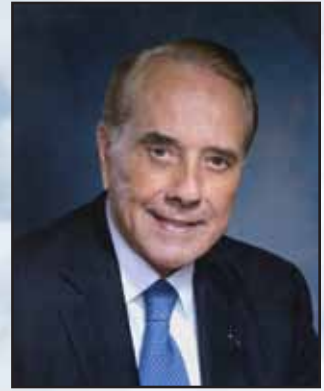




ALSTON + BIRD LLP
Legislative & Public Policy



**2010 POST-ELECTION ADVISORY:
OUTLOOK FOR THE 112TH CONGRESS
& THE LAME DUCK SESSION FOR THE 111TH CONGRESS**

“I’ve seen major shifts in Congress before and I believe this is certainly one of those moments. 2010 will be remembered as a year when a message was sent to Washington on spending and taxes, and more generally on the role of government. Both new and old members must be prepared to hear the message. Still, when the dust settles and it is time to govern, bipartisanship will be just as important as ever on major initiatives, perhaps more so, as the new Congress tries to bring their voices to Washington and the President tries to accomplish major things headed into his re-election campaign. We’ve lived without bipartisanship for two years, and if we’ve learned anything, it is that we’ve got to work together. Already the presidential election cycle is affecting politics, but it will be more evident with the mid-terms behind us. Both parties are under the gun to demonstrate willingness to change their ways. The majority of American voters have said they will no longer tolerate unchecked spending and more and more government.

We hope you will look to Alston & Bird for solutions to problems over the next two years. We have the expertise and excellent contacts on both sides of the aisle, as well as with the agencies, including cabinet members and Administration officials. We look forward to working with you and engaging in new business.”

– Former Senate Majority Leader Bob Dole, Special Counsel at Alston & Bird LLP

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INTRODUCTION

In 2008, the electorate spoke and swept in a new Democratic president with seemingly comfortable Democratic margins in both the House and Senate. With Democrats in control of the House, Senate and White House, an active 111th Congress passed an unprecedented stimulus bill, addressed the transparency issues that brought the economy to the edge of collapse and passed sweeping health care reform that was the centerpiece of the President's campaign. Nonetheless, polling leading up to the election showed that the electorate, regardless of party, was not happy with Congress.

Indeed, the political winds that swept the Democratic triad into power have changed after just 22 months. Mid-term elections generally result in losses for the president's party. However, this year's election has resulted in a significantly greater than average swing comparable only to the Democratic Party's loss of 54 House seats and nine Senate seats in the 1994 midterm elections.

The challenge facing the President is whether he can work with Republicans in the House and a closely divided Senate to introduce legislation that grows the economy and restores consumer confidence, thereby calming the political storm that led to change in the House leadership. The next Congress will face several significant challenges, including tax reform, deficit reduction, energy independence, education reform, transportation/infrastructure revitalization and agriculture reform. If Democrats are not successful in reversing current trends, then today's political climate could spread to 2012 and lead to changes in control of the Senate and White House.

The following advisory looks at the important issues that will be considered under the new political framework of the 112th Congress and during the lame duck session of the 111th Congress.

I. BUDGET/APPROPRIATIONS & INFRASTRUCTURE FUNDING

“The economy will remain the number one issue on the legislative agenda through the post-election session and into the 112th Congress. Newly-elected Republicans who campaigned on a promise of turning the economy around while maintaining fiscal responsibility will now have to face the realities of conducting the business of Congress amidst a fiscal situation with declining revenue projections and rising deficits, all within the construct of a challenging economic environment.”

– **Bob Jones, Leader of the Alston & Bird LLP Legislative & Public Policy Group**

a. FY11 Appropriations

Prior to the mid-term election, only two of the twelve regular annual spending bills had a full Appropriations Committee markup and were considered on the House floor, while not a single Senate spending bill made it to the floor in that chamber. Prior to leaving Washington for a recess through the mid-term election, Congress passed a Continuing Resolution (“CR”) to fund the government through December 3, 2010. During the post-election session that commences on November 15, 2010, Democratic leaders hope to pass an omnibus appropriations measure that will include all twelve spending bills. This would allow Democrats to set spending priorities, even if they are forced to hold down overall funding levels to gain enough GOP votes to get an omnibus package through the Senate.

House Republicans have been urging Speaker Nancy Pelosi (D-CA) not to move forward with an omnibus bill, or at a minimum, not to include any earmarks in the omnibus bill. In March of 2010, House Republicans self-imposed a one-year moratorium on appropriations earmarks. Therefore, any House-passed FY11 appropriations bills will overwhelmingly benefit Democrats. Senate Republicans, led by Senator Jim DeMint (R-SC), have also been campaigning to block an omnibus bill until the newly-elected Republicans are seated.

While some analysts predict that Congress will pass another CR funding the government through early spring, others are increasingly optimistic that an omnibus bill will move during the post-election session. According to Bob Jones, Leader of the Alston & Bird LLP Legislative & Public Policy Group, “Republican leadership may be amenable to moving forward with an omnibus bill during the post-election session because, now that Republicans are in control of the House, they will not want to have to restart the FY11 appropriations bills from scratch, have the current Democrat-crafted bills attributed to them, or pass a year-long continuing resolution.”

b. Deficit Commission

On February 18, 2010, President Obama created the bipartisan National Commission on Fiscal Responsibility and Reform (also known as the “Deficit Commission”) by executive order. The Deficit Commission is charged with making recommendations to Congress designed to improve the country’s long-term fiscal outlook and balance the budget by 2015. The Deficit Commission—which meets once a month and is composed of eighteen members, including six Republican and six Democratic lawmakers—is tasked with submitting its recommendations to President Obama by December 1, 2010. The recommendations must be approved by fourteen of the eighteen members, meaning that both the six Republicans and six Democratic lawmakers on the panel can veto any proposal. House Speaker Nancy Pelosi (D-CA) and Senate Majority Leader Harry Reid (D-NV) have both committed to bring up the panel’s recommendations in their respective chambers without preconditions.

On Monday, October 25, 2010, the *Wall Street Journal* reported that Deficit Commission members were discussing cutting or eliminating popular tax breaks like the deduction for mortgage interest, the child tax credit and the tax-free treatment of employer-paid health insurance. However, Deficit Commission officials have cautioned that, while the report is technically true, substantive negotiations have yet to take place and panel members have ruled almost nothing in or out of the commission's final recommendation. Further, Deficit Commission officials have noted that the panel's members are unlikely to hold substantive negotiations until after the elections.

As would be expected, Republicans on the Deficit Commission are focused on reducing spending as a means of balancing the budget (most of the panel's six Republican lawmakers have vowed to oppose any net increase in taxes), whereas Democrats are more inclined to approve tax increases, at least on upper income and business taxpayers. This ideological split makes it unclear whether an agreement on recommendations can be reached. Further, even if an agreement is reached, it is unlikely that Congress will pass the full set of recommendations released by the Deficit Commission. However, specific recommendations may become part of the larger Congressional debate regarding how best to reduce the deficit.

c. Committee Realignment

With Republicans now controlling the House, and the Democratic majority in the Senate having been drastically reduced, the 112th Congress will see dramatic changes in the make-up of the House and Senate Appropriations and Budget Committees.

Appropriations Committee

In the House, Appropriations Committee Ranking Member Jerry Lewis (R-CA) is likely to be selected by Republican leadership to return as chairman. In order to do so, however, he will need to get a waiver from the Republican steering committee to overcome the party rule limiting Republican chairmen and ranking members to six-year terms (his sixth year ends in December). Behind Congressman Lewis in seniority are Defense Appropriations Subcommittee Ranking Member Bill Young (R-FL), Homeland Security Subcommittee Ranking Member Hal Rogers (R-KY) and Commerce-Justice-Science Appropriations Subcommittee Ranking Member Frank Wolf (R-VA). In addition to the potential change in committee leadership, Republicans will lose three top committee members who opted to leave the House to run for higher office in Labor-HHS Subcommittee Ranking Member Todd Tiahrt (R-KS), Military Construction-VA Subcommittee Ranking Member Zach Wamp (R-TN) and Congressman Mark Kirk (R-IL).

On the Democratic side, with the retirement of Appropriations Chairman David Obey (D-WI), Congressman Norm Dicks (D-WA) is next in line to serve as ranking member. Another significant departure on the Democratic side is the retiring Congressman Alan Mollohan (D-WV), who presently chairs the Commerce-Justice-Science Appropriations Subcommittee. Congressmen Chaka Fattah (D-PA) and Adam Schiff (D-CA) are next in line to serve as ranking member of that subcommittee.

In the Senate, Senator Daniel Inouye (D-HI) will continue his tenure as Appropriations chairman and Senator Thad Cochran (R-MS) will continue his role as ranking member. Republicans will look to replace the following departing members on the committee: Transportation-HUD Appropriations Subcommittee Ranking Member Kit Bond (R-MO), State and Foreign Operations Appropriations Subcommittee Ranking Member Judd Gregg (R-NH), Energy and Water Appropriations Subcommittee Ranking Member Bob Bennett (R-UT), Agriculture Appropriations Subcommittee Ranking Member Sam Brownback (R-KS) and Homeland Security Appropriations Subcommittee Ranking Member George Voinovich (R-OH).

Budget Committee

With Republicans taking over the House, Budget Ranking Member Paul Ryan (R-WI) is slated to take over as chairman. Congressman Ryan has been a point person for Republican leaders on fiscal issues in recent years and is a rising star among the “Young Guns,” a name that Republicans have used to brand the next generation of leadership. He supports the line-item veto, tax cuts, a greatly simplified tax code and government spending controls. In the Senate, Senator Kent Conrad (D-ND) is expected to remain chairman, and Senator Jeff Sessions (R-AL) is slated to become ranking member. This move comes under an agreement reached last year with Senator Chuck Grassley (R-IA), who will become ranking member of the Senate Judiciary Committee, a post presently held by Sessions.

d. Transportation Reauthorization & Infrastructure Funding

The previous transportation authorization bill, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”), expired on September 30, 2009. Current programs are being kept afloat by stopgap spending measures, the latest of which expires on December 31, 2010.

In 2009, the Obama Administration asked Congress to extend SAFETEA-LU at current spending levels until after the mid-term election, in order to postpone painful votes on gasoline taxes or other revenue-raisers. However, House Transportation & Infrastructure Committee Chairman Jim Oberstar (D-MN) disregarded the Administration’s request and moved ahead with a \$500 billion, six-year draft bill, which was passed on June 24, 2009, by the Subcommittee on Highways and Transit.

A major shortfall in the Highway Trust Fund, and the lack of an alternative funding source, has been the primary roadblock to passage of a new authorization bill. However, Chairman Oberstar has recently begun a fresh round of talks with Transportation Secretary Ray LaHood about sources of new revenue to finance the bill.

It is expected that Congress will pass another stopgap spending measure before its final adjournment in order to keep funds flowing when the current short-term extension expires on December 31, 2010. However, Senior Democratic aides say there is little chance of moving the full transportation reauthorization bill in the post-election session.

In speeches given on Labor Day and Columbus Day, President Obama announced a \$50 billion plan to invest in funding for roads, railways and runways. The President has emphasized that his plan would promote job creation, noting that almost one in five construction workers are presently unemployed. Democrats hope to approve this interim infrastructure funding during the post-election session and begin negotiating the larger transportation reauthorization bill in earnest by early next year.

In his public remarks, President Obama has singled out the transportation reauthorization bill as one of the handful of bills that he wants to move quickly in the 112th Congress. However, in this sharply divided Congress, even infrastructure spending, which is normally not a politically divisive issue, is expected to be hotly debated. To move his plan forward, the President must win over Republicans. Congressman John Mica (R-FL), who is slated to be the new chair of the House Transportation Committee, has already said that he is ready to work with his former colleague, Secretary La Hood, to craft a long-term transportation authorization bill that puts projects on track and helps with the nation’s unemployment problems. One potential sticking point in this prospective partnership, however, is Congressman Mica’s desire to make significant changes in how transportation projects are funded.

II. CAMPAIGN FINANCE

The 2010 mid-term election cycle has yielded record amounts of candidate fundraising and expenditures. While the final numbers are yet to be tabulated, this campaign season is expected to have cost candidates more than \$2 billion to seek office—with candidates for the House estimated to have spent more than \$1.5 billion and candidates for the Senate estimated to have expended more than \$500 million for their races.

Some of these funds have come from the treasuries of incumbent candidates and were amassed during previous election cycles, but the majority of these resources have come from the candidates' outreach to supporters and contributors this cycle. In addition to the funds raised directly by the candidates, outside spending, enabled and accelerated by the Supreme Court's decision in *Citizens United v. Federal Elections Commission* ("*Citizens United*"), is estimated to have reached \$400 million this cycle.

At the same time, the rules governing political contributions have changed significantly in the past year and the future for campaign finance rules remains unclear. The Federal Election Commission ("FEC") is expected to move forward with efforts to rewrite its regulations following the Supreme Court's decision in *Citizens United*. The long-awaited rulemaking will implement the Court's decision in *Citizens United* but may also address more controversial provisions in the FEC regulations. Meanwhile, new Republican leadership in the House and Republican gains in the Senate will present an obstacle to certain campaign finance reform efforts in the 112th Congress. According to Diego Marquez, attorney at Alston & Bird LLP in Washington, "the lame duck session may be the last chance for the Democracy is Strengthened by Casting Light on Spending in Elections Act ("DISCLOSE Act"), and there remains a possibility that the Senate will push for a vote before final adjournment of the 111th Congress."

The unprecedented level of financial activity in this election cycle and the uncertainty surrounding campaign finance regulations make clear that those who wish to engage and contribute to federal campaigns should ensure that they are operating in a manner consistent with the evolving rules for engagement.

a. *Citizens United*

On January 21, 2010, the Supreme Court overturned precedent and federal law by ruling, in a 5-4 vote, that corporations and labor unions may spend freely to fund political communications that support or oppose federal candidates. Prior to the Court's ruling in *Citizens United*, federal law prohibited corporations and unions from using their general treasury funds to make independent expenditures for electioneering communications or other speech expressly advocating the election or defeat of a candidate. With its ruling in *Citizens United*, the Court struck down as unconstitutional federal law restricting corporate and labor union funding of electioneering communications. The Court did, however, uphold disclosure rules applicable to expenditures on political advertisements.

