Congress Divided: An Insider's View on Priorities for Corporate America Sam Gandhi, Peter Roskam, Michael Borden, and Patricia DeLoatche March 2021

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Sam Gandhi:

Hello. I'm Sam Gandhi and welcome to the Sidley Podcast. In this podcast, we talk about the tightly divided congress and the bipartisan relationships behind the scenes that could help move legislation. We are talking with Sidley partners Peter Roskam and Michael Borden and Sidley senior policy advisor Patricia DeLoatche.

But after we recorded this podcast on Saturday, March 6, the senate passed the COVID relief bill. It highlights one of the issues we focused on in this episode: how difficult it will be for the Biden administration to achieve its very ambitious agenda. The house is slated to vote on the legislation on Tuesday, March 9.

We now present my conversation with Peter, Pattie, and Michael. Enjoy.

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Impeachment is behind us and President Biden moves on to governing. Georgia voters gave Democrats a 50/50 senate with Vice President Harris the tiebreaker, but now comes the hard part, getting things done. From COVID relief to infrastructure to immigration, how much of the Biden agenda can make it through a still divided Congress.

In today's podcast, we consider compromise or gridlock and what it all means for business.

Peter Roskam:

I think there's a real danger of further corrosiveness. Now there's questions from some Democrats about whether they want certain Republicans to even cosponsor their bills.

Michael Borden:

During the next few months, keep an eye on congressional oversight of the pharmaceutical industry.

Patricia DeLoatche:

The current budget reconciliation bill is the fiscal '21 budget reconciliation. The Democrats in the Senate and the Democrats in the House have another bite at the apple because they can pass a fiscal 2022 budget reconciliation.

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Sam Gandhi:

From the international law from Sidley Austin, this is the Sidley podcast, where we tackle cutting-edge issues in the law and put them in perspective for businesspeople today. I'm Sam Gandhi.

Hello, and welcome to this edition of the Sidley podcast, episode number 18. Today we focus on the effect of a tightly divided congress in the Biden administration, what can be accomplished on the legislative and regulatory fronts, and the potential impact on the business world. I'm rejoined by Sidley partners Peter Roskam and Michael Borden, and Patricia DeLoatche, a senior policy advisor within the firm. This is a follow-up to our podcast from last year in the wake of the election.

Peter is a member of Sidley's government strategies practice. He provides strategic counsel to clients whose business needs involve law, government, media, and public policy, and he's a former six-term U.S. representative from Illinois and held some of the most significant positions in the House during his tenure, from 2007 to 2019. Peter is a partner in the firm's Chicago office.

Michael leads Sidley's government strategies practice and is also a member of its white-collar government litigation investigations practice. He counsels clients facing complex and high-stakes challenges involving congressional investigations, legislation, and federal government regulation, and he joined the firm after working for almost a decade on Capitol Hill, including as senior counsel on the House Financial Services Committee during the financial crisis and the enactment of the Dodd-Frank Act. Michael's a partner in our firm's Washington, D.C. office.

Pattie is a member of the firm's government strategies and food, drug, and medical device compliance and enforcement practices. She provides strategic advice on legislative and regulatory issues before the

administration, the congress, and federal agencies, and she joined the firm after more than 25 years as a leading health policy advisor to key members of congress. She's served on health-related committees and developed, negotiated, and implemented significant health legislation. Pattie is a senior policy advisor with the firm's Washington office.

Peter, Michael, and Pattie welcome back to the podcast.

Peter Roskam:

Thanks, Sam.

Michael Borden:

Thanks, Sam. It's good to be back.

Patricia DeLoatche:

Thanks, Sam.

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Sam Gandhi:

Let me start in with the balance of power giving Democrats the barest control of congress with Vice President Harris casting the tiebreaking vote. The future of Biden's ambitious legislative agenda remains uncertain, and Republicans remain poised to block most of Biden's proposals. In fact, just last Friday we saw not one Republican in the House voted for the COVID relief package, but 50/50 control permits action on some legislation that just can't be filibustered. So Peter, what can Biden get passed and what do you think he's likely to need to give up?

