Strategic Perspectives

Wolters Kluwer

January 12, 2022

2022 Congressional preview: China, insiders, and stablecoins remain likely topics

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This review of Congressional activity on securities law topics looks back at events in 2021 and forward to what may be expected in 2022 by describing in equal parts what Congress actually achieved by way of enacting a few key laws last year, what the SEC did that Congress had planned to do, and the omnipresent question of whether the Biden Administration's signature legislative package, the Build Back Better Act, will become law.

The House Financial Services Committee, typically one of the more active of the several Congressional committees that oversee federal financial regulators, returned to a more normal schedule of regularly scheduled hearings and markups in 2021 versus 2020, the first full year of the COVID-19 pandemic, although the emergence of the Omicron variant has prompted the House FSC to resume virtual meetings for January 2022. The full House continued to operate under rules that extended proxy voting by members, although for a brief period in the days before the Fourth of July holiday Democrat and Republican leaders debated the continued need for proxy voting and other pandemic measures, offering a glimpse of a post-pandemic chamber that was quickly put on hold as the Delta variant of SARS-CoV-2 took hold in the U.S. That said, both Democrats and Republicans appear to have mastered proxy voting to the point that, if Republicans reclaim the House in the upcoming midterm elections, there may be some question whether proxy voting will be brought to an end.

Meanwhile, the Senate focused on executive branch nominations, including nominees for the CFTC but, with the exception of the CFTC's whistleblower program, focused on other legislative business, such as the American Rescue Plan Act, the bipartisan Infrastructure Investment and Jobs Act, voting rights legislation, and behind-the-scenes work on the Build Back Better Act.

Overall, Congressional activity in 2021 was thematically similar to prior years. Annual appropriations, which typically come down to the last weeks of the year, did not happen and the federal government still operates under a continuing resolution extending FY21 funding levels until February 18, 2022. Congress sharpened its focus on legislation to curb Chinese influence in U.S. markets. The SEC, now led by Gary Gensler, has begun to anticipate Congressional action on some topics, including insider trading, by preparing proposed regulations that sometimes are of a lesser or different scope than what Congress had been contemplating. However, the SEC's latest proposals have drawn criticism from Senate and House Republicans for not allowing enough time for public comments. Blockchain remains a growing topic for lawmakers, but thus far the only enacted law concerns transaction reporting to the IRS, although more laws to address stablecoins may be on the horizon. Congress also shored-up the CFTC's whistleblower program. Lastly, the Build Back Better Act, if it becomes law, likely will contain revenue raising provisions that increase taxes for corporations and wealthy individuals. These and other topics are discussed in detail below.

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China: Human rights, auditing, and multinational mergers

In 2021, Congress doubled-down on its approach to China and that trend can be expected to continue in 2022 and likely beyond. Beginning with the CFIUS reforms enacted via the Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018, Congress has continued to sharpen its focus on limiting the influence of Chinese companies in U.S. markets, especially those companies with ties to China's Communist government, as a way of blunting the growing economic and military rivalry between the U.S. and China. For public companies operating in the U.S., that focus has emphasized human rights, audit inspections, and multinational mergers and acquisitions.

Uyghur forced labor bill. The Senate passed a compromise version of the Uyghur Forced Labor Prevention Act (Pub. L. No. 117-78) (See, Congressional Record, December 14, 2021, regarding H.R. 6256, at H7804-H7806), which places the onus on U.S. companies to establish that their goods originating in the Xinjiang Uyghur Autonomous Region (XUAR) in China, where it is alleged that Uyghurs, Kazakhs, Kyrgyz, and members of other Muslim minority groups are subjected to human rights abuses by the Chinese government, are not the result of such forced labor.

The compromise version, however, dropped a securities disclosure requirement that appeared in the original House version of the bill while also resetting the effective date for the rebuttable presumption that is at the heart of the legislation to a time frame between the original House and Senate versions of the bill. Even without the securities disclosure provision, the bill emphasizes the social component of environmental, social, and governance (ESG) investing, and public companies may still need to make disclosures that are material to their businesses. President Biden signed the bill into law on December 23, 2021.

The most recent version of the Uyghur Forced Labor Prevention Act imposes a rebuttable presumption that certain goods produced in the XUAR are banned from U.S. markets. The presumption, however, could be overcome if the Commissioner of U.S. Customs and Border Protection determines: (1) that the importer of record fully complied with applicable guidance and regulations and has completely and substantively responded to all inquiries for information submitted by the commissioner to ascertain whether the goods were mined, produced, or manufactured with forced labor; and (2) by clear and convincing evidence, that the good, ware, article, or merchandise was not mined, produced, or manufactured wholly or in part by forced labor. Upon determining to lift the ban, the commissioner must submit a report to Congress identifying the good and the evidence considered.

The compromise version largely tracks the original Senate version of the bill (S. 65) that was sponsored by Sen. Marco Rubio (R-Fla). The earlier House version (H.R. 1155), sponsored by Rep. Jim McGovern (D-Mass), provided for a rebuttable presumption but under slightly different terms. With respect to the timing of the implementation of the ban, the original House version of the bill provided for an effective date 120 days after enactment, while the Senate version provided for an effective date 300 days after enactment. The compromise version of the bill provides for an effective date 180 days after enactment.

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The Uyghur Forced Labor Prevention Act's rebuttable presumption would, like other bills addressing human rights issues (e.g., conflict minerals disclosures under securities regulations), provide for a sunset date. The compromise version of the bill provides for termination of the rebuttable presumption and of other provisions in the bill on the earlier of eight years after enactment or the date the president submits to Congress a determination that the Chinese government has ended mass internment, forced labor, and any other gross violations of human rights experienced by Uyghurs, Kazakhs, Kyrgyz, Tibetans, and members of other persecuted groups in the XUAR. By comparison, the conflict minerals provision contained in Dodd-Frank Act Section 1502 strips the president of such discretion for an initial period of five years (i.e., "on the date on which the President determines and certifies to the appropriate congressional committees, *but in no case earlier than* the date that is one day after the end of the five-year period beginning on the date of the enactment" (emphasis added)).

Other general provisions in the Uyghur Forced Labor Prevention Act would provide for: (1) the development of an enforcement strategy; (2) the development of a related diplomatic strategy, and (3) the imposition of sanctions. However, the compromise version of the bill and the original Senate bill do not include the original House provision requiring a determination by the Secretary of State on whether Chinese actions in the XUAR constitute crimes against humanity or genocide.

Audit inspections. The Holding Foreign Companies Accountable (HFCA) Act (Pub. L. No. 116-222), which became law December 18, 2020, created a process by which the SEC can delist foreign companies whose audit work papers cannot be inspected by the Public Company Accounting Oversight Board because of policy positions taken by a company's PCAOB-registered auditor's home country regulators. The SEC has taken steps to finalize a set of interim rules implementing portions of the HFCA Act (Holding Foreign Companies Accountable Act Disclosure, Release No. 34–91364, March 18, 2021; Holding Foreign Companies Accountable Act Disclosure, Release No. 34–93701, December 2, 2021).

The PCAOB also has adopted a final rule creating a framework for making determinations under the HFCA Act, while also issuing its first such designations for PCAOB-registered public accounting firms headquartered in mainland China and in Hong Kong, a Special Administrative Region of the People's Republic of China (Rule Governing Board Determinations Under the Holding Foreign Companies Accountable Act, PCAOB Release No. 2021-004, September 22, 2021; HFCA Determination Report, December 16, 2021).

PCAOB Acting Chair Duane M. DesParte explained in a press release announcing the PCAOB's determinations that "[t]o protect investors and to carry out the PCAOB's mandate, our inspectors and investigators need consistent access across all jurisdictions to the audit work performed for public companies in U.S. capital markets." DesParte later suggested that the PCAOB would still prefer to have better relations with Chinese audit regulators. "We remain interested in a relationship with PRC authorities that facilitates the access necessary to oversee PCAOB-registered audit firms in mainland China and Hong Kong, consistent with the robust international regulatory cooperation we experience everywhere else in the world," said DesParte.

The SEC's Division of Corporation Finance also has issued a sample staff comment letter, portions of which staff may send to China-based companies. The sample letter, for example,

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indicated that SEC may ask China-based companies how they plan to address the potential impact on them from implementation of the HFCA Act. The sample letter further suggests questions SEC staff may have for China-based companies regarding China-based sponsors of special purpose acquisition companies (SPACs) and the variable interest entity (VIE) structure used by many China-based companies.

Going forward, it is possible that Congress may enact more legislation addressing China-based companies. For one, the Accelerating Holding Foreign Companies Accountable Act (S. 2184; H.R. 6285), sponsored by Sen. John Kennedy (R-La) and Rep. Brad Sherman (D-Calif), would shorten the compliance period threshold in the HFCA Act from three years to two years. In other words, if the Commission determines that a covered issuer has two (instead of three) consecutive non-inspection years (i.e., the PCAOB cannot inspect the company's auditors), the Commission must prohibit the securities of the covered issuer from being traded on a national securities exchange or via other modes of trading such as over-the-counter markets. The bill passed the Senate by unanimous consent on June 22, 2021. "I'm pleased to see the Senate take a huge step today by voting to give the SEC the ability to kick fraudulent Chinese companies off U.S. exchanges more quickly. I hope the House sends this common-sense bill to the president's desk before foreign companies swindle more workers and families here at home," said Sen. Kennedy in a press release following the vote.