We have seen a flood of campaign spending by third-party groups leading up to the 2010 mid-term elections. The Center for Responsive Politics calculated, through FEC disclosures, that as of October 26, 2010, outside groups had spent approximately \$400 million during this election cycle—easily a record for a mid-term election year. "This spending surge is likely due at least in part to the Court's ruling in *Citizens United*," says Edward Britan, attorney at Alston & Bird LLP in Washington.

b. FEC Rulemaking

On July 22, 2010, the FEC issued two advisory opinions that demonstrate the significant shift in the campaign finance landscape following the Supreme Court's decision in *Citizens United*. Specifically, the FEC approved two separate plans to create political committees designed to collect unlimited individual donations and spend the funds on advertising in support of and in opposition to federal candidates. Such committees would not be allowed to contribute directly to a federal candidate or campaign committee, but could raise unlimited funds from individuals, corporations and unions to spend on independent expenditures. Existing disclosure requirements for political action committees will require this new breed of political action committee, formed solely to make independent expenditures, to report receipts and expenditures to the FEC just like all other candidates, parties and political action committees.

The two advisory opinions released on July 22, 2010, are the most significant FEC guidance on the new rules for independent expenditures. The FEC has been criticized for implementing such sweeping change through advisory opinions as opposed to the regulatory rulemaking process, and the FEC postponed consideration of the notice of proposed rulemaking—the first formal step in writing a new rule on the matter—at its last open meeting on October 7, 2010. It remains unclear when the FEC will issue the notice, but discussions have continued among the FEC commissioners. The rulemaking will seek to bring FEC rules into conformance with the Court's decision in *Citizens United*, but the new rules may also address more controversial issues related to the decision. For example, the FEC may choose to address disclosure requirements and restrictions on spending by foreign-owned companies in the rulemaking process. In fact, a group of fifteen Democratic senators have called on the FEC to use the *Citizens United* rulemaking to restrict the ability of foreign-controlled companies to spend money in U.S. elections.

c. Campaign Finance Reform Efforts in Congress

In an effort to address the effects of *Citizens United* through legislation, Congressman Chris Van Hollen (D-MD) introduced H.R. 5175, the DISCLOSE Act on April 29, 2010. The proposed legislation would significantly alter the landscape for regulation of political activity and contributions. While the legislation would not completely undo the effect of the Supreme Court's decision in *Citizens United*, the bill would increase disclosure and reporting requirements on covered organizations, and move to limit some of the options afforded by the *Citizens United* decision. Additionally, the DISCLOSE Act would prohibit certain government contractors and Troubled Asset Relief Program recipients from making expenditures or contributions in federal elections and would extend the corresponding prohibition on foreign nationals to organizations that are subject to control by foreign nationals, including domestic corporations with at least twenty percent foreign national ownership.

The House passed the DISCLOSE Act on June 24, 2010, by a largely partisan vote of 219-206. However, the legislation has stalled in the Senate after efforts to bring the bill to a floor vote failed to attract Republican support and were defeated. This kind of legislative reform effort will likely face greater opposition in the 112th Congress given the Republican leadership in the House and the increased Republican membership in the Senate. Moreover, Republican leadership has indicated that efforts to craft another version of the campaign finance reform legislation will not be a priority, and key Republicans have stated a preference for further loosening campaign finance restrictions.

d. The Lame Duck Session

It remains possible that the Senate will push for a vote on the DISCLOSE Act during a lame duck session. Senator Claire McCaskill (D-MO) has been among the Democrats calling for the Senate to take up the stalled legislation after the elections. Because the House has already passed the bill, Senate passage is the only remaining obstacle for the DISCLOSE Act. Securing a floor vote in the Senate, however, will not be easy, as Democrats will need at least one Republican to join their efforts. As part of their earlier efforts to secure Republican support for bringing the DISCLOSE Act to the floor, Senate Democrats approached three moderate Republicans—Senator Susan Collins (R-ME), Senator Olympia Snowe (R-ME) and Senator Scott Brown (R-MA). It remains possible that any of the three may agree to support a vote on the legislation. Significantly, Senator Snowe, who has supported campaign finance restrictions in the past, had little incentive earlier this year to break with her party on campaign finance reform, particularly because it would have pushed off the Senate floor a small business jobs bill that she had been working on for months. The lame duck session will provide an opportunity for Senators to reassess their post-election views on the legislation.

e. New Heights in Fundraising

In addition to the Congressional fundraising figures mentioned above, it is important to note that candidates Obama and McCain spent a combined \$1.8 billion on the 2008 presidential race. Undoubtedly, the next presidential race, in two years, will raise the bar higher still. When factoring in a Congressional campaign cycle, the fundraising intensity should reach previously unseen heights in the next election. “Every election cycle costs more than the last, and with the next Congressional elections coinciding with a presidential race, candidates will have to pedal the cycle faster than before,” said Bill Anaya, Counsel at Alston & Bird LLP in Washington and a leader of the firm’s federal election law team. He further observed that “over the last decade, there has been nearly a 100 percent markup in the cost of running campaigns. Consequently, demands for funding will follow this dynamic curve. Any private interest seeking to make their voice heard, have the ability to respond to calls for support and withstand heightened scrutiny will need to stay ahead of the campaign finance legislation, rules and regulations.”

III. EDUCATION

a. No Child Left Behind Reauthorization

In 2010, the Obama Administration pledged to overhaul the Bush Administration's reauthorization of the Elementary and Secondary Education Act ("ESEA"), commonly known as the No Child Left Behind Act ("NCLB"). Although there was considerable work done on the reauthorization in both the House and Senate during the 111th Congress, including more than fifteen hearings, it is unlikely that a new authorization will be passed during the post-election session. However, President Obama has pointed to education reauthorization as a bill that could be passed in bipartisan fashion during the 112th Congress.

Despite self-imposed timelines of July and August 2010 for respective Senate and House markups, neither chamber has released draft language for reauthorization. Instead, Congress is currently working off a blueprint for reauthorization that was released by the Obama Administration on March 13, 2010. The Administration's blueprint, however, is simply a broad outline of the overarching goals for reform and fails to resolve the major issues associated with NCLB.

Given the multitude of issues and interest groups involved, and the now divided Congress, it seems unlikely that the 112th Congress will replace NCLB. However, according to Bob Jones, Leader of the Alston & Bird LLP Legislative & Public Policy Group, "once the partisan tensions ginned up by the mid-term election die down, Members of Congress may realize that education is one of but a few issue areas on which there is considerable bipartisan agreement and may come to a compromise that provides the structure for a reauthorization that both the House and Senate can agree to."

b. Committee Realignment

Congressman John Kline (R-MN) is in line to be the new chairman of the House Education and Labor Committee. Congressman Kline, who comes from a suburban district comprised of constituents who are mostly opposed to NCLB, believes that Congress must fix NCLB, which he has characterized as an intrusion into areas of education in which the federal government should not be involved. In particular, Congressman Kline disagrees with the NCLB measure for "Adequate Yearly Progress," which he says guarantees that every public school in America is failing.

In the Senate, Senator Tom Harkin (D-IA) will remain chairman of the Health, Education, Labor and Pensions Committee. Chairman Harkin has been committed to getting an NCLB reauthorization bill out of his committee and is expected to continue to press forward during the post-election, so that the committee can pick up where it left off when the 112th Congress convenes in January 2011.

IV. ENERGY

a. Lame Duck Session of 111th Congress

The failure to pass significant energy legislation has been a major disappointment to the President. In spite of the House passing a comprehensive energy bill and the Senate Energy and Natural Resources Committee reporting out a bipartisan package, efforts stalled in the Senate because of the controversial cap-and-trade provision.

The Senate has an opportunity to take up several discrete pieces of legislation, including a bill that would include oil spill provisions, as well as a natural gas vehicle proposal, a bill by Senators Jeff Bingaman (D-NM) and Sam Brownback (R-KS) to enact a federal renewable electricity standard (“RES”) and a bill by Senators Bingaman and Olympia Snowe (R-ME) to provide or extend energy tax benefits. Senate Majority Leader Harry Reid (R-NV) has indicated his intention to try to bring the bill including the natural gas vehicle provisions to the floor, but this effort will be complicated by the objections of the Republican sponsor of the bill—Senator Orrin Hatch (R-UT)—to the revenue-raising provisions in the bill. Prospects for the other two pieces of legislation are complicated by the short period of time available and the crowded agenda for the lame duck session. The RES bill has continued to gain sponsors, and may clear the bar, although the immediate seating of the new Senator from West Virginia could affect the vote count. Climate change legislation, which had been shelved earlier in the year, also maintains resonance in the Senate in the form of a possible lame-duck vote on a measure to delay Environmental Protection Agency (“EPA”) greenhouse gas emission regulations.

b. Overview of Energy/Climate in the 112th Congress

With new Republican leadership in the House and Republican gains in the Senate, it is clear that efforts to promote climate change legislation will be much more complicated this session. Further, given the sharp decline since mid-2008 in the price of natural gas, and the decline in the demand for electricity as a result of the challenging economy, incentives and mandates for renewable energy sources may be necessary to jump-start the market. A number of key energy issues will be affected by a rebalanced party affiliation ratio in the Senate and by the loss of key advocates, such as Senators Byron Dorgan (D-ND) and Brownback. The national RES, in particular, has a much slimmer chance of gaining approval. In general, any debate in the 112th Congress is likely to focus on whether incentives or mandates to encourage renewable energy are appropriate or desirable. Specific issues likely to be addressed are the incentives to encourage the revival of nuclear power, incentives to spur carbon capture and storage (“CCS”) and potentially the recommendations of the Blue Ribbon Commission studying spent nuclear fuel issues.

Although energy emerged as one of the top issues of the 2008 presidential campaign, the Senate failed to take up any significant energy legislation during the 111th Congress. The loss of a number of Democratic members in both houses of Congress means that the focus of any energy legislation is likely to be very different from the legislation that was expected to come from the 111th Congress or that had passed in the House of Representatives. Climate change is likely only to be considered in the context of an attempt to forestall regulations by the EPA. Despite success by advocates of a national RES in lining up bipartisan support, the loss of key supporters such as Senators Brownback and Dorgan may complicate efforts to bring a RES forward. Should Senator Richard Burr (R-NC) succeed Senator Lisa Murkowski (R-AK) as the senior Republican member of the Senate Energy and Natural Resources Committee, the bipartisan traditions of the Committee may adjust the balance point for bipartisanship toward the conservative end of the spectrum.

Given the unlikely prospect of enacting changes to the Clean Air Act to divest the EPA of authority to regulate greenhouse gas emissions in the face of a certain veto, the focus of efforts in the House is likely to be adding provisions to the EPA appropriation bill to limit the authority of the EPA to expend funds on greenhouse gas emissions measures.

c. Section 1603 Renewable Energy Grants in Lieu of Tax Credits

One of the most successful and popular provisions of the American Recovery and Reinvestment Act ("Stimulus Bill") permitted developers of renewable energy projects to receive a direct payment from the Treasury in lieu of the tax credits that were otherwise available for the projects. Tax incentives have been used as a means to spur investment in renewable energy. Whether it be a production-based credit such as the Production Tax Credit or wind, biomass, geothermal and other technologies, or an up-front Investment Tax Credit for solar technology, these popular credits have been integral to the growth of renewables. However, many developers of renewable projects do not have federal income tax liabilities that permit the credits to be used, and have instead entered into partnerships with investors who were able to utilize the tax benefits. When the universe of potential investors was significantly reduced by the challenging economy, the grant provision was added to the Stimulus Bill in lieu of tax credits to permit developers to benefit even if they had no tax liabilities. However, the grant provisions are scheduled to expire at the end of 2010 for projects that have not yet commenced construction as of December 31, 2010. The scoring for the grant program is very modest because the Congressional Budget Office has assumed that the credits will be claimed even if the grant is not available.

The shape of any House Republican initiatives for renewables, including the extension of the Section 1603 grant program, has not been defined. Given the bipartisan popularity of the renewable tax credits and the modest budget impact of the Section 1603 grant program, it seems likely that there will be a proposal to extend the program, but the extension may come in the form of a provision added by the Senate to a House originated bill, rather than taking the form of legislation originating in the House.

d. Transmission

There may be an increased effort to legislate provisions relating to planning and paying for improvements to the nation's aging transmission system. Major expansion and upgrades to the current system will be necessary to maintain reliability and to deploy large-scale domestic energy production, both from traditional energy sources, as well as renewable projects. The Federal Energy Regulatory Commission ("FERC") has issued a notice of proposed rulemaking that addresses planning and cost allocation for regional transmission projects. Some legislators may attempt to limit the scope of the proposed rule for the benefit of incumbent utilities, as was done in the Senate Energy and Natural Resources Committee during the last Congress. If the issue comes up, Members will also need to determine whether they should repair provisions of the Energy Policy Act of 2005 that attempted to increase federal authority over transmission siting but were largely overturned by the Fourth Circuit Court of Appeals. Transmission proponents will likely try to limit action by Congress and protect and encourage FERC to go forward with its proposed rulemaking.

e. Oil and Gas Provisions

Although the Gulf oil spill appeared likely to torpedo proposals to expand offshore drilling, as well as result in tough provisions and expanded liability for spills, that seems less likely as it appears that the major part of the spill has dissipated without creating the sort of catastrophe that was first expected. However, given that the ban on offshore activities on the Atlantic and Pacific coasts has expired, there may be some effort to enact a framework for future permit applications. Legislation will be complicated not only by opposition from some states, but also by demands for greater revenue sharing by other states.

f. Renewable Electricity Standard

A renewable electricity standard (“RES”) would require a percentage of electricity to come from renewable energy technologies. Thirty-six states currently have some form of a RES, or an alternative energy standard or a renewable electricity goal, but that has provided a patchwork of different policies, some far more effective than others. The House passed a fifteen percent RES by 2020—Renewable Portfolio Standard (“RPS”) (with up to four percent from energy efficiency)—in the 111th Congress, but the legislation has failed to achieve the 60 votes necessary in the Senate, although there remains a possibility that a bill will be considered by the Senate in the lame duck session.