Peter Roskam:

The 50/50 senate means that there's great limitations, but the Biden administration has a couple of vehicles that they can use to do an end-run around the Senate filibuster rule, the rule that requires 60 votes. This is known as the budget reconciliation process, and so what you're seeing now is that the COVID relief package, which is a massive effort, is going to make its way to the President's desk in the middle of March, and therein lies an incredible accomplishment.

There will be another budget reconciliation vehicle that they're going to use this fall to do some sort of agenda. I predict it's going to be largely in the tax space and some of those things along those lines. Keep an eye out for a third vehicle, and the third vehicle, and I hope we can talk about this a little later in our podcast, is an infrastructure program, but there's limitations, yes, but there's other vehicles by which the administration can move.

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Sam Gandhi:

Pattie, clearly the filibuster is here to stay. We saw some democratic senators talking to the media, or talking to the public about how they're not giving up the filibuster, so typically we need a supermajority of 60 senators to pass major legislation, so given that reality what role do you see a 50/50 Senate playing in legislation?

Patricia DeLoatche:

To your prior question, what can the Senate and what can Congress pass, the legislation it has to pass every year is the appropriations legislation. The appropriations legislation funds the federal government annually, so if that legislation is not passed, and it usually passes on a bipartisan basis, the government doesn't run and the government shuts downs, so the Senate will be forced to work together to get something through.

In addition, the other thing that I think is always missed is there are a lot of areas where there is bipartisan agreement and it's been ongoing for many, many years. When I worked in the Senate, you know, I think that what got the news were all the bills that didn't pass because there was partisan bickering, but there's a lot of legislation that does pass that is bipartisan, but it just doesn't get the headlines. It isn't exciting so the media doesn't report on it as much.

And I wanted to bring up one other point about budget reconciliation that Peter was alluding to, is the current budget reconciliation bill that we're working on is the fiscal '21 budget reconciliation bill because Congress couldn't pass a budget resolution last year, so we have the Democrats in the Senate and the Democrats in the House have another bite at the apple because they can pass a fiscal 2022 budget reconciliation bill this year as well.

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Sam Gandhi:

I'm just going to follow-up with you on one thing, Pattie. Do you think ... just going back to what Peter was talking about, in terms of infrastructure. Do you think infrastructure is kind of the first arrow that they're going to sling to try to really create a more united basis for legislation?

Patricia DeLoatche:

Absolutely, and Michael may want to talk a little bit about this. The other reason that I think there's going to be more bipartisan activities is with the earmarks coming back there's going to be a lot of incentive to get legislation through because these members of Congress are going to have their special projects funded through these earmarks that have been brought back to Congress this year.

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Sam Gandhi:

Michael let's go to that because just given the partisan wrangling, we're still likely to get in Congress. How do the Democrats and Biden advance their agendas if they can't kind of run through legislation?

Michael Borden:

So, as Peter and Pattie have said, legislating during the next two years is going to be difficult for Democrats, but to advance their agenda I would say keep an eye on three different tactics. First are executive orders, and you're probably familiar with these. Since taking office, President Biden has signed more than 50 executive orders, actions, and memoranda aimed at rapidly addressing the COVID pandemic and dismantling many of former President Trump's policies. In fact, 22 are direct reversals of Trump policies.

The executive actions Biden has taken in the first days of his administration include halting funding for the construction of the border wall, reversing Trump's travel band targeting largely Muslim countries, imposing a mask mandate on federal property, ramping up vaccination supplies, and requiring international travelers to provide proof of negative COVID-19 tests prior to traveling to the United States. Now, President Biden has come under some criticism for the number of executive actions he's issued, but

he says that these have been necessary to undo what he considers truly bad policy inherited from President Trump, especially on immigration.

But the second issue to consider is the return of earmarks, as Pattie had hinted. At the end of February, House Appropriations Committee chair, Rosa DeLauro revealed a long-awaited proposal to restore earmarks. As you know, an earmark is the discretionary spending provision that directs funds to a specific recipient. Democrats are rebranding earmarks as community project funding, and after a decade-long earmarks ban, this would allow Congress to decide where to spend and where to appropriate funds rather than the current practice of allowing agencies to decide where money will ultimately flow.

