Kilpatrick Townsend & Stockton LLP

What Direction is U.S. Business Headed in 2024?

Navigating Emerging Trends and Regulations

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2023 saw increased legislative, regulatory, and litigation activity affecting U.S. business operations, partly as a response to significant developments in technology and the economy. This activity shows no signs of abating in 2024, particularly in the areas of privacy and artificial intelligence, and with the upsurge in transparency and disclosure requirements. In addition, many sectors will continue to be sensitive to the interest-rate environment as well as to whether banks and other institutions maintain their conservative approach to lending and whether private equity remains reluctant to invest in new deals.

Kilpatrick's future-focused attorneys are always proactively scanning the horizon for the challenges and opportunities that can have a major impact on the business community. Below, our attorneys preview some of the key trends likely to affect U.S. businesses in 2024 and beyond.

Privacy

State Privacy Regulations. 2023 witnessed a surge in state-level privacy legislation: eight states passed comprehensive consumer privacy laws—four of them (Texas, Florida, Oregon, and Montana) take effect in 2024. By the end of 2026, at least 13 states will have comprehensive privacy laws providing a patchwork of consumer protections to approximately one third of the U.S. population. We do not expect preemption by federal statute in the foreseeable future, so we recommend companies identify where commonalities exist amongst applicable laws and adopt a matrixed approach to privacy compliance.

Children's Privacy and Safety. Children's privacy and safety saw increased regulatory attention in 2023. We expect this trend to likely continue in 2024. Companies processing data about, or providing services to, children should evaluate their data governance practices and user interfaces to manage compliance with an ever-growing body of regulations and enforcement priorities.

Consumer Health Data. 2023 saw a continuing trend toward increased privacy and control over consumer health data, including the introduction of initiatives like the Washington My Health My Data Act (MHMDA), along with similar laws in Connecticut and Nevada. The Federal Trade Commission (FTC) along with the Department of Health and Human Services (HHS) also issued a letter pertaining to the use of online tracking technologies by hospitals and telehealth providers, further indicating the regulatory focus on how companies are using health data. In response to this trend, companies processing health data should prioritize robust data privacy measures and transparency in their operations to build trust and ensure compliance with evolving privacy laws and consumer expectations.

Biometric Data. From identity-based authentication and employee monitoring to facial recognition systems used to identify shoplifters, 2023 saw the use of biometric data integrated into a growing range of products and services. Increasing awareness and concerns over ubiquitous surveillance will present legal and operational challenges in the coming years, requiring companies to focus on managing this data. Issues of consent, data minimization, reasonable safeguards, and the potential misuse of such data for surveillance or discrimination will be at the forefront.

Dark Patterns. 2023 saw a rise in enforcement against companies using "dark patterns"—user interface design techniques that manipulate consumers into making unintended decisions online or hinder their ability to exercise their rights with regard to personal data. Expect regulatory scrutiny to continue in 2024. Companies should evaluate their interface design practices to ensure that they do not compromise user autonomy, lead to privacy violations, or result in consumer exploitation.

2023 Privacy Litigation. 2023 saw a surge in privacy litigation with a focus on consumer data protection and consent, and we expect this trend to continue in 2024. The Illinois Biometric Information Privacy Act (BIPA) remains fertile ground for privacy class action litigation, while privacy litigation based on the Video Privacy Protection Act (VPPA), state wiretap laws, and session replay technology has been less fruitful although prolific. The private right of action in Washington's MHMDA has created another attractive mechanism for the plaintiffs' bar. To mitigate legal risks, companies should regularly review their data collection/usage practices and privacy statements and take steps to ensure that they maintain transparent user consent processes. It is critical to establish and maintain well-documented protocols for reviewing the privacy impact of new products, services, and business operations.

Artificial Intelligence

AI Regulation and Governance. 2023 saw unprecedented regulatory activity related to the development and use of Artificial Intelligence (AI), and this trend is set to escalate in 2024 and beyond. There will be conflicts between existing laws and the developing regulations along with a good dose of politics. In the United States, we will likely see a patchwork of AI regulations similar to what we have seen with data protection and security breach laws. Companies should understand the potential positive and negative impacts of the AI technologies they are deploying and identify how they fit into existing and developing regulatory regimes. Developing and implementing AI governance in the form of thoughtful, stage-appropriate policies and internal controls will not only be a legal requirement but a commercial necessity.

The FTC and the Regulation of AI. While there is no mention of AI in the FTC Act, the FTC has clearly demonstrated that it views the regulation of AI through the lens of its mission to protect consumers. As demonstrated by the recent FTC enforcement against an American drugstore chain, the FTC intends to closely scrutinize the use of AI facial recognition technology. We anticipate that the FTC will continue to exercise its regulatory authority when it believes AI has been developed or deployed in an unfair or deceptive manner. Companies need to consider the impact their products may have on consumers and implement appropriate privacy and security safeguards when deploying new technologies.

