats have indicated the types of tax increases supported by Biden during the campaign would not be included as part of initial stimulus legislation, but instead would be used to offset the cost of changes in permanent policies. That could mean such tax increases might not take effect on January 1, 2021, but could be delayed, maybe until 2022.

Economic proposals outlined thus far include a $700 billion plan to aid US businesses through procurement and R&D investment and a $2 trillion plan to create jobs by building a modern infrastructure and a clean energy future. Both are intended to be paid for with tax increases. Biden has also proposed improvements to US manufacturing through a 10% "Made in America" Tax Credit for investment in revitalizing factories and reshoring jobs, which has been paired with a 10% "offshoring" surtax on a US company's overseas production profits from sales back to the US – such income would be taxed at 30.8%.

Also intended to combat offshoring are changes to the global intangible low-taxed income (GILTI) rules, with many Democrats arguing they do not have enough teeth to prevent US companies from taking undue advantage of other international tax changes included in the TCJA that partially eliminated US tax on foreign-source earnings. Biden has proposed combining the 28% corporate tax rate with a 21% tax rate on GILTI – seeming to concede that GILTI should be taxed at a rate lower than the corporate tax rate – and proposing to apply GILTI on a jurisdictional basis, rather than an aggregate basis as it currently applies, plus repealing the GILTI relief for foreign profits relating to qualified tangible property. Democrats supporting such a move will find good company with the OECD's efforts to develop model minimum tax legislation under Pillar 2 of the Base Erosion and Profit Shifting 2.0 project that also appears likely to include a per-jurisdiction approach. All these ideas seem to be aligned with congressional Democrats' stated desire to remove incentives for companies to shift US jobs and physical operations overseas. However, inconsistencies with the OECD approach are also clear. For example, Biden's proposal to dramatically increase the GILTI tax rate runs counter to the OECD minimum tax model, which likely will include a minimum tax threshold closer to 12.5%. Another key question is whether Biden and congressional Democrats will simply push to tinker with GILTI, or whether additional changes to the TCJA's international tax reforms may be considered.

Beyond international tax, Biden's priorities align with the longtime Democratic priority of making wealthy individuals and corporations "pay their fair share," a push that has increased, not abated, since enactment of the TCJA with solely Republican support.

Biden has called for a "minimum corporate tax" of 15% applying to book income for companies with net income greater than $100 million, which is seen as addressing concerns that some major corporations pay no taxes.

Individual provisions include returning the top income tax rate to 39.6% and repeal of lower rates on capital gains and dividends for those with incomes over $1 million. Estate tax rules would be returned to the 2009 regime of a $3.5 million exemption and 45% rate.

Biden has stated that tax increases won't affect families earning less than $400,000 annually. He has also reportedly proposed phasing out above a $400,000 income threshold the Section 199A qualified business income deduction available to individuals, including many owners of sole proprietorships, partnerships and S corporations, and capping the value of itemized deductions at 28%.

Not all of Biden's proposals are tax increases. He has also, in some of the same plans that call for tax provisions as revenue offsets, proposed to extend, revive or create tax incentives, including credits for first-time homebuyers and renters, as well as for the care of children and the elderly.

President-elect Biden will likely lay out his tax proposals in an FY2022 budget, which will likely be outlined a few months into his presidency and detailed more fully in the spring. Biden has patterned much of his tax agenda on Obama administration proposals, and could similarly include significant lists of tax increases in Treasury "green books." Even if the proposals have no hope of advancement, they could illustrate how money could be redistributed toward middle-class priorities.

Highlights of Biden tax increase proposals and plans they would pay for

Business tax proposals		Climate/ Infra-structure	Health care	Education	Made in USA, R&D	Child, elder care	Housing
Corporate rate	28%	■					
Other business changes	End subsidies for fossil fuels	■					
	Repeal CARES Act excess business losses provision			■			
	No ad deduction for Rx companies		■				
	Financial fee on certain liabilities of firms with more than $50b in assets						■
Intl' tax	21% GILTI rate, per-country basis, no GILTI relief for foreign profits relating to qualified tangible property	■			■		
	Tighter anti-inversion rules	■			■		
	10% offshoring penalty				■		
Minimum tax	15% minimum tax on book income >$100m	■					
Real estate	End use of like-kind exchanges, use of real estate losses to reduce tax liability					■	
Individual tax proposals							
Top income tax rate	39.6%; 199A deduction phased out for incomes above $400,000		■				
Capital gains	Repeal lower tax rate for capital gains for households earning >$1m		■				
Itemized deductions	Pease limitation reinstated over $400,000; 28% cap for "wealthiest"			■			
Estate tax	$3.5m exemption, 45% rate (2009 regime)		■				
	End estate tax stepped-up basis			■			
Social Security	Increase payroll tax withholding for annual incomes more than $400k						

Biden and congressional Democrats are generally ideologically aligned, having argued for years against offshoring and in favor of making the wealthy and corporations pay their fair share. The leaders of congressional tax-writing committees, Rep. Neal and Senator Wyden, have long aspired to act on the bread-and-butter proposal to increase infrastructure investment, and Speaker Pelosi has drawn comparisons between Biden's plan and the House infrastructure bill. They would be expected to largely let the Administration drive the tax agenda, at least at first. Whether in coronavirus relief or another context, Democrats are also likely to act on their long-held goal of expanding low-income tax credits like the Earned Income Tax Credit and Child Tax Credit. The HEROES Act was characterized as a Democratic wish list, so it will be looked upon as representing where Democrats want to go when in charge in Washington.