This overhaul is an attempt to break from the politically taboo reputation of earmarks as wasteful spending and secretive pork-barrel spending. It could also provide an incentive for members of both parties to support the next major funding deal or an infrastructure spending deal since lawmakers can take credit for securing funding in their districts. Senate majority leader, Chuck Schumer, told reporters that he had already instructed committee chairs to start drafting infrastructure legislation, so he said... so, "We can out-compete China and create new American jobs," and he pointed to a three trillion-dollar infrastructure package as the next priority for Democrats after they wrap up coronavirus relief.

President Biden and his team have already begun discussions with key members of Congress on the infrastructure package. Particularly mindful, they've said, of Texas's recent struggles with power outages and water shortages after the brutal winter storm. We're still learning how earmarks are actually going to work, but we know that the earmark revamp will include capping the overall amount of money spent on earmarks to 1% of discretionary spending and allowing lawmakers to submit no more than 10 project requests.

All the requests are going to be posted online. Lawmakers and their immediate families can't have a financial stake in the requests. A federal watchdog will periodically audit a sampling of earmarks, and members are going to have to justify their requests with evidence from their communities of their value and community purpose. But this is a really great opportunity for Congress to really start legislating again, and it's a great opportunity for

the private sector to look for additional directed funding from members of Congress and for key projects that are in every individual member of Congress's district.

Finally, I'd point out a third tactic that is increasingly important. Members of Congress follow and chase the news. They use events to identify and advance policy priorities, and you have to look no further than the house financial services committee hearings on the GameStop trading frenzy. Chairwoman Maxine Waters hauled the CEO of Robin Hood, Citadel, and Melvin Capital to testify in a hearing that lasted nearly six hours, and during the hearing, Mrs. Waters said that the recent volatility had put a national spotlight on institutional practices by Wall Street firms and prompted discussion about the evolving role of technology and social media in our markets.

True, but none of these issues was a priority of hers more than a month ago. Now she is planning to hold at least two more hearings on the topic and look for ways to legislate. Events like this show that investigations can be powerful drivers of the congressional agenda. They don't just create serious risks to the targets of an investigation, they provide opportunities to advance new laws. And during the next few months, keep an eye on congressional oversight of the pharmaceutical industry, particularly as it relates to COVID vaccines and relief, also green energy.

Congress wants to promote energy alternatives to fossil fuels and carbon. I expect they'll put traditional energy producers under a bright spotlight to try to show the need to address climate change. So, these are the three tactics, executive orders, and regulatory action, potentially the return of earmarks to grease big-spending legislation, and finally congressional investigations are going to drive the congressional agenda.

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Sam Gandhi:

Do you think that the issues that are going on in Texas, with their utilities and their closed system, is more likely to be remembered when they're looking at infrastructure legislation, or do you think that is kind of a flash in the pan by the time legislation comes up?

Michael Borden:

So, members of Congress have short attention spans, but there are certain moments that stick in member's minds, and I think that ... for example, the GameStop situation is going to drive potential financial regulation. I think the same is the events in Texas are going to have an impact. Now, it's going to impact, frankly, both. It's going to energize both sides in different ways. For Democrats, they're going to say that this is proof that we need to modernize the power grid. We have to prepare for a new generation of green power. Republicans are going to say this is the danger of a new green deal. This is what happens if you don't have a robust fossil fuel and traditional energy sources to power our neighborhoods, and so I think that ultimately what you'll see when they eventually pass a bill, is you're going to see Democrats focusing on funding green projects and Republicans who are going to have a role in an infrastructure package funding and focusing on reinforcing more traditional sources of energy.

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Sam Gandhi:

You're listening to the Sidley podcast. We're joined by Sidley partners Peter Roskam and Michael Borden, and Patricia DeLoatche, a senior policy advisor with the firm. We're discussing policy implications arising out of the results of the Georgia runoff and the evenly split Senate.

