



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Betsy Shotwell

**SUBJECT:** SEE BELOW

**DATE:** November 10, 2014

Approved

Date

11/10/14

## INFORMATION

**SUBJECT: SQUIRE PATTON BOGGS 2014 MID-TERM CONGRESSIONAL ELECTIONS ANALYSIS: WHAT TO EXPECT FROM THE 114<sup>TH</sup> CONGRESS IN THE RUN UP TO THE 2016 PRESIDENTIAL ELECTION**

The City's Federal lobbyist firm of Squire Patton Boggs, LLP has provided the attached comprehensive analysis of the 2014 mid-term elections. Included in the analysis are the elections potential impacts on major policy areas including the transportation reauthorization that expires May 31, 2014, appropriations and the budget, defense and national security, energy and the environment, financial services, homeland security, tax, technology and telecommunications to name just a few of the issues covered in the analysis. To avoid another "fiscal cliff" the next Congress will need to address the debt limit – the nation's borrowing authority – which will lapse in late spring/early summer. In addition, unless Congress can again come to a bi-partisan agreement, the sequester-level budget caps are scheduled for reinstatement in FY 2016 which begins on October 1, 2015.

However, the current 113<sup>th</sup> Congress still has plenty to do in the "lame duck" session scheduled to start the week of November 10. The Continuing Resolution to fund the government ends on December 11 and a high priority will be to fund the government through the next year although perhaps not the entire fiscal year.

Squire Patton Boggs will continue to update the City Council as priority issues of interest to the City are deliberated in Washington D.C. Updates are also provided in the firm's weekly "Capital Thinking Blog" found on their website: [www.squirepattonboggs.com](http://www.squirepattonboggs.com).

/s/

BETSY SHOTWELL

Director, Intergovernmental Relations

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Attachment

2014 MID-TERM CONGRESSIONAL ELECTIONS ANALYSIS

# WHAT TO EXPECT FROM THE 114<sup>TH</sup> CONGRESS IN THE RUN UP TO THE 2016 PRESIDENTIAL ELECTION



NOVEMBER 6, 2014

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# CONTENTS

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INTRODUCTION.....	3
APPROPRIATIONS/BUDGET .....	6
DEFENSE AND NATIONAL SECURITY.....	8
EDUCATION POLICY .....	10
ENERGY AND THE ENVIRONMENT .....	13
FINANCIAL SERVICES .....	17
FOOD AND AGRICULTURE POLICY.....	21
HEALTHCARE POLICY.....	23
HOMELAND SECURITY AND CYBERSECURITY.....	27
INTERNATIONAL POLICY ISSUES .....	30
TAX POLICY .....	33
TECHNOLOGY AND COMMUNICATIONS.....	37
TRADE POLICY.....	44
TRANSPORTATION AND INFRASTRUCTURE.....	47
ABOUT SQUIRE PATTON BOGGS .....	51

# INTRODUCTION

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The mid-term elections were notable for two reasons, one historical, one prospective. The Senate elections on Tuesday marked the 100th year of direct elections of Senators pursuant to the 17th Amendment, which became effective in 1913, superseding Article I, section 3, of the Constitution, under which Senators had until then been elected directly by state legislatures. With voters having cast their ballots, President Obama and the Republican Congress should be able to accomplish a great deal if they seize the opportunity.

What might motivate them to work together? The President now has two remaining years in office, time in which he is expected to focus on legacy issues. As he has already demonstrated, the President is prepared to act unilaterally, through Executive Orders and through rulemakings underway or contemplated. But surely the President could reduce potential future litigation risks and advance his legacy by working with Congress, though that will require a change of approach and a willingness to compromise.

Republicans have reasons to offer an olive branch, not least to show the American public in the run up to the presidential elections in 2016 that they can govern. The 2014 Senate races were run in states that naturally favored Republican candidates, including several states in which Democratic incumbents were facing electorates that had voted for Mitt Romney by double digits in 2012. By contrast, Democrats will clearly be on the offense in 2016, when 34 seats will be contested. Many Senate races will be fought in states much more historically receptive to Democratic candidates, and the party will have the benefit of a presidential race turnout model that boosts Democratic prospects in close races. Of the 34 Senate seats up in 2016, 24 feature Republican incumbents, while just 10 Democrats will be up for re-election. Unlike in 2014, none of the 2016 Democratic Senators up for re-election hail from states that President Obama lost in the 2012 election. The 2016 Senate Republicans, though, must defend six seats in states that President Obama carried in 2012 (Florida, Illinois, Iowa, New Hampshire, Ohio, Pennsylvania, and Wisconsin) and two he carried in 2008 (Indiana and North Carolina).

In this environment, many Senate Republicans will likely wish to demonstrate to their constituents that they can work with Democrats to move legislation forward that can be signed into law. Going from being the party in control of only one chamber to being in control of both chambers will put the onus on Republicans to change the narrative of a "Do Nothing Congress" to one of a "Do Something Congress." Since they remain well short of 60 votes and thus cannot easily overcome even a threatened filibuster by Democrats, Senate Republicans will need to reach across the aisle to move legislation in which they have an interest. Congressional Republicans will no doubt consider using the Budget Reconciliation process, which requires a simple majority in both chambers, to advance major legislative priorities. (But given the limitations inherent to this procedural option, they may find that their options are limited.) Lacking 67 votes in the Senate, congressional

Republicans cannot expect to overcome presidential vetoes if they go too far. The new majority no doubt will look for ways to send legislation to the President, giving him the opportunity to use a veto pen that he has only wielded twice in his first six years. This strategy in particular may be used by Speaker John Boehner (R-OH) and Majority Leader Mitch McConnell (R-KY) as a pressure relief valve for conservatives who want to confront the President. Once vetoes have occurred and been sustained, the Republican leadership could then pursue more moderate legislative options that the President will sign into law. But even those who wish to get to yes will need to overcome the divisions within their own ranks.

History shows that the last two years of a lame duck President can be productive, even for one facing a Congress controlled by the other party. Presidents Ronald Reagan, Bill Clinton, and George W. Bush, the last three Presidents to serve two four-year terms, successfully worked with Congress to enact significant legislation or to otherwise achieve landmark initiatives in their final two years in office. President Reagan, for example, pushed back against conservatives in his base to negotiate an important arms reduction treaty with the Soviet Union that eliminated the threat of intermediate-range nuclear missiles. Notwithstanding opposition from his party, President Clinton reached agreement with China to normalize trade relations between our two countries. Even though he did not enjoy as much success as Reagan and Clinton, President Bush found common ground with Democrats on a major energy bill, the last "all of the above" energy bill to clear Congress, and signed into law legislation that was essential to dealing with the fallout of the collapse of Lehman Brothers, when the world economy also was at risk.

President Obama will face similar opportunities, such as working with Republicans in Congress to secure enactment of Trade Promotion Authority, which we think is essential for his Administration to conclude major trade agreements across the Atlantic (TTIP) and across the Pacific (TPP) for the benefit of the nation as a whole. Fundamental tax reform, at least on the corporate side of the ledger, is also within reach. If realized, that goal could pay dividends for decades. Finally, there is a real need to address the impact of "sequester" on future spending options, especially the adverse impact it will continue to have on military readiness. Beyond these more contentious issues, Congress and the White House should be able to reach agreement on a new surface transportation bill, an aviation funding bill, and other bills that historically have enjoyed bipartisan support, such as education reform legislation.

However, little of this will be possible unless the President and the Republican Congress are prepared to give a little to get a lot. We remain optimistic about the prospects. As Senator Rob Portman (R-OH) recently put it, "It's very possible to get a number of things done if the president is willing to come to the table, and I believe he will."

One final subject is worth mentioning, which could have a profound impact on relations between the White House and the Republican Senate next year, and thus their ability to get anything done. Minority Leader Mitch McConnell (R-KY) has spoken recently about the importance of returning to “regular order,” including bringing more bills to the floor in which Senators will have real opportunities to offer and debate amendments. But perhaps more importantly, he has suggested that the Senate should return to the precedent of subjecting judicial and agency nominations to the same 60-vote requirement that applies to legislation in order to end debate. This precedent was abandoned late last year when, after long argument between the parties, Majority Leader Harry Reid (D-NV) triggered the “nuclear option,” which reduced the threshold necessary to invoke cloture and end debate on all executive and judicial nominations (other than Supreme Court nominations) from 60 votes to a simple majority vote. As a result of that change, since November 2013 the Senate has confirmed more than 60 judicial nominees, including twelve circuit court judges, relying solely on Democratic votes. Assuming the Senate decides to revert to prior practice, the President will face a much greater challenge in securing confirmation of any of his nominees since he will need the support of many more Republicans than had he needed only a simple majority vote.

For the institution as a whole, we think Leader McConnell’s expressed desire to revert to the pre-nuclear option filibuster threshold and return to regular legislative order would be good changes. But there can be little doubt that the limitations on the President’s ability to move forward on some judicial nominees and potentially even some cabinet selections will lead to more partisan battles that could impede progress in other areas.

Facing an all-Republican Congress, the White House can anticipate an increase in congressional investigations, as well as a continuation of those already underway in the 113th Congress, such as one focused on Benghazi. There can be little doubt that committees with jurisdiction will be investigating various aspects of the Affordable Care Act, investigations which could affect the business community as well, as investigators seek to build a record for recommending changes to the law. In addition, if the President moves forward to address immigration reform by Executive Order, he is likely to face additional congressional investigations, as well as a more poisoned political environment and a harder climb to confirmation for many of his executive and judicial appointments.

But before the 114th Congress convenes and these developments begin to play out, the 113th Congress still has plenty to do in the forthcoming “lame duck” session. Since the 20th Amendment was ratified in 1933, which moved the start date for a new Congress from March to January, legislators have met 19 times in a lame duck session, some more productive than others. In 1948, for example, after Democrats regained control of both Houses and President Harry S. Truman was elected to a full term, the “do-nothing” 80th Congress met for approximately an hour and a half. By contrast, in 2012, the lame duck 112th Congress approved legislation extending most of the “Bush” tax cuts, postponed

budget sequestration, extended unemployment benefits, postponed a reduction in Medicare payments to physicians, reauthorized the Foreign Intelligence Surveillance Act Amendments, and approved the defense and intelligence reauthorization bills. In addition, the Senate confirmed 66 nominees, including 16 judges.

Before it left town for the elections, the 113th Congress adopted a continuing resolution to fund the government through December 11. One of its highest priorities when it reconvenes will be to fund the government through next year, though not necessarily for the full fiscal year. Although the politics have yet to be sorted out, the math is pretty straightforward. Last year, Congress set domestic and national security spending levels for fiscal years 2014 and 2015 at \$1.014 trillion. For FY 2015, the House and Senate defense appropriations bills are only \$1.3 billion apart, and many other measures have the same or nearly identical funding levels. That isn’t to suggest that major policy issues don’t divide the two bodies or the two parties, but at least they are not looking at differences of tens of billions of dollars to reconcile, as in past years. Since spending for FY 2016 and beyond needs to be addressed next year, including the continuing impact of sequester on defense readiness, both parties and both houses should want to resolve the current funding impasse quickly, and to do so for the entire remaining fiscal year. But it still isn’t clear whether enough Republicans are willing to move a bill in the lame duck session to eliminate one less distraction early next year, which they will otherwise face if all Congress is able to do is provide for another short-term extension of funding.

Congress still has not completed action on “tax extenders” legislation either. Although not technically a “must pass” bill, the legislation remains a high priority for the Administration and many Members of Congress. Even though the House and Senate have, to date, taken very different approaches on extenders, resolution—of some duration—for the fifty plus provisions that have already expired or will expire by the end of the year is likely.

Congress has allowed extenders to lapse many times in the recent past. Most recently, in both the 2010 and 2012 lame duck sessions, Congress passed two-year extensions of most expiring provisions. Moreover, despite the twelve-month gap from expiration to renewal, the extender bills were made retroactive to the beginning of 2010 and 2012, respectively. The leadership of both the Democratic-led Senate and Republican-led House have acknowledged that extenders must be addressed in the lame duck session, but there has been considerable disagreement as to what the final legislation should look like, with the House and Senate taking starkly contrasting approaches so far this year. The Senate Finance Committee reported bipartisan legislation, the EXPIRE Act, which would extend nearly all expired provisions for two years (2014 and 2015), thereby preventing an \$85 billion tax increase on individuals and corporations from taking effect. Rather than opting for a short-term extension of all expired provisions, the House has passed a handful of bills making select extender provisions permanent at a much greater cost. Under the House approach, dozens of provisions that



expired at the end of 2013 remain unaddressed. With the 2014 tax filing season closing in, there will be significant pressure to deal with these provisions in the lame duck session. Although both the House and Senate will seek to defend their preferred approach to extenders, it is more likely that the Senate's lowest common denominator approach will prevail as it has historically.