Algorithmic Disgorgement. In 2023, the FTC continued to use algorithmic disgorgement as a legal remedy—requiring companies to delete or destroy algorithms and models developed using improperly or illegally obtained data. With the growing interest in regulating AI, companies developing and/or tuning machine learning (ML) models should adopt internal controls to ensure that they can demonstrate the provenance of the data and the lawful bases for its use.

Synthetic Media. Advancements in ML and computing power are making the technology to create synthetic media widely available. High-fidelity deepfakes pose significant threats in terms of misinformation, fraud, personal safety, and privacy violations. They have the potential to undermine trust in digital content, as they can create highly realistic but entirely fabricated images, videos, or audio recordings, making it challenging to discern truth from fiction. Companies developing or deploying synthetic media technologies should develop internal controls to meet forthcoming regulatory obligations and protect against abuse.

Cybersecurity and AI. In 2024, AI will significantly impact both the creation of sophisticated cyberattacks and the enhancement of defense measures. Concerns are growing especially due to lapses in AI/ML project security, AI's integration into cybercrime (including its use in ransomware, phishing and other attacks, and security bypassing), and threats from AI blind spots in organizations (like unsanctioned AI tools or insufficient guardrails around sanctioned ones). Perhaps most significantly, the 2024 election faces enormous challenges from AI-enabled disinformation. The rise in AI-driven attacks against complex technology layers, like firmware and hardware, and the critical need to protect corporate data and intellectual property from AI tool misuse are pivotal concerns shaping the cybersecurity landscape in 2024.

Digital Assets and Distributed Ledger Technology

Regulation and Compliance Standards to Increase. As with any nascent sector, regulation develops as use and use cases progress. Digital assets (cryptocurrencies, stablecoins, tokenization, and central bank digital currencies) and distributed ledger technology (including blockchain) have seen significant state and federal regulatory development in the U.S. and globally, and this development will only accelerate as the technologies further cement themselves as essential to the corporate sphere and finance more broadly. Regulation is likely to develop through a patchwork of legislation, agency requirements, and court rulings, and entities must keep abreast of this fast-evolving legal space to ensure they comply with all relevant standards.

The Fundamental Impact of CBDCs. Central Bank Digital Currencies (CBDCs) are a digital form of a country's sovereign currency. The issuance of a CBDC facilitates certain benefits, including transparency and immutability, while also improving the transferal and settlement process. CBDCs also present potential challenges, particularly as it relates to increased government oversight and control. China, India, and other countries have already launched CBDCs, while additional nations, including the U.S., UK, Japan, the United Arab Emirates, and Brazil are actively exploring their use. Widespread adoption and use of CBDCs will fundamentally alter global finance, banking, and payment systems, likely resulting in significant changes in related technologies, regulation, taxes, and business more broadly.

Symbiosis with AI. Advancements in AI, and particularly generative AI (genAI), have fueled swift and widespread adoption. This adoption has resulted in significant benefits, but also unique challenges, especially concerning ownership rights and liability. Experts posit that blockchain can be leveraged to provide necessary clarity and immutability regarding AI, particularly as it relates to tracking training data and AI outputs. Similarly, AI can benefit digital assets in regard to optimization, automation, and data management. As these technologies advance, overlap and mutual benefits are likely to further develop while, at the same time, we will see more legislative and regulatory scrutiny.

Technology and Outsourcing Transactions

GenAI Integration with Software/SaaS Offerings Poised to Accelerate. In 2024, we anticipate continuing legislative and regulatory focus on AI that will translate into new regional and national regulations and frameworks that are likely to impact genAI's adoption rate and the manner in which it is deployed. As genAI use cases increase and mature, users and providers of genAI will need to fully comprehend the implications and risks of genAI in order to reap the benefits of this highly transformative technology. In particular, businesses seeking to leverage genAI will need to ensure that each use case is responsibly and ethically deployed, factoring in consent, inherent bias, security and infringement risks, as well as risk of disinformation, among others. Customers will require greater visibility into the legality and quality of data used for training the genAI models and will seek to shift compliance and infringement risk to providers through contractual indemnities and liability provisions. A key first line of defense for managing risk in this rapidly emerging market will be technology contracts that reflect a deep understanding of the risks and issues and address them effectively.