Second, the No IPOs for Unaccountable Actors Act (S. 1914), sponsored by Sen. Marco Rubio (R-Fla), would require the SEC to bar IPOs of companies from jurisdictions that do not allow PCAOB inspections of public company auditors. The premise of the bill is to confront foreign companies seeking to list on U.S. exchanges before they have listed whereas the HFCA Act addresses foreign companies that already have listed on U.S. exchanges. "There is no reason why China should be able to bypass our securities laws yet reap the benefits of listing on our exchanges. It's time for China to play by the rules and cease exploiting the openness of U.S. capital markets," said Sen. Rubio in a press release announcing the bill.

CFIUS legislation. Congress also has continued to focus on multinational mergers. In 2018, enactment of the FIRRMA bolstered the ability of CFIUS to scrutinize Chinese merger activity in the United States. Two bills proposed in 2021 would further enhance CFIUS's authorities.

For one, Sen. John Kennedy (R-La) and Rep. Chris Stewart (R-Utah) introduced the Exposing China's Belt and Road Investment in America Act of 2021 (S. 3038; H.R. 5806), which would provide for CFIUS review of investments that China-controlled businesses make on U.S. soil. Specifically, the bill would require CFIUS to review any investment that is made by a foreign person that involves the acquisition of real estate in the U.S., the establishment of a U.S. business on such real estate, and results in the Chinese government's direct or indirect control of that U.S. business.

The Kennedy-Stewart bill also is included in Section 115 of Title I of the Countering Communist China Act (H.R. 4792), sponsored by Rep. Jim Banks (R-Ind), which is a comprehensive bill that addresses a variety of topics, including Chinese influence in U.S. markets, the origins of SARS-Cov-2 (COVID-19), supply chains, research and development, education, human rights (including regarding the XUAR and Taiwan), defense and national security, and intellectual property.

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Second, the Food Security is National Security Act of 2021 (S. 3089), sponsored by Sen. Chuck Grassley (R-Iowa), would expand the membership of CFIUS to include the Secretary of Agriculture and the Secretary of Health and Human Services. The bill has substantial bipartisan support from Sen. Debbie Stabenow (D-Mich), who also is Chair of the Senate Agriculture Committee, as well as from Sen. Joni Ernst (R-Iowa), and Sen. Jon Tester (D-Mont).

Senators Grassley and Stabenow stated the purpose of the bill in a joint press release. According to Sen. Grassley, "[w]ith foreign investments from around the world going to American farmland and agricultural companies that are critical to the nation's supply chain it's important that we provide adequate oversight into these investments." Said Sen. Stabenow: "As foreign entities continue their acquisitions of U.S. food and agriculture companies, American farmers and families deserve to know these transactions receive proper scrutiny. This bill ensures that the U.S. has the appropriate tools and people in place to safeguard America's food security, food safety, biosecurity, and the highly competitive U.S. farm sector as a whole."

The motivation for the proposed Food Security is National Security Act is partially based on the 2013 announcement that Shuanghui International Holdings Limited and Smithfield Foods, Inc. would merge to form one of the largest food processing companies in the world. Shuanghui International Holdings Limited and Smithfield Foods announced that the merger had received CFIUS clearance via a Definitive Schedule 14A filed on September 9, 2013.

Whistleblowers, nominations, and CFTC reauthorization

Lawmakers acted at mid-year 2021 to reinforce the financial stability of the CFTC's whistleblower program in anticipation that the CFTC might approve a large enough whistleblower award to jeopardize the agency's back-office operations that facilitate the making of such awards. In other developments, the president sent fresh nominations to the Senate for several new CFTC commissioners. Moreover, now-Chairman Rostin Behnam and members of the Senate Agriculture Committee appeared to agree on the need to reauthorize the CFTC at Behnam's October 2021 confirmation hearing but it remains unclear if current lawmakers will have any more success than their immediate predecessors in moving a reauthorization bill, which has yet to be introduced in the 117th Congress.

Whistleblower program financing. The House passed a bill that would allow the CFTC to devote up to $10 million to fund the operation of parts of its whistleblower program related to customer education and non-awards expenses. Lawmakers said the legislation was needed to shore up the CFTC's whistleblower program in the event that awards paid to eligible whistleblowers deplete funds for related educational and administrative expenses. The bill (Pub. L. No. 117–25), sponsored by Sen. Chuck Grassley (R-Iowa), previously passed the Senate by unanimous consent in late May. The House passed the bill as part of a package of bills considered en bloc by a vote of 325-103. The underlying bill became law on July 6, 2021.

Specifically, the law provides for the creation of a separate account at the Treasury Department into which the Commission must deposit up to $10 million from the CFTC's Customer Protection Fund for the purpose of sustaining customer education initiatives and for paying non-awards expenses

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associated with the Commission's whistleblower program. The separate account would be available until October 1, 2022, after which date any remaining funds would have to be transferred back to the Customer Protection Fund.

By way of background, the CFTC's Customer Protection Fund was created more than a decade ago by Dodd-Frank Act Section 748 as part of the swaps and derivatives reform provisions contained in Title VII of the Act. The Customer Protection Fund provision, housed in Commodity Exchange Act Section 23(g), was designed to cover the expenses of awards paid to whistleblowers and the costs of related customer education initiatives. Deposits into the Customer Protection Fund include monetary sanctions the CFTC collects in enforcement actions and that are not distributed to victims unless the fund's balance exceeds $100 million at the time a monetary judgment is collected.

In October 2021, the CFTC announced a $200 million award to a single whistleblower, the agency's largest award to date. The CFTC explained that the whistleblower had provided information that led to the successful conclusion of an open investigation and aided related actions by another U.S. regulator and a foreign regulator. The whistleblower, however, did not qualify for an award related to a state enforcement action because the whistleblower's information was not shared with the state regulator.

SEC and CFTC nominations. SEC Commissioner Elad Roisman has announced his intention to leave the Commission by the end of January 2022. Roisman was the point person during the Jay Clayton-led SEC for proxy reforms and many of his recommendations were adopted by the Commission regarding shareholder proposals and proxy advisers, although under the leadership of current Chair Gary Gensler, those regulatory changes face the prospect of significant rollbacks. Roisman joined the Commission in 2018 and his term was set to expire in 2023. Roisman's departure would leave the Commission down one member, but onetime Acting Chair Allison Herren Lee's term also will expire in 2022. As a result, the Senate will likely deal with at least two SEC nominations in the upcoming year.

The CFTC in 2022 also will have a very different look and feel at the top now that Rostin Behnam has been confirmed to be permanent chair after having served as acting chair for most of 2021. Behnam was confirmed as a commissioner and as chair on December 15, 2021 by the Senate by unanimous consent (See, *Congressional Record*, December 15, 2021, at S9205). Behnam, who was sworn in as chair on January 4, 2022, will serve a term set to expire on June 19, 2026.

The composition of the remainder of the Commission also will change dramatically with the impending April 2022 departure of Dawn Stump and the pending nominations of Summer Mersinger and Caroline D. Pham. Mersinger most recently was chief of staff to Commissioner Stump and as the director of Legislative and Intergovernmental Affairs. Mersinger has a total of more than 17 years of federal government service. Pham is currently a Managing Director at Citi and is head of market structure for strategic initiatives in Citi's Institutional Clients Group. Pham also represents Citi on the Executive Committee of the Chamber of Digital Commerce. Previously, Pham was Special Counsel and Policy Advisor to former CFTC Commissioner Scott O'Malia. President Biden announced his intent to nominate Mersinger and Pham the same day the Senate confirmed Behnam as chair. Both nominations have been formally sent to the Senate as of January 7, 2021.

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In September, President Biden announced his intent to nominate Kristin N. Johnson to replace Brian D. Quintenz, whose term as a CFTC commissioner had expired, and to also nominate Christy Goldsmith Romero. Johnson is currently the Asa Griggs Candler Professor of Law at Emory University School of Law, where she concentrates her work on financial risk, complex financial products, and derivatives. Romero is the Special Inspector General for the Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) and previously was an adjunct law professor, in which role she taught classes in securities regulation, cryptocurrency regulation, and federal oversight. Romero would replace former CFTC chair Heath P. Tarbert. Johnson's and Romer's nominations were formally sent to the Senate on January 4, 2022.

Prospects for CFTC reauthorization bill. The prospects for Congress enacting a CFTC reauthorization bill will likely turn on whether lawmakers have the will to advance a bill that is laden with fewer partisan policy provisions and instead emphasizes the formal maintenance of the CFTC as an important federal financial regulatory agency. At Behnam's confirmation hearing to be chair in October 2021, Sen. Mike Braun (R-Ind) asked Behnam about the need for Congress to formally reauthorize the CFTC. Senator Braun suggested that an extended period without a reauthorization bill is an "anomaly" and should not be "routine" (See video of Senate confirmation hearing for the Hon. Rostin Behnam to be CFTC chair, October 27, 2021, beginning at 1:14:00).

Behnam replied that the "doors have been open and we're doing our job and fulfilling our mission regardless of the lack of authorization." Behnam said reauthorization is important for agency morale and that it is important to have a mandate from the CFTC's authorizing committee so the agency can do its job. Behnam pledged to work with lawmakers to produce a smart, balanced, and measured reauthorization bill that addresses new challenges that have arisen both domestically and abroad. Behnam also said that having been acting chair for the last nearly 10 months that he had also observed the repercussions of recent budget uncertainty at the agency.