A number of years ago the business community used to say they'd pray for gridlock. They think gridlock is a lot better for business than when Congress actually passes legislation. Do you think that's still the same, Peter?

Peter Roskam:

I'm laughing, Sam, when I hear you ask that question. My predecessor, Henry Hyde, said that there's one thing worse than gridlock and that is the greased shoot of government, and so this goes back to things move slow and then things move fast, and then they're slow again, but to your point, look, there's a lot of anxiety out there in the business community that we're hearing from. Anxiety about an agenda that if it's driven policy by bumper sticker that's a concern, and so now is the time for people to be mindful of that. To say, look, there's an opportunity to weigh in and have an influence on these policies, but I would say in answer to your question, yes, there's a

high level of anxiety based on communications that are inbound for us right now.

Michael Borden:

I think there's a fear of new regulations, new taxes, and so generally the status quo is probably better than what can come.

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Sam Gandhi:

Do you think it's likely that we're going to see, after COVID relief, legislation on infrastructure and immigration or do you think it'll be one or the other, or you think it'll be neither of them?

Peter Roskam:

I think it'll be infrastructure but not immigration, and I'd set my clock to it.

Patricia DeLoatche:

I think that infrastructure, and I do think that there may be some areas of agreement with immigration, so I wouldn't be surprised if something happens regarding immigration this year.

Michael Borden:

And the challenge of immigration is the all or nothing approach, and for so long it's been we've got to have comprehensive immigration reform, or we won't do any of it, because without some of the sweeteners that everybody agrees on you can't get to permanent status for people, and so I think that if Democrats are willing to take some victories then you can have both, but it's going to be really, really hard.

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Sam Gandhi:

Let's move to foreign policy. We spoke about this in our last podcast at the end of last year, and specifically, we spoke about China. After President Biden's call on February 10 with the Chinese president, the White House said in a statement that Biden raised fundamental concerns about Beijing's coercive and unfair economic practices and its crackdown in Hong Kong, human rights abuses in Xinjiang, and increasingly assertive actions in the region.

So Peter, how do you think the Biden administration is going to handle China? When we talked last year, we thought there was not going to be such a huge pivot but that it would be a different tone. Do you think that's happened?

Peter Roskam:

I do. I think that that's what's manifesting itself right now and that what we predicted last fall is coming to fruition today. So look, there's been a bipartisan shift in this country over the past five years about our attitude towards China, and it's not just one party that's been driving this. You'll recall Senator Schumer has been a long-time critic of Chinese currency manipulation. Speaker Pelosi has been a long-time critic of China's treatment in terms of Tibetan democracy and so forth, and now there's this focus on China in an adversarial role, and so what you're seeing, I think, is very little flexibility that the Biden administration has because this Congress has made up its mind that it wants to be aggressively poised towards China.

So, then it begs the question, okay, what can President Xi put on the table to coax something out of the Biden administration, and Sam, I would submit not much right now. They can't put Hong Kong on the table, they're not going to. They're not going to put Xinjiang on the table, they're not going to but the Belt and Road Initiative, or South China Sea, or Taiwan. So, what can they put on the table? They can put some things as it relates to tariffs and so forth, but President Biden has said he's not interested in negotiating until he can receive ... or until he's got the benefit of maximum leverage.

So, that's all to say that for Chinese facing entities and Chinese facing companies that are doing business there there's not much of a thought, at this point, in terms of a shift in the administration has meant a shift rhetorically but I don't think substantively at this point.

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Sam Gandhi:

Do you think that's the priority of the Biden administration's foreign policy? We've already seen actions in Syria against Iran, we're starting to see unrest in Myanmar. There are things piling up. Where do you see the focus of the Biden administration's foreign policy beyond China?

Peter Roskam:

The top priority for the administration is going to be gathering allies around all these initiatives, so not going at it alone, not saying it's the United States and take it or leave it, and so forth, but to build out a coalition, particularly with our allies in Europe, and to restore that relationship, because I think what the president wants to do is to use not just North American market power but use European market power, vis-à-vis the Chinese in particular, and if he can create that sort of bullwork moving forward that inures to all kinds of benefits on COVID relief and every other effort you can imagine.