Digital Transformation Will Continue to Be a Key Driver for Outsourcing Deals. As cloud services continue to mature and scale and providers continue to incorporate automation, AI, and other disruptive technologies in their offerings, traditional IT contracts and outsourcing agreements (including traditional approaches to pricing methodologies, Service Level Agreement (SLA) metrics, and contractual risk allocation) are being reassessed to address the unique risks and challenges created by this digital transformation. As a result, IT and outsourcing contracts will need to be appropriately restructured to capture the value and nuances of services increasingly provided over digital channels and consumption-based models. We also anticipate that businesses will continue to embrace digital transformation in customer-facing platforms to enhance user experience and drive revenue, in addition to the historical focus on cutting costs through back-office efficiency.

New Data-Monetization Licensing Models are Gaining Ground. As businesses move beyond traditional data analytics to advanced data-monetizing approaches that combine AI capability with organizational data to generate actionable insights, new licensing models are likely to proliferate, allowing businesses to monetize data via new data-sharing models, such as data pools, cross licensing, and Application Programming Interface (API)-driven open ecosystems. Key business and legal risks and issues for data licensors and licensees will circle around collection, disclosure and use of data, treatment of co-mingled data, compliance with data regulations, and allocation of liability for data usage.

Renewed Interest in Nearshore/Offshore Captive Centers as Part of Sourcing Strategy. We anticipate an increased interest in the global capability center (GCC) service delivery models, particularly for businesses seeking to build internal talent in new tech domains. In recent years, the sourcing market has witnessed a steady increase in U.S. companies establishing new-generation GCCs in nearshore/offshore locations like India, the Philippines, Mexico, Costa Rica, Ireland, and Eastern Europe. Setting up a GCC can yield enormous strategic benefits, but it is a complex undertaking that raises critical operational, business, financial, legal, regulatory, and other cross-border considerations for the organization. These considerations should be assessed upfront and addressed in the relevant contracts to avoid costly mistakes down the road and maximize returns on investment.

Restructuring of Vendor Contracts. As organizations experience "vendor sprawl" across the enterprise, causing product and data silos along with interoperability and security concerns, more organizations are rationalizing their vendor ecosystems. In 2024, we anticipate that the trend of reducing the number of vendors in an organization's environment will continue, presenting unique opportunities for restructuring and renegotiating pricing and other concessions in vendor contracts, including exit clauses and termination fees.

Financial Services

Bank Failures. The failure of several large banks in 2023 will continue to influence the regulatory environment in 2024. We anticipate that banks will face enhanced scrutiny during the 2024 regulatory examination cycle. Banks should review their internal governance and risk management structure to address any deficiencies in process, procedures, and controls. Bank boards should evaluate whether their level of oversight is consistent with the complexity of the bank.

Consolidation. After a relatively slow 2023, we expect the pace of consolidation to increase in the financial services sector. We anticipate that, for mergers involving banks with strong financials and clean regulatory history, the timeline for regulatory approval will accelerate. Before considering an acquisition, whether as the acquirer or the target, banks should review the prospects for a successful transaction with their regulators.

Cybersecurity. The focus on cybersecurity in the financial services sector will continue as regulators intensify their review of how firms manage cybersecurity risk, both through technology and through sound risk management. Banks that rely on outside vendors to support their information security program should confirm that the vendor has adequate resources to protect critical bank data. A bank that experiences a data breach, whether directly or through a vendor relationship, should ensure that disclosures to regulators and affected consumers are timely and complete.

Fintech and AI. We think banks will continue to partner with fintech firms in 2024 to enhance the delivery of customer services, but new partnerships will be subject to intense regulatory scrutiny. Banks should take care to ensure that their vendor risk management program is positioned to evaluate the potential risks of a fintech partnership. Similarly, financial services firms will continue to explore uses for AI, but the evolving AI regulatory framework will determine the pace of innovation.

Consumer Finance and Fintech

Enhanced CFPB Enforcement Process. The Consumer Financial Protection Bureau (CFPB) appears poised to increase its enforcement activities in 2024, including the addition of staff and enhancement of its enforcement investigations process. Late last year, the CFBP announced its plans to increase the number of employees in its enforcement division, allocating 75 new, full-time positions to join the division's 150 current enforcement attorneys and support staff, including the addition of a fifth litigation team. The CFPB also intends to add staff to its legal, operations and research, monitoring, and regulations divisions. CFBP Enforcement Director, Eric Halperin, noted that "(t)hese additional resources will enable us to open more investigations … and meet resource demands from our increasing number of matters…." Moreover, the CFPB intends to enhance certain aspects of its enforcement investigations process, such as improving its ability to meet internal goals for filing and investigating enforcement actions in a timely manner.