However, the influence of the progressive flank of the party will be felt, along with that of moderate senators like Manchin and Kyrsten Sinema (D-AZ), whose votes will be crucial even under reconciliation.

There are also revenue proposals beyond what Biden has embraced, including a financial transactions tax on stock, bond and derivative transactions. Senator Wyden has also proposed a plan to impose a mark-to-market approach requiring capital gains to be taxed annually at ordinary income levels for wealthy taxpayers. "Anti-deferral [mark-to-market] accounting rules" would only apply to individuals with more than $1 million in annual income or $10 million in assets. Applicable taxpayers would be required to pay annual taxes on unrealized gains and take a deduction for unrealized losses on liquid assets, such as stock, while for illiquid assets a look-back charge would be imposed on gains realized upon the sale of these assets.

The TCJA started out as a tax cut but now presents a waterfall of potential tax increases related to interest deductibility, R&D amortization and bonus depreciation. Democrats may be reluctant to support changes to the law they unanimously voted against. However, potential compromise tax legislation could take the form of Republicans negotiating to keep or fix some of their priorities from the TCJA in exchange for Democratic priorities, such as expansion of low-income credits.

Select changes scheduled under TCJA

	R&D expensing	Interest deduction based on EBITDA	100% expensing	GILTI deduction at 50%	FDII deduction at 37.5%	BEAT rate: 10%/11% for banks/dealers
2020		50%				
2021		30%				
2022		EBIT				
2023			Phased down in 20% steps			
2024						
2025						
2026				37.5%	21.875%	12.5%/13.5%

Health

Health care is consistently ranked as a top election concern for voters and was even more so this year as the 2020 election was dominated by a global health care pandemic that has threatened not only our economy, but also stressed our health care system. According to Pew Research Center, 82% of registered Biden/Lean Biden voters said health care is "very important" to their 2020 vote, and the electorate will expect movement out of a Biden administration on the coronavirus and beyond.

Delivering on many campaign promises, however, necessitates congressional action. Despite having a Democratic-controlled Senate, movement hinges on getting both wings of the party on board with legislation and a decision to either remove the filibuster or try to pass a health care bill through the more limited process of budget reconciliation. Due to the difficulty and political capital expended to advance such a fight, bigger reform may be delayed; however, that calculus would change if the Supreme Court rules this spring in favor of Republican states aiming to strike down the ACA. Other changes in health care policy could focus on bipartisan areas of consensus due to limitations imposed by partisanship, procedure and pandemic budget constraints. This means potentially picking up where committees left off in negotiations around drug pricing – the big area of bipartisan focus last Congress beyond surprise billing, which was addressed in the year-end package – and focusing on other areas of bipartisan consensus including rural health, telemedicine, maternal mortality, health equity, mental health and opioid use disorders.

Biden is also likely to use executive action to unwind various Trump regulations and guidance that undermine the ACA, reverse the rollback of dozens of Obama-era public health rules, and freeze Trump rules that have not yet taken effect. Biden has nominated California Attorney General and former House member Xavier Becerra to helm his health department, who has emerged as the nation's defender of the ACA, leading more than a dozen other Democratic attorneys general in supporting the law at the Supreme Court. Becerra has also been outspoken on issues including women's health and addressing health disparities, has gone after hospital consolidation, and joined other attorneys general in holding drug companies accountable for their role in the opioid crisis and providing discounts under the 340B program. After confirmation, Becerra will lead the Biden team in regulatory change to pursue his health care agenda regardless of congressional movement.

Biden administration priorities

Coronavirus response. Amid the global pandemic, Biden has said he would give the federal government primary responsibility for the response to the coronavirus, putting scientists and public health leaders "front and center" in communication with the American people and providing "clear, consistent, evidence-based national guidance." In December, he announced a 100-day plan to manage the pandemic, including distributing 100 million vaccine shots and signing an executive order requiring people to wear masks on interstate transportation and in federal buildings. Among other items, Biden supports increased investment in testing and tracing, utilizing the Defense Production Act to ramp up production of personal protective equipment (PPE), providing vaccines and treatment at no cost to patients, and restoring the White House pandemic office while re-embracing international engagement efforts and funding for the World Health Organization (WHO).