g. Climate Change

Despite President Obama’s support for the implementation of a cap-and-trade program that would set a limit or cap on the amount of greenhouse gas emissions and gradually require further reductions over time until the national emission reduction target is achieved, and despite the passage of the Waxman-Markey bill by the House in the last Congress, there seems to be little prospect for similar legislation in this session of Congress or next. However, there are likely to be additional efforts to slow down or rollback EPA regulation of greenhouse gases.

h. Nuclear Power

Nuclear power is likely to continue to receive attention, as the technology is emission-free and largely domestic. At the same time, there are issues related to the cost of nuclear power plants, the storage of spent nuclear fuel and national security concerns due to the risk of proliferation of nuclear materials. Some have called for nuclear energy to be included as part of a national clean energy requirement along with renewables, and there is some possibility that a national clean energy standard could be considered. The Blue Ribbon Advisory Committee on Spent Nuclear Fuel is scheduled to deliver a report regarding options for dealing with spent nuclear fuel, and Congress may attempt further action with respect to Yucca Mountain. The Obama Administration is also seeking increased authority for the Department of Energy to issue guarantees for new nuclear plants, and that legislation may receive more favorable consideration in the 112th Congress, although as of now, it seems likely that budget issues may make those efforts problematic even though the nuclear guarantee program is designed to be budget neutral. There also have been calls to reform the loan guarantee program and reduce the role of the Office of Management and Budget in the guarantee approval process.

i. Carbon Capture and Storage

Coal remains the primary source for electricity generation for the nation, and our domestic coal resources are abundant. At the same time, with the likely call for emission reductions, utilities that rely on coal for a large percentage of their electricity production will face long-term challenges to meet the requirements. Technologies such as CCS are gaining traction as part of that solution. Under CCS, the CO₂ would be separated and then stored or “sequestered” underground in deep repositories. Many in the oil industry are already injecting CO₂ into the ground as a means to bring oil to the surface, through a process known as enhanced oil recovery. There are questions regarding CCS and how quickly the technology can be utilized. A recent energy tax bill included some new incentives to spur CCS development, but the industry is unlikely to take advantage of these incentives for many years to come.

j. Energy Tax Provisions

When energy legislation moves forward, both tax writing committees have indicated that they will look at energy tax provisions as well. The discussion draft of the Domestic Manufacturing and Energy Jobs Act of 2010, released by Ways and Means Committee Chairman Sandy Levin (D-MI) in July, addresses a variety of energy tax proposals. In the Senate, Senators Bingaman and Snowe have been at the forefront of energy tax legislation and announced in September a package of clean energy tax provisions, the Advanced Energy Tax Incentives Act of 2010 (S. 3935). Senators Snowe and Bingaman also announced on October 1, 2010, the “Reduce Energy Bills at Home Act,” which is intended to continue to provide homeowners with tax incentives to reduce their energy bills by purchasing products that improve the efficiency of a house. The bill extends and enhances the energy tax credits under Internal Revenue Code Section 25C for residential energy efficient products.

V. FINANCIAL SERVICES

“Economic recovery will be at the top of Congress’s priorities next year. These efforts will include continued and substantial attention to the banking and financial services sectors. The first order of business will be reform of Fannie and Freddie.”

– Former Senate Majority Leader Bob Dole, Special Counsel at Alston & Bird LLP

The financial crisis—and the attendant effect on the U.S. economy—will shortly enter its fourth year. During this time, Congress has responded by looking at different economic sectors to help return stability and prevent the economic catastrophes from recurring. Congress concluded a large portion of this work in addressing the financial crisis with the enactment last July of the Dodd-Frank Wall Street Reform and Consumer Protection Act. In the wake of such wide-ranging legislation, oversight of the efforts of Treasury, the Federal Reserve and other financial services regulatory agencies will dominate the activities of the Senate and House banking committees.

Key facets of the crisis remain, however, most notably in the housing sector. The housing finance market continues to suffer. This is intertwined with the U.S. economy as a whole. Broad economic recovery is unlikely to occur until the housing and housing finance markets recover. Accordingly, both the House and the Senate will have to take up the housing issue.

With Republicans now in control of the House, any significant legislative activity affecting financial institutions is likely to take place there. But with Democrats still in control of the Senate, the odds appear to be strongly against passage of a bill for the President’s signature other than a bill to reform Fannie Mae and Freddie Mac. According to Dwight Smith, head of Alston & Bird LLP’s Bank Regulatory Practice in Washington, “despite or perhaps because of current divisions between the parties, we can expect the House Financial Services Committee to actively pursue additional financial reform legislation. The work certainly will include efforts to pull back on some of the Dodd-Frank changes.”

Of course, the outcome of any legislative activity will depend in part on the composition of the two committees. In the House Financial Services Committee, it appears that either current Ranking Member Spencer Bachus (R-AL) or Ed Royce (R-CA) will assume the chairmanship. Ranking Member Bachus has a reputation among Republicans as the man who worked too closely with Democrats during the debate over financial reform legislation, and therefore may not be the right fit to wage the fight to rewrite that law. Congressman Royce, who has taken a more active role in the panel in the past year, is the next most likely choice for chairman, but others with interest include Congressmen Jeb Hensarling (R-TX) and Scott Garrett (R-NJ). Sweeping changes in the subcommittee chairmanships are unlikely.

On the Senate Banking Committee, Senator Tim Johnson (D-SD) is expected to take over the gavel from retiring Chairman Chris Dodd (D-CT). Senator Johnson is more moderate than Senator Dodd and holds positions that put him on the opposite side of consumer activists who have enjoyed success the past two years. Additionally, Senator Johnson is one of the biggest supporters of local community banks in Congress and can be expected to work to protect their interests as they come under new capital requirements in future years.

The financial services industry should anticipate vigorous discussion of the following issues.

a. Fannie Mae and Freddie Mac

Clearly the most significant issue not addressed in the Dodd-Frank Act is the future of the two government-sponsored enterprises (“GSEs”), Fannie Mae and Freddie Mac. Both entities remain under federal conservatorship and currently are obligated to repay Treasury about \$135 billion in federal assistance. Less than three weeks ago, the Federal Housing Finance Agency, which regulates the two bodies, announced that additional assistance would be necessary, ranging in net amounts from \$6 billion to \$124 billion, depending on the recovery of the economy as a whole and of the housing industry specifically.

While both parties have indicated a desire to reform these two GSEs, there is no assurance of a consensus view. Furthermore, the Republican Party’s Pledge to America promises change by “ending [Fannie and Freddie’s] government takeover, shrinking their portfolios, and establishing minimum capital standards.” This principle effectively is memorialized in a bill originally introduced this past spring by Congressman Hensarling. The bill effectively would privatize the home loan insurance business.

The Obama Administration is not necessarily opposed to GSE reform and has said that the silence of Dodd-Frank on the matter was intended to narrow the range of issues in that legislation to avoid a complicated discussion. Although the Administration has not yet committed to a specific set of reforms for Fannie and Freddie, it has promised to bring proposed legislation to Congress in January. The only visible step so far is an invitation from Treasury for comment on several different reform approaches, among them the preferred Republican thinking. Judging from testimony and speeches, however, the Administration favors a government-supported presence in housing finance, while Republicans largely do not.

Given mounting concerns not only over the continuing cost of supporting the two GSEs, but also over housing finance and the recovery of the market for home sales, legislation would seem to be unavoidable. Neither party likely will want to be seen as standing in the way of reform in this sector of the economy. However, there are real philosophical differences in the Republican and likely Democratic reform proposals. Complex negotiations will ensue, which will compel participation by those with an interest in the future (if any) of Fannie and Freddie.

Legislation to reform Fannie Mae and Freddie Mac may also form the basis for a larger financial reform bill into which Republicans may add additional clarification or amendments to the Dodd-Frank Act. This will complicate passage of the bill, particularly in a Democrat-controlled Senate.

b. Home Ownership & Residential Foreclosures

“The foreclosure crisis will affect all Congressional activity next year, including activity on the economic recovery, the housing market and GSE reform,” observes Former Senate Majority Leader Bob Dole, Special Counsel at Alston & Bird LLP. “So far, the Administration has tried unsuccessfully to resolve the crisis through loan modification, but FDIC Chairwoman Sheila Bair has suggested that a more aggressive legislative approach may yield better results.”

Indeed, how often and how quickly defaulting borrowers should be removed from their homes—and whether more widespread loan modifications may be a better alternative—are issues that resisted any easy solution in the last Congress. Despite at least two pieces of legislation, a meaningful loan modification program has yet to emerge, and hoped-for results have eluded the Administration.

Making things even more difficult is the foreclosure issue that has arisen only in the last few weeks—foreclosures on residential homes without full review and the resulting moratoria by some mortgage servicers—which has commanded considerable media coverage and will force some type of Congressional action.

The latest foreclosure issue has spurred both state and federal civil investigations that are likely to come to fruition only after the new Congress is seated. When investigations get underway, they will generate considerable attention of Members of Congress. The House Financial Services Committee has already scheduled a hearing for later this month, but this hearing will be something of a lame duck event, given the turnover in the House in the next session.

Given the complexity and relative suddenness of the problem, partisan positions have not yet been sharply drawn. Neither party has expressed a view on whether federal legislation is necessary.

Congressional action—or even inaction—is likely to be controversial since several powerful constituencies have different interests at stake. Given the impact of any resolution, it is imperative that any participant in the housing finance market make its views known to House and Senate committee members as soon as possible. This universe includes title insurance companies, servicers, investors, originators, delinquent borrowers and purchasers of foreclosed homes, all of whom will need to make their voices heard.

c. Regulatory Implementation

The Dodd-Frank Act requires on the order of 200 new regulations and over 100 reports to Congress. These regulations will cover virtually every sector of the financial services industry. Of particular note will be regulations governing the derivatives market and the home finance industry. Important new regulations will be coming from the new Financial Stability Oversight Council, the Federal Reserve and the FDIC. Additionally, and partly outside Dodd-Frank, the Federal Reserve and the other federal banking agencies will have to develop new capital rules for banks and their holding companies, and they will have to do so in fairly short order. Both banking committees will devote substantial resources to evaluating implementation of the statute. This especially will be so in the House committee, where Republicans have in view some modifications to the statute.

d. Follow-On and Corrective Measures

As noted in the Fannie and Freddie discussion above, strong efforts will be made in the House Financial Services Committee to modify important provisions of the Dodd-Frank Act, although it is not clear what the Republicans' priority of issues will be. The Republicans will have to do so relatively quickly. Most of the Dodd-Frank provisions take effect this coming July and at that point will be very difficult to reverse. Among other things, the committee likely will take up such issues as constraints on the powers of the new Bureau of Consumer Financial Protection, revisions to the FDIC's new resolution authority for nonbank institutions of systemic importance (at least some Republicans believe that the Dodd-Frank regime does not end the too-big-to-fail problem) and Basel III. These discussions will present an opportunity for financial firms—particularly those active in the OTC derivatives and securitization markets—to raise other concerns with the committee.

VI. FOOD AND DRUG

While the 111th Congress saw the establishment of a biogeneric pathway, enactment of mandatory menu labeling for certain retail food establishments and vendors, creation of tobacco product FDA regulatory authority and passage by the House of comprehensive food safety reform, we expect food and drug safety to be at the top of the legislative agenda in the next Congress. Following are some key FDA issues to watch in the 112th Congress.

a. Drug Import Safety

In response to concerns about the safety of imported drug products largely stemming from the tragic outcome of heparin product contamination and a 2008 recall, current House Energy and Commerce Committee Chairman Henry Waxman (D-CA), Chairman Emeritus John Dingell (D-MI) and Oversight and Investigations Subcommittee Chairman Bart Stupak (D-MI) are leading an effort to give FDA additional powers to ensure the safety of imported drugs. A draft of this bill has been released and includes mandatory recall authority, the ability to detain and destroy drugs at the border and the establishment of registration fees for manufacturers and importers to help fund these FDA activities. Given the inclusion of fees in this legislative proposal, some feel that drug import safety and associated fees would be more properly addressed in drug user fee reauthorization discussions already set for 2012. Nevertheless, we expect these Democratic leaders to move forward with a stand-alone bill before that time. In a Republican-led House Energy and Commerce Committee, these Democratic leaders will have to find a Republican champion on the committee in order for this bill to become a priority. Republicans are likely to make substantial changes to the Democrats' approach to drug safety legislation. Changes would focus on risk-based inspections, and funding for new safety initiatives would most likely be user-fee based, rather than through appropriations. Republicans' major concern is how FDA is performing in its drug safety role.

b. Food Safety Legislation

As the 111th Congress comes to a close, comprehensive food safety reform remains unfinished due to Senate inaction resulting from member objections to the August manager's amendment to S. 510. In July 2009, the House passed similar legislation, the Food Safety Enhancement Act of 2009, authored by Congressman Dingell, but the similar Senate bill never reached the floor as a result of unresolved member concerns regarding funding for FDA's additional responsibilities, small farm exemptions and the banning of bisphenol A. There is some speculation that food safety reform could reach the Senate floor during the lame duck session; however, should the Senate not pass S. 510 later this year, food safety House and Senate leaders and industry and consumer stakeholders will have to begin this reform effort anew in the 112th Congress. Food safety reform enjoyed bipartisan support in the House and Senate in the 111th Congress, and we expect that will continue in the next Congress. With that being said, industry stakeholders, consumers, agency personnel and the Administration will have to put reform pressure on the House and Senate to see any action on food safety reform following the failed efforts of the 111th.

c. User Fee Reauthorization

As Congress moves toward a Fall 2012 deadline for reauthorizing the prescription drug and medical device user fee legislation, this legislation will take shape in the 112th Congress and provide a legislative vehicle for other food, drug and device reform proposals. President Obama's FY2011 budget for FDA included \$38 million generated from a proposed generic drug user fee program (and his FY2010 budget included \$36 million generated from proposed generic drug user fees). While the President's budgets have sent a message to the industry and agency, creation of a generic drug user fee program hinges on Congress. The upcoming reauthorization discussions in Congress will set the stage for legislative consideration of generic drug user fees.

d. Increase in FDA Oversight

In the 111th Congress, Senate Health, Education, Labor, and Pensions (HELP) Committee Chairman Tom Harkin (D-IA) established a health care investigations unit to increase the committee's oversight of federal policies, including those administered by FDA. With user fee reauthorization approaching, this committee and Harkin's leadership will play a key role in FDA oversight and reform efforts in the next Congress. Outside of the HELP Committee, Senator Chuck Grassley (R-IA) has continued to serve as a strong advocate for FDA oversight. Senator Grassley's expected reassignment to the Judiciary Committee will provide an opportunity to pursue oversight of FDA policies through oversight of Justice Department investigations of FDA product manufacturers.