Restrictions on Fees for Late Credit Card Payments. Early this year, the CFPB is expected to issue a final rule, amending Regulation Z, which would limit credit card late payment penalty fees. This rule would mandate that late fees charged on credit card accounts be "reasonable and proportional" to the late payment, as required under the Truth in Lending Act (TILA). Specifically, the proposed rule seeks to: (1) lower the safe harbor dollar amount for late fees from $30 to $8 and eliminate the higher $41 safe harbor amount for late fees for subsequent violations; (2) provide that the current provision permitting annual inflation adjustments for the safe harbor dollar amounts would not apply to late fees; and (3) provide that late fee amounts must not exceed 25 percent of the required payment.

Limitations on Overdraft Programs for Large Financial Institutions. In January 2024, the CFPB issued a proposed rule purportedly aimed at closing a "loophole" that exempts overdraft lending services from the requirements of TILA and other consumer financial protection laws. Currently, TILA generally requires lenders to clearly disclose the cost of credit to a borrower, including applicable fees and charges, but provides an exemption from such disclosure requirements for overdraft fees where a bank honors a check when their depositor "inadvertently" overdrew their account. The proposed rule would require financial institutions to treat overdraft fees above a certain threshold as loans subject to the same disclosure requirements and other protections of TILA that apply to any consumer loan product. Under the proposed rule, financial institutions will still be allowed to charge an overdraft fee in line with their costs or in accordance with an established benchmark, but overdraft fees above that amount would necessitate a separate credit account subject to all lending laws. The proposed rule would apply to insured financial institutions with more than $10 billion in assets, which covers approximately the 175 largest depository institutions in the country.

CFPB Rulemaking on Personal Financial Data Rights. In late 2023, the CFPB issued a proposed rule to give consumers more control over their personal financial data once it moves from a bank to a data aggregator or fintech, and to restrict the data that companies can collect, retain, and sell. The proposed rule, which would implement section 1033 of the Consumer Financial Protection Act (CFPA), would: (1) require depository and nondepository entities to make available to consumers and authorized third parties certain data relating to consumers' transactions and accounts; (2) establish obligations for third parties accessing a consumer's data, including important privacy protections for that data; (3) provide basic standards for data access; and (4) promote "fair, open, and inclusive industry standards." The CFPB expects to finalize this proposed rule by the fall of 2024.

Regulation of General-Use Digital Consumer Payment Applications. In late 2023, the CFPB released a proposed rule aimed at regulating larger, nonbank providers of services described as "general-use digital consumer payment applications," including those commonly referred to as "digital wallets," "payment apps," "fund transfer apps," "person-to-person payment apps," and "P2P apps." The proposed rule would regulate companies that process more than five million transactions per year, which would cover roughly 17 big tech companies and payments firms processing 13 billion transactions annually. Such companies would be deemed "larger participants" under the current CFPB regulatory regime and thereby be subject to expanded oversight by the CFPB. According to the CFPB, "digital applications have a share of ecommerce payments volume that is similar to or greater than traditional payment methods, such as credit cards and debit cards," and this proposed rule is intended to bring the level of supervision for these entities in line with the supervision to which banks are subject.

Fair Credit Reporting Act to Cover Data Aggregators and Data Brokers. In August 2023, the CFPB announced it was drafting a proposed rule that would regulate "data brokers"—companies that collect and sell certain consumer data—in a manner similar to credit reporting agencies under the Fair Credit Reporting Act (FCRA). Notably, while consumer credit reporting agencies have long been subject to the FCRA's framework of accuracy requirements, information-sharing restrictions, and other compliance obligations, data brokers have largely avoided FCRA compliance obligations and related liabilities. The CFPB stated that "under such a proposal, a company's sale of data regarding, for example, a consumer's payment history, income, or criminal records would generally be a consumer report." Further, the data broker rule would likely clarify that credit header data (i.e., information like a person's name, age, address, and Social Security number) would also constitute a consumer report. If such data were to be deemed a consumer report, companies that sell such data would have to comply with the FCRA's "permissible purpose" restrictions, which only allow the data to be sold for permissible purposes like employment applications or credit underwriting, and not for purposes like targeted advertising or training AI. A formal proposed rule has not yet been issued by the CFPB but is expected during 2024.

Commercial Finance

High Interest Rates and the Likelihood of Rate Cuts in 2024. High interest rates have caused the cost of capital to significantly rise, which has resulted in less lending and the rise of bank products and treasury services from banking institutions. While it is likely that 2024 will see further uncertainty about the interest-rate environment, significant rate cuts can unleash pent-up demand for commercial lending.

Effects of Bank Restructurings. 2023 saw several major reorganizations—a trend that will likely continue in 2024. We anticipate that these restructurings will have a significant impact on commercial lending and the underwriting of new deals.

Private Debt Keeps Its Powder Dry. Given the current high interest rates and inflation, the cost of assets is very high for dealmaking. Furthermore, all signs currently show a strong labor and economic market. Such strength places a hold in the private debt and lending markets. Therefore, private equity (PE) is sitting on significant reserves of capital. One of the biggest uncertainties in commercial finance right now is how long will PE be willing to wait for the market to cool before putting this dry powder to work.