Both prior House Agriculture Committee Chairs Collin Peterson (D-Minn) (lost reelection) and K. Michael Conaway (R-Texas) (retired) can mutually lament their unsuccessful efforts in the years before the 117th Congress to enact an already long overdue CFTC reauthorization bill when they respectively held that committee's chairmanship, Peterson during the 116th Congress (H.R. 4895; H.R. 6197) (H.R. 4895 was reported by the Agriculture Committee by voice vote and placed on the House calendar in November 2019 but never received a vote by the full House; H.R. 6197 was never acted upon after introduction), and Conaway during the 115th Congress (H.R. 238) (passed House in January 2017 by a vote of 239-182). In both cases, it was largely differing views of how the CFTC should regulate swaps and derivatives and other CFTC structural reform provisions that upended each of the reauthorization bills.

With new Democratic leadership of the House Agriculture Committee, Rep. David Scott (D-Ga), and of the Senate Agriculture Committee, Sen. Debbie Stabenow (D-Mich), perhaps the result will be different. In any event, the CFTC will likely continue to face challenges in obtaining a sufficient annual appropriation given that the FY22 appropriations process has already produced two continuing resolutions to maintain FY21 funding levels into 2022.

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Insider trading

The topic of insider trading has garnered much legislative interest during the past several sessions of Congress but none of the bills proposed has been enacted, although several of them passed the House with wide margins of bipartisan support. This session of Congress, however, it seems plausible that legislation to mandate greater financial transparency by federal judges could move forward after revelations by the *Wall Street Journal* that a significant number of federal judges handled cases in which they or their family members may have had financial interests. With respect to the Supreme Court, the possibility of such legislation raises questions about who in the government can constitutionally oversee the justices. Similar transparency issues also dogged the Fed and the federal reserve district banks in 2021, with similar calls for legislation to bar Fed officials from directly owning companies' shares. Lastly, Congress had been on a path to once again advance bills addressing Exchange Act Rule 10b5-1 trading plans, but the SEC has now taken potentially preemptive action by proposing an update to the rule, although the SEC's disclosure reforms would not reach as far as proposed legislation.

STOCK Act for federal judges. The House passed the Courthouse Ethics and Transparency Act (H.R. 5720), which would require federal judges to make public disclosures of their potential financial interests in litigated cases. The specific requirements are similar to those that already apply to members of Congress and senior executive branch officials under the Stop Trading on Congressional Knowledge (STOCK) Act (Pub. L. No. 112-105). The bill passed the House by a vote of 422-4.

A key concern during a Congressional hearing on the legislation was the potential that the required disclosures to be made by federal judges could jeopardize the safety of judges, several of whom have in recent years experienced violent attacks on themselves and/or their families. The bill would address this possibility by allowing the redaction of certain information that, if revealed publicly, could put judges at risk.

Both the House and Senate versions of the bill originally contained a congressional findings section that indirectly mentioned an article that appeared in *The Wall Street Journal* on the failure of some federal judges to recuse themselves in cases where they had financial interests. The findings section also noted that current law requires recusal when a federal judge has a financial interest in the subject matter of, or a party to, federal court proceedings. The findings section further reiterated that the STOCK Act had extended insider trading provisions of the federal securities laws to members of Congress and other federal officials. The version of the bill that passed the House, however, removed the Congressional findings section from the bill text.

Nevertheless, the House report accompanying the Courthouse Ethics and Transparency Act detailed the findings made by *The Wall Street Journal* article:

> However, according to the *Wall Street Journal*, since 2010, more than 130 federal judges failed to recuse themselves from 685 court cases involving companies in which they or their families had a financial interest, and approximately two-thirds of the judges' rulings were decided in favor of the party in which they or their families held an interest.

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> In 173 cases, the judges' financial interests exceeded $15,000, and, of those cases, 21 totaled over $50,000. Sixty-one judges or their families traded shares of companies while ruling on cases in which those companies were parties. When questioned about these violations by the *Wall Street Journal*, responses by the judges ranged from blaming court clerks and misspellings that went undetected by the judiciary's conflict-screening software to only having minor roles in the cases and not having a role in the trading since the stocks were in a managed account or trust.

(House Rep. No. 117-199, at 3 (footnotes omitted)).

—House Judiciary Subcommittee hearing. The Hon. Jennifer Walker Elrod of the U.S. Court of Appeals for the Fifth Circuit and Chair of the Committee on Codes of Conduct Of the Judicial Conference of the United States, testified about current judicial ethics standards during a hearing held by the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet as the Courthouse Ethics and Transparency Act was being drafted. In response to a question posed by subcommittee Ranking Member Darrel Issa (R-Calif), Judge Elrod observed that judicial disclosures about financial matters and recusals are handled by two different oversight bodies. The judge further explained that some judges have demonstrated a lack of knowledge, for example, between separately managed accounts (controlled accounts) and mutual funds, which typically are accorded a safe harbor for disclosure purposes.

Representative Jerrold Nadler (D-NY), chair of the full House Judiciary Committee, asked Judge Elrod whether requiring all federal judges to hold their financial funds in mutual funds or index funds would solve the problem of financial disclosures, a question he had asked several other witnesses. Judge Elrod agreed that such an approach could simplify the process for judges. She also reiterated that mutual funds typically fall within a safe harbor. But Judge Elrod further reiterated that such an approach may not solve all recusal issues. For example, the judge suggested that other types of financial interests might not be covered. Judge Elrod then noted that she keeps her funds in mutual funds because that makes the funds easier to handle as a judge.

—Chief Justice Roberts responds. U.S. Supreme Court Chief Justice John Roberts addressed the prospect of legislation to require federal judges, including Supreme Court justices, to provide greater transparency about their financial holdings in his 2021 year-end report, suggesting that the justices and the Judicial Conference of the United States would soon take up the issue. Roberts also sought to contextualize the *Wall Street Journal*'s reporting on the alleged failures by federal judges to recuse themselves in cases where they or their family members may have had financial interests.

According to Roberts, three issues have dogged the federal courts through the end of 2021: (1) financial disclosure and recusal obligations; (2) inappropriate behavior in the judicial workplace; (3) judicial assignment and venue for patent cases in federal trial court. The first two issues focus on judicial conduct, while the third focuses on the conduct of parties in patent cases. This review will emphasize only the financial disclosure/recusal topic, which was the first of the three issues Roberts addressed in his year-end report.

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"Let me be crystal clear: the Judiciary takes this matter seriously. We expect judges to adhere to the highest standards, and those judges violated an ethics rule. But I do want to put these lapses in context," said Roberts. The chief justice then explained that of the 2.5 million federal civil cases filed during the *Wall Street Journal*'s study period, only a small fraction of cases involved alleged judicial lapses and, thus, federal judges had a 99.97 percent compliance rate with existing disclosure/recusal obligations. Roberts also observed that the *Wall Street Journal* did not allege that any reported lapses impacted judicial consideration of those cases or that any judges received a financial benefit.

Roberts also said that many of the alleged lapses may be attributable to "unintentional oversights" related to conflict checks. Although the chief justice said computer software is not to blame for judicial and clerical errors, the federal courts are in need of updated conflict checking software. Roberts also noted that in the case of judges who were either unaware of their obligations or had multiple lapses, more ethics training would be needed.

By way of background, the Chief Justice's year end reports were first issued by Justice Burger decades ago. During the Roberts era, they often begin with a story about the founders or a famous judge, although current events sometimes take precedence. At the height of the Great Recession, for example, Justice Roberts acknowledged the country's economic pain and simply issued a one-paragraph report with a single operative sentence: "The courts are operating soundly, and the nation's dedicated federal judges are conscientiously discharging their duties." Many year-end reports read like a recurring newspaper column but they also can take on serious topics, commonly judicial independence and inadequate Congressional funding of the federal courts. Judicial conduct and ethics have arisen as topics three other times in year-end reports during the Roberts era.

The 2018 year-end report looked at judicial conduct more generally in the context of the Federal Judiciary Workplace Conduct Working Group, convened by the Director of the Administrative Office of the United States Courts at the request of Roberts, and whose recommendations Roberts endorsed, after explaining that "[i]t determined—based on input from employees, advisory groups, and court surveys—that inappropriate workplace conduct is not pervasive within the Judiciary, but it also is not limited to a few isolated instances involving law clerks." In the 2017 year-end report, Roberts had indicated that the judiciary would take a closer look at the issue of inappropriate judicial behavior and that topic would reappear in the 2021 report.

Perhaps the 2011 year-end report represents the most detailed attempt by Roberts to address questions of judicial conduct, including recusals. The report began with a recitation of how U.S. District Judge Kenesaw Mountain Landis's appointment as Commissioner of Baseball in the wake of the 1919 "Black Sox Scandal" in which players on the Chicago White Sox baseball team were accused of fixing the outcome of the World Series led to the creation of a judicial ethics code. Roberts noted that Landis's appointment had raised questions about whether he could be both Commissioner of Baseball and a federal judge and where Landis might obtain guidance on the ethics of his dual employment. (Landis served as a judge of the U.S. District Court for the Northern District of Illinois from 1905 until he resigned in 1922, about one year after he become Commissioner of Baseball).

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Roberts then outlined several ways in which Supreme Court justices today consult relevant ethics guidance:

- All justices consult the Judicial Conference's Code of Conduct (Roberts described the code as a "starting point" and a "key source of guidance");
- The justices may also consult judicial opinions, treatises, scholarly articles, disciplinary decisions, the Supreme Court's Legal Office, the Judicial Conference's Committee on Codes of Conduct, and their colleagues;
- The justices comply with statutory requirements for financial reporting, receipt of gifts, and outside earned income; and
- The justices adhere to the same principles for recusal as other federal judges (Roberts noted that there is no mechanism for review of a justice's decision not to recuse).

With respect to financial reporting and recusals, Roberts indicated that the justices follow existing laws but that in both cases the constitutionality of Congress's authority to impose those requirements has never been tested.