Strengthening the ACA. The cornerstone of the Biden health care platform is the creation of a new public health insurance option, similar to Medicare, in which the federal government would set provider reimbursements and premium rates. Costs would vary on a sliding scale based on income and automatically enroll at zero cost those in the Medicaid expansion population in states that have not expanded. Biden also supports other changes to strengthen the ACA including expanding eligibility for financial assistance and making premium tax credits more generous by eliminating the 400% cap on tax credit eligibility; lowering the limit on the cost of coverage from 9.86% of income to 8.5%; and reducing out-of-pocket cost sharing for enrollees by setting the benchmark plan at the gold level. Biden would also restore funding to consumer outreach and assistance programs, which were cut by the Trump administration, and unwind various Trump-era regulations and guidance that undermine the ACA, such as those expanding access to short-term limited duration plans and supporting Medicaid work requirements and block grants.

Expanding Medicare, Medicaid and long-term care. In addition to automatically enrolling into the public option adults who would be eligible for Medicaid if their state had expanded, Biden would allow states that have expanded Medicaid to move enrollees into the public option as long as they continue their current share of the costs ("maintenance-of-effort" payments). Biden also supports increased federal Medicaid funding for home- and community-based services.

Regarding Medicare, Biden favors expanding Medicare eligibility to age 60 and adding vision, hearing and dental benefits. He also favors tax credits for informal caregivers and seniors who purchase private long-term care insurance and improving nursing home staffing and quality standards.

Reducing drug prices. Biden supports legislation approved by the Democratic-led House of Representatives last year giving Medicare the power to negotiate "abusively priced" prescription drugs with manufacturers, capped at a level associated with Organization for Economic Cooperation and Development (OECD) prices, which would be leveraged for Medicare and the public option but also available to private payers. Biden also supports proposals to limit price increases for all brand, biotech, and highly priced generics to the general inflation rate, in addition to limiting the prices of new specialty drugs with little to no competition by establishing an independent review board to recommend a price through external reference pricing. Like President Trump, Biden also supports proposals to allow for safe drug importation, to cap out-of-pocket costs in Medicare Part D, to eliminate the tax break for pharmaceutical company advertising expenses, and various bipartisan proposals aimed at improving the supply of quality generics by cracking down on anti-competitive efforts that delay entry. Biden's promise to freeze Trump administration proposed rules could also delay recently finalized drug pricing rules, including one to end drug rebates due to their sizable economic impact.

Mental health and the opioid crisis. Biden aims to redouble his efforts to implement the federal mental health parity law in addition to improving access to mental health care and eliminating stigma around mental health, which he championed as vice president. Included in this are plans to implement suicide prevention strategies for veterans and the LGBTQ community, double the number of mental health professionals in schools and encourage youth to pursue health care jobs. Biden has a five-point plan to address the opioid crisis that includes increased access to services, reducing unnecessary opioid prescriptions and holding pharma accountable for their role in the crisis. Biden would direct the US Justice Department to make addressing bad actors a top investigative priority and the Drug Enforcement Administration (DEA) to step up efforts to identify suspicious shipments and protect struggling communities.

Reducing disparities in care. Biden's platform includes plans to reduce disparities in care and increase access to all regardless of gender, race, income, sexual orientation or Zip code. This includes expanding access to contraception and protecting the right to an abortion through restored federal funding for Planned Parenthood and a reversal of the Mexico City Policy (also referred to as the "global gag rule"). Biden also supports a national strategy to address maternal mortality, health care protections for the LGBTQ community, and a doubling of America's investment in community health centers to serve underserved populations. Biden also supports an updated national HIV/AIDS strategy and restored global funding through PEPFAR and the Global Fund. Regarding immigrant health care, Biden would reverse the Trump administration's "public charge" policy (which has been blocked in the courts), expand ACA coverage to include Deferred Action for Childhood Arrivals (DACA) recipients, remove the waiting period in Medicaid and the Children's Health Insurance Program (CHIP) for lawfully present immigrants, and allow undocumented immigrants to purchase unsubsidized coverage in the ACA marketplace.

Value-based care, price transparency and interoperability. Biden has not publicly said much about these three issues, seen as focus areas for the Trump Administration, however they are generally bipartisan in nature and will continue to be a focus both in the administration and in Congress. Biden will likely leverage the CMS Innovation Center (CMMI) to continue the push from Medicare fee-for-service to value-based care, begun in earnest under the Obama administration, which could focus on increasing access to primary care among other items. There is also no indication he will unravel Trump-era final rules that have pushed providers, insurers and health IT toward greater price transparency and interoperability in an effort to get data into the hands of consumers.

Surprise billing. Biden supports prohibiting health care providers from charging out-of-network rates in situations when patients have no control over who they can see, like in the case of emergency hospitalizations. While this was addressed in the 2020 year-end package, Biden's Health and Human Services (HHS) Department will be in charge of crafting the regulations that will provide additional specifics around the independent dispute resolution (IDR) process that will determine out-of-network rates to be paid by health plans if parties are unable to reach agreement, along with other details regarding the bill's reporting requirements, transparency components and patient protections.