State and Local Tax

New Revenue Sources. In 2023, states continued receiving revenue from relatively new taxes and fees, including taxes on legalized marijuana and online sports gambling. It remains to be seen whether increased revenues from these sources will put less pressure on more traditional taxes like sales taxes, corporate income taxes, and personal income taxes.

Expanding the Application of Sales Taxes. We expect that states will continue to look at ways to apply sales taxes to new business models, including services provided online. There will continue to be questions about whether some online services are taxable, and in some cases, who should be considered the vendor responsible for collecting sales tax.

Impact of Mandatory Unitary Combined Reporting on Corporate Income Taxes. We expect that, given the trend towards mandatory unitary combined reporting with market-based sourcing across states, key issues will include the composition of the combined group and where the benefit of the service should be considered received for receipts factor purposes.

State Income Tax Withholding and Remote Work. We expect that the trend towards remote work will continue to cause headaches for companies in connection with state income tax withholding. This is also likely to give rise to more frequent personal income tax disputes between individuals and states, especially concerning where individuals are residents as well as the legality of the convenience of the employer test for personal income tax sourcing.

Tax Controversy

IRS Enforcement. In 2023, Congress provided the Internal Revenue Service (IRS) with a substantial budget increase to phase in over a ten-year period. The IRS has issued administrative guidance explaining how it intends to use the additional funding. From a tax controversy perspective, we are watching to see if the additional funding results in an uptick in audits, speedier appeals, or a more streamlined way to respond to IRS notices.

Focus of IRS Audit Resources. In 2023, the IRS heavily audited a relatively narrow range of fact patterns (*e.g.*, perceived tax shelters like captive insurance companies and transfer pricing issues involving multinational companies). We expect the IRS to continue to target select fact patterns, and we are also watching to see if the IRS broadens its audit focus, given its additional funding and audit personnel.

U.S. Federal Tax

Does the Tax Code Require a Realization Event? In December 2023, the U.S. Supreme Court heard arguments in *Moore v. United States.* In *Moore*, the taxpayer challenged the constitutionality of the repatriation tax under Section 965 of the Internal Revenue Code (the Code), which imposes a one-time tax on the undistributed post-1986 profits of a foreign corporation that is majority-owned by U.S. persons. Under Section 965, only U.S. shareholders that own more than 10% of the stock of the foreign corporation are subject to the tax, which is applied regardless of whether the earnings are distributed or whether the shareholders own the shares when the profits are earned. The Moores argued that income can only be taxed if it is realized *(i.e.*, received). The main concern for a ruling in favor of the government is that it could be viewed as giving Congress the right to impose a wealth tax or broader items, but a ruling in favor of the Moores would put other well-established provisions of the Code, like partnership taxation and long-standing international tax rules, into question. A decision is expected in June 2024.

Chevron Doctrine Under Supreme Court Microscope. In *Loper Bright Enterprises v. Raimondo*, a group of commercial fishermen challenged a rule issued by the National Marine Fisheries Service requiring the fishing industry to pay for observers who monitor compliance with fishery management plans. The petitioners have asked the Supreme Court to overturn its 1984 decision in *Chevron U.S.A. Inc. v the NRDC,* which established the Chevron doctrine. The Chevron doctrine generally provides that the courts should defer to federal agencies when Congress delegates rule-writing authority to an agency (or where a statute is ambiguous) as long as the agency's interpretation of the regulation is "reasonable." At oral argument, held in January 2024, the conservative justices seemed ready to overturn the Chevron doctrine. If the Chevron doctrine is overturned, court review of income tax regulations and policy will likely revert to the 1979 decision in *National Muffler Dealers Association v. U.S.,* which gives judges the authority to determine whether to give deference to the U.S. Department of the Treasury (the

Treasury). In practical terms, we may see longer review and comment periods when the Treasury is adopting tax regulations. A decision in Loper is expected in June 2024.

Private Equity – Limited Partner Exception from Self-Employment Taxes. In 2018, the IRS launched a Self-Employed Contributions Act campaign. As part of this campaign, the IRS has focused on limited partnerships that rely on the limited partner exception (LP Exception) in section 1402(a)(13) to avoid including a limited partner's share of limited partnership ordinary income in their computation of net earnings from self-employment. In late 2023, in *Soroban Capital Partners, LP v. Commissioner,* a case of first impression, the United States Tax Court held that it must apply a functional analysis test to determine whether a partner in a state law limited partnership is a "limited partner, as such" for purposes of the LP Exception. Absent reversal on appeal, this case could have wide ramifications as limited partners, including those in PE funds structured as limited partnerships, will need to review whether they are limited partners under the functional analysis test and determine if they should reassess their previous reporting. Moving forward, we are watching to see how the court applies the functional analysis test if the case moves to trial, whether the petitioner will appeal the court's decision, and what guidance the IRS issues with respect to the LP Exception.