Lastly, in the 2007 year-end report, Roberts spoke to the need for the public to have confidence in the integrity of federal judges. Said Roberts: "Federal judges hold a position of public trust, and the public has a right to demand that they adhere to a demanding code of conduct. The overwhelming majority do. But for those who do not, the Judiciary must take appropriate action." The remark was prompted by a report released by a study committee created by Roberts's predecessor, Chief Justice William Rehnquist, and chaired by Justice Stephen Breyer, titled "Report on the Implementation of the Judicial Conduct and Disability Act of 1980." Roberts further remarked that "[t]he Judiciary cannot tolerate misconduct. The public rightly expects the Judiciary to be fair but firm in policing its own."

—Presidential Commission on the Supreme Court. The Presidential Commission on the Supreme Court of the United States, which had been convened by the Biden Administration, also had addressed the issue of federal judges' financial disclosures and recusal obligations in its final report on the Supreme Court issued about a month before Roberts issued his 2021 year-end report. The larger purpose of the Commission's report was to advise the president and Congress about ways in which the court's personnel and/or jurisdiction might be altered in order to address questions that have been raised in recent years regarding the Supreme Court's independence and legitimacy. The financial disclosure/recusal topic arose within the context of a related discussion of judicial ethics.

The Commission said that U.S. Supreme Court justices currently have no code of conduct. Although the Commission explained that it did not study whether and to what extent the justices consult or adhere to existing conduct rules for other federal judges, the Commission did suggest that "not having a formally adopted code might not be best practice for the Court."

Supreme Court justices also are not subject to the complaint and discipline framework for other federal judges (*i.e.*, the Judicial Conduct and Disability Act of 1980 excludes them). With respect to recusal, the justices are subject to existing rules but each justice differs in their application of these rules and there is no review available of justices' decisions to recuse or not to recuse. The Commission noted that justices who do recuse cannot simply be replaced by another judge and that fact can impact decisions by non-recusing judges in affected cases.

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With respect to a code of conduct, the Commission recommended that the justices could adopt the code already applicable to other federal judges, adopt their own code, or Congress could direct the Judicial Conference to create such a code (the report acknowledged the potential that the Judicial Conference may lack statutory authority, a claim previously made by Chief Justice Roberts), or Congress could write a code for the justices. With respect to a complaint and discipline framework, the Commission noted similar issues regarding whether the justices' conduct can be evaluated by a subordinate body and whether a framework would raise Constitutional issues. During the House Judiciary Subcommittee hearing discussed above, several of the panelists raised the question of whether any reviewing body could Constitutionally oversee the conduct of Supreme Court justices.

With respect to recusals, the Commission observed that the justices do have to follow statutory rules applicable to all federal judges. However, the reasons for a recusal, or for why a recusal should have happened if it did not, often must be gleaned indirectly by examining the context of a justice's financial disclosures and recusal decision. The Commission said the most common reason for a recusal found by this contextual method is a justice's former employment (*e.g.*, as a lower court judge or as an employee in the Solicitor General's office); the second most common reason is a justice's stock ownership.

The Commission noted three possible reform options regarding justices' recusals: (1) mandate that the justices state their reasons for deciding to recuse or to not recuse; (2) create a procedure by which another justice or the entire Court reviews recusal decisions; or (3) revise existing laws to make it easier for justices to avoid financial conflicts. More specifically, the Commission said Congress could bar judges and their spouses and dependent children from owning individual shares in public companies or Congress could mandate divestiture in the event of a conflict. The Commission's report concluded: "The Commission notes a building consensus among observers that no Justices or their spouses and dependent children should own or continue to own individual publicly traded securities."

With respect to legislative options for addressing financial conflicts, however, the Commission suggested one way for justices to eliminate financial conflicts right now. Under Internal Revenue Code (IRC) Section 1043, high ranking government officials, including Supreme Court justices, can sell property under a certificate of divestiture and, subject to certain requirements, the gain from the sale is not recognized for tax purposes.

IRC Section 1043 applies to "eligible person[s]," which include officers or employees of the executive branch, or a judicial officer, of the federal government, and that person's spouse or minor or dependent children whose ownership of property is attributable by law, regulation, executive order, or judicial canon, to the eligible person. A certificate of divestiture is a written determination by the president, the director of the Office of Government Ethics, or the Judicial conference of the United States, that identifies the property to be divested, and stating that divestiture of the property is reasonably necessary to comply with federal conflict of interest laws, regulations, executive orders, judicial canons, or has been requested by a congressional committee as a condition of confirmation. "Judicial officer" means, among other things, the Chief Justice of the United States and the Associate Justices of the Supreme Court.

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The Commission's report asked almost rhetorically, why the justices do not already routinely divest property that may raise conflicts of interest in reliance on IRC Section 1043. The report suggested that perhaps the language or operation of the statute is problematic. A footnote to the main text of the report elaborated that Section 1043's "reasonably necessary" requirement may be the problem because, as the report suggested, "[p]erhaps the Justices interpret this language as not permitting *preemptive* divestments to avoid conflicts" (emphasis added).

Lawmakers have recently tried to limit the reach of IRC Section 1043. For example, in the 115th Congress, the No Windfalls for Government Service Act (S. 13), sponsored by Sen. Sheldon Whitehouse (D-RI), and co-sponsored by Sens. Tammy Baldwin (D-Wis), Elizabeth Warren (D-Mass), and Dianne Feinstein (D-Calif), would have limited the amount not recognized to $1 million for a taxable year, subject to some further adjustments.

A press release announcing that the bill had been re-introduced (it was first introduced in the 114th Congress as S. 3527) explained that its purpose was to prevent members of the Trump Administration from being able to defer taxes on millions of dollars of holdings. The press release also cited news articles from the *Washington Post* for the proposition that IRC Section 1043 may ease the transition to government work for less wealthy persons but that it also allows wealthy persons to re-balance their portfolios upon entering government service. The press release further cited an article from *The Economist* asserting that President George W. Bush's Treasury Secretary, Henry Paulson, used the provision to avoid paying $200 million in taxes.

"It's inappropriate for the federal government to provide excessive tax breaks to Cabinet members in return for complying with ethics rules. Public service is an honor, and billionaires shouldn't require federal tax breaks for their service. This bill appropriately limits tax benefits for wealthy Cabinet members who must remove their own conflicts of interest," said Sen. Feinstein.

—Impact of judicial ethics revelations on private cases. The Bumble Bee private price fixing case provides one example of the fallout from the *Wall Street Journal* article's conclusions, although the recusal process in that case had begun before the article was published.

According to defendants StarKist Co. and Dongwon Industries, Co. Ltd., Judge Janis Lynn Sammartino, U.S. District Judge for the Southern District of California, by presiding over the Bumble Bee multidistrict litigation (MDL) for a period of years without disclosing certain financial interests, including that a family member held stock in plaintiffs Target Corporation and Sysco Corporation, violated federal laws requiring judges to recuse themselves if they may be biased or have specified financial interests in the litigation. As a result, StarKist and Dongwon Industries argued both that the class certification in the case was erroneous as a matter of law and that the class certification should be vacated because of Judge Sammarino's alleged recusal violations under Federal Rule of Civil Procedure 60(b)(6), which allows relief from a "final judgment, order, or proceeding" if, among other things, there is "any other reason that justifies relief."

StarKist and Dongwon Industries noted that the process of recusal in the Bumble Bee case had begun prior to publication of the *Wall Street Journal* article but noted that the article had concluded

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that Judge Sammartino had the second highest number of recusal violations among federal judges. StarKist and Dongwon Industries also cited a separate case, *Driscoll v. Metlife*, in which the judge to whom the case had been reassigned after Judge Sammartino recused herself, vacated a summary judgment order issued by Judge Sammartino on the ground that Judge Sammartino had had disqualifying financial interests, which StarKist and Dongwon Industries characterized as being similar to those at issue in the Bumble Bee MDL.

The dispute over whether to vacate the class certification largely depends on application of 28 U.S.C. §455, the statute spelling out when a federal judge must recuse himself or herself from a case. Section 455(a) provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This provision, however, can be waived if the disqualification *only* involves Section 455(a) and the basis for the disqualification is fully disclosed on the record (emphasis added).

Section 455(b)(4) provides that a judge "shall also disqualify himself in the following circumstances: *** (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." Subject to some exceptions, "financial interest" means, among other things, "ownership of a legal or equitable interest, however small…" Violations of Section 455(b) are non-waivable.

Section 455(c) provides that "[a] judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household."

Class plaintiffs opposed StarKist's and Dongwon Industries' motion to vacate by arguing that, with respect to Section 455(a), the defendants had not asserted factors showing Judge Sammartino was conflicted at the time the class certification order was issued. Class plaintiffs also observed that the *Wall Street Journal* article did not assert that any of the judges cited in the article had intentionally issued rulings in cases to advance their financial interests. With respect to Section 455(b)(4), class plaintiff asserted a similar lack of evidence that Judge Sammartino knew of her husband's financial interests and thus, had the requisite scienter. With respect to Section 455(c), class plaintiffs noted that this provision imposes a duty on judges to keep informed of their own and their family's financial interests but does not explicitly suggest disqualification for failing to remain informed. Overall, class plaintiffs argued that StarKist and Dongwon Industries merely sought a "do-over" of the class certification and that the harmless error doctrine should apply to produce a denial of the defendants' motion to vacate the class certification order.

StarKist and Dongwon Industries replied to the class plaintiffs' opposition brief by, among other things, emphasizing that Section 455(a) has no scienter requirement and, thus, disqualification is mandatory if the judge's "impartiality might reasonably be questioned." StarKist and Dongwon Industries also denied that they merely sought to rehash the class certification.