We also expect Congress to consider legislation that combines the most critical elements of the Marketplace Fairness Act (MFA) with a long-term extension of the Internet Tax Freedom Act (ITFA). Both MFA and ITFA enjoy broad bipartisan support in Congress. The MFA, for example, which would give states the authority to compel online and catalog retailers to collect sales taxes on remote sales if they have simplified their state sales tax laws, passed the Senate with a strong bipartisan margin in 2013. The ITFA, which would make permanent the ban on state and federal taxation of Internet access, passed the House this summer with strong bipartisan support and was then extended as part of the legislation funding the government until next month. Congressional leaders have expressed urgency to resolve both issues in tandem, since the ITFA expires on December 11, 2014. Senate Majority Leader Reid and other Senators have publically committed to take up and pass the Marketplace and Internet Tax Freedom Act (MITFA) early when Congress returns to work this month. Swift consideration of MITFA would satisfy a broad coalition of stakeholders, including Internet Service Providers and anti-tax advocates that strongly support ITFA, and brick-and-mortar retailers, technology providers, Internet retailers, and state-and-local governments that support enactment of the MFA this year.

We also expect Congress to take up the issue of retransmission consent for satellite TV providers. Current law, which expires at the end of the year, provides satellite TV providers with certain retransmission rights to broadcast TV station signals. If the law is not renewed, some 1.5 million satellite TV subscribers could lose access to these broadcast stations. This past summer, the House passed a bill to address the problem. In September, the Senate Commerce Committee passed its version, although after some difficulty. There are some key differences between the Senate and House versions that will need to be resolved. The Senate bill, for example, addresses several issues with retransmission agreements and procedures, including examining the costs of such agreements for cable TV providers, investigating whether such agreements are being negotiated in "good faith" by broadcasters, and placing limits on such agreements to prevent cable and satellite TV providers from carrying certain out-of-market stations. The House bill does not include any of these or other provisions.

We also expect Congress to give final approval to the annual defense authorization bill, which has cleared the House but not yet reached the Senate floor. Leadership of the Armed Services Committees will produce a bill that represents the equivalent of a conference report, with initial approval in the House and final passage in the Senate thereafter. In recent years, when Congress has struggled to pass legislation of any sort, the defense authorization bill is one of the few bills that Congress can be counted on to send to the President.

In addition, Congress will need to extend the Terrorism Risk Insurance Act (TRIA) by year end when current law expires. The House Committee on Financial Services and the full Senate have approved legislation to reauthorize TRIA. While the House and Senate versions of the legislation differ substantially, both chambers have acknowledged the need to reauthorize TRIA by year end.

Beyond that, we don't see much else being done in the lame duck session.

In the pages that follow, we offer our thoughts on major policy areas that will drive the agenda in Washington for the next two years in the run up to the 2016 presidential election and how they might affect you. The next Congress will face the need to extend or reauthorize the nation's surface transportation and aviation programs, with funding and policy challenges involved in each. It will also need to address the debt limit. Many other challenging issues await it as well. To give you a sense of what potentially lies ahead, we sketch out our sense of what is in store in the areas of appropriations and budget matters, defense and national security, energy and the environment, financial services, food and agriculture policy, healthcare, homeland security and cybersecurity, international policy issues, tax, technology and telecommunications, trade, and transportation and infrastructure.

As a firm with deep public policy roots, we are proud of our ability to help clients exercise a right enshrined in the U.S. Constitution by petitioning their government. We have been at it since 1965, when Jim Patton encouraged a young White House aide named Tom Boggs to help him build a different kind of law firm, one that understood that all three branches of government could provide solutions to challenging problems. By combining political know-how, legislative experience, and substantive knowledge of the law, they had a vision for helping clients achieve success.

This year marked a historic transition for our public policy practice, as we joined with our colleagues at Squire Sanders to form Squire Patton Boggs and dramatically expanded the capabilities we offer our clients. From a small firm in 1965, we have evolved into a firm with 44 offices in 21 countries, including a presence in capitals around the world where major policy decisions made today could affect your business tomorrow. We have an expanded ability to connect your business objectives to policy decisions worldwide. We look forward to using our broader capabilities to help our clients achieve their global public policy objectives in the next two years.

# APPROPRIATIONS/BUDGET

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## Major Policy Developments

The recent bipartisanship on budget issues will be tested early in the 114th Congress. Another fiscal cliff looms in 2015 as the nation's borrowing authority will lapse in late spring/early summer, requiring an increase in the debt limit, and sequester-level budget caps are scheduled for reinstatement in FY 2016, which begins on October 1, 2015.

The debt limit is the total amount of money that the U.S. Government is authorized to borrow to meet its existing legal obligations, including Social Security and Medicare benefits, military salaries, interest on the national debt, and tax refunds. Congress must increase the nation's debt limit periodically. Failure to increase the debt limit would cause the government to default on its obligations, something the United States has never done. The debt limit has been addressed nearly 80 times since 1960, most recently in February 2014, when it was extended through March 15, 2015. This is a soft deadline, as the Department of Treasury typically employs "extraordinary accounting measures" to further extend the limit. Treasury has indicated that the current extension will be sufficient until summer.

Sequestration is a "poison pill" included in the Budget Control Act of 2011 (BCA) that imposed discretionary spending caps through 2021 to achieve \$1.2 trillion in deficit reduction required to offset an increase in the debt limit. This provision was included in the BCA as a way to incentivize the Joint Committee on Deficit Reduction, also established through the BCA, to develop a compromise deficit reduction plan. The failure of the Joint Committee to come to a bipartisan agreement forced the implementation of sequestration in FY 2013, ultimately resulting in an eight percent reduction in defense discretionary funding and a five percent reduction in non-defense discretionary funding for that fiscal year. The BCA also identified specific topline funding levels for defense and non-defense programs through 2021.

The Bipartisan Budget Act of 2013 established overall discretionary spending caps for FY 2014 (\$1.012 trillion) and FY 2015 (\$1.014 trillion). The agreement eliminated \$63 billion of the sequester impact for FY 2014 and FY 2015, but also extended the BCA's spending caps through 2023. Therefore, unless Congress can again come to a bipartisan agreement, the BCA's discretionary spending limits will affect the FY 2016 budget process. Adding to the challenge, neither of the architects of the Bipartisan Budget Act—Senate Budget Committee Chair Patty Murray (D-WA) and House Budget Committee Chairman Paul Ryan (R-WI)—will likely serve as Budget Committee chairs in the 114th Congress. While the BCA topline discretionary funding level for FY 2016 would essentially keep federal funding level at \$1.015 trillion, longstanding arguments over the reduced spending levels and their impact on domestic programs and military readiness will be amplified by the costs of recent military action against the Islamic State and the Ebola crisis.

Additional factors may further reduce federal spending next year, such as mandatory offsets for the required debt limit increase and a further push for additional deficit reduction, including entitlement reform.

The FY 2016 budget process will commence this spring with the submission of the President's Budget Proposal to Congress, in which he is expected to propose higher discretionary spending caps than those mandated by the BCA. The Senate and House Budget Committees will also work on preparing a budget resolution for FY 2016. A budget resolution represents an agreement between the House and Senate on a budget plan for the upcoming fiscal year and several years going forward. A budget resolution is considered "concurrent" once it is agreed to by both the House of Representatives and the Senate, but is not enacted into law; rather, it serves as the framework for subsequent budget-related legislation.

If Republicans can work through philosophical fiscal differences within their own party, they should be able to approve a budget resolution for FY 2016, a component of the federal budget process that has been lacking for the past four years. The Senate requires a 60-vote threshold to end debate and advance legislation; hence, despite holding a slight majority, this requirement may limit the ability of Republicans to advance budget legislation that is too austere. Incoming Budget Committee Chairmen Senator Jeff Sessions (R-AL) and Representative Tom Price (R-GA) both share current House Budget Committee Chairman Paul Ryan's vision to achieve a balanced budget within 10 years, although they may forgo some of Ryan's more controversial methods, such as the privatization of Medicare, in order to secure sufficient Republican support in the Senate. (Ryan's most recent budget proposal received only 41 Republican votes in the Senate.) Both chairmen have stated they believe the BCA-mandated spending cap is the ceiling for FY 2016 discretionary spending.

A budget resolution can also include reconciliation instructions that direct certain committees to recommend changes to laws impacting revenue or spending within their jurisdiction that would be required to implement the proposals outlined in the budget resolution. In addition to discretionary spending, reconciliation can incorporate revenue, entitlement reform, and debt limit provisions, as long as the measure does not increase the long-term deficit. Budget reconciliation requires only a simple Senate majority, allowing the majority party to bypass the typical 60-vote threshold to pass budget-related legislation. The reconciliation process was last utilized by Democrats in 2010 to help pass healthcare reform. However, lacking the necessary two-thirds majority to overcome a presidential veto, the use of reconciliation could backfire on Republicans, as it did in the mid-1990s when President Bill Clinton vetoed a reconciliation bill and congressional Republicans were blamed for the resulting government shutdown.

## Anticipated Congressional Committee Developments

Senator Thad Cochran (R-MS) will assume the leadership of the Appropriations Committee in the 114th Congress. Senator Barbara Mikulski (D-MD) will serve as Ranking Member, although retirements and election losses for several Democratic subcommittee leaders will further change the dynamics of the committee. Majority Leader Harry Reid (D-NV), currently on leave from the committee while he serves as Majority Leader, could regain his position—and seniority—next year.

Current Ranking Member Senator Jeff Sessions (R-AL) will become the Chairman of the Budget Committee. Senator Sessions is a fiscal conservative who notably led Republican opposition of the Bipartisan Budget Agreement of 2013 (the Ryan-Murray Budget deal), and is a proponent of budget reconciliation. If Senator Patty Murray (D-WA) chooses to replace retiring Senator Tom Harkin (D-IA) as Ranking Member of the Health, Education, Labor and Pensions (HELP) Committee, the Democratic leadership of the Budget Committee becomes uncertain. Senator Ron Wyden (D-OR) is next in seniority, followed by Senators Bill Nelson (D-FL) and Debbie Stabenow (D-MI), all of whom have Ranking Member opportunities on other committees.

In the House, Representative Hal Rogers (R-KY) will continue to chair the Appropriations Committee, with Representative Nita Lowey (D-NY) likely to remain as Ranking Member. The retirement of three cardinals whose subcommittees control the majority of the domestic discretionary budget will create a domino effect of changes in subcommittee leadership: Representative Frank Wolf (R-VA) (Commerce-Justice-Science); Representative Jack Kingston (R-GA) (Labor-HHS-Education); and Representative Tom Latham (R-IA) (Transportation-Housing). House Republicans typically allocate chairmanships based on seniority, and a number of committee members have already expressed interest or been identified as possible candidates for these subcommittees, including several chairs of other subcommittees. Chairman Rogers is expected to make his recommendations to the House Republican Steering Committee in December or January. On the Democratic side, the retirements of Representatives James Moran (D-VA) and Ed Pastor (D-AZ) will leave the Ranking Member position open on the Interior-Environment and Transportation-Housing subcommittees, respectively.

Current House Budget Committee Chairman Paul Ryan (R-WI) will seek the chairmanship of the Ways and Means Committee, left vacant by the retirement of Representative Dave Camp (R-MI). As a result, Representative Tom Price (R-GA) will likely assume the chairmanship of the Budget Committee, while Representative Chris Van Hollen (D-MD) will continue as Ranking Member.

## Anticipated Agency Developments

We do not anticipate substantial changes in leadership at the White House Office of Management and Budget (OMB), as Shaun Donovan was only recently sworn in as the Director of OMB on July 28, 2014, by a vote of 75-22.

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## Contact Information

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# DEFENSE AND NATIONAL SECURITY

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## Major Policy Developments

The twenty-fifth anniversary of the fall of the Berlin Wall will be observed on November 9, 2014. That singular event led to even broader changes in the world order, including the breakup of the Soviet Union and the reunification of Germany. In the United States, those events led to a significant reduction in the Cold War-sized U.S. military force and the declaration of a peace dividend from the reductions in the defense budget. On the morning of 9/11, that peace dividend was gone. In the twenty-five years since the raucous celebration in the streets of Berlin, the world, in terms of national security, is a much more disordered and dangerous place than could have been imagined then. The national security policy challenges facing the President remain the same as before the election: ISIL, Syria, Iraq, Afghanistan, Iran's and North Korea's nuclear programs, Arab-Israeli peace, Ukraine, Russia, and even the Ebola virus. With Tuesday's election results, the President must face them with the help, or hindrance, depending on one's perspective, of a Republican-controlled Senate and House.