Energy Taxation. In 2023, the Treasury and the IRS issued significant guidance implementing the changes to the Code enacted in the Inflation Reduction Act (IRA) of 2022. The guidance includes the following: IRS notices implementing the first round of applications for the Section 48C Advanced Energy Project Credit; IRS notices on eligibility for bonus credit programs for domestic content and energy communities; proposed Treasury regulations regarding elective payments and transfers of certain energy tax credits; proposed Treasury regulations regarding the Section 45X advanced manufacturing production tax credit; proposed Treasury regulations regarding prevailing wage and apprenticeship requirements for enhanced energy credit rate; proposed Treasury regulations regarding the definition of Section 48 energy investment tax credit; and proposed Treasury regulations regarding the Section 45V hydrogen production tax credit.

International Tax

Pillar Two: Global Minimum Tax. In 2021, the Organization for Economic Co-operation and Development (OECD) released the Model Global Anti-Base Erosion (GloBe) rules (Model Rules) under Pillar Two. Under these rules, member countries agreed to enact a jurisdictional-level minimum tax system with a minimum effective tax rate of 15% applicable to multinational groups with a consolidated revenue of over €750 million. The Model Rules include the income inclusion rule (IIR), undertaxed profits rule (UTPR), and domestic minimum tax (also referred to as the qualified domestic minimum top up tax or "QDMTT"). As of December 31, 2023, the IIR and QDMTT went into effect in many jurisdictions for fiscal years beginning on or after January 1, 2024, and the UTPR is expected to come into effect on December 31, 2024, for fiscal years beginning on or after January 1, 2025. Countries that have enacted or have plans to enact the IIR and/or QDMTT include Australia, Canada, Japan, South Korea, Vietnam, the European Union member countries, Switzerland, and the United Kingdom. While, the U.S. has not enacted any Pillar Two Model Rules, in 2022, the corporate alternative minimum tax (CAMT) was enacted as part of the IRA and came into effect for fiscal years beginning on or after January 1, 2023. The CAMT imposes a 15% minimum tax on the adjusted financial statement income (AFSI) of large corporations with an average annual financial statement income exceeding $1 billion. Additionally, the global intangible lowtaxed income tax (GILTI), which is concerned with income earned from intangible assets by controlled foreign corporations (CFCs), has already been in force since 2018. The GILTI tax rate is between 10.5% to 13.5%. U.S.-headquartered, ultimate parent entities will have to contend with the Model Rules that have been, or will be, enacted in foreign jurisdictions in which their subsidiaries are located. For instance, in jurisdictions that have adopted the QDMTT, the QDMTT is expected to apply before any GILTI allocations, and any allocations of taxes paid under GILTI will not be considered when determining the local QDMTT liability. However, there are safe harbor rules that could mitigate this result. Going forward, for many multinational groups, compliance with new annual tax filings will be a more complicated effort. Companies that fall under the CAMT and GILTI rules (and any similar CFC rules), will have to reconcile the application of these rules with the Model Rules in foreign jurisdictions in which they have subsidiaries. Starting from June 30,2026, for calendar-year taxpayers, filing for Pillar Two tax returns, including the GloBE Information Return (GIR) by each constituent entity or a designated filing entity, is required. In jurisdictions where the QDMTT is in force, a QDMTT local tax return filing also will be needed and may need to be filed before June 30, 2026.

Real Estate Investment and Development

Interest Rates. This year, the most important variables for the real estate market are how aggressive the Federal Reserve will be and how quickly rates will fall. The speed at which interest rates move will determine whether a "higher for longer" rate environment will continue to hamper returns for all real estate asset classes or if returns and prices will increase compared to those found in the more recent past. The Federal Reserve is forecasting three interest rate cuts in 2024, while others are forecasting up to four or five cuts.

Commercial Real Estate Loans. Many lenders have significantly tightened their commercial lending standards in 2023 or announced that they would not make any new loans for commercial real estate projects. A number of experts have predicted that the conservative approach to lending will continue in 2024. Once interest rates start to decrease, however, it is also likely that liquidity and capital will become more widely available for loans, potentially enticing some lenders to resume extending credit for commercial real estate projects and helping usher a less stringent approach to lending.

Office Market. In 2023, the office market continued to struggle with the fallout from the abrupt workplace changes brought on by the COVID-19 pandemic, as tenants were shedding space and lenders pulled back from the office market. For many office-building owners, 2024 is shaping up to be a make-or-break year, with their fortunes depending on whether companies can force or entice their employees back into the office on a regular basis or whether work-from-home arrangements become further entrenched and companies decide to spend less on offices that are not fully utilized.