Market concentration. Biden says his administration will aggressively use its antitrust authority to address market concentration across the health care system that has driven up prices for consumers. This will likely be a focus area for HHS Secretary-designate Becerra, considering he brought a high-profile antitrust case against nonprofit health care giant Sutter Health as California Attorney General and drafted an antitrust bill that would have given the attorney general power to review private equity- or hedge fund-led mergers or acquisitions of a health care system or hospital.

Congressional action

Pandemic relief will continue to be the top health care priority for Democrats in Congress, likely aiming to advance priorities that were not included in the year-end relief package. The House-passed HEROES Act is a plausible starting point, which in addition to funding for providers, testing and tracing – some of which was included in the year-end package – also included increased Medicaid and Medicare payments, an ACA special enrollment period, and a variety of other health care and a variety of economic measures and individual and business supports.

Beyond bipartisan areas of consensus, what gets done in a Democratic-controlled Congress could depend on the future of the filibuster and whether Senate Democrats choose to remove it or try to pass a health care bill through the more limited process of budget reconciliation. This, however, could prove challenging given statements from Democrats in Republican states, including Joe Manchin (WV) and Jon Tester (MT), who have pledged to keep the 60-vote requirement for legislation.

Democrats will also have to determine whether they focus on a bigger bill package, which might include a public option, or smaller improvements to the ACA and health care markets. Similar to 2016, when Senate Republicans failed to advance an ACA repeal-and-replace bill, there is divergence across the party on the best market intervention and it may be difficult to get everyone on board with a single piece of legislation. Due to the difficulty and political capital expended to advance such a fight, bigger reform may be delayed; however, the calculus would certainly change if the Supreme Court rules in favor of Republican states aiming to strike down the ACA due to the alleged unconstitutionality of its individual mandate, although this seems unlikely following oral arguments late last year.

New Senate leadership priorities

New Democratic leadership will take the reins of the two key health care committees in the Senate – the Senate Finance and Health, Education, Labor and Pensions (HELP) Committees. Sen. Ron Wyden (D-OR) is expected to helm the Finance Committee and has said he wants to focus on pandemic relief and addressing systemic racism in the nation's health care system, including developing maternal mortality legislation and advancing other equity concerns.

Wyden will also likely want to pick up where he left off in terms of drug pricing legislation, which he cosponsored with current committee Chairman Grassley, who is set to vacate his spot as the top Republican on the committee. While Republicans vehemently oppose the House-passed Democratic bill that would allow Medicare to negotiate drug prices, the Finance bill features instead provisions to rein in price increases through measures including mandated manufacturer rebates for prices rising faster than inflation in Medicare Part B and D, price reporting for drug cost increases, and Medicare Part D redesign. While Wyden and Grassley were unable to get enough support from Senate Republicans to advance the legislation, a new Democratic majority would likely be able to push through something similar, barring demands from the left wing of the party to include Medicare negotiation or other more progressive measures. Such a bill would also likely have significant cost savings, something that will be highly sought after given the difficult budget environment, but it may still lack sufficient Republican votes to pass easily through the Senate. Sen. Mike Crapo (R-IA), who is likely to succeed Grassley as the top Republican on the committee, put forward a Republican alternative to the bipartisan Grassley-Wyden bill that is less aggressive and leaves the inflationary rebate piece that Democrats insist must be included as a key mechanism for curbing prices.

Sen. Patty Murray (D-WA) is expected to take control of the HELP Committee, the principal health care panel in the Senate. She would likely also be focused on pandemic relief in addition to protecting and expanding on the ACA following the systematic dismantling approach of the Trump Administration. Murray would also have a new negotiating partner on the committee, as Sen. Lamar Alexander (R-TN) retired, with Richard Burr (R-NC) having the right of first refusal followed by Rand Paul (R-KY). Following the inclusion of the committee's top priority – surprise billing – in the 2020 year-end package, the committee will be freed up to focus on other priorities, including traditionally bipartisan health care packages like prescription and medical device user fees (PDUFA and MDUFA) along with those addressing issues such as opioids and mental health.

Other areas of bipartisan consensus

In addition to the bipartisan priorities of lowering drug prices, health equity, mental health and opioid use disorders, another likely focus area is on issues plaguing rural and underserved communities, many of which are struggling with hospital closures and having difficulty with provider recruitment and retention. A bipartisan task force stood up this summer by the House Ways & Means Committee aims to explore policy solutions for rural and underserved communities.

Telehealth is also an area ripe for bipartisan compromise following the need for an expansion throughout the coronavirus pandemic, with the potential to make permanent some of the new flexibilities after the COVID-19 public emergency is over. A robust package featuring various Medicare and Medicaid issues is also overdue. All of these areas, however, are likely to be costly and could serve as a roadblock to significant change.