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In another example, Amazon.Com, Inc. sued WDC Holdings, LLC alleging a kickback scheme regarding real estate transactions. The district court judge would, after lengthy proceedings in the case, "reluctantly" decide to recuse himself because of a potential financial conflict. In a brief court order, Judge Liam O'Grady of the U.S. District Court for the Eastern District of Virginia explained: "However, perception of the fair administration of justice—both by the public and by the parties in the case— is of the highest importance to the Court. Also importantly, my learned and honest colleagues should not have to suffer possible criticisms that might target them and me by those who do not understand the issues involved, if I were to decide not to recuse myself." According to a follow-up article by the *Wall Street Journal,* Judge O'Grady's wife had owned $22,000 of Amazon stock (See, Joe Palazzolo, "Federal Judge Steps Aside From High-Profile Amazon Case, Citing Financial Conflict," *The Wall Street Journal,* January 11, 2022).

Ethical questions at the Fed. Much like the federal judiciary, the Fed also has recently experienced ethical lapses by some of its key officials with respect to insider trading. Democratic Senators have urged the Fed district bank presidents to adopt ethics reforms and have introduced legislation to formally impose curbs on stock trading by Fed officials in response to media reports that then-Boston Fed President Eric Rosengren and then-Dallas Fed President Robert Kaplan had traded securities at the same time the Fed was implementing emergency measures to prevent an economic collapse due to the COVID-19 pandemic. Both Rosengren and Kaplan have since resigned.

Senator Elizabeth Warren (D-Mass), for example, asked the Fed district bank presidents to ban the ownership and trading of individual stocks by senior officials and to impose ethics and financial conflicts of interest rules that track government ethics provisions contained in the Anti-Corruption and Public Integrity Act (S. 5070; H.R. 9029), legislation Sen. Warren and Rep. Pramila Jayapal (D-Wash) introduced in the 116th Congress. Senator Warren also asked the SEC to investigate whether Fed officials, including Fed Vice Chair Richard Clarida, may have violated federal securities laws by trading securities. Senator Warren, as recently as early December 2021, renewed her demand that the Fed release all the information it has regarding alleged ethical lapses by Fed officials.

Clarida announced on January 10, 2022 that he intends to resign from the Fed as of mid-January, or about two weeks before his term would expire. A letter Clarida sent to President Biden explaining his decision did not mention public criticism of his allegedly unethical stock trades.

Senator Warren later renewed her calls for Fed transparency at about the same time Clarida announced his resignation. Specifically, a letter sent by Sen. Warrant to Chair Powell asks the Fed to: (1) provide the contents of a Fed email cautioning employees to avoid securities trading as the Fed took action to stabilize markets at the start of the pandemic (as has been reported by the *New York Times*); (2) disclose all trading by Fed governors and presidents from January 1, 2020 to the present; (3) provide a staff briefing on the Fed's previously announced new rules on securities trading; and (4) clarify the timing of Clarida's disclosures about his trading activities.

At his January 11, 2022 Senate confirmation hearing for a second term as Fed chair, Powell would tell Sen. Warren that he would check on the status of the new rules and reply to her prior inquiries. At the close of questioning, however, Powell told Chair Sherrod Brown (D-Ohio) that the Fed's final ethics rules would be ready "imminently," but that the Fed was taking time to

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carefully draft the rules and would have to hire experts and build systems to administer them. In earlier questioning by Sen. Catherine Cortez Masto (D-Nev), Powell explained that no Fed officials would be able to buy individual securities and that Fed officials could only hold mutual funds. Powell also explained that the "federated" character of the Fed meant that a new centralized review body had to be created to monitor compliance with the forthcoming ethics rules. Powell also told Sen. Jon Ossoff (D-Ga) that once a Fed official announces his or her plan to buy or sell securities by giving 45-days notice, the purchase or sale must occur and that the proposed transaction would become nondiscretionary. Powell further said that the new rules would effectively end active trading by Fed officials.

Moreover, Sen. Sherrod Brown (D-Ohio), Chair of the Senate Banking, Housing, and Urban Affairs Committee, introduced the Ban Conflicted Trading at the Fed Act (S. 3076), which would apply the Ethics in Government Act of 1978, portions of the Stop Trading on Congressional Knowledge (STOCK) Act of 2012, and Exchange Act Section 21A(i) to Fed bank presidents, vice presidents, and directors. Exchange Act Section 21A(i) bars persons subject to the Ethics in Government Act from participating in initial public offerings except on terms offered to the general public.

The Ban Conflicted Trading at the Fed Act also would amend the Federal Reserve Act to ban the purchase or sale of any covered investment and would bar a Fed official from entering into a transaction that creates a net short position in any security. "Covered instrument" would include securities, commodities, virtual currencies, futures, or derivatives, but would not include diversified mutual funds or investment trusts. Additional exceptions would apply to investments held before taking office, although these investments would be subject to requirements for blind trusts and for divestitures. The Fed would administer the Federal Reserve Act provision and violations would be penalized by a civil penalty of at least 10 percent of the value of the covered investment. The Fed would have to implement rules to require advance notice and prior approval of investment transactions and Fed officials would have to hold such investments for a minimum of one year.

New Fed rules on senior policymakers' investment holdings will be integrated with existing Fed rules over time, according to a Fed press release issued about a week before Sen. Brown introduced his bill to limit Fed officials' investments. The Fed rules would apply to Fed district bank officials and Fed policymakers and senior staff. Generally, the rules would ban individual securities holdings, while preserving the ability of senior Fed officials to hold diversified investments such as mutual funds.

The Fed's press release also noted several disclosure features that are part of the new rules, including:

- 45 days' advance notice for purchases and sales of securities;
- The need to obtain prior approval for purchases and sales of securities;
- A one year holding period;
- A ban on purchases or sales during periods of heightened financial market stress; and
- A requirement that Fed district bank presidents publicly disclose financial transactions within 30 days (this step would bring the rules for Fed district bank presidents into line with those for Fed members and senior staff).

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Fed Chair Jerome H. Powell, who was recently nominated by President Biden to serve another term as chair, remarked: "These tough new rules raise the bar high in order to assure the public we serve that all of our senior officials maintain a single-minded focus on the public mission of the Federal Reserve."

Senator Pat Toomey (R-Pa), Ranking Member of the Senate Banking, Housing, and Urban Affairs Committee, commented on the Fed's new rules soon after they were announced while also appearing to call into question the oversight provided by a committee chaired by Fed Governor Lael Brainard, whom President Biden recently nominated to serve as Fed Vice Chair. "Chair Powell is to be commended for effectively addressing this issue. The trading activity of the former Boston and Dallas Fed bank presidents were unfortunate because they created the appearance of a conflict of interest," said Sen. Toomey. "This episode does raise questions about the operations of the Committee on Federal Reserve Bank Affairs, which is chaired by Governor Brainard and is directly responsible for overseeing the Fed regional banks and their presidents."

The president formally sent Powell's and Brainard's nominations to the Senate on January 4, 2022. Brainard's confirmation hearing is scheduled for January 13, 2022.

Rule 10b5-1 plans. The Promoting Transparent Standards for Corporate Insiders Act (H.R. 1528), sponsored by House Financial Services Committee Chair Maxine Waters (D-Calif), passed the House with ease for the second time. The bill was previously introduced and passed the House in the last Congress by a vote of 413-3.

The bill would require the SEC to study the misuse of Rule 10b5-1 trading plans by corporate executives. Specifically, the bill would have SEC staff review numerous aspects of trading plans, including limits on the use of multiple trading plans, a mandated delay between adoption of a trading plan and the execution of the first trade under the plan, and to require greater board oversight of trading plans. The SEC would have to issue a report within one year after enactment. The Commission would then be required to amend applicable regulations to implement any recommendations set forth in the report.

The impetus for earlier version of the bill arose from allegations that Intel's CEO used Rule 10b5-1 trading plans to shield profits at a time when the security of Intel microprocessor chips had come under scrutiny (See, e.g., the January 2018 letter from Senate Banking Committee Members Jack Reed (D-RI) and John Kennedy (R-La) calling for SEC and Department of Justice investigations).

During House debate on the Promoting Transparent Standards for Corporate Insiders Act, Democratic floor manager Rep. Ed Perlmutter (D-Colo), emphasized the ways in which executives may be using Rule 10b5-1 plans to shield insider trading. He cited examples from the COVID-19 pandemic that may appear to be similar to the Intel episode from several years ago. Said Rep. Perlmutter, "For instance, shortly after Moderna announced positive results for its vaccine, the pharmaceutical company's CEO altered his trading plan to increase the number of shares sold through the plan. Shortly thereafter, he sold shares for millions of dollars in profit." Perlmutter added: "Similarly, on the same day Pfizer announced positive data regarding its vaccine, Pfizer's CEO sold more than $5 million worth of shares as part of his trading plan" (See, Congressional Record, April 19, 2021, at H1914).

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House FSC Ranking Member McHenry emphasized the balanced nature of the bill: "It protects retail investors in the market from illicit insider trading while, at the same time, ensuring that the rules governing insider trading are clear, fair, and not prohibitively onerous" (See, Congressional Record, April 19, 2021, at H1914).