The next major policy issue facing the President and the 114th Congress is what to do about the defense budget and sequester. Imposed by the Budget Control Act (BCA) of 2011, and triggered by Congress' failure to agree on a broad plan of spending cuts and revenue increases to reduce the deficit to meet the BCA's yearly spending caps, sequester imposes across-the-board percentage cuts in every budget line item. These so-called "salami slice" cuts were so disruptive to the Department of Defense (DoD) during FY 2013 that the Bipartisan Budget Agreement (BBA) of 2013 eliminated sequester for Fiscal Years 2014 and 2015. However, it still imposed spending caps, albeit revised ones, for DoD as well as the domestic side of the budget.

The 2013 sequester amount, along with the spending caps for 2014 and 2015, reduced defense spending by \$600 billion from the 10-year plan that was in the President's 2012 Budget. However, the BBA did not alter the sequester mechanism for 2016 and beyond. In what could be described as a classic game of chicken, the President's budget for Fiscal Year 2016 and beyond assumed that Congress would fix sequester. Thus, the topline numbers for FY 2016 and beyond exceed the budget caps in the BCA. That means the FY 2016 budget would have to be reduced by an additional \$36 billion, and the 10-year plan by \$168 billion. This additional reduction to programs already planned and programmed would result in additional manpower cuts, eliminating an aircraft carrier, eliminating a squadron of F-35s and the fleet of KC-10 tankers, retiring 8 additional ships, and eliminating 8 new construction ships and reducing readiness funding by \$16 billion, to name some examples.

Congressional defense leaders on both sides of the aisle have joined President Obama in condemning the effects of sequester on defense programs and readiness and calling for its repeal. However, in the over three years since sequester was invented, no consensus has emerged on how to repeal it. The President has insisted that sequester must be repealed for both the defense and domestic sides of the federal budget and replaced with targeted cuts and tax and revenue increases. The President proposed to provide additional funding for investment in defense and domestic programs such as education and infrastructure that contribute to national and economic security. Republican proposals have generally only targeted the defense side or offered delays in Obamacare as the funding source to pay for sequester relief. Deficit hawks are satisfied that sequester is working to reduce the deficit and should remain in place.

The outcome of this policy debate will drive all other defense policy decisions in the final two years of the Obama Administration. It will determine everything from the numbers of Americans in uniform, the size of their pay raises and the cost of healthcare benefits, the readiness of ships, aircraft, and combat vehicles, to the number of ships and aircraft purchases. It will drive the level of investment in research and development and decide if and when new weapon systems will be developed to meet the next generation of threats. It will also affect the debate on all national security issues such as putting United States troops back on the ground in Iraq to fight ISIL (current air and supply operations are running at \$8.3 Million a day) and how much the U.S. can afford to support the Afghan Government after the 2014 drawdown.

## Anticipated Congressional Committee Development

Senator John McCain (R-AZ) will finally chair the Senate Committee on Armed Services after 27 years as a committee member. He previously served as Ranking Member from 2007-2013. Senator McCain has been publicly critical of President Obama's national security policies and responses to the situations in countries such as Syria and the Ukraine and operations against ISIL. With the change of control in the Senate, Senator McCain will not be restrained, as was Democratic Chairman, Senator Carl Levin (D-MI), who often refrained from publicly criticizing a Democratic President. Instead of succeeding Senator Levin as Chairman, Senator Jack Reed (D-RI) will likely be Ranking Member. A West Point graduate, he is well respected and is often mentioned as a possible Secretary of Defense. He will be called upon by the White House to carry the flag for the President's defense budget and policies.

On the Senate Appropriations Committee, it is anticipated that Senators Thad Cochran (R-MS) and Dick Durbin (D-IL) will exchange seats as Ranking Member and Chairman of the Subcommittee on Defense. In the Subcommittee on Military Construction and Veterans Affairs, Senator Mark Kirk will become Chair. Because of retirement, defeats, and other Committee assignments, Senator John Tester (D-MT) will likely be the Ranking Member.

Because of the retirement of Representative Buck McKeon (R-CA), Representative Mac Thornberry (R-TX), the heir apparent throughout 2014, will likely ascend to the chair. A thoughtful, well-regarded member on national security issues, he will also be in a position to challenge the President's budget decisions and policy responses with the gavel in his hand. Representative Thornberry is also a leading thinker on acquisition reform who spent 2014 seeking input from all stakeholders. Look for the FY 2016 budget process to have a major component of acquisition policy legislation in both the House and Senate authorization bills. Representative Adam Smith (D-WA) will continue as Ranking Member.

In the House Appropriations Committees, Representative Rodney Frelinghuysen (R-NJ) and Representative Pete Visclosky (D-IN) will likely remain as Chair and Ranking Member on the Subcommittee on Defense. Representative John Culberson (R-TX) and Sanford Bishop (D-GA) will continue to fill the same roles on the Military Construction and Veterans Affairs Subcommittee.

### Anticipated Agency Developments

Secretary Hagel and his top staff are expected to remain through the end of the Obama Administration. All will be participating in the debate on sequester and the defense budget, and all will be watching the outcome. But watching the closest will be the hundreds of military programmers and budgeters, who may have to figure out a justifiable plan to reduce the military services by an additional \$168 billion over the next 10 years. There will hardly be a congressional district untouched by this level of cuts which will come in fast at \$36 billion in the first year of execution.

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### Contact Information

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# EDUCATION POLICY

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## Major Policy Developments

In 2016, Senate Republicans face an electoral map that favors Democrats regaining control of the Senate. House Republicans will be running in elections that could be influenced by the coattails of the presidential candidates for each party. In anticipation of facing this environment, congressional Republicans may look for an issue area in which they can demonstrate they can address middle-class issues of concern and pass legislation that the President will sign. Education presents just such an opportunity.

### Elementary and Secondary Education Act Reauthorization.

The Elementary and Secondary Education Act (ESEA) was last authorized in 2002 when the previous iteration of the law – No Child Left Behind (NCLB) – was enacted. The law expired in 2007 and every Congress since that time has sought solution to reauthorizing the law but have ultimately come up short. The 113th Congress was no exception, despite the fact that the House passed an ESEA reauthorization bill in summer 2013 and the Senate Health, Education, Labor and Pensions (HELP) Committee also reported a bill out of committee around the same time. For both committees, ESEA reauthorization will remain a top priority, possibly even higher than reauthorizing the Higher Education Act (HEA), with the Department of Education's NCLB waivers being a motivating factor.

We expect the future of elementary and secondary education to be a top-tier topic for leading candidates seeking the presidential nomination of both parties in 2015 and 2016. If they were to run, former Secretary of State Hillary Rodham Clinton (D-NY) and former Governor Jeb Bush (R-FL) would likely use their expertise in this area to differentiate themselves from other candidates in the primaries and effectively force their opponents to develop their own comprehensive education improvement plans. However, developments on the campaign trail may not be enough to contribute to passage of ESEA reauthorization in the next Congress.

That said, with both chambers controlled by the same party, reauthorizing ESEA in the 114th Congress may prove to be easier than it has been in the past given the political tension that has come along with ESEA reauthorization in previous years. We expect the House to take a similar approach to ESEA as it did in the 113th Congress, which is likely to be more closely aligned with the Senate Republicans' goals for reauthorization.

With Senator Lamar Alexander (R-TN) as the likely chairman of the Senate HELP Committee, we expect that any ESEA reauthorization bill that the Senate might consider is likely to be similar to the bill introduced this Congress, the Every Child Ready for College or Career Act of 2013 (S. 1101). Seven Republicans on the committee signed on as co-sponsors of the bill which would seek to make Title I funding more flexible to ensure it follows students to the public school of their choice and eliminates the Obama Administration's signature programs like Race to the Top

and Investing in Innovation, among other changes to the current law. As a former Secretary of Education, past governor, and past presidential candidate, Senator Alexander is ideally positioned to quarterback major education initiatives through the closely divided Senate.

### Higher Education Act Reauthorization.

With the current HEA law expired as of 2013, there was some movement on reauthorizing HEA in the 113th Congress but it will not reach the finish line before the end of 2014. This year, the Senate took a comprehensive approach to reauthorizing HEA. HELP Committee Chairman Harkin, for example, released a discussion draft in June to get feedback from stakeholders. The House chose to take a piecemeal approach to reauthorization and passed several smaller higher education-related bills that would reauthorize parts of HEA.

The House will likely begin the HEA reauthorization process in early 2015 but the leadership has not determined a specific timeline for consideration of an HEA reauthorization bill, particularly as the House Education and the Workforce Committee plans to address ESEA reauthorization first next year. Any House HEA reauthorization is likely to include language that is similar to the bills that it passed in the 113th Congress related to promoting competency-based learning, financial literacy, and data transparency. The committee is also likely to look at how to streamline the current loan programs into a "one grant, one loan" program and will seek to improve loan repayment options to help students manage their student debt load.

As the Senate HELP Committee considers HEA reauthorization, we expect that the legislation that Senator Alexander will produce to be starkly different from the discussion draft that Chairman Harkin released in summer 2014. Senator Alexander previously stated that he would prefer to take a "blank slate" approach to reauthorizing HEA because he feels that there are too many rules and regulations placed on institutions of higher education. He previously chaired the congressional task force that looked into how to decrease the regulatory burden currently placed on colleges and universities, and will likely use what he learned in the task force to inform his drafting of an HEA reauthorization bill. Additionally, Senator Alexander will likely include provisions to simplify and streamline the Free Application for Federal Student Aid (FAFSA), implement year-round Pell Grants, and overhaul the current student loan system given that his bipartisan legislation – the Financial Aid Simplification and Transparency (FAST) Act – that he introduced this year with Senator Michael Bennet (D-CO) covered these topics.

As for the Department of Education, it will pursue a rigorous regulatory agenda that will include issuing a proposed rule on teacher preparation programs now that the mid-term elections have occurred. We also expect it to issue by the end of 2014 or early 2015 its proposed rules on other higher education topics, including cash management, state and foreign authorization, and retaking coursework following the program integrity negotiated rulemaking that ended in the spring. Next year, the Department will start its rulemaking on accreditation, with a solicitation for stakeholders to serve on the negotiated rulemaking committee likely being published by this December. The Department is also slated to complete additional regulatory actions on other higher education topics, including Pay as You Earn. A Republican Senate, along with the House, will be much more engaged in overseeing the development and implementation of these rules to make sure they are necessary and do not overly burden education stakeholders. Already, House Majority Leader Kevin McCarthy (R-CA) has made clear that part of the House Republican agenda will be to drastically decrease the over 4,200 various reports, including education-related reports, sent to Congress. His rationale is that many of these reports are unnecessary, but are required to be sent to Congress by law.

### **Career and Technical Education Reauthorization.**

With the Carl D. Perkins Career and Technical Education Improvement Act of 2005 already expired, both education committees will likely hold hearings to inform the reauthorization process. At this point, it is unclear whether the committees will take any other major legislative action. Pressure to reauthorize career and technical education (CTE) programs, however, will ramp up early next year as many stakeholders will take a different approach by calling for some CTE programs to be reauthorized and included as part of the HEA.

### **Campus Sexual Assault.**

Throughout 2013, the Obama Administration and Members of Congress have looked for ways to combat sexual assault on college campuses. These actions have included several congressional roundtables and hearings on the subject, updates to the Clery Act through the negotiated rulemaking process, and legislation introduced to have colleges and universities take proactive steps toward eliminating and mitigating sexual assault. This issue has been a bipartisan one with 17 Senators from both sides of the aisle signing on as co-sponsors of the sexual assault legislation—the Campus Accountability and Safety Act—that Senator Claire McCaskill (D-MO) introduced this year. The House has yet to introduce a companion bill to the Senate’s legislation, but is currently looking into how they will address issues related to campus sexual assault in 2015.

Although Democrats will not retain control of the Senate in 2015, Senator McCaskill and the other Democrats that are leaders on this issue have been working hard to ensure that they have Republican champions that can continue to push for enactment of campus sexual assault legislation. We expect this issue to continue to be bipartisan. Although he was not a sponsor of the bill in the 113th Congress, Senator

Alexander has worked closely with Senator McCaskill and the others concerned about campus sexual assault this year to look for a path forward for this type of legislation in the 114th Congress, whether it is a bill that moves on its own or is wrapped up into HEA reauthorization. Senator Alexander will likely hold a hearing on this issue and look for ways to bridge the divides with the House’s perspective on this issue.

