Alert
April 18, 2023

COZEN O'CONNOR

# Cozen Currents: The Taxman Cometh, But Which Taxman?

**The Cozen Lens**

- Congress isn't in its tax heyday like it was in 2017 or 2021, but tax policy is far from dormant as the Biden administration focuses on implementing the Inflation Reduction Act tax agenda and a major tax cliff looms on the horizon.
- Both Federal Trade Commission Chair Lina Khan and Securities and Exchange Commission Gary Gensler are viewed as progressive regulators, but their approaches are distinctly different.
- Julie Su's confirmation to succeed Marty Walsh as secretary of Labor is far from certain, but as acting secretary, she's already overseeing President Biden's ambitious labor agenda.

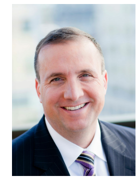
**The Tax Man Cometh**

**Taxes Today: It's All About Implementing.** The Inflation Reduction Act (IRA) included hundreds of billions in clean energy tax credits and corporate offsets. Its implementation by the Biden administration this year will have far-reaching implications for the future of industrial policy.

- The Treasury Department and the Internal Revenue Service (IRS) are in the process of issuing guidance for the IRA, which passed last August. The hastily written legislation left the Biden administration to fill in the details.
- President Biden wants to run in 2024 on a successful implementation of industrial policy from legislation passed last Congress. But it's a balance of priorities. Democrats want to deploy clean energy tax credits to quickly decarbonize the economy, however, that can conflict with promoting the domestic supply chain.
- Poor implementation of the IRA leaves it vulnerable to changes by a future Republican Congress and administration. Republicans are already calling to claw back several of the IRA provisions. The onus is on the Biden administration to listen to concerns of industry to ensure they get the implementation right. If done well, it becomes harder politically to undo in the future.

**Taxes Tomorrow: Its Small Ball Looking for a Field.** There isn't momentum for a major tax deal this year. But there may be some openings on limited tax legislation, while providing the groundwork for greater action in a future Congress.

- The dynamics aren't present for a major tax deal in a divided Congress. Democrats feel emboldened by their party's over-performance in the midterms to keep their priorities of the Child Tax Credit and other family-oriented tax breaks tied to business breaks like a return to R&D expensing, bonus depreciation, and more generous interest deductibility limits. Most Republicans continue to oppose such a deal.
- There are some opportunities for tax policy riders later this year. The FAA reauthorization bill, the Farm bill, FY24 appropriations, and raising the debt ceiling are all legislative vehicles theoretically open to tax policy riders. A recession later this year could be a catalyst for some sort of fiscal package. But any tax policy rider requires getting the sign off of tax committees'



Howard Schweitzer

CEO, Cozen O'Connor Public Strategies

hschweitzer@cozen.com
Phone: (202) 912-4855
Fax: (202) 640-5932

**Related Practice Areas**

- Government Relations - Cozen O'Connor Public Strategies leadership, leadership helming the non-tax legislation, and party leadership. It's a high hurdle with limited time and the 2024 election looming.

- The long game on tax policy continues to be active. Tax priorities that failed to pass last Congress are being reintroduced this year, including R&D expensing, bonus depreciation, LIFO relief, low-income housing development, 1099-K reporting requirements relief, broadband tax relief, estate tax repeal, and SALT cap relief. Greater visibility and bipartisan support today leaves tax priorities in a stronger position in the future when tax legislation will be front-and-center.

**Taxes The Day After Tomorrow: Tax Armageddon in 2025.** The individual provisions and some business tax breaks from the Tax Cuts and Jobs Act (TCJA) expire at the end of 2025, as do enhanced Affordable Care Act subsidies in the IRA. The direction Congress takes on this multi-trillion dollar fiscal cliff hinges on the 2024 elections.

- If Republicans win unified control of government, they would likely pursue a reconciliation bill like they did with the TCJA. Margins matter a bit less for Republicans than Democrats, as the GOP is more unified on taxes. But a House GOP that still has a meaningful contingency of members from high-tax districts will once again face a thorny question over the SALT cap.
- If Democrats win unified control of government, they would likely pursue a reconciliation bill like they did with the IRA. They would look to extend TCJA provisions to those making less than $400,000 and try to bring back several erstwhile provisions from the Build Back Better (BBB) agenda. But narrow margins would once again give outsized influence to moderates who could play a decisive role in narrowing the scope, as was the case with BBB.
- If divided government continues, the two parties will have to engage in some painful horse-trading that leaves some tax hikes on the table, especially if there is an insistence that legislation not increase the deficit. This could make for a prolonged negotiation, with the potential for a temporary extension, as was the case with the expiring Bush tax cuts in 2010.

#### Khan the Ideologue and Gensler the Pragmatist

**What Does It Mean to Be a Progressive.** Federal Trade Commission (FTC) Chair Lina Khan and Securities and Exchange Commission (SEC) Chair Gary Gensler have both earned reputations as progressive regulators, but the two have distinct approaches.

- The White House’s decision to have Khan lead the FTC came as a surprise given that her prior work in Washington was limited to behind-the-scenes staff roles. As chair, Khan has shown herself to be ideologically driven and is willing to risk defeats in court in order to highlight philosophical points.
- Gensler, on the other hand, is a DC veteran having previously led the Commodity Futures Trading Commission during the Obama administration. Given this prior work, Gensler, for all of his progressive goals, has emerged as a pragmatist that values reforms that can withstand legal challenges even if they ultimately are less aggressive than his intended aims.