By December 2021, however, the SEC had proposed amendments to the regulations that govern Rule 10b5-1 trading plans, thus placing itself ahead of Congress, although the SEC had telegraphed its proposal by putting Rule 10b5-1 trading plans on its Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions. The proposal would require tabular and narrative disclosures regarding the number of shares repurchased, the objective or rationale of the repurchase, information about publicly announced repurchases and repurchases that are not publicly announced, and the policies and procedures the issuer has adopted regarding purchase and sales of securities by its officers and directors and any restrictions on such transactions. Disclosures would be provided on a new Form SR to be furnished by an issuer before the end of the first business day following the day on which the share repurchase order was executed; any material changes to, or errors in, the information furnished would require the submission of an amended Form SR (Share Repurchase Disclosure Modernization, Release No. 34-93783, December 15, 2021).

The SEC's proposal, thus, would emphasize disclosures but would not address all of the elements identified by the study contemplated by the Waters bill. "While new disclosure requirements and cooling off periods as proposed yesterday are steps in the right direction, I encourage the SEC to not become overly reliant on disclosure to cure these anti-investor practices that aim to circumvent insider trading rules," said Rep. Waters in a press release. "The SEC, in the final rule, should aim to prohibit practices of executives who strategically and opportunistically abuse and misuse 10b5-1 plans and should, in addition to the executives involved in the trades, also hold the compliance personnel who rubber stamp and greenlight these trades responsible for the abuse."

The companion Senate version of the Waters bill (S. 2211), sponsored by Sen. Chris Van Hollen (D-Md), requires a substantively identical SEC study but would require the SEC to report the results of the study to Congress within 180 days of enactment instead of one year from enactment as is provided for in the House version. The Senate bill and the House bill contemplate SEC amendments to Rule 10b5-1 in the same time frame, with the Senate version requiring the SEC to amend its regulations on share repurchases within one year of enactment while the House version requires the SEC to amend its regulations after completing the study, which could be up to one year post enactment.

Blockchain developments

Blockchain legislation has begun to evolve beyond the usual bills seeking to carve out exemptions from federal securities laws for digital tokens into bills that put a highly pragmatic focus on the collection of unpaid taxes. This emphasis found its first expression in the Infrastructure Investment and Jobs Act, which became law in 2021 and now requires cryptocurrency exchanges to report transaction data to the IRS and to their customers.

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Blockchain legislation also evolved to address the growing concerns federal regulators have about stablecoins. While the one comprehensive bill proposed to date may be unlikely to become law in its current form, it nevertheless suggests one path toward the regulation of stablecoins. Moreover, the President's Working Group on Financial Markets (PWG) issued a report calling for swift action by Congress regarding stablecoins, while Republican leadership on the Senate Banking, Housing, and Urban Affairs Committee published a framework for providing a range of options to regulate stablecoins based on an issuer's business model.

This review first looks back at the cryptocurrency transaction reporting provision that became law and the ongoing efforts to narrow the scope of that provision. Second, the review examines the several options for regulating stablecoins.

Bipartisan infrastructure bill. President Biden signed the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58, previously styled H.R. 3684) into law on November 15, 2021, thus ending a months-long odyssey resulting in a compromise bill that passed the Senate in August by a vote of 69-30 and then the House in November by a vote of 228-206, but only after a lengthy holding pattern in the House that ended with an agreement among House Democrats on whether moderate Democrats would vote for the forthcoming Build Back Better Act (BBBA) (H.R. 5376) (the BBBA's cryptocurrency provisions are discussed below while the BBBA's corporate and individual tax provisions are discussed in greater detail in the last section of this review).

For securities law practitioners, the Infrastructure Investment and Jobs Act's cryptocurrency transaction reporting provision is one of its signature features, although this may not be the last time Congress addresses cryptocurrency issues in the coming months. Much of the bill, however, concerns more traditional transportation and other infrastructure spending. Given the amounts of funds to be provided by the bill, the president also announced an executive order (Fact Sheet) creating the Infrastructure Implementation Task Force within the Executive Office of the President to help coordinate implementation of the Act by executive branch agencies. The president further announced that the former mayor of New Orleans, Mitch Landrieu, will be senior advisor responsible for coordinating implementation of the Infrastructure Investment and Jobs Act.

Section 80603 of the Infrastructure Investment and Jobs Act requires transaction reporting under the Internal Revenue Code by persons and entities in the cryptocurrency industry. Specifically, the provision applies to "any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person."

Some lawmakers and the cryptocurrency industry had objected to the broad language used in the provision but bipartisan efforts to amend the text failed when Democrats and Republicans mutually declined to allow each other's unrelated amendments to proceed to votes. The primary objection was that the reporting provision could ensnare more distant blockchain providers, such as miners and network validators, who may not possess the types of information that would have to be reported to the Internal Revenue Service.

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Lawmakers have introduced numerous bills during the last two Congresses that have largely focused on creating exemptions from securities laws for digital tokens or that sought to create regulatory sandboxes where creators of new financial technology services can experiment within set parameters without fear of being subjected to enforcement actions. Some other bills would have created exceptions to tax laws, for example, to allow the inclusion of digital assets in retirement accounts.

Meanwhile, the IRS has pursued a series of John Doe summonses against cryptocurrency exchanges with the goal of obtaining transaction information that would help the agency to verify its concern that many such transactions are not being reported to the IRS or are not being fully or correctly reported, thus resulting in a significant, collective tax deficiency.

Thus, it is significant that one of the first U.S. blockchain laws is one that will require reporting of cryptocurrency transactions for tax purposes and, if the IRS is correct, will result in greater tax compliance by persons who trade in cryptocurrencies and higher revenues to the U.S. Treasury.

It is also significant that a second batch of U.S. cryptocurrency laws also would address tax concerns and could become law if the BBBA is enacted. The BBBA would contain a provision that amends Internal Revenue Code Section 1091 on wash sales to include references to digital assets. BBBA Section 138152 would define "specified asset" to mean, except as otherwise provided by the Treasury Secretary, "any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary."

The BBBA also would amend the Internal Revenue Code to include digital assets in provisions dealing with constructive sales and to include digital assets among the Internal Revenue Service's statutory enforcement priorities (See BBBA Sections 138150, 138152, and 138401). The BBBA passed the House but it is likely to be amended by the Senate.

Three days after the Infrastructure Investment and Jobs Act was signed into law, Sens. Ron Wyden (D-Ore) and Cynthia Lummis (R-Wyo) introduced a bill to blunt the effect of Section 80603. The untitled bill, S. 3249, closely tracks the compromise language of the amendment that had failed during the Senate's consideration of the Infrastructure Investment and Jobs Act. Specifically, the bill would clarify that "broker" excludes persons who "solely engage[] in the business of": (1) "validating distributed ledger transactions"; (2) "selling hardware or software for which the sole function is to permit a person to control private keys which are used for accessing digital assets on a distributed ledger"; or (3) "developing digital assets or their corresponding protocols for use by other persons, provided that such other persons are not customers of the person developing such assets or protocols." A careful reading of the provision, thus, suggests that it would only apply if the service provider "solely" engages in the identified activity. The provision would be given the same effect as if it had been enacted as part of the Infrastructure Investment and Jobs Act.

"Our bill makes clear that the new reporting requirements do not apply to individuals developing block chain technology and wallets," said Sen. Wyden via a joint press release. "This will protect American innovation while at the same time ensuring those who buy and sell cryptocurrency

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pay the taxes they already owe." Senator Lummis added: "Digital assets are here to stay in our financial system and the decisions we make now will have impacts far into the future. We need to be fostering innovation, not stifling it, if we are going to maintain America's position as the global financial leader."

PWG report. The President's Working Group on Financial Markets (PWG), working alongside the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC), issued a long-awaited report on stablecoins in November 2021. The report emphasized prudential regulatory concerns, although it mentioned that the SEC and/or the CFTC have roles in the regulation of stablecoins to the extent stablecoins are securities, commodities, or derivatives. The report and a fact sheet issued along with the report suggest a definition of "payment stablecoins and payment stablecoin arrangements" that emphasizes stablecoins that seek to offer a mode of payment for goods or services by maintaining a stable value relative to a fiat currency or other assets, somewhat akin to how other countries may peg their national currencies to the U.S. Dollar.

With respect to prudential concerns, the report noted the potential for runs, payment system risks, and for stablecoins to "rapidly scale." The scalability concern, said the report, could raise questions about systemic risk, concentration of economic power, and anti-competitive effects.

The report concluded that legislation to regulate stablecoins is "urgently needed." Overall, the report recommended that legislation should require stablecoin issuers to be insured depository institutions, should restrict the lending of stablecoins, and should impose related requirements regarding risk management, liquidity, and capital. To lessen the potential for the concentration of economic power, the report recommended limits on affiliations between stablecoin issuers and other commercial entities and on the use of transaction data. The report placed special emphasis on the need to regulate custodial wallet providers. The report used language such as "any entity that performs activities critical to the functioning of the stablecoin arrangement" when describing the potential breadth of regulations (this language is similar to the broad language contained in the bipartisan infrastructure bill's crypto transaction reporting provision).

In a press release accompanying the report, Treasury Secretary Janet L. Yellen noted the risks that may arise without government oversight of stablecoins. "Current oversight is inconsistent and fragmented, with some stablecoins effectively falling outside the regulatory perimeter. Treasury and the agencies involved in this report look forward to working with Members of Congress from both parties on this issue," said Yellen. "While Congress considers action, regulators will continue to operate within their mandates to address the risks of these assets."

In remarks delivered to the Stanford Graduate School of Business, Treasury Under Secretary for Domestic Finance Nellie Liang highlighted the need for legislation addressing stablecoins. According to Laing, stablecoins present risks not only because of their use in illicit finance but also because of concerns about prudential regulation, investor protection, and market integrity. Laing further noted that although the size of the stablecoin market pales in comparison to the current market capitalization of all crypto assets, they nevertheless facilitate transactions in those other crypto assets.