Creative Uses for Office Space. Office-building owners have been looking for creative ways to convert underperforming office space, including notably to residential buildings. To date, few such conversions have been completed due to the multiple technical and zoning challenges they face, but their volume may increase in 2024 if government incentives become more available.

Online vs. In-Person Retail. 2023 saw a pullback in online shopping from its all-time highs during the pandemic and a return to more brick-and-mortar shopping. This trend is affecting not only retail real estate but industrial real estate as well. The industrial sector has been hot with the rise of online retailers' volume during the pandemic, but it may be cooling off. On the other hand, both modes of shopping may benefit from a continued strong economy and retail spending.

Real Estate Finance & Capital Markets

Special Servicing of Commercial Mortgages. We anticipate that the pace of transfers of commercial mortgages into special servicing will increase throughout 2024. Many commercial mortgagees will face interest rate-driven inability to refinance at maturity. In addition, there will be significant payment defaults due to insufficient income to cover debt service, with the office segment facing acute challenges from tenant downsizing and non-renewals, increasing competition for a smaller pool of prospective tenants, and the need for large capital infusions to reposition vacant space to meet modern tenant needs.

Commercial Loan Origination and Securitization. In 2024, commercial loan originations and new commercial loan securitization issuances will likely rise slightly over 2023 volumes but will continue to remain at lower volumes than in recent years. This is due to challenges related to higher interest rates, general economic uncertainty surrounding a potential recession, and Federal Reserve action with respect to interest rates.

A Preference for Workouts and Modifications. Special servicers will be more focused on workouts and modifications rather than on foreclosure or otherwise taking possession of property as real estate owned (REO) property, in part in an effort to preserve the lower than current market rate of interest that the borrower's loan carries. Nonetheless, foreclosure filings will likely increase as special servicers elect to dual-track both foreclosures and workout negotiations in order to retain the ability to foreclose in a timely manner should negotiations with borrowers break down.

Challenges Facing SASB Loans. Large loan single asset single borrower (SASB) securitizations present discrete issues related to the single property, all-or-none aspect of the securitization and are likely to face headwinds in today's economic climate. In 2024, the effects of such headwinds will be particularly visible in the marketplace as SASB securitization issuances have outpaced conduit securitization issuances for most of the past five years.

Challenges in Structuring CLOs and Other Securitization Structures. We anticipate that collateralized debt obligations (CLOs) and other securitization structures will be tested in 2024 and beyond. While these structures have shown resiliency to date, the structuring complications and distinctions that these structures present will create challenges in the industry.

Corporate

Corporate Transparency Act. As of January 1, 2024, the Corporate Transparency Act (CTA) requires most business entities to file information with the Financial Crimes Enforcement Network (FinCEN) related to their beneficial owners. The CTA is intended to enhance transparency in corporate structures and ownership as an effort to combat illicit activity. Reporting companies under the CTA include corporations, LLCs, limited liability partnerships, limited partnerships, and business trusts formed in the United States, or foreign entities registered or qualified to do business in any state. The CTA also provides an exemption for several entities, including Securities and Exchange Commission (SEC) reporting companies, "large operating companies," and other certain regulated entities (e.g., banks, credit unions, and public utilities). If the CTA applies, companies formed prior to January 1, 2024 must file their report by January 1, 2025. Companies formed after January 1, 2024 must file within 90 days of their formation. Companies formed after January 1, 2025 must file within 30 days of their formation. Failure to comply with CTA reporting requirements may result in civil and criminal penalties.

Private Equity

Acquisitions and Dispositions. PE acquisition and disposition activity is anticipated to be robust in 2024 due to a confluence of factors, including significant dry powder for the PE industry as a whole, a stable lending environment, a healthy domestic economy, and an easing of monetary policy and federal government paralysis during the election year.

Consolidation Strategies. A principal driver of acquisition activity for PE this year will be the push for additional acquisitions for funds to buy and build strategies. A number of middle-market PE funds are focused on growth strategies derived from industry consolidation and then sales of those consolidation strategies to larger strategic buyers or larger PE funds. This consolidation strategy will be a driver for growth in the industry.

Private Equity and AI. The use of AI in diligence and financial modeling will continue to accelerate as PE funds look to streamline their diligence efforts and to adopt efficiencies in their investment process.

Employee Benefits

Pension Plan De-Risking. The rate of pension de-risking transactions, including lump sum offerings, annuity purchases, and plan terminations, has accelerated in recent years as companies look to move pension liabilities off their balance sheets. The IRS and Department of Labor (DOL) are expected to release new rules governing de-risking transactions in 2024, as required by the Setting Every Community Up for Retirement Enhancement (SECURE) 2.0 Act of 2022.