VII. FOREIGN POLICY

New Republican leadership in the House and Republican gains in the Senate are likely to have a significant effect on implementation of the Obama Administration's foreign policies. While Congress does not drive foreign policy, it can be expected to exert greater control in several spheres, while tempering the Administration's preferred actions in others. The Republicans are also likely to use their increased leverage to pressure the Administration to address foreign policy issues that it would prefer not to prioritize. As Senator Dole has stated, "The Administration, on its own, is not planning to shift its foreign policy goals and priorities. What will be different is that Republicans in Congress are going to increase pressure on the Administration to change—and, in some cases, abandon—those goals and priorities." The Senator continued, "Expect the Republicans in Congress to keep an especially close eye on defense and defense spending, major power relationships, treaties and U.S. leadership in the United Nations."

a. Iraq, Afghanistan and Missile Defense

In 2011-2012, the wars in Iraq and Afghanistan will almost certainly continue to be the most critical foreign policy issues facing the Administration and Congress. With their increased ranks, Republicans are likely to seek greater focus on what they perceive to be arbitrary troop withdrawal dates and excessive cuts in military spending. Joined by Blue Dog and other moderate Democrats—and making common cause with many top Pentagon officers—they can be expected to draw attention to these issues and play a greater role in Administration decisions on spending and troop numbers through appropriations bills, hearings, Congressional reviews and direct dialogue with relevant Cabinet members and other Administration officials.

Republican proponents of a stronger missile defense—deployed domestically and abroad—will see their hands increased in the incoming Congress. Senate Minority Whip Jon Kyl (R-AZ), for example, will have new opportunities—and new Congressional allies—to pursue his goals of early expansion of U.S.-based missile defenses, as well as early deployment of new defenses in central Europe. Senator Kyl and others are also likely to escalate their efforts to curb the Administration's commitment to nuclear weapons reductions and increase support for nuclear modernization.

b. Relations with Russia and China

President Obama's foreign policy has focused largely on addressing relations with Russia and China. The Administration has, in its own words, worked to "reset relations" with Moscow and has devoted considerable effort to encourage Beijing to play a more constructive role internationally—on political, economic and military matters. In what some have described as a major policy achievement, it has negotiated a new Strategic Arms Reduction Treaty ("START") with Russia. Earlier in 2010, it appeared that, led by Senate Foreign Relations Committee Ranking Member Richard Lugar (R-IN), minority Senators were prepared to vote in sufficient numbers for the treaty to be ratified, although voting, which the Administration and Senate Foreign Relations Committee Chairman John Kerry (D-MA) had hoped for in the summer, was postponed with the expectation that it would take place during the impending lame duck session of Congress. The mid-term gains by the Republicans in the Senate may mean that it is essential that a vote be scheduled for this session, rather than in the new Congress, if a much more uphill battle is to be avoided.

On China policy, the Administration has engaged Beijing in an intense dialogue on currency issues, among other matters. In addition, it is important to note that the ranks of new Senators and House members include many who are likely to join existing Congressional critics of Russia's and China's records on human rights issues; in hearings, resolutions, letters and meetings in both houses, members are likely to increase their focus on these issues in an effort to ensure that the Administration uses the tools at its disposal to affect positive change.

c. Nuclear Ambitions of Iran and North Korea

Beyond the wars and major power relations, the Obama Administration has made domestic issues its highest priority. Believing that its electoral mandate was to improve the economy, it devoted considerable political capital to financial and health care reform, while addressing foreign policy issues as needed. In the new Congress, this will be more difficult, as newly empowered Republicans exert greater influence on Administration policies. The most significant of these may be efforts to curb the nuclear ambitions of Iran and North Korea. Republicans can be expected to urge the Administration to adopt stronger unilateral and multilateral policies in opposition to these countries' nuclear weapons programs. In particular, support for stronger economic sanctions against Tehran and Pyongyang is almost certain to increase.

Some members may agitate for preemptive military action against Tehran in order to protect Israel, the United States' closest ally and the only democracy in the region. In general, the new Congress can be expected to be more pro-Israel and to find the Obama Administration's policies thus far to be insufficiently supportive—bilaterally, in international organizations and in the Middle East peace process. House Republican Whip Eric Cantor (R-VA), who is expected to become the next majority leader, already has a strong pro-Israel record, is likely to play a key role in urging the Administration to treat Tel Aviv as more of an unconditional ally and decrease pressure on Israel to moderate its policies on security issues.

d. Crisis in Sudan

Every Administration is challenged by emergent international crises, in addition to numerous frozen conflicts inherited from previous Presidents' terms. An early challenge for President Obama in the second half of his term will be Southern Sudan's separation from Sudan and its notorious Khartoum regime. If the popular referendum on independence takes place as scheduled in January 2011, the Administration faces the daunting task of leading the major powers in ensuring that Sudan abides by the terms of the settlement process and that Southern Sudan is allowed to develop fully as an independent and sovereign nation with internationally recognized borders. Southern Sudan will continue to benefit from Congressional support; its advocates, as well as Khartoum's detractors, will monitor the Administration's progress closely.

e. Effect of Election on Administration's Foreign Policy Goals

On a number of specific issues, the Administration will find that Republican gains in the Congress make it more difficult to achieve its foreign policy goals. One is Cuba, where predictions of a strong relaxation of the United States' anti-Castro policies did not come fully true in the first half of President Obama's term and are even less likely to be realized in the second half. Any new attempt to ease the trade embargo will be met with stronger resistance, with Senator-elect Marco Rubio (R-FL) and Congresswoman Ileana Ros-Lehtinen (R-FL) assuming leadership roles.

Congresswoman Ros-Lehtinen, who is slated to chair the House Foreign Affairs Committee, is also strongly pro-Israel and is likely to advocate for stronger Administration support—bilaterally and in regional forums—for Tel Aviv. She is tested and experienced as a long-term committee member and past chairperson of three subcommittees. In addition to increasing advocacy for Israel, Ros-Lehtinen and other Congressional Republicans are likely to look closely at the Obama Administration's multilateral policies. Any effort to ratify the Comprehensive Nuclear Test Ban Treaty, membership in the International Criminal Court, climate change treaties and international conventions on ending discrimination against women and protecting the rights of children and the disabled will be met with greater opposition than in the first half of President Obama's term. Newly elected conservative Senators are likely to be especially wary of anything they perceive as ceding policy control over U.S. affairs to the United Nations or other international organizations and entities.

This is an example of a wild card that may face Republican Congressional leaders who support strong U.S. engagement internationally: Some of the newly elected House members and Senators who benefitted from the tea party movement may hold isolationist or libertarian views on foreign and defense policy issues. While these individuals are likely to oppose Obama policies on many fronts, they may also be uncomfortable with mainstream Republican support for the military interventions in Iraq and/or Afghanistan, foreign aid and other programs. As is often the case, the challenge for Republican leaders will be to build ad hoc coalitions wherever possible with the party's own right-leaning members of Congress, as well as moderate Democrats who favor broad international engagement, U.S. leadership abroad and a strong national defense.

VIII. HEALTH CARE

The health sector will continue to receive attention and focus throughout 2011 and beyond, as the U.S. Departments of Health and Human Services (“HHS”), Labor (“DOL”) and Treasury begin implementing provisions of the sweeping health care reform legislation that was signed into law in March 2010—the Patient Protection and Affordable Care Act (Pub. L. No. 111-148), as amended by the Health Care and Education Reconciliation Act (Pub. L. No. 111-152) (collectively, “ACA”).

The ACA has major consequences throughout the health care system, including for Medicare and other federal health programs, health insurers, health care providers and employers offering health care coverage to their employees. The continued debate surrounding the various policy issues that the ACA sought to address (including expanding health coverage, realigning provider payment incentives around quality health outcomes and limiting health care growth), in addition to specific implementation issues that arise as the regulatory agencies interpret and begin to enforce the law, ensure that health care will be an important policy topic throughout 2011.

Implementing the ACA involves a variety of federal agencies, including HHS, DOL, Treasury and the Centers for Medicare and Medicaid Services (“CMS”). The ACA adds most of the health care reforms to the Public Health Service Act (“PHSA”) and incorporates those requirements into the group health plan requirements under the Internal Revenue Code and the Employee Retirement Income Security Act (“ERISA”). Thus, guidance with respect to many of the new requirements for group health coverage is within the jurisdiction of all three agencies. So far, the agencies have been adopting a coordinated approach to issuing guidance. Within HHS, the newly created Office of Consumer Information and Insurance Oversight, led by Jay Angoff, is responsible for implementing many of the reforms. At DOL, reform guidance efforts are within the Employee Benefits Security Administration, headed by Assistant Secretary Phyllis Borzi.

CMS is responsible for the near-term implementation effort and changes to the Medicare and Medicaid programs. The White House appointed Dr. Donald Berwick, by way of a controversial “recess” appointment, to lead these implementation efforts as CMS Administrator. Despite the broad array of health care interests that backed Dr. Berwick’s appointment, his nomination and subsequent recess appointment had been opposed strongly by Republicans over comments he has made about health care rationing and the role of government in health care. In addition to carrying out the numerous Medicare provider payment reductions under health care reform, Dr. Berwick’s top priority is overseeing continued delivery system reforms. To date, CMS has already begun releasing regulations and sub-regulatory guidance, and will continue to do so in 2011. Most of the rulemaking to implement many of the delivery system reforms are expected to take place throughout 2011 to 2013.

a. Mid-Term Elections

As expected, health care reform was a major issue in the November mid-term election. Republicans campaigned aggressively on the promise of “repealing and replacing” the health care reform law. It appears that the number of physicians serving in the House of Representatives has increased as a result of the mid-term elections to over twenty. According to Republicans, these physicians were motivated to run for office because of their dissatisfaction with the health care reform effort. With their new majority in the House, Republicans plan to push forward with their promise to undo President Obama’s signature legislative achievement. Even if Republicans manage to introduce a repeal bill that could withstand a filibuster in the Senate, there is little doubt that President Obama would veto it. Republicans do not have the veto-proof majority in both chambers of Congress that is required to override such a veto.

Alternatively, it seems likely that Republicans will target discrete provisions of the law for piecemeal elimination. They will likely focus on initiatives that would slow or disrupt the Administration's preparations for 2014, which is when the most far-reaching provisions of the new law will begin. Additionally, Republicans promise that over the next two years, they will deny any additional funding that President Obama requests for health care reform implementation—either by refusing to include it in appropriations bills or by tightening the budgets of relevant federal agencies. The Congressional Budget Office has estimated that over the next ten years, the administrative costs of health care reform implementation could run from \$5 billion to \$10 billion each for the Internal Revenue Service and HHS—costs that could require budget increases. The President and Democrats in Congress have vowed to push back at any such attempts. This could possibly set up a funding battle similar to the 1995 standoff that ultimately led to the federal government shutdown when President Bill Clinton and the majority-Republican Congress could not agree on a budget.

Finally, the Republican majority in the House will usher in frequent oversight hearings featuring CMS Administrator Berwick (who escaped a Senate confirmation hearing and has yet to testify before Congress) among other officials. These oversight hearings will be aimed at laying the groundwork for a broad-based public repudiation of the law. That could give Republicans the political momentum to overturn the health reform law if they can retake the presidency in 2012.

b. Medicare Update

Physician Services

The 112th Congress will face the issue of looming reductions in reimbursement for physicians treating Medicare patients. Unless Congress continues its short-term fixes for Medicare physician payments, or elects to enact a longer-term solution, physicians will face a 23 percent reduction in Medicare payments as of December 1, 2010, and a 30 percent reduction as of January 1, 2011. On June 25, President Obama signed into law the "Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010." This legislation reversed a 21 percent cut that was implemented on June 1, 2010, and replaced it with a 2.2 percent increase until the end of November.

As Congress's most recent short-term fix nears its expiration, the debate continues as to whether to enact another temporary solution or a complete repeal of the current physician reimbursement system. Given the lame duck session scheduled to begin on November 15, another short-term fix to delay the cuts until the end of 2010 seems the more likely result, as Democrats may pass the issue off to Republicans to address in the coming year. However, the American Medical Association ("AMA") and other physician specialty groups continue to advocate for a more sustainable solution, such as a thirteen-month payment "patch" until Congress repeals the current reimbursement system. In light of the escalating costs associated with Congress's patchwork approach to addressing physician payments and the imminent cliff in future payment reductions, physician reimbursement of Medicare physicians clearly will be a priority for the next Congress.

Other Providers

The ACA makes numerous changes to the way Medicare reimburses health care providers. Such changes were designed not only to help pay for the expansion of health insurance coverage to 32 million new individuals, but also to promote higher quality and greater efficiency within the health care system.

Most notably, the law contains reductions in the coming years to the annual Medicare payment updates for providers serving Medicare beneficiaries in the traditional fee-for-service program. In addition, the reform law imposes a “productivity adjustment” to the annual payment updates for many providers, estimated to be about an additional one percentage point reduction to payment updates each year. Productivity adjustments are designed to bring these provider payment updates more in line with physician payment updates, whose Medicare fee schedule annual update incorporates adjustments for gains in physician productivity. CMS Chief Actuary Richard Foster has criticized the savings from the productivity adjustments as being “unrealistic” and has conducted simulations showing that fifteen percent of Medicare Part A providers would become unprofitable over the next ten years as a result of the productivity adjustments. Notwithstanding the application of annual payment reductions and productivity adjustments, opportunities may exist for fee-for-service providers in various delivery system reforms, such as accountable care organizations and other payment design innovations within the Center for Medicare and Medicaid Innovation.