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"Absent urgently-needed legislation, the agencies can apply their existing authorities and consider FSOC authorities, but we believe legislation is the best way to address prudential regulatory gaps," said Laing. Laing added: "In addition to these authorities, in the absence of urgently-needed Congressional action, the Financial Stability Oversight Council (FSOC) should consider steps available to it to address the risks outlined in the report, including the designation of certain activities conducted within a stablecoin arrangement as, or as likely to become, systemically important payment, clearing, and settlement activities."

Senator Toomey, who previously had criticized the PWG's process for putting together its report (*e.g.*, his perception that stablecoin issuers had little input and his concern that FSOC may designate stablecoins as a systemic risk), repeated his concerns after the PWG released the report that federal regulators should not move precipitously to regulate stablecoins before Congress can take action. "As the Biden administration acknowledges in its report, it is the responsibility of Congress to clarify whether, and to what extent, federal agencies have jurisdiction over stablecoins," said Toomey. "While Congress works on thoughtful legislation, I hope the administration will resist the urge to stretch existing laws in an effort to expand its regulatory authority. Digital assets have the potential to be as revolutionary as the internet. It's important lawmakers and regulators alike work to continue America's longstanding tradition of fostering technological innovation—not stifling it."

Regulating stablecoins. A December 2021 hearing held by the Senate Banking, Housing, and Urban Affairs Committee titled "Stablecoins: How Do They Work, How Are They Used, and What Are Their Risks?" prompted Ranking Member Toomey to offer a proposed legislative framework. According to Sen. Toomey, legislation to regulate stablecoins should not pigeon-hole stablecoins into the existing regulatory regime for insured depository institutions but rather should allow stablecoin issuers to choose a traditional bank charter, a special purpose bank charter, or to be regulated as money transmitters and money services businesses. Moreover, Sen. Toomey said legislation could require stablecoin issuers to have clear redemption policies, provide disclosures about the assets that back a stablecoin, and perhaps also mandate compliance with requirements for liquidity and asset quality. But Sen. Toomey reiterated his concern that Congress or the executive branch may seek to regulate stablecoins in a manner that curbs innovation or which could more reflexively regulate non-interest bearing stablecoins as securities.

Chair Sherrod Brown (D-Ohio) pledged in opening remarks at the hearing that he would continue to ensure that financial regulators have the tools to police stablecoins. Senator Brown suggested that the opacity of the stablecoin market could lead to an asset bubble that, if left unchecked, could pose systemic risks to the real economy. "So far, what happens in the crypto markets has stayed in the crypto markets. But stablecoins create a very real link between the real economy and this new fantasy economy," said Sen. Brown.

Stablecoin regulation would resurface as a topic at Fed Chair Jay Powell's January 11, 2022 Senate confirmation hearing for a second term as Fed chair. Senator Toomey asked if a Fed central bank digital currency or digital dollar would preclude the coexistence of a well-regulated, privately issued stablecoin. Powell replied "No."

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The Digital Asset Market Structure and Investor Protection Act (H.R. 4741), sponsored by Rep. Don Beyer (D-Va), is the first, and most comprehensive attempt to regulate stablecoins via legislation and, if enacted, would accomplish several things, including providing an explicit grant of authority to the Treasury Department to regulate stablecoins. Thus far, the bill has been referred to the House FSC, the House Agriculture Committee, and the Ways and Means Committee. As Congress begins to consider the possibility of legislation to regulate stablecoins, a role the PWG report clearly said belonged to Congress, it remains to be seen if the Senate will advance legislation to compete with the Digital Asset Market Structure and Investor Protection Act. With that background, the next few paragraphs preview the Digital Asset Market Structure and Investor Protection Act.

Section 311 within Subtitle B of Title III of the Digital Asset Market Structure and Investor Protection Act would prohibit the issuance and use of digital asset fiat-based stablecoins without the approval of the Treasury Secretary. "Digital asset fiat-based stablecoin" would mean a digital asset (as defined by the Commodity Exchange Act (CEA)) that the Treasury Secretary has determined is pegged to (or collateralized substantially by) the U.S. dollar or one or more fiat currencies. Section 201(b) of the bill elaborates on the definition of "digital asset" that would be added to the CEA; thus, a "digital asset" would be an asset: (1) created electronically or digitally via software code; (2) that is programmed with rules for its creation, supply, ownership, use, and transfer and which is designed to resist modification; (3) with a transaction history recorded on a digital ledger, or is subject to consensus via mathematical process, that is updated as soon as possible, and which is designed to prevent modification post-consensus; and (4) that is capable of transfer between persons without the aid of an intermediate custodian.

Within 90 days of enactment, the Treasury Secretary would have to create an application process by which the secretary can approve or disapprove stablecoins under terms and conditions the secretary deems to be necessary and appropriate. The Treasury Secretary would be required to consult with the Fed, the SEC, the CFTC, and foreign central banks or foreign treasury departments on the creation of the application process. Significantly, the bill would prohibit the grandfathering of existing stablecoins.

The Digital Asset Market Structure and Investor Protection Act also would achieve several other goals with respect to securities regulations, commodities regulations, and the Fed:

- ***Securities law***—Title I of the bill would amend the federal securities laws to: (1) define "digital asset security;" (2) provide for the registration of digital asset securities under Exchange Act Section 12 if total assets and holders of record thresholds are met; (3) allow an issuer of a digital asset security to file a desecuritization certification with the SEC stating that the good, service, or platform is fully operational and, thus, no longer meets the definition of digital asset security and should instead be regulated by the CFTC as a digital asset; and (4) require the SEC and CFTC to jointly classify "major digital assets" (*i.e.*, the top 25 digital assets by market capitalization and daily trading volume) as either digital assets or digital asset securities based on data from CoinMarketCap or a similar source.
- ***Commodities law***—Title II of the bill would amend the Commodity Exchange Act to, among other things: (1) provide that "commodity" includes "digital asset," which in turn includes Bitcoin, Ether, and their hard forks; (2) define "digital asset" (see the discussion of stablecoins

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above for more on the specifics of this definition); and (3) clarify the actual delivery exception under CEA Section 2(c)(2)(D) that applies to certain retail commodity futures contracts by limiting the CFTC's authority to that of shortening, not lengthening, the applicable time period from the statutory 28 days and by providing that, with respect to digital assets, actual delivery must occur within 24 hours after a transaction by either recording the transaction on a public distributed ledger or by the reporting of an off-chain transaction to a CFTC-registered digital asset trade repository, a type of entity that would also be created under the bill.

In March 2020, the CFTC issued final interpretive guidance stating that:

> More specifically, in the Commission's view, "actual delivery" has occurred within the context of virtual currency when: (1) A customer secures: (i) Possession and control of the entire quantity of the commodity, whether it was purchased on margin, or using leverage, or any other financing arrangement, and (ii) the ability to use the entire quantity of the commodity freely in commerce (away from any particular execution venue) no later than 28 days from the date of the transaction and at all times thereafter; and
>
> (2) The offeror and counterparty seller (including any of their respective affiliates or other persons acting in concert with the offeror or counterparty seller on a similar basis) do not retain any interest in, legal right, or control over any of the commodity purchased on margin, leverage, or other financing arrangement at the expiration of 28 days from the date of the transaction (footnotes omitted).

The CFTC then summarized the interpretation thus: "Indeed, in its simplest form, actual delivery of virtual currency connotes the ability of a purchaser to utilize the virtual currency purchased 'on the spot' as a medium of exchange in commerce or within the entirety of its relevant blockchain ecosystem."

The March 2020 guidance became effective on June 24, 2020. The CFTC continues to apply guidance issued in August 2013 to CEA Section 2(c)(2)(D)(ii)(III)(aa).

- ***Digital Federal reserve notes***—Under Subtitle A of Title III of the bill, the Fed would be authorized to issue digital versions of Federal reserve notes in addition to physical Federal reserve notes. The Fed, upon consulting the Treasury Department, would be authorized to use digital ledger technology to administer transactions in digital Federal Reserve notes. Digital Federal reserve notes also would be deemed to be obligations of the U.S. and would be considered legal tender. Subtitle A of Title III of the bill also would clarify that "digital assets" and "digital asset securities," among other items, are not legal tender.

The Digital Asset Market Structure and Investor Protection Act is to date the most comprehensive cryptocurrency legislation proposed and its overall tenor is that of regulation and government oversight. By contrast, the many other blockchain bills introduced over the past several Congresses have tended to focus on creating exemptions from federal securities laws or to clarify tax law provisions

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in a manner that would be advantageous for those who issue or invest in digital assets. Given the tenor of the blockchain provisions contained in the Build Back Better Act, it appears that Congress is perhaps ready to further regulate at least the federal tax aspects of digital assets in order to prevent tax evasion but it remains to be seen if Congress will seek to regulate other aspects of digital asset markets. In the near term, the most likely legislative action on digital assets will continue to focus on possible enactment of S. 3249's clarification of the tax reporting provision contained in the Infrastructure Investment and Jobs Act.

Build Back Better Act

The Biden Administration's signature legislative package formally styled as the Build Back Better Act passed the House in 2021 after moderates and progressives within the Democratic party resolved differences that had prevented earlier floor action on the bill. Republicans have largely been absent from negotiations over the BBBA because Democrats have elected to invoke the budget reconciliation process to advance the package of social safety net reforms contained in the BBBA. That has meant that most negotiations over the contents of the BBBA have taken place between the Biden Administration, House Democrats, and Sens. Joe Manchin (D-WVa) and Kyrsten Sinema (D-Ariz), the latter of which also was a key player in advancing the bipartisan infrastructure bill that became law in fall 2021. Senator Manchin has been the main public face of moderate Democrats with respect to the BBBA and had successfully negotiated a smaller price tag for the BBBA before announcing during an interview in late 2021 that he would not vote for the BBBA in its current form.