401(k) Plan Risk Management. Over the last several years, Plaintiffs' firms have brought suits challenging the prudence of investments and plan expenses under increasingly novel theories, and we anticipate this trend will continue in 2024. In response, companies continue to focus on ways to reduce their risks in managing 401(k) plans through fiduciary processes and plan-design decisions.

Inclusive Family Benefits. Over the last few years, employers have increased focus on providing inclusive family benefits, including fertility support (through both major medical and separate arrangements), adoption and surrogacy reimbursement plans, paid family leave, and paid caregiver leave. We anticipate that this trend will continue as many employers see such benefits as a significant advantage when competing for employees in today's tight labor market.

Integrated Leave Management. With the proliferation of state paid leave and state disability arrangements, employers are increasingly focused on providing efficient and integrated leave programs for employees that satisfy state and local requirements. Such programs include short term disability, long term disability, paid family and caregiver leave, and paid time off (PTO).

Investment Management

SEC's Proposed Rulemaking. The SEC's ambitious rulemaking agenda is likely to be headline news in 2024, particularly given the sense of urgency imbued by the looming presidential election. There are numerous investment management-related proposed rules, including rules that could mandate climate risk disclosures, require that registered funds adopt swing pricing, regulate the use of predictive data analytics, and mandate registrants' approach to cybersecurity risk management. It will be important to watch for new rulemaking by the SEC to determine whether new policies and procedures will be necessary to address any new rules.

Private Fund Adviser Rule. The industry is likely to spend much of 2024 grappling with the implications of the private funds rule adopted in 2023 and preparing to implement its requirements. The litigation challenging the validity of the rule will also be closely watched.

Corporate Transparency Act. Compliance with the CTA will need to be addressed in 2024, particularly for state-registered investment advisors and private funds that are not managed by SEC-registered investment advisors.

Investment Advice Fiduciaries Under ERISA. The DOL's attempt to define who is an investment advice fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) in the newest iteration of the so-called "fiduciary rule" will be closely monitored because it could have a significant impact on the retirement marketplace for investment products and services. In light of the 2024 presidential election, the rule's progression is expected to take place on an accelerated schedule. When the rule comes into effect, it will be important for investment professionals to carefully review client and potential client relationships to determine if they fall under the proposed new rule.

Energy

Corporate Offtake Options. In 2023, there was not only a continuing rise of 24/7 energy-matching contract structures for clean energy leaders, but also the emergence of restructuring (or litigating) out-of-date virtual power purchase agreements. In 2024, corporate energy offtake options will continue to diversify as markets change and corporations and developers creatively combat barriers, such as additionality, rigid regulatory structures, interconnection, grid congestion, or otherwise. Expect creative, front-end solutions in energy-related contracts to back-end problems as the corporate energy offtake market matures.

Behind the Meter. The days of full retail net energy metering may be behind most energy users, but the future of distributed, behind-the-meter energy still looks bright. Both large energy users and average residential users have more options than ever to self-supply their own energy via local energy projects sited on or near their properties. The continuing challenges, particularly in areas operating under the regulated monopoly paradigm, are for energy users to be able to self-supply under the regulatory structures that often favor utility generation. These challenges will require new and innovative solutions.

Environmental Justice. As energy production in the United States continues to move away from traditional fossil fuel sources and towards new sources of renewable energy, the need for new projects and infrastructure will continue to increase. This need for siting and constructing new projects has the potential to interact and overlap with the Biden Administration's environmental justice initiative, Justice40. With more clean energy projects moving closer to being shovel ready in 2024, there will likely be more instances where these two goals clash.

Energy, Chemicals, and Infrastructure Project Funding. According to a new January 2024 International Energy Agency (IEA) report, in 2023, worldwide renewable energy capacity increased at the most rapid rate in the last 20 years. The report noted that, in 2023, nearly 510 gigawatts of new renewable electricity were installed worldwide—a nearly 50 percent increase in growth over 2022. Behind this substantial increase in clean electricity capacity was the development of significant increases in clean liquid and gaseous fuels, chemicals, and infrastructure projects. The U.S. clean project increases in 2023 are the direct result of the nearly $800 billion provided by two principal federal statutes, the Infrastructure Investment and Jobs Act (IIJA) of 2021 and the IRA of 2022. The IIJA created significant new grant, loan, and loan guarantee opportunities for clean energy, chemicals, and infrastructure, while the IRA added to these funding opportunities and also created additional new and expanded clean energy tax incentives. These funding opportunities and tax incentives are available for 5–15 years and, thus, these projects will continue to result in strong industry growth in 2024 and beyond.

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