State and legal action

States will continue to be active in health care, with many advancing legislation at the state level that addresses issues Congress has been unable to advance, such as drug pricing, transparency and data sharing. States will also continue to submit 1115 Medicaid demonstration and 1332 state innovation waivers, although those proposing policies such as Medicaid work requirements are expected to be a nonstarter with the Biden administration.

How far states can go will also in part hinge on the courts, which to date have blocked certain state movements including Medicaid work requirements. The Supreme Court also recently upheld an Arkansas law that regulates pharmacy benefit managers (PBMs), finding that their state law requiring PBMs to reimburse prescription drugs at a rate equal or higher than the pharmacy's wholesale acquisition cost is not preempted by the Employee Retirement Income Security Act (ERISA). This and other cases in the pipeline for this spring have the potential to impact states' ability to regulate their own health care markets.

Financial Services

In financial services, Biden's win and victories by Democrats in the Senate and House will bring a governing partnership between the White House and Congress that could produce a number of progressive policy victories. While the narrow 50-50 Senate majority will likely restrict the scope of what Democrats can achieve, the Biden White House could press for "public option" approaches not just for health insurance, but also consumer bank accounts and credit reporting, ideas that will be welcomed by Democratic committee chairs. The political alignment will also likely mean greater scrutiny of big banks and "shadow banking" risks; an emphasis on affordable housing issues, racial diversity and student debt; and a newly energized Consumer Financial Protection Bureau (CFPB). Biden and congressional Democrats will also renew the Obama-era effort to impose a fiduciary duty on securities brokers and advisers to retirement plans, and resume their scrutiny of private equity firms. Finally, the eventual shift to Democratic-appointed regulators will have consequences for the pending rewrite of a key 1970s anti-redlining law for banks, and could shift the SEC back toward "rules-based" enforcement.

Biden administration priorities. As a senator from the banking-friendly state of Delaware for many years, Biden was a reliable defender of the state's banking laws and the credit card industry, and squared off against the future Sen. Elizabeth Warren (D-MA) over the 2005 rewrite of bankruptcy law that banks had sought for years. That posture will probably become a relic of history, however, as Biden's White House seems likely to work hand-in-glove with the two liberal chairmen of the House and Senate banking committees. Biden's campaign signed on to a number of consumer-friendly ideas negotiated by the Biden-Sanders unity task force. These include a proposal to replace the three credit reporting bureaus (Equifax, Experian and TransUnion) with one federal credit reporting registry, housed in the CFPB, over a period of years. Biden could support the more incremental approach of simply offering the new agency as an alternative to the three bureaus, while requiring federally backed mortgages and student loans to use it. Sen. Sherrod Brown (D-OH), the incoming chairman of the Senate Banking Committee, has signaled his interest in the issue, telling *Politico* on Oct. 28, "The next Congress must enact bold, comprehensive legislation to reform a credit reporting industry that has failed working families and that perpetuates systemic racism and economic inequality. And that includes taking up Joe Biden's proposal for a public credit registry."

Biden has also endorsed allowing the US Postal Service to offer checking and savings accounts, remittance services and small-dollar loans in an effort to reach the unbanked, though the administration could soothe alarm in the industry by taking the more modest approach of allowing for-profit banks to offer a roster of consumer-friendly products at post offices. Biden's campaign also supported an idea by Sen. Brown to have the Federal Reserve be involved in creating "FedAccount" consumer bank accounts with no balance requirements or fees, which could encourage savings by low-income households while allowing account holders to receive federal stimulus payments. But that idea will meet some resistance from the Banking Ccommittee's incoming ranking member, Pat Toomey (R-PA), who told *American Banker* after the November election, "The idea that we should have the government go into the banking business, that does not strike me as a good idea." Toomey instead suggested reaching the unbanked through financial innovations and lighter regulation of community banks. Biden's campaign has also said he will encourage banks to offer small-dollar loans as a way of eroding the business model of high-interest payday loan vendors.

Notably, Biden and Sanders also agreed that a Democratic government should consider restoring Glass-Steagall firewalls between retail banking and riskier investment banking that were taken down by the 1999 Gramm-Leach-Bliley Act. While that idea is catnip to Sen. Brown and other critics of large banks, given other priorities it seems improbable that Biden, Brown and returning House Financial Services Committee Chairman Maxine Waters (D-CA) would devote the months necessary to the divisive task of reinstating Glass-Steagall, though other changes in the financial system are being contemplated by former CFTC chair Gary Gensler and KeyBank NA executive Don Graves, whom Biden named to the transition team after the November election. Other priorities enumerated by the Biden-Sanders agreement could get a push from the new administration, such as proposals to allow student debt to be discharged in bankruptcy; to immediately forgive $10,000 of student debt per person per year for up to five years (originally offered by Sen. Warren); to crack down on "predatory" for-profit colleges; and to target "usurious" credit card rates and strengthen oversight of credit cards and consumer lending generally.