### **Treatment of Student-Athletes.**

In the aftermath of the National Labor Relations Board’s (NLRB) decision (at the regional level) that student-athletes have the right to form a union and bargain collectively, we expect a continued congressional focus on the NLRB’s decision and the treatment of student-athletes in the 114th Congress. Both education committees are likely to hold more hearings. In addition, Members of Congress, particularly Democrats, will likely continue to request information from universities and the NCAA on their policies related to student-athletes. We also expect Members of Congress to introduce stand-alone bills to focus additional attention on the issue.

### **Student Data Privacy.**

In the 113th Congress, Senators Ed Markey (D-MA) and Orrin Hatch (R-UT) introduced legislation that would update the Family Educational Rights and Privacy Act (FERPA) to add additional safeguards for student data and educational records that are held by private companies. Though we do not expect Congress to consider this legislation in the lame duck, it is likely that student data privacy issues will continue to be an issue in the 114th Congress. The Senators will likely continue to push for student data privacy legislation, though it is unclear whether or not there is an appetite throughout Congress to update FERPA given that some stakeholders have stated that it does not need to be updated.

We expect the White House to issue an Executive Order on student data privacy focused on K-12 by the end of this year. The White House may issue another Executive Order on student data privacy, with the focus on higher education, next year.

### **College Ratings System.**

The Department of Education had announced that it would release the details of its college ratings system sometime this fall. With the mid-term elections behind us, those details are likely to be released soon. The concept for the ratings system was originally part of President Obama’s college affordability proposal released last summer. A large number of universities and colleges have spoken out about their concerns about the Department getting involved in rating colleges and are closely watching to see what kinds of metrics they will use in the pilot that will be released. As the Department seeks to implement the college ratings system in 2015, we expect that there will be a lot of congressional scrutiny over ratings system and how the Department chooses to rate colleges and universities. We do not expect many Members of Congress, however, to champion the college ratings system and there will not be a serious push to tie the metrics to Title IV funding under the HEA.

## Anticipated Congressional Committee Developments

As noted above, current Senate HELP Committee Ranking Member Lamar Alexander (R-TN) is set to take over the chairmanship of the committee. Senator Alexander's background in education is very extensive as he served as the Secretary of Education under President George H.W. Bush and also was the President of the University of Tennessee. Additionally, as Governor of Tennessee, one of his signature accomplishments was to overhaul the state education system. He has been a leader on education issues for the Republican Party since he was elected to the Senate in 2002. Senator Alexander has been a constant critic of the U.S. Department of Education under President Obama and Secretary of Education Arne Duncan, often referring to the Department as seeking to be a "national school board" for what he sees as overreach into the states' role in education policy. He sees education as a local and state responsibility and will likely seek ways to limit the role and impact of the federal government in education.

We anticipate that Senator Patty Murray (D-WA), who had served as Chairman of the Budget Committee, will serve as Ranking Member of the committee.

Representative John Kline (R-MN) will maintain his leadership of the House Education and the Workforce Committee, which has jurisdiction over all education programs. With Representative George Miller (D-CA) retiring at the end of the year, we expect that Representative Bobby Scott (D-VA) will succeed him as Ranking Member.

## Anticipated Agency Developments

On October 1, the Department of Education announced that Deputy Secretary Jim Shelton is leaving the Department at the end of 2014. Shelton was confirmed by the Senate in March but he has been serving in the Acting Deputy Secretary role since September 2013. He was a major advocate for education technology and had the Office of Elementary and Secondary Education in his jurisdiction. The Department has yet to announce who will replace Jim Shelton as Deputy Secretary in 2015, but whoever is nominated will be in charge of continuing to issue and renew NCLB waivers until an ESEA reauthorization bill is passed.

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# ENERGY AND THE ENVIRONMENT

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## Major Energy Policy Developments

### Prospects for Comprehensive Energy Reform Legislation.

Although energy legislation has historically been crafted in a bipartisan manner that cuts along regional lines, prospects for a comprehensive energy bill reaching the White House are not particularly bright. We anticipate that the House will again move a comprehensive bill similar to the American Energy Solutions for Lower Costs and More American Jobs Act (H.R. 2), but a more limited bill would have better prospects to get to the White House, such as one that addresses crude oil exports and LNG exports, energy infrastructure policy, energy efficiency, and potentially a provision approving TransCanada's Keystone XL pipeline application (if it hasn't been approved by the Secretary of State). Even such a limited package will face resistance, not because of what it contains but because it will be viewed as too limited, given the desire of many stakeholders to move a more comprehensive, "all of the above" type of bill. Moreover, even a limited proposal touching upon controversial issues including the Keystone XL pipeline may prove difficult to move through a closely divided Senate.

In this environment, we expect the House and Senate to focus on narrowly tailored energy policies that stand a realistic chance at securing bipartisan, bicameral, and presidential support, such as the Energy Savings and Industrial Competitiveness Act of 2014 introduced by Senators Rob Portman (R-OH) and Jeanne Shaheen (D-NH). But without a change in the Senate's underlying environment in which every bill becomes a vehicle for anything remotely related to it, even something this noncontroversial could die again.

### Crude Oil Export Policy.

This year, private-sector advocates on both sides of the issue began to craft the contours of the debate to come. Leading Members of Congress followed suit. For example, Senator Lisa Murkowski (R-AK), who will likely chair the Senate Committee on Energy and Natural Resources, released a white paper advocating that the Department of Commerce use existing authority to relax restrictions on crude oil exports. (Today, crude exports are largely limited to exports to Canada for consumption there, and exports in the form of "refined petroleum products," including "processed condensate" and "distilled hydrocarbon mixtures," which are not subject to the same limitations that govern crude oil.) Senior members of the House Energy and Commerce Committee, including Representatives Joe Barton (R-TX) and John Shimkus (R-IL), have also voiced support for exports. On the other hand, Senators Ed Markey (D-MA) and Robert Menendez (D-NJ) continue to oppose any relaxation in existing crude oil export rules. However, other members of relevant committees and leaders on both sides of the Capitol refrained from taking a position. Thus, given the choice to take a side in a controversial matter that pits members of the independent oil and gas production and refining communities at odds, most members have publically demurred

as the debate takes shape. We do not expect this status quo to radically change in the near-term, though we do expect a significant uptick in committee oversight and legislative debate under Republican control of both chambers of Congress.

### LNG Export Policy.

A similar, gradual evolution in the congressional policy-making landscape will likely take place surrounding liquefied natural gas (LNG) exports. Congressional interest in LNG export policy reached a crescendo in mid-to-late 2013 as tensions in the Ukraine and surrounding region rose, and with it European fears regarding access to Russian-produced natural gas. That interest manifested in tangible actions by the relevant committees on both sides of the Capitol. The House Energy and Commerce, for example, held a number of hearings regarding the geopolitical benefits of increased exports of LNG throughout the world, and the committee advanced legislation introduced by Representative Cory Gardner (R-CO), H.R. 6, which sought to amend the Natural Gas Act to expedite the Department of Energy's procedures for considering LNG applications to countries that are not a party to a free trade agreement with the United States. (Having won his election, Senator-elect Gardner will be able to pursue the legislation next year.) The Senate also held a hearing on the issue under the leadership of former Chairman Ron Wyden (D-OR), though the committee refrained from considering a Senate counterpart to Representative Gardner's legislation. In the midst of this surge in debate, the Department of Energy also amended its procedures governing LNG export applications in part to address congressional and industry concerns. Nevertheless, we do not expect congressional support for legislation that would expedite DOE procedures for considering LNG applications to wane. Quite to the contrary, we expect that the House and Senate will consider legislation similar to H.R. 6 in the new Congress and do so early on. But we do not expect that legislation to reach the President's desk unless it is attached to a more comprehensive energy proposal.

### NRC Appointment, Yucca Mountain Policy.

The Nuclear Regulatory Commission (NRC) will take on a new direction in 2015. Two weeks ago, Chairman Allison M. Macfarlane announced that she will resign from the Commission effective January 1, 2015 to take a position with the George Washington University. Chairman Macfarlane has been a steadying force at the Commission since taking over for the previous chair, Gregory Jaczko. Under Chairman Macfarlane's leadership, the NRC has returned to its traditional role as an expert independent agency that works largely outside of a partisan construct. That relatively non-partisan reputation may be tested, however, over the next two years as the NRC works through the final safety-related analysis for the Yucca Mountain license review. Staff for the commission set the stage for that forthcoming review several weeks ago by releasing a detailed, comprehensive report concluding that the Yucca Mountain facility is

capable of safely complying with the NRC safety-related regulations and could safely store spent nuclear fuel for up to one million years. That report immediately drew applause from congressional supporters of nuclear waste storage at the Yucca Mountain facility, including Senator Murkowski, and criticism from opponents, such as Senator Harry Reid (D-NV). We therefore expect that Yucca Mountain policy will be at the forefront of confirmation hearings for whomever President Obama nominates to replace Chairman Macfarlane.

## Major Environmental Policy Developments

### The President's Climate Change Agenda.

We anticipate that the Administration will remain focused on implementing the President's climate change agenda as a legacy issue before he leaves office in January 2017. The Environmental Protection Agency (EPA), for example, will continue to push forward the President's initiatives to reduce CO<sub>2</sub> emissions from both new and existing power plants. Under the President's "Clean Power Plan," which would reduce greenhouse gas (GHG) emissions from existing power plants, the agency has undertaken extensive outreach efforts to craft a plan that would be acceptable to state regulatory authorities, which will have the lead in implementing the regulations. (The proposal is already in litigation, even though the rule is not yet final.) Last week, the EPA suggested that states may receive additional flexibility in its approach based on comments it has already received. The Clean Power Plan would require state governments to implement plans to reduce carbon CO<sub>2</sub> from existing power plants by 30 percent by 2030 using a 2005 emission level as a baseline. The proposal will affect all 50 state governments, local governments, utilities, rate-payers, private and public investors (including pension funds), manufacturers, technology companies, public health advocates, and various energy production stakeholders. Comments on the proposed plan were formerly due October 20 and have been extended to December 1, 2014.

Congressional Republicans will spend significant time through the legislative and oversight process focusing on various aspects of the President's Climate Change agenda. We expect early votes in the House and possibly in the Senate for proposals intended to slow down or outright prevent the EPA from implementing that agenda. Nevertheless, because of the closely divided nature of the Senate, we see little prospect that the 114th Congress will be able to stop administrative action from moving forward. Notwithstanding Republican control of both Houses, Senate Republicans will face a very tall order in securing 60 votes to move any legislation that would block EPA from moving forward on the Clean Power Plan or other aspects of the President's climate change agenda. Moreover, it is hard to imagine the President losing a veto-override vote should legislation clear the 60-vote threshold to emerge from the Senate. Thus, this and other elements of the President's climate agenda will likely be left to the courts to ultimately address.

### "Waters of the U.S."

The EPA and the Army Corps of Engineers (Corps) have proposed a rule that would change the definition of "Waters of the U.S.," and thus how various bodies of water are regulated under the Clean Water Act. The proposed rule has generated considerable opposition from across the energy and agriculture sectors. Under the proposed rule, most seasonal and rain-dependent streams would be regulated. In addition, the proposed broadened definition could include ephemeral streams, isolated ponds, lakes, wetlands, and man-made waters, which opponents believe would significantly expand EPA/Corps' exercise of authority over various permit activities (construction, dredging, etc.). According to the EPA, the current proposed rule is not intended to protect any types of water that historically have not been covered under the Clean Water Act. Nevertheless, the proposed rule, once final, is likely to have significant impacts on permitting new construction, agriculture, and municipal activities as well as recreational and mineral interests throughout the country.

Members in the House and Senate have introduced legislation in an effort to block, change, or challenge the "Waters of the U.S." definition rule (H.R. 5078, S. 2496). Both the FY 2015 House Energy and Water Appropriations bill and the House Interior-Environment Appropriations bill also currently include a one-year funding moratorium to keep the proposed rule from becoming law. We anticipate that the Republican-controlled 114th Congress is likely to push again for blocking or changing the proposed rule.

### Coal Ash Regulations.

The 2008 collapse of the TVA's coal ash impoundment in Kingston, Tennessee, inundated over 300 acres, resulted in a \$1.2 billion cleanup, and led to the 2010 proposal of EPA rules under the Resource Conservation and Recovery Act (RCRA) to regulate coal ash more strictly. A large volume of coal ash is reused in concrete and in other applications; over a billion tons are in landfills and in impoundments, where possible water contamination is an issue.

The EPA is under a court order to issue final rules by December 19, 2014; EPA's draft final rule is now under review by the Office of Management and Budget. The more costly and complex the rule, the less attractive coal is as fuel for electric power and the harder the ash may be to re-use. By the same token, if the controls prove too lax, the risks increase of ground water contamination from metals and other compounds in the ash.