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Sam Gandhi:

I want to shift, Pattie, back to you in terms of going back to this very tight Senate, and frankly a tight House. COVID relief passed just the other day with only seven votes. They lost two Democratic votes, and that's a very, very, very tight margin, and we've discussed the odds regarding passing legislation and pursuing regulation with this very tight Congress. What else should we be focusing on with the very slim majority the Democrats have?

Patricia DeLoatche:

Well, one thing that is really important to monitor is the Senate, and I actually worked in the Senate in 2001 when there was a 50/50 Senate. The Republicans were in charge because George W. Bush was president at that time. However, Senator Jim Jeffords of Vermont, who is a Republican, and he chaired the Senate Health, Education, Labor, and Pensions Committee, got very frustrated with the Bush administration, and switched parties in May 2001, so that essentially put the Democrats in control of the Senate. One senator change the entire dynamic, all the chairs became Democrats and the agenda on the Senate floor changed.

The decision had been made after the presidential election, in the election of 2000, to split the staff salaries and the committee office space 50/50 but when Senator Jeffords ... I remember it like it was yesterday. When Senator Jeffords made that decision the Republicans just were shell shocked, and I remember he was very close to Senator Grassley, they came into the House of Representatives together, and Senator Grassley was ... the story was that he was talking to Senator Jeffords just pleading, and just saying please don't do this, and Senator Grassley was chair of the Senate Finance Committee at the time.

So I think it's ... especially with this discussion about minimum wage, and there's talk about the frustration that some of the Senate Democrats, the more progressive wing, are having particularly with Senator Joe Manchin of West Virginia, and why he isn't supportive of increasing the minimum wage in this budget reconciliation package, and I even heard someone yesterday say, yeah, go ahead and let him switch parties. We don't care. We're so mad at him. He isn't a true Democrat. So those types of conversations can really ... because that's kind of like what happened with Senator Jeffords at some point. People were really frustrated with his very liberal policies, and so I think we need to keep an eye on the dynamics in the Senate.

And Peter can talk about this, too, is the House of Representatives is already in election mode. Every two years the entire House of Representatives is up for re-election, and as you mentioned, Sam, it's a very, very tight House.

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Sam Gandhi:

I think it'd be a little remiss if we didn't acknowledge the events of January 6 and the deadly insurrection at the Capitol. Events like that, that are fairly monumental, and also very personal to a lot of the members of Congress and their staffs. How will those events impact this Congress and will those relationships among the members be worse in the aftermath of this Senate impeachment trial?

Peter Roskam:

I think there's a real danger of further corrosiveness of these relationships, and I'll just give you an example. Now there's questions from some Democrats about whether they want certain Republicans to even cosponsor their bills, or to lead their bills if they were involved somehow in challenging the election of Joe Biden and so forth. So, it's a level of animosity that at one hand has increased, but it begs the question how long will that last. So, to go back, Sam, to our earlier discussion on the infrastructure conversation, does that create a new opportunity and sort of a new level of coordination and negotiation while both sides are competing for the narrative about what happened in Texas on the energy side of things?

Is there a level of negotiation that can come about using earmarks and creating an environment where people can get to yes on a piece of legislation? The jury's still out and we're ... what's interesting is Congress is downstream from the culture. Congress reflects the culture, and to the level that people are highly animated, and greatly concerned, and we see this manifesting itself all throughout our culture today, that reflects itself in the Congress. So, those events of January 6 were simply heartbreaking, and they caused so much grief, and pain, and fear that it's just breathtaking, and now the question is how does ... article one, how does the first branch of government respond? The expectation is that they've got to navigate through this and come up with a remedy moving forward because to live in this perpetual state of conflict is simply untenable.

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Sam Gandhi:

Pattie and Michael, you two have also witnessed enduring relationships between Democrats and Republicans in your time on the Hill. Can you speak to that and help us get a sense of what goes on behind the scenes?