Senate Banking Committee. With Democrats reclaiming the Senate majority, Sen. Brown will be the new chairman of the Banking Committee, providing a prominent perch for the unabashedly populist, pro-consumer, pro-union senator who has lashed "megabanks" mercilessly for their business practices over the years. At a final hearing of banking regulators on November 10, Brown said, "We have to break up the biggest banks, and give that power to everyone else who has been denied a voice in our economy. Our financial system should be a public good."

Brown told *The Hill* in September that as chairman, after addressing pandemic relief he would focus on housing issues, something the committee did not spend much time on under previous Chairman Mike Crapo (R-ID). Brown could also be expected to try to strengthen capital rules for big banks and press for regulators to toughen stress tests and "living will" resolution plans for those banks. He shares Chairman Waters' interest in targeting systemic racism in U.S. institutions and likely will push for the Fed to be more pro-active in measuring and addressing such inequalities, as well as pressing financial firms and public companies generally to formally disclose their efforts to promote diversity among both senior executives and rank-and-file workers. Brown has also complained that the SEC still has not completed Dodd-Frank rules under which companies could claw back incentive compensation paid to executives whose firms had to correct material errors in their financial statements.

Brown could also seek to reinvigorate other Dodd-Frank achievements, by expanding the CFPB's authority to police financial products or restoring the Financial Stability Oversight Council's power to designate specific companies as systemically important institutions (SIFIs). The FSOC voted to give up that authority in December 2019 after a presidential executive order and a rulemaking guided by outgoing Treasury Secretary Mnuchin, who has chaired the council. Brown's interest in post-crisis financial stability issues has also been seen in his focus on "shadow banking" risks posed by overnight repo markets and money market funds, both of which proved unstable in the market turmoil that accompanied the early days of the pandemic. Brown also is likely to focus the committee on problems associated with private equity firms, as the House Financial Services Committee did last year.

Many of these initiatives would prove poisonous to Republicans on the Banking Committee, however, such as incoming Ranking Member Toomey, and the panel has had a tradition of not spending time marking up party-line bills that would inevitably face a filibuster on the Senate floor. All that could change if Senate Democrats moved to eliminate the legislative filibuster, though with a narrow 50-50 split in the Senate that scenario is likely a long shot.

House Financial Services Committee. Maxine Waters (D-CA) returns as the chairman of the House Financial Services Committee, which was a prolific generator of House floor legislation in the last Congress, most of which was ignored by then-Senate Banking Committee Chairman Crapo and the Senate's GOP leadership. Waters will have a more receptive partner in Sen. Brown, and both can be expected to work cooperatively with Biden's White House and Treasury Department to advance a number of shared progressive priorities.

Waters can be guaranteed to maintain a focus on housing issues and oversight of the Department of Housing and Urban Development (HUD) and Federal Housing Authority (FHA), including a bill she sponsored in 2019 with Vice President-elect Kamala Harris to spend more than $100 billion on affordable housing. Like Sen. Brown, Waters was an intense critic of the Office of the Comptroller of the Currency's May 2020 update of the Community Reinvestment Act, a 1977 law that requires banks to invest in underserved neighborhoods, calling it overly reliant on expenditures for CRA credit instead of input from local communities. No other regulators signed on to the OCC's regime, so Waters will maintain close oversight of the Federal Reserve's own CRA overhaul expected next year. At a final November 12 hearing of banking regulators at her committee, Waters specifically cited the OCC's CRA rule, Federal Reserve actions that have weakened the Dodd-Frank Volcker Rule, and "a number of troubling rulemakings to weaken capital and other prudential requirements for the nation's largest banks… I am putting our witnesses on notice that I will be working with the Biden administration to roll back these rules."

Waters and other senior committee Democrats thought their approach of summoning bank and tech-company CEOs for hearings over the last two years was a success, and more of those can be expected. Waters has also been a harsh critic of the SEC's new Regulation Best Interest, saying it fails to hold brokers to a fiduciary standard when they recommend products to clients, and will also press for a Biden-appointed Labor secretary to revisit the DOL's fiduciary rule for advisers to retirement plans. The Obama-era 2016 fiduciary rule was overturned by a federal court; the DOL is in the process of completing a new, weaker version, but the Biden-Sanders task force endorsed "taking immediate action to reverse the Trump administration's regulations allowing financial advisers to prioritize their self-interest over their clients' well-being."

The SAFE Banking Act, which provides a safe harbor for banking by cannabis businesses in states where such sales are legal, also passed the House in May (attracting support from half the GOP caucus) and will be reintroduced in the committee next year. In a departure from the posture of Sen. Crapo, Sen. Toomey has expressed support for this effort, telling *American Banker* on November 18, "I am open to working with my colleagues on how we could enable businesses that are operating legally in their respective states to be able to have ordinary banking services. I think that's something we should work on." In general, Waters can be expected to be pulled further left by the group of high-profile 2018 freshman Democrats who are returning to the committee, including Alexandria Ocasio-Cortez (D-NY), Ayanna Pressley (D-MA), Rashida Tlaib (D-MI) and Katie Porter (D-CA).