Prescription Drugs

The ACA contains a number of provisions impacting pharmaceutical manufacturers, including Medicaid drug rebate provisions that save \$38.1 billion over ten years. Collectively, the measures (1) increase federal rebates paid by manufacturers on brand-name drugs within the traditional Medicaid program from 15.1 to 23.1 percent, and for generics from eleven to thirteen percent of Average Manufacturer Price (“AMP”) in 2010; (2) expand Medicaid drug rebates to cover drugs provided through managed Medicaid plans beginning in 2010; and (3) expand Medicaid drug rebates to cover new formulations of brand-name drugs, beginning in 2010. The law also creates a federal upper limit under the Medicaid program for generic drugs at 175 percent of AMP to help address provider concerns with AMP regulations from 2005. Additionally, the law fills the Medicare Part D “donut hole” by providing a \$250 rebate for beneficiaries who enter the coverage gap starting in 2010 and increasing beneficiary discounts on drugs to 75 percent gradually from 2011 through 2020, ultimately adding a 25 percent government discount to the drug manufacturer rebates of 50 percent. Finally, the law implements means testing for Part D premiums beginning in 2011, and levies an annual pharmaceutical industry fee beginning in 2011 that raises a net \$27 billion over ten years. CMS has already published rules implementing a number of the above listed provisions—most notably the final requirements for pharmaceutical manufacturers under the Medicare Coverage Gap Discount Program—and will continue to do so in 2011.

Accountable Care Organizations (“ACOs”)

ACOs represent the Administration’s primary effort to transition from a “siloed” system of care under Medicare fee-for-service to an integrated delivery system that promotes improvements in quality and efficiency of care. Under ACOs, groups of providers—primarily hospitals and physicians—would be jointly held “accountable” for the costs and quality of care delivered to an assigned patient population. While the concept behind ACOs is not new and integrated health systems and multispecialty group practices have been in operation for decades, the concept is now gaining significant traction following enactment of the ACA.

The ACA established the Medicare Shared Savings Program, scheduled to begin January 1, 2012. The program will provide incentives in the form of shared savings for ACOs that meet certain spending and performance targets. To participate in the program, an organization may be comprised of group practices or networks of physicians and other professionals, a partnership or joint venture between hospitals and physicians and other professionals, or hospitals employing physicians or other professionals (or other structures permitted by HHS), and must meet a

number of other statutory requirements, including having a formal legal structure to receive and distribute shared savings and enough primary care professionals to care for at least 5,000 assigned beneficiaries. ACOs would participate in the program for at least three years and would be eligible to receive a share of the savings below their specified spending benchmark for a given twelve-month period if specified quality performance standards are met.

Providers, practitioners and other stakeholders have raised concerns about liability under the federal fraud and abuse laws and the antitrust laws that currently would prohibit certain arrangements contemplated under the ACO models. CMS, the HHS Office of the Inspector General and the Federal Trade Commission (“FTC”) held a day-long open workshop on October 5 to consider the implications of these laws for ACOs and to what extent CMS and the Office of Inspector General (“OIG”) should use the waiver authority granted under section 3022. The agency heads participating in the workshop touted collaboration—both among the agencies themselves and between the regulators and the regulated—and it seems clear based on the day’s discussion that the FTC and CMS intend to use the waiver authority and/or create new safe harbors or exceptions to the antitrust and fraud and abuse laws so that ACOs may operate legally. CMS plans to issue a proposed regulation this fall implementing the Medicare Shared Savings Program. The final rule will be issued in 2011 and could have significant implications for the future of integrated care in the U.S.

Post-Acute Care (“PAC”) Bundling Pilot

The ACA directs the Secretary to develop a national, voluntary pilot program encouraging hospitals, doctors and PAC providers to improve patient care and achieve savings for the Medicare program through “bundled” payment models. The program must be established by January 1, 2013, for a period of five years. There is a consensus among policymakers, as well as key groups like the Medicare Payment Advisory Commission (“MedPAC”), that there are many challenges to implementing a PAC bundled system including: design of quality incentives, determining what entity receives payment, beneficiary choice, tempering incentives to increase number of bundles, preventing stinting on patient care and compatibility with ACOs. Throughout 2011, there will be more discussion on how to implement the bundling pilot.

Independent Payment Advisory Board (“IPAB”)

The ACA establishes the IPAB to develop and submit detailed proposals to Congress and the President to reduce Medicare per-capita spending when projected spending growth exceeds a target. In contrast to the recommendations of the current MedPAC, whose recommendations are advisory, IPABs proposals will be implemented unless Congress enacts specific legislation with alternative provisions to achieve the required level of savings (with certain exceptions). Such legislation would be considered under “fast track” parliamentary procedures. The fifteen-member IPAB will be appointed by the President and confirmed by the Senate. Membership will include nationally recognized experts in fields such as health finance and economics, integrated delivery systems and health facility management, along with physicians and other providers. The IPAB’s first proposal with savings recommendations could be submitted by January 14, 2014, for implementation in 2015, if the Medicare per capita target growth rate is exceeded. Of note, IPAB cannot recommend tax increases, beneficiary co-payment increases or benefit and eligibility changes. Hospitals and hospice providers may not be included in payment recommendations through 2019. As IPAB begins to take shape in 2011, opponents will continue to be highly critical of the IPAB, arguing that it abdicates the power of Congress to unelected officials who cannot be held responsible for their actions by citizens, and the implementation of the IPAB’s recommendations will result in reduced health care quality and access.

Center for Medicare and Medicaid Innovation (“CMI”)

The ACA creates a Center for Medicare and Medicaid Innovation within CMS effective January 1, 2011, to test, evaluate and expand different payment structures and methodologies to reduce program expenditures while maintaining or improving quality of care. The law first required testing of models and dedicated \$5 million for the design, implementation and evaluation of models for fiscal year 2010. The law also allows for the possible expansion of models being tested under demonstration projects and allocates \$10 billion for expansion of models for fiscal years 2011 through 2019. The Secretary may limit testing of a model to certain geographic areas and will select the models to be tested where there is evidence of deficits in care leading to poor clinical outcomes or potentially avoidable expenditures. ACA requires that the Secretary focus on models expected to reduce program costs while preserving or enhancing the quality of care, including the following: medical homes, alternative payment mechanisms, coordinated care, health information technology, medication management, patient education, integrated care for dually eligible beneficiaries, care for cancer patients, post-acute care, chronic care management, collaboration among mixed provider types, rural telehealth expansion, and the development of a rapid learning network. In early October, Dr. Richard Gilfillan, former Geisinger Health Plan CEO, was named acting director of the CMI. Throughout 2011, the CMI will be very active in designing and implementing different testing models and CMI is sure to be an agency priority as CMS Administrator Berwick has called it a potential “jewel in the crown” of the health reform law.

c. Medicaid

While there were significant changes to the Medicaid program mandated under ACA, many of these changes will not be implemented until 2014. Key among these changes is the expansion of the Medicaid program to include individuals with incomes up to 133 percent of the federal poverty level. Other changes to the program include expanding Medicaid coverage to childless adults and enhanced federal funding for newly eligible individuals. In the coming year, as states continue to face rapid growth in enrollment and spending, states will be looking to Congress for financial assistance. States obtained some relief from the American Recovery and Reinvestment Act (“ARRA”), which provided a temporary increase in the Federal Medical Assistance Percentage (“FMAP”) through December 2010. This relief was then extended by Congress through June 30, 2011, in legislation enacted in August 2010. However, as states still struggle with historically difficult budget conditions, the expansion of the Medicaid program under ACA will require either increased state Medicaid spending or additional FMAP relief from Congress when it expires.

d. Insurance Reforms and Issues for Group Health Plans

The ACA involves two waves of health care reforms for health insurance issuers and group health plans (fully insured and self-insured). The first wave generally goes into effect this year, while further reforms take effect in 2014, when the health insurance reforms become fully effective and the exchanges are to be up and running.

The regulatory agencies spent the summer writing rules to implement many popular aspects of the health reform law, including provisions prohibiting pre-existing condition exclusions, restricting rescissions and requiring coverage for preventive services and products.

In many respects, implementation of these reforms is likely to proceed regardless of which party holds the majority in Congress. Even the GOP plan to repeal health care reform calls for making it illegal for insurers to deny coverage on the basis of a pre-existing condition, eliminating annual and lifetime spending caps and

preventing insurers from dropping coverage if enrollees become sick. However, the current interim final rules for these provisions are not without controversy and could come under increased scrutiny.

For example, the ACA embodies President Obama's promise that "if you like the coverage you have, you get to keep it" by exempting pre-existing plans ("grandfathered plans") from many (but not all) of the reforms. The regulations issued by HHS, DOL and Treasury, which detail the changes that may be made to existing health plans without loss of grandfather status, were under attack in the Senate just before the recess for elections. While no action was taken, this is an indication that certain regulations will be under further attack under the Republican majority in the House.

Other issues to watch include final implementation of rules governing medical loss ratio ("MLR"). The National Association of Insurance Commissioners ("NAIC") recently concluded a closely-watched months-long process to develop a draft regulation (which was recently certified by HHS as an interim final rule). Under the MLR requirements, health insurance issuers offering group or individual health insurance coverage must report plan MLRs to HHS and provide annual rebates to enrollees if plan MLRs are below the applicable minimum standard (80 percent for individual and small group plans, and 85 percent for large group plans). The regulation drafted by the NAIC provides key definitions and standardized calculation methodologies for rebate calculation in 2011-2013.

HHS, Treasury and DOL jointly issued Interim Final Rules on the following reforms, all generally effective for plan years beginning on or after September 23, 2010:

- required dependent coverage of children to age 26;
- rules for health plans to maintain "grandfathered" status;
- prohibition on preexisting condition exclusions;
- limitations on lifetime and annual dollar limits on benefits;
- restrictions on rescissions;
- patient protections;
- required coverage of preventive health services; and
- rules for insurer internal claims and appeals and external review processes.

In addition to the Interim Final Rules, the agencies have also issued "subregulatory" guidance on a variety of topics, such as notices and website questions and answers, which supplement the formal guidance.

The next major effective date for health insurance reform under the ACA is 2014, when, among other things, State "Exchanges" are to be up and running, and when individuals will be required to pay a tax if they do not have health insurance. This "individual mandate" has been the basis for lawsuits challenging the constitutionality of the ACA, and Republicans in control of Congress will likely work to repeal it. The corresponding employer mandate is similarly controversial. The employer mandate, along with the increased costs associated with implementing the health care reforms, significantly changes the decision-making matrix for employers in determining whether to offer health insurance coverage.

e. Health-Related Taxes

As part of the financing for health care reform, the ACA contains a variety of tax provisions related to health care. Among these are the taxes or “fees” aimed specifically at certain sectors of the health care industry: a fee on branded drug sales, effective beginning in 2011; a 2.3 percent excise tax on sales of medical devices, effective beginning in 2013; and a fee on health insurance issuers, effective beginning in 2014. The Secretary of the Treasury has jurisdiction over regulations regarding all of these provisions and is expected to issue guidance on a timeframe that corresponds with the effective date of the various provisions. Key implementation issues involve certain exceptions from the taxes (such as the exception for orphan drug sales from the fee on branded drugs and the retail sale exemption from the device tax). The Republican-controlled House is more likely to entertain proposals to modify these key financing provisions.

The tax provision in the ACA that has gained the most vocal opposition so far, however, is not specifically health-related—rather, it is the new requirement that businesses issue 1099s to all corporations that provide goods and services in excess of \$600. Efforts to repeal or significantly modify this provision have garnered bipartisan support in both houses of Congress, in part due to the outcry of small businesses and the administrative burdens associated with the requirement. Two key issues have prevented any change so far—the need to find an appropriate revenue offset and the desire on the part of Democrats to avoid vulnerability in any part of health care reform at least for now. Republicans in turn view this as a way to begin an effort to modify health care reform. Thus, the symbolism associated with any change may have effects beyond the provision itself.

f. Fraud/Abuse

The ACA contained numerous provisions that aim to reduce waste, fraud and abuse in public programs. The provisions include provider screening requirements, enhanced oversight periods for new providers and suppliers (including a 90-day period of enhanced oversight for initial claims of durable medical equipment suppliers), enrollment moratoria in areas identified as being at elevated risk of fraud in all public programs and requiring providers and suppliers to establish compliance programs. The law also required the development of a database to capture and share data across federal and state programs, increase penalties for submitting false claims, strengthen standards for community mental health centers and increase funding for anti-fraud activities. CMS has already begun implementing key ACA anti-fraud provisions with the release of a proposed rule on new screening requirements, the temporary enrollment moratoria, payment suspensions and compliance plan requirements for providers and suppliers, as well as a guidance document on the CMS voluntary self-referral disclosure protocol. In 2011, CMS will continue to implement ACA’s anti-fraud provisions that significantly expand the tools available to CMS and the HHS OIG for oversight of the Medicare and Medicaid programs and strengthen the program integrity process.

g. Health Information Technology (“Health IT”)

The past year has proven to be a year of notable activity in the health IT space. The Office of the National Coordinator (“ONC”) and CMS have issued regulations implementing many of the health IT provisions of the Health Information Technology for Economic and Clinical Health (“HITECH”) Act, including regulations finalizing the Medicare and Medicaid Incentive Programs, the certification criteria for electronic health records (“EHR”) and the temporary certification program for EHRs. In addition to this year’s regulatory activity, there continues to be bipartisan interest among policymakers in health IT and its ability to create a more efficient health care

system going forward. This was evidenced by health IT hearings held this year by the House Ways and Means Subcommittee on Health, the House Science and Technology Committee's Subcommittee on Technology & Innovation and the House Energy and Commerce Subcommittee. Given the HITECH Act, the adoption of health IT, as well as upcoming changes to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy, Security, and Enforcement Rules, will continue to be priority areas in the 112th Congress.

h. Deficit Commission

The bipartisan Deficit Commission is charged with submitting to President Obama by December 1, 2010, recommendations designed to balance the budget by 2015, and making recommendations to improve the long-term fiscal outlook. House Speaker Pelosi and Senate Majority Leader Reid have both committed to bring up the panel's recommendations without preconditions. But that commitment could be tough to live up to if the recommendations include changes to the health care law that Democrats and President Obama spent most of 2009 and early 2010 working to enact.

