Global Counsel

Silver linings: Post-midterms divided government would slow new Biden rules - but not spending from recent bills?

Blog post by Erin Caddell, 1 November 2022

With high inflation, rising interest rates and a choppy stock market through much of 2022, US companies and their investor owners can be forgiven for focusing on downside risks of late. But the high degree of economic uncertainty is obscuring what is likely to be an improved, though still noisy public-policy environment for American businesses in 2023 and 2024.

With Republicans poised to retake the House and potentially the Senate in the midterm elections on November 8, gridlock is likely to return to Washington, DC. Large-scale legislation will become almost impossible to pass. And GOP pressure will mean President Joe Biden's administration will focus on implementing and preserving several substantive bills passed in its first two years rather than passing new ones, limited further by the conservative US Supreme Court. Meanwhile, tens of billions of dollars allocated in bills passed earlier in Biden's presidency, including the American Recovery Plan, the Bipartisan Infrastructure Law and the Inflation Reduction Act, will be distributed in the years to come, much of it benefiting the private sector in the form of new spending and tax credits.

Recent polls suggest many House and Senate races are breaking to the GOP as the midterms approach. An average of polls tracked by RealClearPolitics forecasts Republicans will win a 31-seat majority in the 435-member House in next month's election (Democrats currently have an eight-seat majority), while pollster FiveThirtyEight pegs the likelihood of a House takeover at 81%. The Senate appears more of a toss-up, but here again Republicans appear to be gaining as Election Day approaches in key races including Pennsylvania, Nevada and Arizona.

We have seen in past cycles how congressional oversight and jawboning from the opposing party can slow an Administration's agenda under divided government. Agency heads are dragged to the Hill to testify before hostile committee chairs, and a flurry of information requests are logged. Inquiries are launched into past administrative actions, occupying staff time – a tactic House Republicans have already said they plan to use aggressively if they win the majority in areas ranging from the Biden Administration's covid-19 response to its policies on the southern US border. The gear-jamming can come not just from the opposition, as the president's own party reacts to the shifting political winds. Case in point: in mid-October, a dozen moderate Senate Democrats, including a couple in tight re-election races, sent a letter to Securities and Exchange Commission Chair Gary Gensler asking his agency to slow his ambitious agenda in areas such as climate disclosures for public companies and equity market-structure, giving industry more time to comment on proposed changes.

Many federal agencies will have their hands full in 2023 and beyond to implement the Inflation Reduction Act (IRA), giving them less time to focus on new regulations. Signed by Biden in August, the IRA is a sweeping bill that includes dozens of provisions affecting spending on renewable energy, new taxes as well as new or extended tax credits, changes to the way the federal government buys prescription drugs, and extension of some Affordable Care Act (ACA) insurance subsidies. The energy and climate provisions alone will total $386 billion over 10 years in new spending and tax credits. Spending from the bill has barely started. A look at the Congressional Budget Office's schedule for IRA implementation, allocated among the relevant committees of jurisdiction, is instructive here. Funds distributed from the IRA through the Committee for Environment and Public Works, for instance, kick in at $1.5 billion in fiscal 2023 and do not peak until F2026, at $10.3 billion, according to the CBO. Would a Republican congressional majority, now ringing the alarm on "out of control" federal spending on the campaign trail, attempt to wring retroactive changes to IRA as part of a deal to raise the debt limit? It is possible, but the climate spending and incentives will be directed to red states as well as blue, and Members in both parties have learned that keeping federal money flowing back to their districts is key to being re-elected.

All would not be smooth sailing for Corporate America even under divided government. Activist agency chairs such as Lina Khan at the Federal Trade Commission (FTC) and Michael Regan at the Environmental Protection Agency (EPA) will do whatever they can to enact as much of their agenda as possible in the next two years in case a Republican president takes office in January 2025. However, new progressive initiatives along the lines of the Biden Administration's student-loan debt cancellation plan announced this summer, or the Department of Labor's recently proposed rule making it more difficult for gig-economy firms to classify workers as independent contractors, become much less likely under divided government. The other side of the aisle is likely to pose challenges, as well. Today's Republican Party is far less business-friendly than even a few years ago as populism roils the GOP. Case in point was the controversy earlier this year over Disney's public opposition to Florida legislation limiting discussion of gender issues with young public schoolchildren, which led Florida's Republican Governor (and possible presidential candidate) Ron DeSantis to seek an end to special tax benefits Disney enjoys in the state. Looking ahead to next year, Republicans may well attempt to seek concessions from Biden and congressional Democrats next year in return for a vote to raise the federal debt limit – actions that can have real impact on markets businesses. But for the many smaller companies that do not typically operate in the public eye, and those less vulnerable to short-term market or economic shocks, the combination of a less ambitious go-forward regulatory agenda and the long tail of spending on already approved bills could be a welcome respite in a challenging macro environment.