**How to Tackle Regulation.** Unsurprisingly, Khan’s and Gensler’s regulatory agendas are both facing legal threats, especially in light of the Supreme Court’s decision in *West Virginia v. EPA,* which provided less deference to administrative agencies.

- For Gensler, with his emphasis on creating lasting change, some of his most ambitious regulatory efforts have appeared to stall as the SEC works to assess how to make them as legally defensible as possible. This has happened most prominently with the agency’s efforts to draft climate disclosure rules and the consideration of dropping Scope 3 requirements, which are those emissions that derive from a company’s upstream and downstream activities and are viewed as being on the shakiest legal ground. Removing this portion would be a disappointment to climate advocates, but would create a rule that is seen as having a better chance to survive a legal challenge.
- On the contrary, Khan has aimed to pursue an expansive regulatory agenda by leveraging the FTC’s unutilized legal authorities, such as taking a broad interpretation of the FTC’s remit to regulate “unfair or deceptive acts or practices in or affecting commerce.” Khan has claimed that this gives the agency the authority to write rules for data privacy and “junk fees,” but there are questions as to if they will pass legal muster. The threats of a court battle have not led

Khan to deviate course though and all indications are that she intends to press ahead, valuing the insight into how far progressives can push the envelope on crafting future regulations over ensuring that these particular rules endure legal scrutiny.

**Why Pursue Enforcement Actions.** Similar to their contrasting approaches on regulation, Khan and Gensler have embraced different strategies in terms of their enforcement agendas.

- When considering possible lawsuits, Khan has indicated that she, more so than her predecessors, is comfortable with losing the challenge in the interest of making a point. With this style, Khan has tended to push the boundaries of what is considered antitrust with the types of cases she has taken, a trend that is likely to continue despite increasing losses.
- Gensler has taken a more traditional approach to the SEC's enforcement actions with the most notable part of his style being a tendency to target high-profile individuals or industry leaders. He has also relied on enforcement actions to serve effectively as regulation and guidance for some industries, such as crypto. This pursuit of regulation by enforcement has frustrated industry stakeholders, but Gensler has shown no interest in deviating from these tactics as he seeks to score incremental victories.

#### Biden's Labor Agenda Post-Marty Walsh

**From Walsh to Su.** President Biden's new pick for secretary of Labor, Julie Su, comes to the role from a different background than her predecessor, Marty Walsh.

- Walsh, the former mayor of Boston, spent his career as a union leader. He took a hands-on approach to serving as Biden's secretary of Labor, often getting directly involved in labor disputes. This was an unconventional role for a Cabinet official, but a useful one for Biden as the White House confronted supply chain challenges and high inflation.
- Su is currently serving as the acting secretary of Labor. Unlike Walsh, she has a background in policy rather than organized labor. She previously led the California Labor and Workforce Development Agency and was California's labor commissioner. Su's extensive resume positions her to be an effective regulator who can execute Biden's labor agenda, which includes rulemakings on worker classification, Davis-Bacon Act prevailing wage requirements, and overtime pay.
- Su is facing opposition from the business community. Last month, a collective of 32 business trade groups sent a letter critical of Su to the Senate Health, Education, Labor, and Pensions (HELP) Committee. Su is unlikely to get any GOP votes, so her confirmation will ultimately hinge on moderates, namely Senators Joe Manchin (D-WV), Jon Tester (D-MT), and Kyrsten Sinema (I-AZ).

**Worker Classification.** The Department of Labor (DOL) is pursuing a rule with implications for the gig economy.

- The DOL's Wage and Hour Division (WHD) is currently engaged in a rulemaking that would repeal a Trump-era rule on the subject and institute a new "economic reality test" to determine worker classification based on "multifactor, totality-of-the-circumstances analysis." The Biden DOL's rule appears likely to tighten companies' ability to classify workers as independent contractors. This could have a potentially significant impact on gig firms such as Uber, Lyft, and DoorDash. Jessica Looman, Biden's nominee to be administrator of the WHD, was voted out of the HELP committee late last month.
- Recent comments from a commissioner of the Federal Trade Commission (FTC) indicated that the gig economy is coming under the eye of the FTC. In remarks last week, Alvaro Bedoya argued that labor organizing by independent contractors is not an antitrust violation. In general, the ability of workers classified as independent contractors to organize is considered to be limited under antitrust law. In his speech, Bedoya advocated for the opposite interpretation.

**Overtime Pay.** The Biden DOL may also take action to expand employees' eligibility for overtime pay.

- A recent New York Times article described an alleged pattern of businesses misclassifying employees as managers to qualify for overtime exemptions, which could motivate the Biden DOL to consider changing the overtime threshold so that more workers are eligible for overtime pay.

- A February Supreme Court decision in favor of widening overtime eligibility could give the DOL some momentum in this effort.The Court's 6-3 conservative majority has been a consistent thorn in the side of the White House during Biden's term, but the rare victory for labor in *Helix Energy Solutions Group v. Hewitt* offers some reason for optimism for the Biden administration. In this case, the justices ruled that an employee paid a daily rate is not a salaried worker and is thus entitled to overtime.