For more information, see "Deficit Commission" under Part I. Budget/Appropriations & Infrastructure Funding. Subsection b.

IX. HOMELAND SECURITY & DEFENSE

a. 112th Congress Outlook

The languishing economy and the pressure on Congress to reduce the deficit will likely keep spending on homeland security and defense programs flat. The Administration and Congress will continue to target specific programs to keep these budgets in check. The Republican takeover of the House may help the Administration reduce the number of earmarks in the yearly Defense Appropriations bill and spending on certain programs targeted for reduction. The most significant change in the 112th Congress may be the makeup of both the Senate Defense and Homeland Security Appropriations Subcommittees. Both subcommittees will lose six or more members. Republican gains may also cause greater tension between Congress and the Administration over the extent and duration of the U.S. engagements in Iraq and Afghanistan.

The lame duck session will see a push by Senate Armed Forces Chairman Carl Levin (D-MI) for the Senate to finish the defense authorization bill. The bill stalled in the Senate before Congress recessed in October. The House passed its version earlier in the year. This would be the first Congress in the last 48 not to pass an authorization bill. After the elections, there may be little pressure to pass a bill unless the defense appropriation bill is likely to pass. Traditionally, the defense authorization bill precedes the defense spending bill.

Recent attempts to attack aircraft continue to show that the main threat from terrorism is targeted on air travel. Congress will continue to fund detection technology improvements and deployment. Due to the ongoing terrorist threat, highlighted by the air cargo mail bomb attempt immediately before the mid-term elections, Congress will focus spending on new or emerging technologies to screen cargo. In the past, homeland security officials have been stumped by the Congressional mandate to screen all cargo on aircraft and maritime ports. Congress will continue to fund efforts to find technology that can offer that solution. Congress has continuously supported homeland security efforts through increased spending in a bipartisan manner, even in the face of attempts by the President's budget to reduce funding. Therefore, the 112th Congress will continue increased funding for new technologies, including Advance Imaging Technology, nuclear detection and liquid/chemical/biological detection equipment.

In addition to deploying new technologies at domestic airports, the Department is working on agreements for global screening technology standards. Currently, the Department is working through the International Civil Aviation Organization ("ICAO") to develop global screening technology standards. These standards will dictate the types of technologies that will be used worldwide.

b. Foreign Engagement

The war in Afghanistan and the continued U.S. presence in Iraq will remain a priority for defense spending and Congress will again turn to a supplemental appropriations bill to fund these efforts. This Administration continues to push to reduce spending by targeting specific programs, for example the F-35 engine. This belt-tightening will continue as the Administration plans for continued withdrawal from Iraq and disengagement in Afghanistan. This will become a political issue championed by both sides. With Republicans taking over the House, funding in the Defense Appropriations bills will be increased over objections from the White House. Additionally, there is likely to be a reduction in the number of earmarks in the Defense Appropriations bills. Policy issues that will consume the Administration and Congress include Wiki leaks, the Guantanamo Bay detainee trials and the repeal of "don't ask, don't tell" and implementation of its replacement policy. Republicans

will continue to force the Administration to adopt a hawkish position with Iran. The Iranian nuclear threat has proven to be a difficult diplomatic issue for the Administration, and Congressional hawks will force the issue of a military response option to confront the defiant Iranian leadership.

c. Cybersecurity

Some in Congress feel that the White House has not made adequate progress in implementing the recommendations from an internal cybersecurity review from 2009. This discomfort with Administration progress may lead to the enactment of legislation that would provide more tools to the executive branch.

The GAO has found that the Administration has fully implemented two of the 24 recommendations in the 2009 report, while 22 have been partially implemented. Some, including leaders on the Senate Homeland Security Committee, believe the Administration lacks the tools and resources necessary to make real progress and to do so in partnership with the private sector.

Senators Tom Carper (D-DE), Joe Lieberman (I-CT) and Susan Collins (D-ME) have introduced legislation that would establish the office of cyber policy in the White House as the lead federal authority on cybersecurity efforts. The bill would also establish a National Center for Cybersecurity and Communications within DHS. The entity would enforce cybersecurity policies across the government and would engage the private sector in the enhancement of the nation's cybersecurity posture.

Growing concern over cyberterrorism has increased the number of legislative proposals in the 111th Congress, and it is very likely that a substantial cybersecurity bill will be enacted within the next two years. Pre-election comments by Senate staff indicate that the Senate will not take up a cybersecurity bill until the next Congress. At this time, there are three to four legislative proposals in the Senate and a few in the House as well.

Last month, the Administration formally announced an agreement between the Departments of Homeland Security and Defense to create a new joint office for cybersecurity. The office will be located at the National Security Agency. The agreement defines the personnel and tools that will be used to defend the nation's cyber networks. No new laws or regulations were created to establish this office. It is likely Congress will take a close look at the structure of the office and how the working relationship may affect privacy and civil liberties concerns.

Senate Majority Leader Harry Reid (D-NV), in an effort to pass a consensus cybersecurity bill this year, combined his earlier proposal with bills developed by the Homeland Security and Governmental Affairs, Judiciary, and Commerce, Science and Transportation Committees. Questions surrounding the amount of authority given to the executive branch over control of the Internet—whether the President will have a “switch” to shut it down during a cyber attack—privacy and ISP litigation concerns will have to be worked out before any significant bill moves forward.

On the House side, the Homeland Security Committee will play a significant role in any legislation moving forward. It is likely other committees, such as Judiciary, may have certain provisions or issues that could make up a comprehensive bill. As in the Senate, it may take House leadership to bring together the various proposals to pass a comprehensive bill. There appears to be bipartisan interest in resolving this critical issue and doing so in partnership with the business community that controls key elements of the infrastructure.

d. Immigration Reform

The President has listed immigration reform as among his top priorities for the next two years. The escalating violence along the border with Mexico, the move by Arizona and several other states to pass immigration enforcement laws and the strain of an antiquated system on the economy may require Congress to finally address much-needed changes. Past attempts have been thwarted by constituencies that want to see greater enforcement of the current laws before changes are considered. However, any changes may be limited in scope. The likely makeup of the 112th Congress will include a greater number of Members on extreme opposite sides of enforcement, fence construction (which the Republicans promise to revive) and citizenship and work visas.

e. Homeland Security Reauthorization

The 112th Congress may provide the best opportunity for the passage of a long-awaited Department of Homeland Security Reauthorization bill. Previous efforts have been thwarted by the Congressional schedule and by fears that a comprehensive bill may subject the majority party to difficult votes on amendments regarding Guantanamo Bay detainee trials and immigration issues. In recent years, the House has passed numerous individual bills addressing reauthorization of specific programs at the Department, excluding the Coast Guard and other legacy components. The strategy contemplated having the Senate pass a comprehensive reauthorization bill and then using the individual House bills during a conference to develop a single reauthorization bill. The Republican takeover in the House will most likely result in the House passing a single reauthorization bill. As long as the Senate Homeland Security and Governmental Affairs Committee leadership remains the same, regardless of who is in the chairman's seat, the Senate may cooperate and also pass their version of a reauthorization bill. Key issues that may be addressed include grant funding formulas, transportation security funding, air and cargo security screening requirements, risk-based analytical tools, infrastructure security and Fusion Centers or intelligence and information sharing between federal, state and local law enforcement officials.

X. INTERNATIONAL TRADE

New Republican leadership in the House may place additional momentum behind trade issues that have languished since 2008. Congress has been focused on domestic programs that increase exports, on measures to protect U.S. industries from allegedly unfair competition from China, and on long-term goals for export control reform. These efforts are likely to continue, but newly elected legislators may push forward efforts to increase bilateral trade by approving pending free trade agreements and considering extensions of existing preference programs and establishment of new programs.

a. Free Trade Agreements

The 112th Congress will inherit three free trade agreements (“FTAs”)—with Korea, Colombia and Panama—that were concluded by the Bush Administration but never presented to the 111th Congress. Chances for passage of the three FTAs remain uncertain in this Congress.

The Administration has expressed support for all three FTAs and directed the U.S. Trade Representative (“USTR”) to engage Korea in discussions about market access for U.S. beef and autos, and about protections for laborers in Korea. Senate Finance Chair Max Baucus (D-MT) has indicated he will not support the agreement without additional access for U.S. beef. Incoming House Ways and Means Chair Dave Camp (R-MI) has been a vocal proponent of all three FTAs, but he is similarly unlikely to support an FTA that might not adequately protect Midwestern auto workers. Since Korea signed an FTA with the EU in October, many in Congress have emphasized the export opportunities the United States will lose if Congress does not act. The outstanding question is what Korea might concede and what the Administration and Congress will do if Korea stands its ground.

Pending FTAs with Colombia and Panama are also on the government’s export-promotion agenda and appear to have the support of Senators Baucus and Camp. Most goods from Colombia and Panama already enter the United States free of duty, while U.S. goods exported to these countries are subject to high rates of duty. Nonetheless, opponents in Congress are concerned about violence against union leaders in Colombia and whether Panama might be a tax haven. Moreover, supporters of these FTAs must contend with a legislative agenda that may not prioritize these agreements.

Trans-Pacific Partnership (“TPP”) negotiations are still in the early stages, so the 112th Congress is unlikely to be asked to consider this agreement. If and when an agreement is presented to Congress, however, the extension of duty-free treatment for goods from Vietnam may face strong opposition. Given the backlog of pending agreements, new FTAs are unlikely in the current Administration.

b. Preference Programs

Preference programs offer duty-free or reduced-duty treatment for goods from developing countries, thereby facilitating growth of those countries’ economies and offering increased sourcing options for U.S. companies. Three preference programs may expire if not renewed by the 112th Congress, and legislation to create new programs was introduced in the last Congress and may be revisited in the coming year.

Benefits for U.S. imports under the Generalized System of Preferences (“GSP”) and the Andean Trade Promotion and Drug Eradication Act (“ATPDEA”) will expire on December 31, 2010, if not extended. Provisions allowing the use of foreign fabric in apparel produced under the African Growth and Opportunity Act (“AGOA”) will expire on September 30, 2012, if not extended. While there is significant support for such preference programs, some in Congress prefer a more comprehensive review of preference programs instead of continued short-term extensions of existing programs. Congress could also extend these programs after expiration and offer retroactive treatment to cover the gap, but the uncertainty of extension and retroactivity is a hurdle to companies making sourcing decisions.

Additionally, bills were introduced in the current Congress to extend additional benefits to apparel from Cambodia, Bangladesh, Pakistan, Afghanistan and the Philippines, and these bills are likely to resurface in 2011. One proposal would extend duty-free, quota-free GSP treatment to apparel from least-developed beneficiary countries, including some AGOA countries, Bangladesh and Cambodia. In addition to opposition from domestic textile interests, this proposal is opposed by companies sourcing from African countries that are “too developed” to be beneficiaries and that could lose market share to Bangladesh and Cambodia. Another proposal would allow duty-free treatment for certain apparel from Pakistan and Afghanistan. The bill passed the House in 2009, but its strict labor provisions faced opposition in the Senate. Under new leadership, the House might be willing to work with the Senate to establish reasonable labor provisions, although Republicans from textile states may nonetheless oppose this bill. A third proposal would offer beneficial duty treatment to apparel made in the Philippines with U.S. yarn or fabric. This proposal was more quietly received in Congress, but if the 112th Congress considers it, its U.S. yarn and fabric requirements could help it escape opposition from U.S. textile interests and help it gain support from free-traders in Congress.

c. Doha Round Negotiations

World Trade Organization (“WTO”) negotiations remain at a stalemate, although various sub-groups continue to meet and discuss moving the process forward. The United States has demanded additional market access from countries like Brazil, India and China, but some fault the United States for slowing down negotiations by refusing to further open its own markets in exchange. Progress in areas like services may also be hindered by lack of agreement on core topics like market access for agricultural and manufacturing goods. Absent an unexpected breakthrough in negotiations, legislative approval of multilateral agreements in the 112th Congress will be unnecessary. Congress’ action, or inaction, on pending bilateral FTAs could, however, indirectly affect the Administration’s progress in its WTO negotiations, as some think U.S. credibility is tarnished by the United States’ failure to implement the agreements it already has signed.

d. China

Concerns about Chinese policies that harm U.S. businesses have received increasing attention in 2010 and are likely to continue to be debated in the new Congress. Significant legislative issues are currency exchange and product safety. Congress will also closely follow various administrative proceedings concerning trade with China.

Senators Baucus and Camp are among those in Congress who have expressed growing frustration over the Administration’s inaction in response to China’s alleged undervaluation of its currency. In 2010, the House passed the Currency Reform for Fair Trade Act, which would make it easier for the United States to impose

additional duties on imports from China to countervail currency manipulation. Interest in China's alleged unfair trade practices is running so high that a Senate version could be considered in the lame duck session. If currency manipulation legislation does not pass this year, new bills are almost certain to be introduced in 2011. The shift in the House majority could impact such legislation in the new Congress. Several Republicans, including the new Speaker of the House John Boehner (R-OH), opposed the currency bill passed by the House, citing fears of retaliation by China and violation of international obligations. Opponents may attempt to delay legislative action and instead lean on the Administration to address the currency issue.

Fears about the safety of the increasing volumes of products imported from China are also part of the rationale for several legislative efforts in the product safety area. After sweeping consumer product safety legislation was passed in 2008, Congress may now vote on food safety legislation that would include new safeguards for imported food. Similarly, the Foreign Manufacturers Legal Accountability Act would require any foreign company to register a U.S. agent for service of process before it could ship products to the United States. This proposal has bipartisan support in the House and Senate, and the House bill was approved by the Energy and Commerce Committee. While the legislation could possibly be considered in the 2010 lame duck session, it is opposed by many importers and logistics companies, so its fate remains uncertain.