Patricia DeLoatche:

One thing I wanted to add on to what Peter was just saying about how the impeachment trial will impact relationships in the future, and I think the big question is what type of influences is former president Trump going to have on the Republican party? I listened to his speech to the Conservative Political Action Conference, and he named every member of Congress who voted to impeach him and said he will be working every Republican primary. He also mentioned that a Republican president will make a triumphant return to the White House in 2024, so I thought that was very interesting, and so I think that that also could influence the relationships within Congress in this ... on the 117th Congress.

But in answer to your other question, I worked for Senator Hatch for over 11 years in the Senate, and he and Senator Kennedy did a lot of work together, particularly the Children's Health Insurance Program. That was a result of one of those collaborative efforts. He also had a very close working relationship with Senator Amy Klobuchar. They co-chaired the Rare Disease Caucus and worked hard to bring therapeutics to market for rare conditions. Senators Hatch and Grassley also worked with Speaker Pelosi to reauthorize the CHIP program, and one of the things that I do is I monitor the Senate floor.

I listen to C-SPAN. When you listen to the Senate floor you hear about these bipartisan partnerships. For example, Senator Amy Klobuchar and Senator Blunt worked together on the Inaugural Committee. They were cochairs and they were both talking about what a great relationship they had, that they were good friends, they were able to pull off this inauguration two weeks after the horrible events of January 6. That didn't get a lot of media attention, again, because it wasn't an exciting discussion, but to me, it's an example of how the Senate really behind the scenes there is much more bipartisan relationships than one would think, and I saw it for 11 years.

Michael Borden:

But we can't underestimate the trauma of January 6. A close friend of mine, who was on the House floor and then hiding in the Capitol, I spoke to her that night and she said to me that she was safe, but she wasn't okay, and I think that's still true, and you still have large physical barricades up around all of the House and the Senate office buildings, and the Capitol itself, and that's still ... it's a visual reminder of what happened.

Now most staffers are still working from home and they haven't had a chance to see the people they know, or the friends, or the people they work with because of COVID, and so frankly remote work might actually prolong some of the tension because you don't have a chance to see and be with your friends, and your colleagues, and coworkers, and people who you worked with before. It sort of allows everyone to be a Twitter warrior. You can hide behind your computers and be angry and just spew venom, and so you hear a lot from individual staffers that they don't want to work with each other right now, that it's just not sustainable and it's not the way that Congress will truly work, and it's nothing something that, I think, will endure.

I think that when the House and Senate offices really do open up as soon as we pass through the pandemic, and the trauma of the pandemic, and the traumas of January 6, I think that tempers will cool, people will remember that there's a lot more that we agree on than disagree on and there are a lot of opportunities to actually work together, and it's the only way to actually get something accomplished. So we can't underestimate the trauma, but we shouldn't overstate that it'll last forever.

Patricia DeLoatche:

You know, the thing that I find so troubling because Michael I think you raised really important points about the staff not being in their offices. I was on the Hill during 9/11 and also the anthrax attacks took place like one floor up from my office, and the thing that was different during that time is there was a unity amongst staff and Senators, and there was just this collaborative partnership because we were all together. Now, we were out of our offices for three months in the Senate Hart building after the anthrax attacks, and we're on top of each other in the other offices that we could find, but the events of January 6, it just appears to be so different because Michael's right, nobody really is working in the office buildings.

Very few people are coming into work, and so there isn't that support there that I think was there for us during 9/11 and anthrax, and Peter and I were on a call last week where a member of Congress told us that the congressman next door to him, he hadn't seen him in a year because he has not been coming into the Capitol since COVID. A lot of people aren't. Not just staff but members of Congress aren't coming into the office either.

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Sam Gandhi:

We've been speaking with Sidley partners Peter Roskam and Michael Borden, and Patricia DeLoatche, a senior policy advisor with the firm about policy implications arising out of an evenly split Senate. Peter, Michael, Pattie, this has been a great look at Washington. Thanks for coming back and following up on the development since the election. Thanks for sharing.

Peter Roskam:

Thanks very much Sam.

Michael Borden:

Thanks Sam.

Patricia DeLoatche:

Thank you Sam.

00:31:34

Sam Gandhi:

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