Democratic leadership in the Senate has elected to focus on voting rights legislation and possible revisions to the Senate's filibuster rule in January 2022, thus likely delaying progress on the BBBA until a later time. Meanwhile, relevant Senate committees have proposed a collection of provisions that would comprise a Senate version of the BBBA. With respect to the corporate and individual tax provisions, few differences exist between the House and Senate versions of the BBBA. As a practical matter, significant differences would not be expected here because it is the corporate and individual tax provisions, coupled with funding for increased IRS enforcement activities, that are the primary source of funding for the larger set of social safety net provisions that form the core of the Build Back Better Act. However, given the opened-ended nature of negotiations, the BBBA is likely to be significantly amended before lawmakers consider a final version of the legislation.

The text of the BBBA, as passed by the House, consists of the November 3, 2021 House Rules Committee Print, the manager's amendment dated November 4, 2021, and the manager's amendment dated November 18, 2021. A section-by-section summary provides additional information, although some section numbers no longer match the underlying bill text because of later amendments to the bill.

The tax provisions contained in the Senate version of the BBBA can be found in a draft published by the Senate Finance Committee on December 11, 2021. Although most other Senate committees also have released updated drafts of BBBA text via the Senate Democrats' website, the Senate Judiciary Committee has not yet released its text for provisions that address funding for the Department of Justice's Tax Division and funding for DOJ and Federal Trade Commission antitrust enforcement.

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The Senate committees that have released updated BBBA text, include:

- Title I —Agriculture, Nutrition, and Forestry.
- Title II—Health, Education, Labor, and Pensions.
- Title III—Environment and Public Works.
- Title IV—Banking, Housing, and Urban Affairs.
- Title V—Homeland Security and Governmental Affairs.
- Title VI—Judiciary (not available as of publication).
- Title VII—Energy and Natural Resources.
- Title VIII—Commerce, Science, and Transportation.
- Title IX—Indian Affairs.
- Title X—Small Business and Entrepreneurship.
- Title XI—Veterans' Affairs.
- Title XII—Finance.

The Senate Democrats' website also included CBO scoring, and in the case of the Finance Committee, a score by the Joint Committee on Taxation (JCT). The main differences between the House and Senate tax provisions, thus far, emphasize IRS enforcement-related priorities. As a result, the Senate version is significantly more generous in funding IRS taxpayer services than the House version, is somewhat more generous than the House version in funding IRS enforcement activities, is less generous than the House version in funding IRS operations support, and is identical to the House version in funding IRS business systems modernization. The remainder of the House and Senate BBBA revenue-raising provisions are otherwise similar regarding corporate and individual taxation. With respect to the Senate tax provisions, the JCT indicated that they could raise $1.44 trillion over ten years. However, the JCT document linked to by the Senate Democrats' website is labeled "Very Preliminary" and does not appear on the JCT's website.

A previous CBO score for the House version of the BBBA (before House passage) indicated that the bill would result in a net increase to the budget deficit of $367 billion over ten years. The CBO, however, did not score the proposed changes in revenue expected from increased IRS enforcement of tax laws; nevertheless, the CBO estimated that outlays in the BBBA for IRS enforcement would yield $207 billion in revenue. The White House previously estimated that funding for increased IRS enforcement could yield $400 billion in revenue. A subsequent CBO analysis of the version of the BBBA that passed the House retained the $207 billion estimated revenue from the tax provisions in the bill. The JCT also scored the revenue raising provisions of the House version of the BBBA at the time of House passage and estimated that the bill would raise $1.48 trillion over ten years.

The charts below compare and contrast the House and Senate versions of the BBBA with respect to: (1) corporate taxes; (2) executive compensation; (3) individual taxes; (4) tax enforcement; (5) blockchain; (6) antitrust; and (7) law practice. A more detailed description of the BBBA as passed by the House can be found in Mark S. Nelson, J.D., "House sends Build Back Better Act to Senate," *Securities Regulation Daily* (November 19, 2021).

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Build Back Better Act: House and Senate versions compared

Corporate taxes

House version		Senate version	
§138101	Would impose corporate alternative minimum tax of 15 percent of adjusted financial statement income for corporations with income of more than $1 billion.	§128101	Same.
§138102	Would impose a 1 percent excise tax on stock repurchases by corporations whose stock is traded on established securities markets.	§128102	Same.
§138142(a)	Would clarify that losses on worthless securities that are capital assets are realized at the time of an identifiable event establishing the worthlessness of the securities.	§128142(a)	Same.
§138142(b)	Would allow for the deferral of some losses in controlled group corporate liquidations.	§128142(b)	Same. But would also clarify that cancellation, lapse, expiration, termination, and worthlessness of property shall be treated in the same manner as a transfer of such property.

Executive compensation

House version		Senate version	
§138501	Would add an aggregation provision to IRC Section 162(m), which disallows a deduction in the case of excessive employee remuneration. “Applicable employee remuneration” would be revised to include other forms of compensation and the Treasury Department would be required to issue regulations addressing the performance of services other than as an employee and compensation provided via a passthrough or other entity.	§128501	Same.

Individual taxes

House version		Senate version	
§138203	Would impose a 5 percent surcharge on a taxpayer’s modified adjusted gross income in excess of $10 million plus an additional 3 percent surcharge for a taxpayer with modified adjusted gross income in excess of $25 million. Different thresholds apply to married taxpayers filing separately and to trusts.	§128203	Same. But would add an exception for electing small business trusts, would address the foreign tax credit, and would provide adjustments for partnerships.

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Individual taxes (cont'd)

House version		Senate version	
§138301	Persons (applicable taxpayers) with large individual retirement plan balances would not be allowed to make annual additions to those plans if the annual additions would exceed the excess (if any) of the applicable dollar amount ($10 million) for the taxable year over the aggregate vested balances of all such plans.	§128301	Same.
§138302	Would require taxpayers with large retirement account balances to make annual minimum distributions if their income is above the thresholds ("dollar limit") for "applicable taxpayers" contained in Section 138301.	§128302	Same.
§138311	Would eliminate the "back-door" Roth IRA strategy that resulted from an amendment to tax laws that applied to Roth IRA contributions but not to Roth IRA conversions.	§128311	Same.

Tax enforcement

House version		Senate version	
§63001	Would allocate $498 million to the Department of Justice's Tax Division to pursue civil and criminal tax evasion cases.	§	Not available.
§136901	Would provide more than $4 billion to the IRS to enforce tax credit provisions contained in the BBBA's green energy subtitle.	§126901	Same.
§138312	Would reset the statute of limitations period for individual retirement plan non-compliance at six years.	§128312	Same.
§138401	Would allocate to the IRS: • $1.9 billion for taxpayer services; • $44.9 billion for enforcement; and • $32.1 billion for operations and business systems modernization.	§128401	Would allocate to the IRS: • $3.2 billion for taxpayer services; • $45.6 billion for enforcement; and • $30.1 billion for operations and business systems modernization.
§138403	Would repeal an IRS requirement that a supervisor approve an employee's assessment of a penalty; the BBBA also would require IRS supervisors to certify quarterly that relevant IRS administrative policies have been followed in assessing penalties.	§128403	Same. But adds: "The quarterly certification required under this section shall not affect liability for any penalty under this title."

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Blockchain

House version		Senate version	
§138150	Would amend the Internal Revenue Code to include digital assets in provisions dealing with constructive sales.	§128149	Same.
§138152	Would incorporate digital assets into IRC Section 1091 on wash sales by replacing “stock or securities” with a blockchain-inclusive definition of “specified asset.”	§128151	Same.
§138401	Would include digital assets among the IRS’s statutory enforcement priorities by providing for digital asset monitoring and compliance activities.	§128401	Same.

Antitrust

House version		Senate version	
§62001	Would allocate $500 million to the DOJ’s Antitrust Division.	§	Not available.
§62002	Would allocate $500 million to the FTC.	§	Not available.

Law practice

House version		Senate version	
§138518	Would amend IRC Section 162 to allow the deducting of out of pocket litigation costs in the year they are incurred instead of at the end of litigation (i.e., disregard the possibility that such amount will be repaid and do not reduce income from a recovery by such amount).	§128513	Same.

Conclusion: a forecast for 2022

The coming year likely will bring more of the same legislation on topics familiar to securities practitioners, such as curbing China’s influence in U.S. markets and further limiting insider trading with respect to federal judges and Fed officials. However, other legislative topics are less certain, including the reauthorization of the CFTC and the regulation of stablecoins, although there appears to be a growing consensus that stablecoins should be regulated in some manner. Equally unsure is the fate of the Build Back Better Act. The BBBA, as currently drafted, would be funded largely through tax increases on corporations and wealthy individuals, while also increasing government revenues via renewed IRS enforcement activities and, more specifically, IRS enforcement regarding virtual currency transactions.

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The success of any of these legislative priorities will ultimately be balanced against what is possible under a narrow Democratic Congressional majority, the political pressures of the approaching mid-term elections, the ongoing COVID-19 pandemic and its economic consequences, and the immediate priority that Democrats have placed on moving certain bills, especially those focused on voting rights. As a result, securities practitioners can expect that Congress may advance a few securities-related bills in 2022, but the more important short-term focus may shift to regulatory proposals issued by the SEC that, if adopted, could preempt Congressional action on some securities law topics.

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