We expect strong oversight interest in the rule, and a legislative effort by the coal and utility industry to reduce the stringency of almost any rule EPA proposes, as the large volume of such waste means that utilities will be facing significant costs. The environmental community will likely oppose any such effort vigorously, given the large number of ash impoundments in many states.

## **EPA's Ground Level Ozone Standard.**

The EPA is expected to comply with the statutorily-mandated review of the National Ambient Air Quality Standard (NAAQS) for ground level ozone by Dec. 1, 2014, with a final standard due by Oct. 1, 2015. As part of the review process, the Clean Air Scientific Advisory Committee (CASAC) made a formal recommendation to EPA that the agency should consider a range between 60-70 parts per billion (ppb) when setting a new Ozone NAAQS. This proposal, which EPA concurred with in a comprehensive report made publically available in September, would be considerably lower than the current level of 75 ppb, which was set in 2008.

The EPA recently submitted its proposed rule for the Ozone standard to the White House Office of Management and Budget (OMB) for review. OMB considers EPA's proposal "economically significant." It is widely anticipated that should the agency recommend a range between 60 and 70 ppb that several major cities, counties, and municipalities throughout the U.S. will likely fall out of compliance with the new standard. As a consequence, we expect both chambers of Congress to pursue legislation to prevent the EPA from reducing the ground level ozone standard. Senator John Thune (R-SD) already proposed legislation in October that could serve as a model for future efforts, and we expect House Republicans to pursue a similar approach.

## **Oil and Gas: Well Stimulation and Hydraulic Fracturing on Federal and Tribal Lands.**

Over the opposition of the oil and gas industry, the Department of Interior has continued to push forward with proposed regulations that would govern hydraulic fracturing on federal lands regulated by the Bureau of Land Management (BLM). The draft proposed rule would: (1) require disclosure of chemicals to be used in fracturing activities on public lands, (2) require enhanced integrity of structures to prevent contamination of groundwater, and (3) require operators have a water management plan in place to handle fluids that flow back to the surface. The revised proposed rule, which has been sent to OMB for review, also would establish "detailed guidance on how trade secrets claims will be handled, modeled on the procedures promulgated by the State of Colorado." We expect that the final rule will draw significant oversight and legislative interest by congressional leaders in both chambers.

## **Methane Emissions.**

The EPA is concerned that the oil and natural gas industry might be a significant source of methane emissions during the production, delivery, and use of natural gas. More recently, EPA signaled its intentions to regulate, noting that "[w]hile neither the New Source Performance Standards (NSPS) nor National Emission Standards for Hazardous Air Pollutants (NESHAP) directly control or address methane emissions, these rules are expected to achieve substantial methane emission reductions as a co-benefit of controlling volatile organic compounds emissions. However, since the regulations do not cover the distribution sector, no methane emission reductions from distribution pipelines are expected as a co-benefit."

It is widely anticipated that EPA will propose new rules to reduce methane emissions. In its new standards, EPA could seek to cut methane emissions by as much as half. However, the EPA's methane agenda is only one aspect of the Administration's broader interagency methane control strategy that the White House announced in March. There, the President's senior staff released a comprehensive, interagency strategy to cut methane that will include a series of initiatives that agencies will take on over the next two years to reduce methane emissions. According to the White House, these proposals will include, at a minimum: a new EPA proposal to reduce methane emissions from new and possibly existing landfills; an advance notice of proposed rulemaking by BLM to explore the possibility of capturing, selling, and disposing of methane gas from leased mines on federal land; a joint EPA/USDA "roadmap" to reduce methane emissions from U.S. dairy farms; and a multi-tiered methane control strategy by DOE to combat methane leaks from natural gas transmission and distribution systems. Many of these initiatives are already under way. Indeed, DOE announced its framework to implement the President's methane control strategy in July, and several of those initiatives will take on new energy in 2015. Consequently, we expect that the Administration's methane control strategy will be a key priority in the last two years of the President's term—even if it receives less attention than the Clean Power Plan or other high profile environmental policy items.

## **TSCA Reform.**

The prospects for modernizing the Toxic Substances Control Act (TSCA) could be improved significantly by the change in leadership of the Senate Environment and Public Works Committee. Senator Barbara Boxer (D-CA) used her position as EPW Chair during the past Congress to block a bipartisan TSCA reform bill, the Chemical Safety Improvement Act (CSIA), co-authored by Senators Tom Udall (D-NM) and David Vitter (R-LA) and co-sponsored by more than two dozen Senators. Senators Udall and Vitter have indicated that they intend to introduce TSCA reform legislation again in the next Congress, and supporters of the CSIA, including the American Chemistry Council and other business groups, have stated publicly that they will renew their push for a bill. While Senator Boxer will continue to be in a position as Ranking Member to oppose any bill that does not address her concerns, including preemption of state chemical laws, there appears to be a bipartisan majority on the committee willing to support TSCA reform legislation. Additionally, although Senator Vitter likely will not serve as Chairman (and also may be occupied by his planned run for Governor of Louisiana), he has expressed his continued commitment to passing a bill. Moreover, Senator James Inhofe (R-OK), the likely new Chairman, cosponsored the CSIA and has expressed support for TSCA reform.

Likewise, in the House, Representative John Shimkus (R-IL) is expected to lead the TSCA reform effort again in his capacity as Chairman of the Environment and the Economy Subcommittee of the House Energy and Commerce (E&C) Committee. Under Chairman Shimkus' leadership, the subcommittee held a series of hearings on TSCA issues during the past Congress. Chairman Shimkus prepared a "discussion draft" of a TSCA reform bill for review by E&C Committee members (although no formal legislation was ever introduced). Some Democratic Members of the Committee, led by Representative Henry Waxman (D-CA), sought changes to key provisions of the discussion draft, but with his retirement, the prospects for a compromise bill in the new Congress may be enhanced. Moreover, if it appears that the new Senate majority will pass TSCA reform legislation, the likelihood for movement of a TSCA reform bill in the House also would increase.

### **Natural Resources/Critical Minerals Policy.**

We anticipate significant opportunities in the 114th Congress for the natural resources/critical minerals sector. With Senator Lisa Murkowski (R-AK) expected to become Chairman of the Senate Energy and Natural Resources Committee, there is a real possibility that the cycle of House approval and Senate rejection of helpful legislation can be broken. The prospects for meaningful collaboration between the two parties, both to produce helpful legislation and to provide helpful oversight, may be better than they have been in recent history. In this Congress, Senator Murkowski and former Chairman Ron Wyden (D-OR) introduced the Critical Minerals Policy Act (S. 1600), with 18 cosponsors (10 Democrats and 8 Republicans). She now will be in a much stronger position to move that legislation, which should bode well for positive movement for the minerals industry in the 114th Congress. In short, this may be one of the best opportunities for improved federal permitting for the metal mining industry in more than a decade.

### **Anticipated Congressional Committee Developments**

We expect Senator Lisa Murkowski (R-AK) will lead the Energy and Natural Resources Committee in the 114th Congress. Assuming she wins the December 6 runoff election, Senator Mary Landrieu (D-LA) will become Ranking Member. With a loss, Senator Maria Cantwell (D-WA) will serve as Ranking Member. Senator Murkowski is likely to continue to press pro-energy development initiatives, including measures to authorize crude oil exports and to ensure revenue sharing by Alaska and other states that have opened (or open) offshore areas to oil and gas development.

With Senator John McCain likely to become the Chairman of the Armed Services Committee, Senator James Inhofe (R-OK) will likely become Chairman of the EPW Committee, since he has seniority over Senator David Vitter (R-LA), the current Ranking Member, and has two years left to serve in that capacity under Republican Caucus precedent. Senator Barbara Boxer (D-CA) will likely serve as Ranking Member.

In the House, Representative Fred Upton (R-MI) will continue to chair the Energy and Commerce Committee and Representative Ed Whitfield (R-KY) will continue to chair the Energy and Power Subcommittee. They are likely to continue to pursue an "all of the above" energy agenda. With Representative Henry Waxman (D-CA) retiring, two Members are vying to serve as Ranking Member: Representatives Anna Eshoo (D-CA) and Frank Pallone (D-NJ). Representative Bobby Rush (D-IL) will likely continue as Ranking Member of the Energy and Power Subcommittee.

With Representative Doc Hastings (R-WA) retiring, Representative Rob Bishop (R-UT) is likely to replace him as Chairman of the Natural Resources Committee. He will likely continue to pursue an "all of the above" approach to energy development on federal and tribal lands. Representative Peter DeFazio (D-OR), who had been expected to continue as Ranking Member, will instead likely take the Ranking Member slot on the Natural Resources Committee instead.

### **Anticipated Agency Developments**

We do not anticipate substantial changes at the Department of Energy, the Department of the Interior, or the Environmental Protection Agency. Moreover, the composition of the Federal Energy Regulatory Commission (FERC) is pretty well settled. As a result of an agreement reached between the White House and the Senate earlier this year, Commissioner Norman Bay will succeed current Chairman Cheryl LaFleur next spring. The Nuclear Regulatory Commission has in place only three commissioners, with two vacancies, and a third about to be created when the current Chairman steps down. The President has nominated two individuals to fill those slots, but the Senate has not acted on the nominations yet. In the lame duck session, Chairman Landrieu is expected to hold a hearing on the nomination of Colette Honorable to serve as one of the Commissioners, and to favorably report her nomination to the full Senate.

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# FINANCIAL SERVICES

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## Major Policy Developments

Four years after the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), financial services regulators continue hard at work implementing the 398 rulemakings required by the legislation. To date, regulators have finalized approximately 50 percent of the Dodd-Frank Act rulemakings, while almost 25 percent have not yet even been proposed. Although regulators have expressed their commitment to full implementation of the Dodd-Frank Act, the agencies nevertheless continue to struggle with budget constraints and pressure from various Members of Congress (mostly Republicans, but some Democrats, too), who have voiced concerns regarding the burdens and potential unintended consequences of the Dodd-Frank Act rulemakings.

With Republicans in control of both the House and Senate, we expect continued pressure and scrutiny on regulators as they complete the Dodd-Frank Act rule-making process and begin to focus on compliance and enforcement. We also expect renewed attempts by both chambers to re-open the Dodd-Frank Act to not only make needed technical corrections, but also to address several substantive issues of controversy discussed below. With a narrowly divided Senate and a President who could veto any proposals that are perceived as paring down the Dodd-Frank Act, the potential for substantial changes to the Dodd-Frank Act remains uncertain. However, we anticipate that Republicans will push to approve legislation on various targeted financial reform issues.

### **Financial Stability Oversight Council.**

We anticipate continued scrutiny of the Financial Stability Oversight Council (FSOC), which has authority to designate certain non-bank companies as systemically important financial institutions (SIFIs). Lawmakers will continue to pressure the FSOC regarding its lack of transparency and due process in its designation of SIFIs, particularly in the insurance and asset management industries. Moreover, lawmakers will insist on increased transparency regarding FSOC's designation process vis-à-vis the international SIFI designation process currently underway by the Financial Stability Board (FSB) and the International Association of Insurance Supervisors (IAIS). Finally, Republicans may also debate whether to expand the FSOC to include additional members from various regulatory agencies and provide additional records and information regarding FSOC member meetings.

### **Consumer Financial Protection Bureau.**

The 114th Congress will see continued efforts by Congress to curb the regulatory authority of the Consumer Financial Protection Bureau (CFPB). Lawmakers will likely re-introduce legislation to subject the CFPB to the annual congressional appropriations process. Congress may also seek to replace the CFPB's single director structure with a board structure, with nominees appointed by the President and confirmed by the Senate.

### **Housing Finance Reform.**

This year, the Senate Banking Committee approved legislation to reform the government-sponsored enterprises (GSEs), Fannie Mae and Freddie Mac. The House Financial Services Committee also approved GSE reform legislation, though it was markedly different from the Senate Banking Committee proposal. GSE reform has proven to be a divisive issue in both chambers. While the future of GSE reform remains uncertain, we are likely to continue seeing substantive debate on this issue, and renewed attempts to pass GSE reform legislation, in the 114th Congress. Additionally, as it moves forward with a single mortgage-backed security to build a Common Securitization Platform, the Federal Housing Finance Agency (FHFA) will also play an essential role in the debate over housing finance reform.

### **Enhanced Prudential Standards for Large Banks.**

Globally, the Basel Committee on Banking Supervision is overseeing the implementation of Basel III, a comprehensive set of reform measures developed to strengthen the regulation, supervision, and risk management of the banking sector. In July 2013, the Federal Reserve, Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) approved a final rule implementing the Basel III regulatory capital requirements in the United States. Additionally, the Federal Reserve is expected to propose special capital requirements for the largest banks that will be noticeably higher than those currently required under international banking regulations. Of note, stakeholders have expressed concerns regarding the \$50 billion threshold (total assets) established under the Dodd-Frank Act, which subjects large banks to enhanced prudential standards such as increased capital requirements. In recent remarks, Federal Reserve Governor Daniel Tarullo suggested that the asset level for enhanced prudential standards should be reexamined. Several Members of Congress from both sides of the aisle have also expressed concerns regarding the \$50 billion threshold. As such, we expect this issue to continue to be raised in the 114th Congress.