In mid-October, the USTR accepted a Section 301 petition from the United Steelworkers and commenced an investigation of China's alleged subsidization of its green energy industry. Earlier in the year, Senators Baucus and Charles Grassley (R-IL) requested International Trade Commission investigations of the effects on American business of China's intellectual property rights infringement and its "indigenous innovation" program favoring Chinese over U.S. products in the Chinese market. These and other trade remedy actions against China (including the current Section 421 tariff against Chinese tires and U.S. complaints in the WTO concerning Chinese trade remedies against U.S. steel and against providers of electronic payment services) have garnered considerable attention and bipartisan support in Congress that we expect will continue in the 112th Congress.

e. Exports

In his 2010 State of the Union Address, President Obama announced an initiative to double exports within five years, and House Democrats responded with a "Make It In America" agenda aimed at increasing exports by rebuilding the U.S. manufacturing sector. Under Republican leadership, the House is likely to continue to support the export initiative but may now focus less on mandating U.S. manufacturing and more on opening markets abroad, by advocating for passing of pending free trade agreements and completion of the TPP.

Congress must continue, however, to balance the benefits of export promotion with national security concerns and the need for effective export controls. Reforming an outdated system of controls may be a task for the next Congress. In 2010, House Foreign Affairs Committee Chair Howard Berman (D-CA) released details of a draft Technology Security and Antiboycott Act to reform controls on dual-use exports and to reauthorize the Export Administration Act ("EAA"). Businesses were critical of the extra-territorial reach of the bill, and the Administration indicated it preferred that the committee delay action until the Administration's own export reform goals could be incorporated. Under new leadership, the committee may seek to address industry criticisms before moving forward with the bill, thereby also giving the Administration some of the additional time it seeks.

The Administration's goals involve more sweeping export control reform to create a single "positive" control list, a single licensing agency and coordination of certain enforcement activities under a single agency. Legislation eventually would be required to implement these reforms, and the foreign relations, banking, armed services and homeland security committees could all claim partial jurisdiction. Republicans have indicated a willingness to work with the Administration on reform, but they may challenge whether some initiatives sufficiently safeguard security concerns. Department of Defense support for reform may help minimize this opposition. Nonetheless, the Administration's proposals may not be feasible in the short term, and the last EAA lapsed in 2001, which shows the difficulty in building House and Senate support for a single vision for export control reform.

f. Trade Sanctions

One of the main trade sanctions issues facing the 112th Congress will be whether to relax sanctions on Cuba. The Travel Restriction Reform and Export Enhancement Act, which would lift the travel ban and ease restrictions on agricultural exports to Cuba, has eighty-one co-sponsors in the House and was approved by the Agriculture Committee, but the House Foreign Affairs Committee made a last-minute decision not to mark up the bill before the election recess. Congresswoman Ileana Ros-Lehtinen (R-FL), who is now expected to take over leadership of the committee, is a vocal opponent of easing Cuba sanctions, and her position will present an obstacle to efforts to move similar legislation in the 112th Congress. Reform is strongly supported by U.S. agriculture groups, many business groups and some Republicans, however, so the discussion is likely to continue in the next Congress.

XI. INVESTIGATIONS

a. Overview of the 112th Congress

With Republicans now in control of the House, oversight of the executive branch will undoubtedly increase, as Republican complaints regarding executive branch and cabinet agency activity can be accompanied by subpoenas and hearings that Democratic chairmen could have blocked previously. Just as oversight of the Bush Administration increased when Democrats controlled the House and Senate, there is expected to be an uptick in investigations and oversight hearings by a Republican Congress into activities of the Obama Administration.

While oversight and investigations of executive branch agencies need not involve the private sector (e.g., investigations related to immigration policy or civil rights enforcement), it should not be assumed that Republican focus on the Obama Administration will eliminate Congressional activity that could have an impact on private sector entities. For example, recipients of government funds related to the TARP, stimulus programs or other controversial emergency measures taken over the last two years might be involved in investigations or oversight hearings related to these programs. Particularly in instances where government expenditures that flowed to the private sector under one of these programs can be characterized as wasteful, inefficient or improperly administered, private sector entities will be necessary players in any hearings or oversight, even if the political goal of the hearing or investigation is to discredit the program itself.

Additionally, Republican-led committees, like their Democratic counterparts, may well react to high-profile news events from the business community by holding hearings and initiating investigations. While it is impossible to predict precisely what next year's hot topics will be, Republican staff are well aware of the political risks of being viewed as protecting large corporations from accountability. Thus, while Republican-led committees may be, in general, more receptive to the business community's views on the negative economic impacts of increased regulation, allegations of serious corporate misconduct may arise where Republicans are eager to mute Democratic criticism that Republicans are protectors of "big business."

b. Changes in Relevant Committee Leadership

Congressman Darrell Issa (R-CA) will chair the Committee on Oversight and Government Reform. Congressman Issa has been a vocal critic of the Obama Administration and will likely use the committee's subpoena power to open investigations on a variety of programs. Former Chairman Ed Towns (D-NY) is expected to serve as ranking member. The House Judiciary Committee will be led by Congressman Lamar Smith (R-TX), with former Chairman John Conyers (D-MI) expected to serve as ranking member. Senator Patrick Leahy (D-VT) will continue to chair the Senate Judiciary Committee. As part of an agreement reached last year, current Ranking Member Jeff Sessions (R-AL) will be replaced by Senator Chuck Grassley (R-IA).

XII. PENSIONS AND EMPLOYEE BENEFITS

a. Mid-Term Elections

Retirement income security issues have often been handled on a bipartisan basis, as evidenced by the series of bipartisan pension bills in prior Congresses sponsored by former Congressmen Rob Portman (R-OH) and Ben Cardin (D-MD). This trend was interrupted by the Pension Protection Act of 2006, which was negotiated on a primarily partisan basis in the Republican-controlled Congress. Bipartisanship, however, is still often possible with pension provisions—the pension funding relief enacted in the current Congress being a recent example. Thus, the change in majority may have less impact on pension legislation than in some other areas. A Republican House majority, however, will be less interested in new restrictions on employer-sponsored plans and more interested in reducing administrative burdens on plan sponsors. A Republican majority is also likely to question pension guidance issued by the Obama Administration.

b. Issues for the 112th Congress

The primary retirement reform initiative of the Obama Administration—automatic enrollment IRAs designed to expand access to retirement savings to workers without an employer plan—got a slow start as all eyes were on health care reform. Bills based on the President's budget proposals were introduced in late summer. Specifically, Congressman Richie Neal (D-MA), a long time member of the Ways and Means Committee and Chairman of the Subcommittee on Select Revenue Measures, introduced HR 6099, the Automatic IRA Act of 2010, in August. The companion Senate bill, S. 3760, was introduced by Senator Jeff Bingaman (D-NM). This issue is expected to continue into the next Congress, regardless of the majority, given that it is a retirement income security priority issue for the Administration.

Assistant Secretary of Labor Phyllis Borzi recently testified before a hearing of the Senate Committee on Health Education Labor and Pensions that the Administration's pension priorities also include ensuring that 401(k) plans provide sufficient lifetime income options and appropriate investment opportunities. The Departments of Labor and Treasury have jointly asked for comments on issues and solutions relating to the offering of lifetime income products. Further development of these issues at both the Administrative and Congressional levels is expected in the next Congress.

As discussed in the section on taxes, deficit reduction and tax reform are major topics for the next Congress. The pension area is not likely to be immune from deficit reduction efforts. Specific proposals have not yet emerged and are likely to be affected by the election results. Reducing the amount of tax preferred saving and limiting pension-related tax benefits for more highly compensated employees have been proposals considered in the past. Executive compensation has been under increased scrutiny and may be looked at further—e.g., further limitations on deductions by businesses for executive compensation. This type of proposal, however, will face greater obstacles in a Republican majority.

Employer-sponsored health plans will undergo major changes as a result of the passage of the Patient Protection and Affordable Care Act. Employers will face new decisionmaking factors as a result of health care reform. A Republican House will have a different view on many of the affected employer plans, including the tax provisions, such as the \$2,500 cap on contributions to health flexible spending account. Further discussion of these issues is in the discussion on health care.

XIII. PRIVACY & DATA SECURITY

The preeminent privacy issue facing the House Energy and Commerce Committee, Senate Commerce Committee, Federal Trade Commission (“FTC”) and Department of Commerce during the 112th Congress will be defining the proper role of the federal government in setting and regulating consumer privacy standards for all businesses operating in the United States. At the forefront of this issue is whether Congress and Obama Administration departments and agencies can agree upon a general framework and legislative language to regulate the collection, use and disclosure of consumer data by businesses, whether they are operating exclusively online, exclusively offline or in both environments. “Every business that sells to consumers likely collects some data on them that they use to enhance their future product and service offerings in order to grow their revenue and expand their customer base. Over the past two years, Congress has been considering legislation that would establish new rules to regulate this important customer relationship, making consumer privacy legislation in the next Congress one of the key issues with broad applicability to businesses, and one issue to which executives will want to pay close attention,” observed former Senate Majority Leader Bob Dole.

In addition to consumer privacy legislation, the House and Senate Judiciary Committees are expected to continue their review of the Electronic Communications Privacy Act (“ECPA”) and the possibility of enacting ECPA reform legislation to address cloud computing and other technological developments. At the outset of the 112th Congress, however, the attention of the Senate and House members on the relevant committees with judiciary and commerce jurisdiction may first focus on the reintroduction and passage of data security legislation if the Senate fails to act on such a bill during the upcoming lame duck session. These three principal topics in the privacy issue area are discussed in more detail in the subsections below, and reference is also provided there to health care privacy matters covered elsewhere in this advisory.

a. Consumer Privacy Legislation

As a result of Republicans taking back the majority in the House, the chairmanships of the House Energy and Commerce Committee and its subcommittees will likely shift in ways that could significantly alter the outlook for consumer privacy legislation in the 112th Congress. While the outgoing chairman, Congressman Henry Waxman (D-CA), was a strong proponent of enacting comprehensive privacy legislation, the three leading Republican congressmen currently vying to take over as the next chairman of the powerful Energy and Commerce Committee have favored approaches to consumer privacy issues that rely on reinforcing industry best practices rather than expanding federal government regulation of businesses’ customer data practices. These leading candidates include Congressmen Fred Upton (R-MI), Cliff Stearns (R-FL) and John Shimkus (R-IL), each of whom appears to be in a better position to assume the committee chairmanship than the term-limited former Republican Chairman Joe Barton (R-TX), who currently serves as Ranking Member in the 111th Congress. (Although it is unlikely, if Congressman Barton manages to regain his seat as chairman of the full committee, then he would be expected to strongly support moving forward comprehensive privacy legislation in the next Congress as his predecessor Chairman Waxman did in the 111th Congress.)

With the anticipated shift toward a new Republican leader in the Energy and Commerce Committee, the incoming chairman would not be expected to call for privacy legislation that significantly expands federal government regulation of businesses’ customer data practices, but some form of privacy legislation that codifies industry best practices would likely remain as an agenda item for the committee. Moreover, of the three leading candidates for chairman, Congressman Stearns has been a leader on consumer privacy legislation

in the committee over the past decade, and he would be the member most likely to address privacy issues, whether he does so as the full committee chairman or as Chairman of the Subcommittee on Communications, Technology and the Internet (“CTI”), where he currently serves as Ranking Member and would likely remain if not selected as full committee chairman. Previously, Congressman Stearns served as chairman of the Subcommittee on Commerce, Trade and Consumer Protection (“CTCP”), where he sponsored privacy legislation over several Congresses that gained the broad support of the business community. As chairman of the full committee or CTI Subcommittee, Congressman Stearns would be expected to introduce privacy legislation again in the 112th Congress.

In a CTCP Subcommittee hearing on privacy legislation this past July, Congressman Stearns made some opening remarks where he noted his experience on privacy issues, their complexity and the “broad range of interests” involved in them. He also gave some indication of how he would approach privacy legislation in the next Congress, stating, “I support providing consumers with choices and transparency, but we must also keep in mind that only the consumer knows how he or she feels about the information that is being collected, the parties doing the collecting, and the purpose for which the information is ultimately collected. Congress cannot and should not make that decision for them.” In addressing legislation proposed by current CTCP Subcommittee Chairman Bobby Rush (D-IL), Congressman Stearns went on to say, “I would like to work with my colleagues to develop a better self-regulatory structure that will protect consumers while creating the proper incentives for businesses to adopt and maintain the best privacy and protection standards.”

The former Democratic Chairman of the CTCP Subcommittee, Congressman Rush, will need to reassess his own privacy bill from the 111th Congress in light of the shift in power on the committee. “The key questions facing the Republican-controlled committee will be whether, and how, to shape the proposed comprehensive privacy bills of the 111th Congress into more targeted forms of privacy legislation that could pass a Republican-controlled House on a bipartisan basis and avoid the kind of business opposition faced by the previous bills,” observed Paul Martino, partner in Alston & Bird’s Legislative & Public Policy group in Washington. “The expectation is that Republicans will pick up on data privacy where they left off in 2006, reshaping Democratic calls for legislation that would give broad new regulatory powers to the Federal Trade Commission into more finely-tuned efforts that rely on industry best practices and self-regulatory programs as the preferred ways to ensure consumer privacy.”

Despite the shifts in the House Energy and Commerce Committee, the Senate Commerce Committee is not expected to change dramatically in its approach to privacy legislation. Traditionally, this committee’s members have moved much more deliberately in the drafting and consideration of privacy legislation than their counterparts in the House, and the pace of anticipated progress is not expected to change as a result of the election. However, it should be noted that this past year marked the most significant interest by the committee in data privacy legislation in the past eight years when, in July 2010, Chairman Jay Rockefeller (D-WV) held the first hearing of what many expect to continue in the 112th Congress as a series of hearings on consumer privacy issues. These hearings would be the first extensive review of privacy issues and potential legislation since the committee considered and reported out a privacy bill in 2002 sponsored by its chairman, Senator Ernest Hollings (D-SC), which came to be known as the Hollings privacy bill. Expected to lead the drafting of privacy legislation in the 112th Congress are Senator Mark Pryor (D-AR), currently Chairman of the Subcommittee on Consumer Protection, Product Safety and Insurance, and Senator John Kerry (D-MA), currently Chairman of the Subcommittee on Communications, Technology and the Internet. Both senators are expected to maintain their chairmanships of these subcommittees that have jurisdiction over privacy

issues, and each is considering draft proposals now for possible introduction late in the 111th Congress or at the outset of the 112th Congress.