Waters is also committed to improving diversity among regulators, telling them at the November 12 hearing, "Financial regulation and the approach to diversity and inclusion in this country are going to change for the better… Under President Biden's leadership, our financial regulators will and must be diverse.

We are emerging from the dark days of the Trump administration into the dawn of a new progressive America, where pro-consumer and pro-investor policies will always be first on the agenda."

Financial Regulators

At the November 10 regulators hearing, Sen. Brown said, "The 'Wall Street First' attitude of the Trump administration is over… President-elect Biden will have the opportunity to install watchdogs at these agencies who will put working families and their communities first, and we'll give Americans confidence that their government is on their side." Treasury Secretary-designate Janet Yellen will provide a familiar, consensus-building presence as the new administration focuses on pandemic relief and other urgent issues, but they will have to deal with a number of Trump appointees with unexpired terms at the Fed, FDIC and elsewhere.

Federal Reserve. At the Fed, Chairman Jerome Powell's term doesn't expire until Feb. 2022. While appointed by President Trump, Powell has not proved to be an ideological chair, and his aggressive posture against the pandemic has won him high marks. Renominating Powell could be a way for Biden to signal moderation and continuity, though a number of other names will be in the mix when Powell's term is up, such as Fed governor Lael Brainard, Sen. Warren, Sarah Bloom Raskin, Roger Ferguson and others. The term of Randal Quarles, the Fed's vice chair of supervision who has presided over the weakening of certain Dodd-Frank rules for banks, expires in October 2021, and Biden is unlikely to renominate him.

Securities and Exchange Commission. The term of former SEC Chairman Jay Clayton, who departed the agency in December, featured a number of party-line votes on rules, including a 3-1 vote in 2019 for Regulation Best Interest, Clayton's attempt to navigate a standard of care for securities brokers. Democrats said that effort failed to fulfill the Dodd-Frank Act's call for a uniform standard for brokers and financial advisers. They would welcome a chairman more devoted to rules-based enforcement over "principles-based." The Democratic House and Senate could also use the Congressional Review Act to overturn a number of rules that have passed the Commission since June, including: 1) amendments to Regulation S-K that eased rules governing how public companies must describe risk factors in their financial statements; 2) changes to the SEC's whistleblower program; 3) a rule change on "proxy access" that made it more difficult for shareholders to bring up items for a vote at meetings; and 4) a loosening of conflict-of-interest rules for independent auditors.

CFPB. At the CFPB, Director Kathy Kraninger's term doesn't expire until Dec. 2023, but given the Supreme Court's June 2020 ruling requiring the Bureau's director to serve at the pleasure of the president, Kraninger can be expected to offer her resignation. Rep. Porter has been mentioned as a possible candidate to lead the CFPB, which under Democratic leadership could resume greater scrutiny of student loan servicers, mortgage servicers, credit card issuers, bank overdraft fees, installment lenders, debt collectors and credit reporting agencies. The CFPB is also likely to be much more active in rulemaking than under Kraninger's tenure.

Among other regulators, Biden will get to appoint a new Comptroller of the Currency, the large-bank regulator, as Brian Brooks is currently serving in an unconfirmed acting capacity after the abrupt departure of Joseph Otting in May 2020. (At the eleventh hour, the Trump administration nominated Brooks to serve as the Senate-confirmed Comptroller, but the Banking Committee never acted on his nomination.) At the FDIC, Chairman Jelena McWilliams' term isn't up until June 2023; she cannot be removed by Biden and her spokesman has said McWilliams "intends to fulfill" her full term, but she could find herself outvoted 3-2 by Democratic board members as current members are replaced.

At the Federal Housing Finance Agency (FHFA), the GSE regulator, Director Marc Calabria is near the beginning of a five-year term that doesn't expire until April 2024, but the same Supreme Court ruling on CFPB (*Seila Law vs. CFPB*) could allow the new president to remove him too. The FHFA director's status is also the target of a separate case the Supreme Court will hear this term. In the absence of legislation establishing a new system for housing finance, Democrats don't like Calabria's plan to gradually recapitalize Fannie Mae and Freddie Mac and release them from conservatorship, and will press for someone with more progressive credentials.

Financial Regulators' Terms

Regulator	Term expires
Federal Reserve Board Chairman Jerome Powell	February 2022
Fed Vice Chair of Supervision Randal Quarles	October 2021
Acting Comptroller of the Currency Brian Brooks	Acting capacity
FDIC Chairman Jelena McWilliams	June 2023
Acting SEC Chairman Elad Roisman	Acting capacity
CFPB Director Kathy Kraninger	December 2023
Federal Housing Finance Agency Director Marc Calabria	April 2024
National Credit Union Administration Chairman Rodney Hood	August 2023

Retirement

Biden's win and the election of Democratic majorities in the House and Senate mean that Democrats will have the opportunity to pursue their priorities in the area of retirement and pensions policy. The power given the Senate's minority to block any bill with less than 60 votes in support remains an obstacle, which the majority could surmount by using the budget-reconciliation mechanism or simply fashioning bills that could attract enough bipartisan support to deliver 60 votes on the Senate side.