### **Capital Requirements for Insurers.**

In June, the Senate approved legislation that would amend the Dodd-Frank Act to clarify that the Federal Reserve can apply insurance-based capital standards to the insurance portion of any insurance holding company it oversees. The legislation responds to recent criticism that regulators should not apply bank-like capital requirements to insurers. In the House, Republicans approved a package of bills that includes a provision on insurance-based capital standards, similar to the one approved in the Senate. While it remains uncertain whether the Senate is willing to consider the House package of bills, the House may be willing to vote on the insurance-based capital standards provision as a standalone bill in the near future.



## **Cross-Border Regulation of Derivatives.**

U.S. financial regulators have taken steps to delineate the jurisdictional scope of their regulation of the over-the-counter derivatives markets. In particular, the Commodity Futures Trading Commission (CFTC) issued final interpretive guidance and a policy statement on its cross-border approach to derivatives in July 2013, whereas the Securities and Exchange Commission (SEC) adopted final cross-border rules in June 2014. As industry participants continue to interpret and implement the requirements of these cross-border releases, we anticipate continued scrutiny of these regulatory approaches and calls for harmonization and cooperation with international regulatory authorities.

## **Market Structure Reforms.**

Lawmakers will continue discussing the need for market structure reforms to decrease market fragmentation, increase operational stability, and reduce costs for investors. As the dialogue on reforming market structure continues, lawmakers will likely highlight the importance of reforming the current market-maker regime, reducing access fees, and creating more transparency with respect to automated trading operations and routing decisions.

Earlier this year, the SEC announced its intention to complete a comprehensive review of market structure to help restore confidence in market fairness. Additionally, in August of this year, the national securities exchanges and the Financial Industry Regulatory Authority (FINRA) filed a proposal with the SEC to establish a national market system plan to implement a tick pilot program that would widen tick sizes for certain stocks.

## **Non-Bank Mortgage Servicers.**

In the 114th Congress, we anticipate continued discussion about the role of nonbank mortgage servicers in the housing finance market. Recently, the FHFA Inspector General released a report indicating that small lenders and nonbank mortgage servicers are likely to pose a greater risk to the GSEs as they become a bigger part of their business. Separately, the CFPB and the New York Federal Reserve have expressed similar concerns and are “coordinating closely” on matters related to nonbank mortgage servicers.

## **Anticipated Congressional Committee Developments**

In 2015, we expect Congress to continue playing a significant role in the Dodd-Frank Act implementation process, with the Republican-controlled Congress likely to pursue substantive changes to the law, including increased oversight of young agencies such as the FSOC and CFPB, and continued pressure on agencies such as the CFTC and SEC through the budget process. Legislation and continued congressional oversight presents an opportunity for stakeholders to voice their concerns and press for potential changes (through Congress) in the Dodd-Frank Act rulemaking and implementation process.

## **House Financial Services Committee.**

We anticipate that the makeup of the House Financial Services Committee will remain largely the same, with Representative Jeb Hensarling (R-TX) serving as Chairman and Representative Maxine Waters (D-CA) as Ranking Member. While it is possible that current Agriculture Committee Chairman Frank Lucas (R-OK) (who faces Republican term limits that would bar him from continuing in his post beyond this year) may challenge Chairman Hensarling for his spot as Chairman, it remains to be seen if such a challenge would occur and its success remains unlikely. Representatives Hensarling and Lucas have exhibited similar views on the implementation and oversight of Dodd-Frank Act financial reform. Assuming Chairman Hensarling retains his chairmanship, he will likely continue to press for housing reform and shutting down the Export-Import Bank. Additionally, the committee will focus on amending the Dodd-Frank Act. In particular, the committee is expected to focus on issues such as: the FSOC’s and CFPB’s regulatory authority, the implementation of a new bankruptcy plan for large financial institutions, capital standards for large banks and non-bank SIFs, and market structure and high frequency trading. The committee will also continue with its vigorous oversight role and regulatory relief efforts related to the Dodd-Frank Act. Given that the committee had little success in achieving many of its goals with a Democratic-controlled Senate during the 113th Congress, we anticipate that much of the legislation discussed and reported out of committee this Congress will serve as a starting point during the 114th Congress.

## **Senate Banking Committee.**

Chairman Tim Johnson (D-SD) will be retiring at the end of the 113th Congress. With Republicans taking over the Senate, we expect that Senator Richard Shelby (R-AL) will become Chairman. On the Democratic side, a few Senators are more senior than Senator Sherrod Brown (D-OH), and thus would have a claim to serve as Ranking Member. (Senator Jack Reed (RI) is expected to become the Ranking Member on Armed Services, Senator Chuck Schumer (NY) is expected to remain focused on Senate leadership, and Robert Menendez (NJ) is expected to remain the Senior Democrat on the Foreign Relations Committee.) Assuming those more senior Senators take other positions, Senator Brown will become the Ranking Member.

With Senator Shelby as Chairman, we expect the committee to push for reforming the GSEs, conduct vigorous oversight of the federal regulatory agencies within its jurisdiction (particularly federal banking regulators and the CFPB), and propose reforms to scale back the Dodd-Frank Act. Senator Shelby will continue working to ensure large financial institutions are scrutinized and appropriate relief is provided for small community banks. He has stated in the past that the Dodd-Frank Act did not go far enough to end bailouts and has supported higher capital requirements for banks. Both he and Senator Brown have been outspoken on the “too big to fail” issues and their concerns that the U.S. taxpayer not be on the hook for such failures.

As Chairman, Senator Shelby may also continue adding pressure to the CFPB by increasing oversight hearings and exploring the idea of a five-person commission subject to the congressional appropriations process. However, despite Republican control of the Senate, it is important to emphasize that their majority is slim and far short of the 60 votes needed to pass many of the major changes they would like to see implemented.

### **House and Senate Agriculture Committees.**

Given their oversight of the CFTC and its role in the regulation of the swaps markets, both the Senate and House Agriculture Committees will continue to play a significant role in the implementation of the Dodd-Frank Act. In the 113th Congress, the House passed a bill that would reauthorize the CFTC through 2018. That proposal also contained provisions related to CFTC cost-benefit analysis in rulemakings, addressed end-user market participant concerns such as capital and margin requirements for over-the-counter (OTC) swaps, and cross-border application of CFTC swaps. By contrast, the Senate Agriculture Committee has yet to release a draft of its approach to CFTC reauthorization. Ultimately, the two chambers will need to adopt laws and reconcile the differences in order to reauthorize the CFTC. For a further discussion of the Senate and House Agriculture Committees and the 114th Congress, please see the Agriculture Policy portion of our analysis.

### **Anticipated Agency Developments**

The CFTC and the SEC will continue to face the challenge of coordinating their swap-related rulemakings to ensure regulatory consistency across both agencies. Additionally, the regulators will continue to focus on promulgating outstanding Dodd-Frank Act rulemakings. At the CFTC, with this year's confirmation of Chairman Timothy Massad and Commissioners Christopher Giancarlo and Sharon Bowen, the CFTC will likely focus on five key issues: (1) improvement to swap data quality and clarity on swap data trade reporting, (2) swap execution facility (SEF) permanent registration, (3) cross-border considerations, (4) agriculture and end users' concerns, and (5) position limits. Further, the CFTC has reactivated its Energy and Environmental Markets Advisory Committee, as well as its Agricultural Advisory Committee. The CFTC currently operates with only four Commissioners after the departure of former Commissioner Scott O'Malia. We expect the confirmation for any nomination to the CFTC to have a difficult path. While the potential for a Republican-controlled Senate would make the confirmation process slightly easier for a Republican nominee, the White House is not likely to make or promote a nomination with any expediency.

At the SEC, we anticipate that the CFTC commissioners will focus on continued implementation of the Dodd-Frank Act and other legislative mandates related to securities market regulation. The SEC will continue to adopt final regulations for security-based swap markets, in some areas following the CFTC's completed rule set and likely distinguishing its approach in others. One example is the SEC's recently-adopted territorial approach to the regulation of cross-border derivatives transactions, in which it adopted a strict rulemaking despite the CFTC's previous action to adopt "interpretive guidance." The SEC will also continue to explore equity market reform, including amendments to Regulation NMS, possible oversight of dark pools, exchanges, and automated trading activity, as part of a data-driven approach benefiting from the SEC's new Market Information Data Analytics System (MIDAS). In furtherance of its mission to protect investors and promote market viability, the SEC will also pursue new capital formation rules and areas where increased disclosure will assist market participants, such as the JOBS Act passed by Congress in 2012.

We also expect to see continued action at the CFPB and FSOC. The CFPB will continue working on payday lending, student loan, and mortgage-related rulemakings. The CFPB has been focused on expanding the definition of payday lending, which it has specific jurisdiction to regulate under the Dodd-Frank Act, to encompass all other forms of short-term lending. Further, the CFPB will continue examining the role of "larger participants" in financial services directly impacting consumers. Additionally, the CFPB recently proposed a policy whereby the bureau would issue "no-action" letters for innovative financial products or services. Similar to those issued by the SEC and CFTC, the no-action letters would clarify that, subject to particular facts and circumstances, CFPB staff does not presently intend to recommend the initiation of an enforcement or supervisory action against the requester regarding the particular matter. According to the CFPB, this is part of its initiative for facilitating innovation in consumer-friendly financial products. The FSOC will continue examining non-bank financial institutions, including the insurance, asset management, and non-bank mortgage servicing industries. However, both the CFPB and FSOC will be highly scrutinized by a Republican-controlled Senate.

Other financial regulatory agencies, including the Federal Reserve, the FDIC, and the OCC, also will continue their efforts to implement the Dodd-Frank Act. Moreover, President Obama will need to fill the two open spots on the seven-member Board of Governors of the Federal Reserve System. While it is possible that the President will attempt to push through nominations during the lame duck session, it is more likely that the nomination process will begin in the 114th Congress. As such, President Obama's ability to succeed in appointing his preferred candidates will be very limited by the Republican-controlled Senate.

Moreover, with many of the Dodd-Frank Act regulatory compliance dates having either passed or drawing near, we anticipate large efforts by regulators to ensure the timely implementation and compliance with the Dodd-Frank Act. Upcoming compliance deadlines during the 114th Congress include, among others: (1) banks' compliance with capital requirements, (2) banking entities' conformance of their activities and investments to the Volcker Rule's restrictions on "covered funds," and (3) issuers' compliance with asset-level disclosure requirements for

asset-backed securities. Further, as these compliance deadlines draw near, we expect regulators to issue additional guidance on compliance to answer questions by market participants regarding the rules' technical requirements. Regulators will continue to grapple with the cross-border application of many of the Dodd-Frank regulations. As such, we anticipate that the regulatory agencies will continue to coordinate closely with international regulators in an effort to resolve the differences between the U.S. and international regulatory regimes.

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# FOOD AND AGRICULTURE POLICY

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## Major Policy Developments

### Country-of-Origin Meat Labeling.

Agriculture leadership in the House and Senate are open to finding a legislative fix for country-of-origin meat labeling legislation (COOL), with Senate Agriculture Committee Chairman Debbie Stabenow (D-MI) looking at the lame duck session to pursue a solution. The law requires the labeling of meat to include the country where the animal was born, raised, and slaughtered. Should efforts be unsuccessful in the lame duck session, the issue of USDA's COOL rule will remain a priority issue next year as Members of Congress have received significant pressure from businesses across all industry sectors, particularly following the WTO's recent ruling that USDA's current labeling law violates trade rules and is unfavorable to imports from Canada and Mexico. Representative Mike Conaway (R-TX), who is likely to be the next chairman of the House Agriculture Committee, has already indicated that he supports changes to COOL.

Since Congress created the mandate in the 2002 farm bill and revised it in the 2008 farm bill, USDA must work with Congress to find a legislative solution that would comply with our WTO obligations. Both Canada and Mexico have called for immediate congressional action. To apply further pressure, Canada has already issued its retaliation list that totals billions of dollars in potential applied tariffs on U.S. companies' products, and Mexico is in the early stages of drafting its list. No retaliatory action can be taken by either country until after the appeals process is completed. The Obama Administration is expected to appeal the WTO ruling in January 2015.