In terms of potential Congressional hearings, it is anticipated that the first hearing to be held in the 112th Congress on privacy issues will be a review of an upcoming FTC report on data privacy practices in which the FTC is expected to recommend new self-regulatory principles to be adopted by industry. The FTC indicated recently that the report would be issued before Thanksgiving and would include its findings and recommendations developed over the past year following three publicly-held roundtables on current industry practices. Principles recommended by the FTC could ultimately serve as a blueprint for Senate or House legislation, particularly bills drafted by Democratic members, making the review of this report an important focal point early in the new Congress. Additionally, the Senate Commerce Committee and House Energy and Commerce Committee may focus on their continuing review of online marketing practices, including online behavioral advertising, and the progress that industry is making in its efforts to better disclose data collection and use practices surrounding Internet advertisements and to provide consumers with the ability to opt out of targeted online ads.

b. Electronic Communications Privacy Act (“ECPA”) Reform

In the 111th Congress, the House and Senate Judiciary Committees commenced a long-anticipated review of the Electronic Communications Privacy Act (“ECPA”) following the many significant technological and communications developments that have taken place since the Act’s original passage in 1986, nearly a decade before the wide-scale commercialization of the Internet began in earnest. Given the broad interest of industry, academics and public interest organizations, some of which have formed a coalition calling for ECPA reform, the committees are expected to continue their review of the law in the 112th Congress. As part of this process, they could consider legislation to ensure that IP-based services, cloud computing and other technological developments are protected from unwarranted government access while preserving the tools that law enforcement requires in today’s communications environment. While many businesses have not yet focused their attention on ECPA reform, the issue may serve as another avenue to address online consumer privacy protections in a way that benefits both consumers and businesses alike.

c. Data Security Legislation

Data security legislation has been advanced in recent Congresses in an effort to strengthen business data security standards that would, in turn, help prevent identity theft and standardize consumer notification practices following a breach of security by a business holding consumer data. While legislation has been pursued since 2005, following well-publicized breaches by public companies that affected hundreds of millions of consumers, a federal data security bill has not yet passed Congress. In the interim, the FTC has aggressively pursued businesses with lax data security standards under its existing Federal Trade Commission Act authority, and nearly every state has enacted its own data breach notification law. These two key developments, along with improved data security technology adopted by business, have lessened the need for a federal statute over the past five years. Nonetheless, Congress has remained interested in pursuing federal data security legislation for a half-decade, and that trend is expected to continue in the 112th Congress if data security legislation is not enacted prior to the close of the 111th Congress.

d. Health Information Technology Privacy

See Health Information Technology under Part VIII. Health Care. Subsection g.

XIV. TAXES

a. Lame Duck Session

Congress has left major tax provisions to be addressed in a lame duck session. If Congress fails to act to extend the tax cuts enacted in 2001 and 2003 (including maximum individual rates on ordinary income, capital gains and dividends), Americans will see the effect on their paychecks early in 2011, as tax withholding will increase to take into account the higher rate structure. Prior to elections, the debate was focused on whether the tax cuts should be extended only for the “middle class,” meaning those with income under \$250,000, as urged by the President and most Democrats, or for all taxpayers. The year is also drawing to a close without a resolution of the estate tax, which is not in effect for 2010 and, without action by Congress, will revert in 2011 to the prior law provisions—55 percent top rate and \$1 million exemption amount. Bipartisan efforts to enact a permanent “fix” have not come to fruition. Also remaining are key business tax provisions, including the popular R&D tax credit and the active financing subpart F provision, which expired at the end of 2009. In years past, it was not unusual for these provisions to expire and be extended retroactively. This legislation was typically considered “must pass” and often was a driver for other tax legislation. This year may break the cycle as the revenue raisers used to pay for the extensions have divided the business community, with key groups taking the position that, on balance, the effect of the revenue raising provisions would outweigh the tax benefits to be extended. Certain tax relief provisions relating to the 2001/2003 tax cuts and the estate tax are exempt from statutory pay-go rules, meaning that they can be enacted without revenue offsets. While this provides relief from the difficult political task of increasing taxes, it does not alleviate the concerns of deficit conscious members of both the House and the Senate, setting up difficult decisions for the lame duck Congress.

b. Mid-Term Elections

With Republicans taking over leadership of the House and making significant gains in the Senate, there will be some new faces in key positions in the tax-writing committees. Congressman Dave Camp (R-MI) is expected to serve as chairman of the Ways and Means Committee. In the Senate, due to committee term limits, Senator Grassley’s (R-UT) six years as ranking member of the Finance Committee will be completed and he has announced that he will leave his spot as the top Republican on the Finance Committee and will move to the Judiciary Committee. This leaves Senator Orrin Hatch (R-UT) set to take over as the ranking member on Finance.

c. Looking Ahead

Two broad and complex policy considerations will form the center of the tax legislative debate in the next Congress—the deficit and tax reform. With Republicans now controlling the House, more of the debate is expected to focus on tax provisions that are favorable to businesses and to reducing spending as a means of deficit reduction.

International tax issues will be at the core of the debate. In the Democratic-controlled Congress, business taxpayers have been seen as a source of revenue, and there has also been a desire to foster tax policies that “bring jobs home to the U.S.,” even though ultimately this may result in an adverse effect on U.S. competitiveness. In a Republican majority, concerns from businesses that view U.S. tax laws as an impediment to repatriation of foreign earnings and a disincentive to invest in the United States are likely to receive more support. A key issue

will be whether the trend in the Democratic Congress to use tax provisions aimed at multinational companies as revenue raisers outside the context of tax reform will continue. In general, revenue raising proposals, such as the provisions relating to carried interests, are likely to receive more scrutiny under Republican majority.

Expected before the end of the year is a report from the President's bipartisan Deficit Commission, which was created by executive order to address the fiscal challenges facing the United States. The Commission is charged with submitting recommendations to President Obama designed to balance the budget by 2015 and making recommendations to improve the long-term fiscal outlook. The ideological split between Republican and Democratic members of the Commission makes it unclear whether an agreement on recommendations can be reached. If the Commission does release recommendations, it is unlikely that they will be passed by Congress as is, but specific recommendations may be part of Congressional consideration of the issues. For more information, see "Deficit Commission" under Part I. Budget/Appropriations & Infrastructure Funding. Subsection b.

The Senate Finance Committee recently restarted its look at tax reform with a hearing on lessons to be learned from the Tax Reform Act of 1986, the last major tax reform enacted in the United States. Witnesses, all of whom were key players in the 1986 discussions, agreed on many things, including that the current U.S. tax system is not transparent and is perceived as unfair; tax reform cannot be accomplished without major support and engagement from the White House; the current U.S. tax system is out of step from an international perspective; and tax reform should be revenue neutral. While there was also agreement among this panel that the road to tax reform should focus on modifying the current income tax system, others have raised the idea of a value-added tax or similar consumption tax base. The end of 2010 also marks the expiration of still more expiring tax provisions.

It is unclear whether Congress will separately take up deficit reduction before tax reform, as was done in the years leading up to the Tax Reform Act of 1986, or will consider tax reform issues and deficit reduction issues at the same time. True structural changes in the tax laws will take some time to develop, which may mean that deficit reduction comes first. Staff of the tax-writing committees on both sides of the aisle are already indicating that tax expenditures, including expiring tax provisions, will be given close scrutiny next year.

XV. TELECOMMUNICATIONS

a. Broadband Reclassification, Net Neutrality and Telecom Issues in General

With Republicans taking over control of the House and making significant gains in the Senate, President Obama's commitment to preserve the Internet's openness is expected to face additional challenges. However, "telecom and technology issues, like energy issues, often are not partisan—unless you aren't a partisan for innovation, efficiency, economic growth and the transformative power of advanced solutions and services," said Bill Anaya, Counsel at Alston & Bird LLP in Washington. He went on to say that "today's fixed and mobile Internet requires the interaction and engagement of a broad spectrum of technologies and infrastructure components. This forces together the policy agendas of key innovators and their constituencies—the trick is to write the legislative or regulatory protocol in such a way that there aren't any crashes. It's natural to have to reboot the code from time to time, and this session of Congress won't be immune from the desire to hit the refresh button."

Republican House Members who are positioning to become the next chairman of the Energy and Commerce Committee, which has jurisdiction over Internet and telecommunications issues, oppose government regulation of the Internet as favored by advocates of net neutrality. Advocates of net neutrality have been urging the government to prohibit broadband providers from discriminating against Internet content or applications in favor of their own services or those of partners. Even before the significant Republican gains in both the House and Senate, legislation to address net neutrality faced substantial hurdles in Congress.

Broadband reclassification faces similar opposition in Congress. For example, the senior Republican view on the Senate Commerce Committee opposes the Federal Communications Commission ("FCC") proposal to reclassify broadband from an information service to a telecom service regulated under Title II of the Communications Act.

Republican control of the House also adds complexity to the FCC's regulatory agenda on Internet policy, wireless spectrum and a range of other agenda items. The Chairman of the FCC has put forth a regulatory approach to broadband that would not require the enactment of legislation. The Chairman characterizes this approach as a "third way" that would exempt broadband from the more onerous provisions of Title II, such as price controls. Much of industry opposes this approach too.

A new politically divided government adds a layer of complexity to passage of telecom legislation, and the 111th Congress had its challenges. Some of that was due to the diminished levels of oxygen in the room to address telecom and technology policy on the legislative level. With more targeted energy and health care items to be addressed in the upcoming session of Congress, proponents of telecom proposals will have to drive the economic growth rationale to gain traction and momentum. This momentum can generate interest in elevating telecom on the agenda or as a substitute should some of the broader policy objectives not accelerate out of the blocks once the new session is gaveled into gear.

"What we need to do is work with leaders in the Congress and the Administration to ensure we protect and strengthen the best of what we have in place while fostering the development of what we can't even imagine—we owe this to future generations and to those who rely on broadband services today, whether a war fighter, a student, a parent, an employer, a doctor, a child or a disabled American," said Former Senate Majority Leader Bob Dole.

b. Spectrum and D Block

Industry and the public safety community are engaged in an effort to secure government policies that address their spectrum demands. Public safety is asking that Congress set aside a swath of spectrum known as the “D Block” for a national interoperable public safety broadband wireless network.

The FCC has proposed auctioning off this spectrum to a commercial bidder and using the proceeds to help finance the public safety network equipment. The FCC would also allow first responders pre-emptive access to roam onto commercial networks during emergencies.

Public safety officials say the FCC plan is insufficient. They have been pushing lawmakers to pass legislation that would re-allocate the D Block spectrum to them. Senate Commerce Committee Chairman Jay Rockefeller (D-WV) has introduced a bill that would re-allocate the D Block of spectrum to public safety use. Both Democrats and Republican leaders on the House Energy and Commerce Committee favor the FCC’s approach.

The Republican-controlled House and Republican gains in the Senate will add to the complexity of this important national security and commercial wireless broadband spectrum priority. “This critical issue has been unresolved for too long, and government and industry leadership is needed to arrive at clear and defined spectrum resources and rights for our nation’s public safety heroes and the industry leaders that make the wireless Internet possible. Spectrum is the lifeline for the public safety community, those they serve and millions of everyday consumers and job creators. If we need a national policy to benefit the American people, it is here,” said Bill Anaya, Counsel at Alston & Bird LLP in Washington.

c. Mobile Phone Billing

One of the potential items for consideration which could advance in the new Congress is legislation providing greater mobile phone billing protections for subscribers. Consumers are complaining about their wireless bills, and the FCC has promised to act. The FCC is working on a “bill shock” proposal that requires that carriers notify users of overcharges and sudden increases in their bills.

As cellular services are increasingly bundled with video and broadband services, and consumers download greater numbers of applications onto their smartphones, the content of monthly bills has become more challenging for consumers to understand. Third-party charges, fees for services, taxes and other items have led lawmakers to become interested in addressing this consumer protection issue. This consumer protection item could draw bipartisan interest in ensuring that the FCC addresses the matter in a workable manner.

d. Comcast-NBC Merger

The merger between Comcast and NBC has been the subject of interest on the Hill and within the Administration since its announcement in December of last year. Public interest groups and industry have been urging the President and his team to view the transaction through their varied lenses.

It does not appear the Administration will accelerate the regulatory review of the proposed \$30 billion merger, meaning that the proposed combination will receive a complete examination. Key policy considerations include balancing the important economic benefits of the merger—including advances in innovation—with the Administration’s additional interests in protecting consumers and competition.

The matter is currently under review by the FCC and the Justice Department. Considerable Hill interest in this matter will continue until the merger is concluded, but the Republican takeover of the House and gains in the Senate will be viewed as important to the proposed combination as it will increase the pressure on the Administration to approve the merger.

e. FM Transmitters in Mobile Devices

Makers of electronics devices, operators of the wireless networks and the broadcast industry are engaged in a debate over a potential mandate that would require manufacturers to install FM radios in all mobile phones.

This is a byproduct of negotiations between the recording industry and broadcasters over performance royalties. The industries are in discussions over legislation that would require AM and FM radio stations to pay performers a fee for playing their music on air. Inclusion of a radio chip mandate in mobile devices may become part of the negotiated deal. Third parties, including the consumer electronics and wireless industries, have been fighting against the possibility.

This issue is nascent, but will be important to the broadcast, wireless, consumer electronics and disability access community. With division among important industry groups, movement in the next Congress will be dependent on the education efforts of these interests.

f. Carriage Rules

With the fees that content owners are charging to cable television operators generating so much interest among lawmakers and the FCC because of the current negotiations between Cablevision and Fox, some in government are calling for the FCC to have a more formal role in such negotiations in order to ensure that the discussions are advancing and to address consumer issues.

Senate Commerce Communications Subcommittee Chairman John Kerry (D-MA) has proposed draft legislation that would allow the FCC to intervene more directly when retransmission talks break down. The draft legislation aims to protect consumers during disputes between broadcasters and cable providers that threaten to disrupt service.

FCC Chairman Julius Genachowski and fellow Commissioner Michael Copps have voiced frustration with these types of disputes, and Chairman Kerry may hold hearings on the retransmission negotiation process during the lame duck session.

g. Cybersecurity

See "Cybersecurity" under Part IX. Homeland Security & Defense. Subsection c.

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