Biden's priorities. Biden will come to office having proposed retirement initiatives during the campaign, though he can be expected to work collaboratively in this area with key policymakers such as returning House Ways and Means Chairman Richard Neal (D-MA) and Sens. Ben Cardin (D-MD) and Rob Portman (R-OH). Biden has criticized the current set of retirement tax incentives for providing a much stronger tax break for upper-income individuals, and has proposed to "equalize" the system by replacing the current deduction with a flat dollar tax credit. That proposal has struggled to find broad support in either house of Congress, and the administration would likely need to expend considerable political capital for it to gain traction in either chamber.

Biden has also proposed allowing caregivers who don't receive wages for their work to make "catch-up" contributions to a qualified retirement savings account even if they have no earned income, as is currently required. The proposal tracks HR 3078, a bipartisan House bill offered by Reps. Harley Rouda (D-CA) and Jackie Walorski (R-IN). Biden has also supported expanding employer-sponsored plans by automatically enrolling employees in IRAs, similar to ideas long championed by Chairman Neal and the Obama administration, and he has proposed shoring up the Social Security Trust Fund by removing the current $137,700 cap on FICA payroll taxes.

House Committees. At the Ways and Means Committee, Chairman Neal has a long record of strong interest in legislation to expand and promote retirement savings and retirement security. He is likely to work closely with Speaker Pelosi and Education & Labor Committee Chairman Bobby Scott (D-VA) early in the 117th Congress to advance pension reforms aimed at shoring up the troubled multiemployer pension funding system, as the House has proposed in last year's HEROES legislation. Neal is also expected to seek to advance the Auto-IRA/Auto-401k proposal that he has long championed. Those two initiatives promise a robust debate on retirement savings policy early in 2021. Scott is also likely to take the lead on House action regarding the continuing battle over investment advice standards. At the House Financial Services Committee, Chairman Maxine Waters (D-CA) will lead efforts to examine and potentially revise the Securities and Exchange Commission's Regulation Best Interest.

In addition to those two major initiatives, Neal worked closely with Ranking Member Kevin Brady (R-TX) on a new bipartisan retirement policy bill in the last Congress. The Securing a Strong Retirement Act (HR 8696), a follow-on to the SECURE Act that was enacted in December 2019, was introduced on October 27 last year and is certain to be high on Neal's priority list this year. Key provisions of the bill seek to expand retirement savings coverage and allow Americans to save more and earlier for their retirement. The bill also makes changes to the Multiple Employer Plan (MEP) provisions that were the centerpiece of SECURE, and would increase the age at which individuals must take required minimum distributions from 72, as provided in SECURE, to 75. The bill exempts those with less than $100,000 in retirement savings from having to take minimum distributions.

Senate committees. With the Senate in Democratic hands, incoming Finance Committee Chairman Wyden will play a key role in moving any retirement legislation that includes a tax component. In 2019, Wyden proposed raising taxes on capital gains to the same rates as ordinary income, a change that he estimated would raise $1.5 trillion to $2 trillion over a decade, which would be used to shore up the Social Security Trust Fund. The proposal would exempt the first $3 million of a taxpayer's savings in tax-preferred retirement accounts such as IRAs, 401k plans and 403(b) plans, and none of the gains in those accounts would be subject to the annual tax. When the SECURE Act was released in 2019, Wyden called the bill "an important step forward, but we need to do much more to help workers save for retirement."

Finance Committee members Sens. Cardin and Portman have a history of working together on bipartisan pension-related legislation, and that partnership could

prove fruitful again in the next Congress. The SECURE Act included 20 proposals taken from a similar Portman-Cardin bill in the Senate. They joined in sponsoring S. 1431, The Retirement Security and Savings Act, legislation that shares a great many priorities and individual provisions with the Neal-Brady legislation. The overlap between the Neal/Brady and Cardin/Portman bills could provide the basis for legislative progress on retirement priorities.

At the Senate HELP Committee, whose jurisdiction includes pensions policy, likely incoming Chairman Patty Murray (D-WA) last year introduced the Information Needed for Financial Options Risk Mitigation (INFORM) Act, which would require pension plan sponsors to provide plan participants and retirees with information when offering lump-sum buyouts. The bill was a response to the Trump Administration's 2019 move to allow employers to offload pension liabilities through buyouts. Murray is also at work on legislation that would address concerns from the financial services industry and consumer organizations regarding the Trump Department of Labor's regulatory proposal regarding the acceptability of environmental, social, and governmental investment options in qualified plans.

Similar to the situation in the House relating to governing the provision of investment advice to retirement accountholders, Sen. Murray has expressed interest in amending ERISA to establish new standards. Murray also has been the leader on legislation to address the multiemployer defined benefit plan funding crisis.

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