### Implementation of Food Safety Modernization Act.

The Food and Drug Administration (FDA) is under court deadlines to finalize regulations to implement the Food Safety Modernization Act, which was signed by the President on January 3, 2011. Much of the food industry has been concerned about overreach in the proposed regulations and the imposition of costly testing and compliance regimes. Although FDA has revised and re-proposed several of the major regulations to address those concerns, we expect congressional efforts to delay the regulations and to force, perhaps by appropriations riders, FDA to be more accommodating of the concerns of industry. There is ample recent precedent for this type of action: the 2014 farm bill required FDA to provide Congress with a scientific and economic analysis of FSMA; the FY 2014 appropriations bill directed FDA to undertake comprehensive training of federal and state inspectors related to food safety inspections under FSMA; and numerous FSMA-related provisions are in the pending FY 2015 appropriation bills.

### Menu Labeling.

As part of the Affordable Care Act, Congress mandated that chain restaurants with 20 or more outlets list calories and other nutrition information on menus and menu boards. The development of regulations by FDA to implement this requirement has been fraught with controversy with consumer groups and other NGOs arguing that the requirement should apply to movie theaters, prepared food sold in grocery stores, convenience stores, and the like, while food retailers have vigorously opposed expansion of the requirement. Some chain restaurants, which initially supported the federal requirement to avoid having to comply with multiple state and local requirements, have had second thoughts. FDA regulations, widely believed to expand the requirement beyond restaurants, have been under extended review at the Office of Management and Budget (OMB). Legislation promoted by the Food Marketing Institute would prevent expansion and introduce some additional flexibility beyond what FDA is expected to require. The results of this week's election are likely to increase pressure on OMB to resist approving FDA's expansive regulation and to further encourage members of Congress to pursue efforts to amend or delay enforcement of the menu labeling regulation.

### Genetically Modified Organisms Labeling.

With the defeat of the Oregon and Colorado ballot measure requiring the labeling of products with genetically modified ingredients, the debate on genetically modified organisms (GMO) labeling will move from the West to Capitol Hill. The food industry will be looking to pursue legislative action to resolve the patchwork of GMO labeling laws, as Vermont works to implement its own GMO labeling law, despite an industry-led lawsuit challenging it. Both Connecticut and Maine's GMO labeling laws can only be triggered when neighboring states pass a GMO labeling law.

Industry efforts to find a solution to avoid having to comply with differing state requirements may include various legislative approaches, including the re-introduction of Representative Mike Pompeo's (R-KS) bipartisan bill that would preempt state labeling laws. Such efforts will likely be met with strong opposition, as Senator Barbara Boxer (D-CA) and Representative Peter DeFazio (D-OR) will likely re-introduce their legislation, the Genetically Engineered Food Right to Know Act, which has all Democrats as cosponsors and Senator Lisa Murkowski (R-AK) and Representative Don Young (R-AK).

## Supplemental Nutrition Assistance Program.

Although Congress passed a farm bill at the beginning of this year, Republicans will turn their attention back to the bill to evaluate and attempt to reform the Supplemental Nutrition Assistance Program (SNAP). Representative Mike Conaway (R-TX) has already convened a committee of various stakeholders on and off the Hill to start evaluating SNAP. Proposed reforms could include separating SNAP from the farm bill and reauthorizing it separately on a three-year cycle, as well further implementing work requirements and reforming eligibility requirements through the Low Income Heating Energy Assistance Program. Such reforms will likely be met by veto threats by the White House.

The Department of Agriculture will likely be playing defense on issues related to SNAP. The Department may feel substantial pressure, including pressure from states through waiver requests, to allow program reforms in response to findings in the anticipated release of its report detailing the food purchasing behaviors of SNAP participants. Additionally, USDA will continue to implement new provisions of SNAP as required by the farm bill, including the employment training pilot program.

## Child Nutrition Act Reauthorization.

The Senate Agriculture Committee and the House Education and the Workforce Committee will hold hearings to inform the reauthorization of the Child Nutrition Act (CNA), with significant focus on USDA's recently established nutrition standards for the national school lunch program and competitive foods. Some Republicans introduced bills in the 113th Congress to repeal the nutrition standards for the national school lunch program and competitive foods, and to create a waiver program for schools. Republican actions have been and will continue to be met with strong push back, including veto threats from the White House, as the most recent iteration of CNA, the Healthy Hunger-Free Kids Act, was a signature part of the First Lady's Let's Move! initiative.

SNAP and CNA reforms may be influenced by the findings of the National Commission on Hunger, which was established in the farm bill to develop recommendations to reduce the need for government nutrition programs while still providing a safety net for the poor. The Commission is expected to release its report by the end of this year. Additionally, USDA will continue to implement provisions of the farm bill.

## Anticipated Congressional Committee Developments

With Republican control of the Senate, Senator Thad Cochran (R-MS) is in line to chair the Senate Agriculture Committee, though he will likely forego the chairmanship to lead the Senate Appropriations Committee. With Senator Cochran's likely move, Senator Pat Roberts (R-KS) will take over the committee.

The chairmanship for the House Agriculture Committee will open in the 114th Congress as current Chairman Frank Lucas (R-OK) is term-limited out of the position. Representative Mike Conaway (R-TX) will likely take the helm of the committee, though he will face competition from Representative Steve King (R-IA), who chairs the Department Operations, Oversight, and Nutrition Subcommittee. On the Democratic side, Representative Collin Peterson (D-MN) will likely stay as Ranking Member.

Representative John Kline (R-MN) will maintain his leadership of the House Education and the Workforce Committee, which has jurisdiction over the school lunch and child nutrition programs. With Representative George Miller (D-CA) retiring at the end of the year, we expect that Representative Bobby Scott (D-VA) will succeed as Ranking Member.

## Anticipated Agency Developments

Secretary of Agriculture Tom Vilsack, who remains one of two original cabinet members remaining since the beginning of President Obama's first term, continues to fight rumors that he will be leaving his position in the last two years of the Administration. With the seventh year of the Obama Administration approaching, there may be a few departures of key officials, including those who oversee health and nutrition programs for the department.

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# HEALTHCARE POLICY

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## Major Policy Developments

With Republicans enjoying a narrow majority in the Senate, healthcare policy priorities will begin to shift in the 114th Congress, with divergent paths for both the ceremonial and practical. Senate Minority Leader Mitch McConnell (R-KY) has indicated he would like to “clear the decks” of must-pass legislation in the lame duck session to allow the new Republican majority to focus on policy priorities and advance legislation next year. The healthcare policy agenda in the new Congress will continue to focus on implementation of the Patient Protection and Affordable Care Act (ACA), as deadlines for major elements of the law and significant rulemaking proceed at a rapid pace. The new Republican majority in the Senate, however, marks the first real opportunity for Congress to consider and approve changes to President Obama’s signature policy achievement.

First on the agenda in the new year will be a revived attempt to repeal the healthcare reform law, which the House has considered in some form over fifty times in the last four years. As in the past, a full repeal vote will be purely symbolic and would certainly face a presidential veto. Congressional Republicans also would have an opportunity to move from ACA repeal votes to consider “replace” health reform legislation.

With a repeal (and possibly replace) vote behind them, the Republican Congress can address more attainable ACA changes. A handful of reforms likely to be considered earned bipartisan support in the 113th Congress, but failed to advance with the Democratic majority in the Senate, which feared that approving any changes to the law would undermine their prospects in the mid-term elections. Senate Republicans are still well short of the 60 vote super-majority and will have to identify proposals that actually stand a chance of being signed into law. Their best hope to change the ACA before 2016 will be to focus on provisions that can draw Democratic support with a goal of improving the law rather than undermining it. Such proposals could include a repeal of the medical device tax, changing the “full-time-employee” definition for purposes of employer responsibility and health insurance coverage, and changes to consumer friendly health care tools like flexible spending accounts (FSAs). Rising insurance premiums may encourage congressional Democrats to support legislation that would allow Americans to keep the coverage if they like it, without a penalty for failing to meet the law’s qualified health insurance benchmarks. Republicans could also attempt to revise the risk corridor program, which allows for additional federal payments to insurers that enroll a disproportionate number of sick (and expensive) patients, and has been criticized as a bailout for the health insurance industry. Other provisions likely to see congressional activity and debate, but without robust crossover political appeal, include repeal of the Independent Advisory Payment Board (IPAB), religious exemptions, and repeal of the individual mandate (which earlier this year scored \$35 billion in savings, making it an appealing offset for other policy priorities).

Next year also marks the implementation year of a number of ACA provisions that have been delayed, including the employer mandate, large employer reporting requirements, and minimum essential coverage reporting by insurers. The administrative delay of the employer mandate drew fire from congressional Republicans, prompting a potential lawsuit that would accuse the White House of abuse of executive authority and skirting the issue in advance of the mid-term elections. Large employers have already responded to the impending mandate by cutting workers’ time or, in some cases, dropping employer-sponsored plans all together. The new Senate majority could drive the issue with an aggressive push for repeal or another delay. Changes to impending reporting requirements, however, offer a middle ground option to address concerns of mid-size business struggling to adhere to the rules.

Reconciliation offers another avenue to address ACA changes, with the added irony that the same procedural maneuver was used by congressional Democrats to move healthcare reform in 2010. Reconciliation will be an attractive option to the slim Republican majority in the Senate as the process limits debate in the Senate to 20 hours, and doesn’t require the 60 votes necessary to break a filibuster. But there are limits to this approach under Senate precedent, as embodied in the Byrd Rule, which in theory limits reconciliation to provisions with a budget impact and does not allow for inclusion of extraneous policy provisions. As with other legislative initiatives, the Senate Republican majority will have to carefully balance priorities of the conservative House majority with what the Obama Administration is willing to sign into law.

As in previous years, Medicare physician payments will quickly rise to the top of the health policy agenda, both in the lame duck session and the new Congress. Physicians were spared a 24 percent payment cut in the last “doc fix” bill, which extends through March 2015. But that bill, the Protecting Access to Medicare Act of 2014, was considered to be a big disappointment to both stakeholders and many Members of Congress who were hoping to overhaul the Sustainable Growth Rate (SGR) system once and for all. While Senate Finance Committee Chairman Ron Wyden (D-OR) brokered bipartisan, bicameral negotiations that produced draft reform bills with the most favorable score in about a decade, Congress ultimately failed to pursue comprehensive reform in lieu of another short-term patch, as it has done since 2003. Senator Wyden has been outspoken about his desire to address comprehensive reform in the lame duck session, particularly with the impending retirement of House Ways and Means Chairman Dave Camp (R-MI), who also has been a major player in reform discussions. With a current patch that doesn’t expire until next spring, we anticipate that congressional Republicans will use the lame duck session to coordinate SGR reform strategy that will pick up in earnest in the new Congress.

The House and Senate will still have to resolve significant issues that undermined negotiations earlier this year, including offsets and inclusion of the Medicare extenders package. The new Senate majority should bring the chambers closer together, but in order for SGR reform to become law, offsets that would repeal or delay major provisions of the ACA will be dead on arrival with the Administration.

We anticipate that legislation addressing Medicare physician payments, whether a short-term patch or comprehensive reform, will be one of few large healthcare bills to move next year. As in past years, an SGR bill offers a vehicle for other healthcare provisions, and typically carries a big enough score and offset to allow for potential policy riders. Such offsets, however, mostly come from the Medicare program, and could include reductions to a number of providers in post-acute care. The post-acute care industry has faced enhanced scrutiny from Congress and the Administration in response to rapid growth, as well as variation in utilization, quality and margins, in the Medicare program. Earlier this year, Congress moved the Improving Medicare Post-Acute Care Transformation (IMPACT) Act of 2014 that will require standardized, interoperable data collection on patient assessment, quality measures, and resource use to better evaluate providers and determine appropriate care settings. In an environment where there is no low-hanging fruit, however, the industry could face additional payment reductions to help pay for an SGR bill. We also anticipate enhanced scrutiny of the Medicare extenders package, which survived earlier this year despite growing resistance from some House Republicans.

The new Republican majority in the Senate will also revive the debate on entitlement reform, as House Republicans see an opportunity to gain traction on major legislation that died in the Senate with the Democratic majority. Representative Paul Ryan (R-WI), who could become Chairman of the House Ways and Means Committee, has previously put forward budget plans that included major health policy reforms, such as premium support in Medicare for younger beneficiaries while preserving traditional fee for service for beneficiaries over 55, increasing the eligibility age for Medicare, combining deductibles for Parts A and B, increasing income-related premiums, and transition of federal support for Medicaid to block grants with additional state flexibility in administering the program. His budget plans also highlighted “repeal and replace” policies including portable, consumer driven healthcare coverage, support for research and development, medical liability reform, and high risk pools. While each of these issues fare a better chance of success in the Republican-held Senate, they still face the most significant obstacle in President Obama.

The ongoing Ebola crisis in West Africa and spread of new cases in the United States will keep preparedness and treatment of this infectious disease on the agenda. While \$750 million in federal funding has already been approved for the Department of Defense to enhance response efforts in West Africa, Congress has yet to find common ground on proposals to prevent additional exposure in the United States. Republicans in both chambers have called for travel restrictions on affected regions, and Senator Marco Rubio (R-FL) has introduced

legislation that would temporarily ban new visas from Guinea, Liberia, and Sierra Leone. While some Democrats have expressed support for a travel ban, they also blame containment and response problems on insufficient funding at the Centers for Disease Control and Prevention (CDC). This public health emergency certainly provided a lively October surprise to the mid-term election cycle, but public anxiety remains high and healthcare providers continue to seek better coordination with the CDC on evolving protocols. We anticipate Congress to continue to discuss legislative options that could include travel restrictions, funding for CDC to enhance response and training, and potential funding for Ebola drugs and vaccines.

The House Committee on Energy and Commerce “21st Century Cures” initiative will pick up steam in the new Congress, with draft legislation anticipated early in the new year. The committee has held hearings and roundtable discussions with prominent thought leaders to highlight advances in science and technology, and potential improvements to regulatory procedures to support development and approval of new therapies. Hearings have focused on a broad range of issues including funding for medical research at the National Institutes of Health (NIH), streamlining the process for approval of drugs and devices at the Food and Drug Administration (FDA), coordination with the Centers for Medicare and Medicaid Services (CMS) on coverage and reimbursement for medical innovations, patents, data sharing as a key to better medicine, modernizing clinical trials, personalized medicine, and the role of digital healthcare. We anticipate initiative leaders Representative Fred Upton (R-MI), Chairman of the Committee, and Representative Diana DeGette (D-CO) will focus on drafting a legislative proposal in the lame duck session to be released early next year.

The State Children’s Health Insurance Program (CHIP) is also expected to be a priority policy issue in the 114th Congress. The ACA provided a short term CHIP extension through September 2015, so Congress must act next year to reauthorize the program. The ACA also included a significant incentive to extend the program, authorizing an additional 23 percent bump on top of states’ current federal match rates. The additional funding, however, poses a challenge by making the program that much more expensive to extend beyond 2015. Beyond expense, there is a debate among thought leaders about whether the program should be extended or allowed to sunset and transition enrolled children into expanded Medicaid and/or the state based health insurance exchanges. Such an action could be a significant problem for states that have not expanded Medicaid, and have used CHIP to maintain strong health coverage for children. Transitioning that population to insurance exchanges also comes with technical problems, as parents who are deemed to have affordable coverage from their employer would not be eligible for federal subsidies in the exchange. That affordable coverage designation only applies to the individual/employee’s coverage, not family coverage that would be at their own expense.

Republicans have long supported CHIP, which offers both federal financial support *and* flexibility for state administration. Representative Michael Burgess (R-TX) led the last reauthorization charge in the House, and Senator Jay Rockefeller (D-WV) has been a prominent leader on CHIP issues in the Senate. Senator Rockefeller introduced S. 2461, the CHIP Extension Act of 2014, that would extend the program through 2019. He is hoping the bill will be addressed in the lame duck as his legacy issue before his retirement. Representatives Henry Waxman (D-CA) and Frank Pallone (D-NJ) also have introduced CHIP extension legislation on the House side. While action before the end of the year is unlikely, we expect this debate to intensify in the 2015.

Following explosive growth, accusations of program abuse, congressional inquiries, a lawsuit, an interpretive rule, and another lawsuit, the 340B Drug Discount Program could see both legislative and regulatory activity in the new Congress. In recent years, the program sparked congressional attention, with Senator Charles Grassley (R-IA) taking a particular interest into whether the program was working as intended. While the program is meant to help lower outpatient drug prices for the uninsured, there is some question about how some hospitals are using those savings as well as HRSA's perceived lack of oversight of the program. Senator Grassley's investigation has also looked into the contract pharmacy market and revenue following guidance allowing covered entities to work with in-house as well as contract pharmacies.

While an ongoing legal battle plays out between HRSA and drug manufacturers regarding implementation of the 340B orphan drug rule, the agency has also been working on a "mega rule" that could mean big changes to the program, which was submitted to the Office of Management and Budget (OMB) for review in April. The final rule is expected to address a number of issues that could have significant implications for the future of the program and participating entities. This includes definition of eligible patient, definition of covered entity, diversion, contract pharmacy compliance, potential limitations on use of 340B revenue, and a program shift from providers to patients. Congressional oversight is also expected to continue, with the potential for additional inquiry letters to hospitals requesting site-specific information on their use of the program.

E-health is expected to grow as a leading issue in the 114th Congress, with various initiatives playing out on multiple fronts. Stakeholders are actively lobbying for enhanced coverage and reimbursement for telemedicine services in Medicare and Medicaid, with a growing list of telehealth bills already introduced in the 113th Congress. Proposals seek to utilize telehealth services and remote patient monitoring to reduce hospital readmissions, support coordination and management of patients with chronic conditions, and drive additional efficiencies and savings in the healthcare system. Representatives Gregg Harper (R-MS) and Mike Thompson (D-CA) have been early leaders on the legislative front, but will have to contend with the growing list of interested parties on a final proposal that could be part of the 21st Century Cures bill or SGR reform/patch bill. Congressional Budget Office (CBO) scoring presents an

additional hurdle in terms of extracting potential savings, although House Republican Leadership has expressed interest in reviewing how the number crunching agency evaluates economic impact.

On the health information technology front, healthcare providers are preparing for implementation of two significant changes while simultaneously lobbying for additional time to meet those new requirements: conversion to ICD-10 and attestation of meaningful use of certified electronic health records. In April, Congress responded to calls from providers by delaying implementation of the ICD-10 standard for medical diagnosis and billing codes to October 1, 2015. Providers are also requesting additional flexibility on meaningful use deadlines, which are part of the Medicare and Medicaid EHR Incentive Program that provides financial incentives for the meaningful use of certified electronic health records. While the agency has already offered some flexibility to providers on electronic systems and hardship extensions, January 1, 2015, marks the beginning of the reporting period where providers are required to report a full year of EHR use. Stakeholders are urging the agency to revise the requirements to allow providers to report data for any three-month period in 2015, citing scarce resources and overlapping regulations. Bipartisan legislation was introduced in the House in September by Representatives Renee Elmers (R-NC) and Jim Matheson (D-UT) would shorten the 2015 reporting period from a full year to 90 days, as required in 2014, allowing more providers to meet stage 2 requirements and avoid payment reductions for non-compliance. Early testing surveys indicate low levels of provider readiness, so some level of relief is likely. Providers are also advocating for better alignment between meaningful use, the Physician Quality Reporting System (PQRS) and the Value-Based Modifier Program (VBM) that require providers to report information in different formats, and could lead to overlapping penalties. Stakeholders are expected to ramp up advocacy for additional flexibility to meet each of the new requirements over the coming year.

HHS is also expected to continue its work to foster interoperability of electronic health information and systems. The Office of the National Coordinator for Health Information Technology (ONC), led by Dr. Karen DeSalvo, released a high-level strategic plan to achieve interoperability in June, a draft ten year roadmap this month, and is expected to release a draft report (and public comment period) early next year. However, many challenges must be addressed before interoperability becomes a reality, and the question remains whether health IT and interoperability will actually improve public health and drive efficiencies. Stakeholders are also concerned that Dr. DeSalvo's recent move to HHS to work on Ebola and public health issues will leave a leadership vacuum that could undermine progress on interoperability. Her deputy, Dr. Jacob Reider, has also announced his departure, following a string of announcements from other senior staff. Dr. DeSalvo, however, clarified that she will remain ONC National Coordinator in addition to her appointment as HHS Acting Assistant for Health, and will continue to work with Acting National Coordinator Lisa Lewis from her new post to maintain the momentum around interoperability.

## Anticipated Congressional Committee Developments

We expect Senator Orrin Hatch (R-UT) will lead the Finance Committee in the 114th Congress, with Senator Ron Wyden (D-OR) serving as Ranking Member. Senator Pat Roberts (R-KS), having narrowly defeated his challenger following a tumultuous election year, will serve as Chairman of the Subcommittee on Healthcare, with Senator Debbie Stabenow (D-MI) rising to the Ranking Member position with the retirement of current Chairman Jay Rockefeller (D-WV).

The Senate Committee on Health, Education, Labor and Pensions (HELP) will see Senator Lamar Alexander (R-TN) taking over as Chairman of the full committee and Senator Patty Murray (D-WA) as Ranking Member.

Senator Susan Collins (R-ME) will assume the Chairmanship of the Special Committee on Aging, with Senator Bill Nelson (D-FL) serving as Ranking Member.

In the House, Representative Fred Upton (R-MI) will continue to chair the Energy and Commerce Committee with Representative Joe Pitts (R-PA) serving as Health Subcommittee Chair. With the retirement of Representative Henry Waxman (D-CA), two Members are vying to serve as Ranking Member: Representatives Anna Eshoo (D-CA) and Frank Pallone (D-NJ). Selection of the Ranking Member of the Health Subcommittee will follow caucus votes on the full committee Ranking Member position.

With Representative Dave Camp's (R-MI) retirement as Chairman of the House Ways and Means Committee, the committee will be under new leadership next year. Representatives Paul Ryan (R-WI) and Kevin Brady (R-TX) are both pursuing the gavel. Both Members have been actively engaged in healthcare policy, with Representative Brady serving as the current Health Subcommittee Chair, and Representative Ryan's leadership on entitlement reform showcased in previous budget proposals. Representative Sandy Levin (D-MI) will continue on as Ranking Member.

The gavel of the Labor-HHS Appropriations Subcommittee is also up for grabs following Representative Jack Kingston's (R-GA) retirement. There are enough senior committee members who have expressed interest in the gavel to upset regular order from within the subcommittee. Potential candidates to replace Representative Kingston include Representatives Robert Aderholt (R-AL), John Culberson (R-TX), Tom Cole (R-OK), and Charlie Dent (R-PA). Regardless of who holds this gavel, the Member will confront the most difficult test of all Appropriations Subcommittee Chairmen as this bill historically has involved fights over social policy that split the Republican party and make passage of a stand-alone bill far from certain each year.

## Anticipated Agency Developments

We do not anticipate significant changes at the Department of Health and Human Services (HHS) or various sub-agencies within the Department. Having been officially sworn-in only in June, Secretary Sylvia Burwell will continue to lead HHS with a focus on implementation of the ACA. Secretary Burwell will be particularly honed in on driving Obamacare enrollment and successful exchange services through the end of the year. Secretary Burwell has continued to develop HHS senior staff to improve management of the health insurance marketplace and Healthcare.gov with recent notable additions from business and the private sector.

Secretary Burwell appointed Dr. Karen DeSalvo last month as Acting Assistant Secretary for Health to work on Ebola and other public health issues. Dr. DeSalvo, who has a strong background in public health issues, will remain National Coordinator for Health Information Technology where Chief Operating Officer Lisa Lewis is now serving as acting director and will continue to work on issues including electronic health records utilization, meaningful use and interoperability. Dr. DeSalvo will also work with recently appointed Ebola "czar" Ron Klain.

Marilyn Tavenner will continue in her role as Administrator of the CMS and principal overseer of delivery system reform implementation. Thomas Frieden, who survived recent calls for his resignation following the Ebola emergency, will continue to serve as Director of the CDC and lead the effort for improved protocols and response to the ongoing crisis.

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# HOMELAND SECURITY AND CYBERSECURITY

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## Major Policy Developments

### Cybersecurity.

The increasing and nearly daily occurrences of cybersecurity attacks against both public and private sector entities that service the everyday lives of Americans continues to raise the importance of addressing cybersecurity issues head on. Members of Congress feel a level of frustration about the lack of movement on legislation as they seek to balance security with privacy. Members of the House and Senate continue to work together to seek ways to pass cybersecurity bills in the lame duck session. Member retirements in key leadership roles, such as with Chairman Rockefeller in the Senate and Chairman Rogers in the House, could spur action, as they face a crowded calendar of “must-do” bills. Given the odds against anything being approved this year, we anticipate that enactment of cybersecurity legislation will again be a top issue for the 114th Congress. We also expect continued executive action by the President as a means to move the ball forward on this issue while the Congress continues to work through the process. With few exceptions, the key congressional players engaged in cybersecurity-related initiatives in the last Congress will remain the same and will provide some continuity for the public and private sector participants who have been closely following the process.

Efforts focused on increased cyber information sharing and associated liability protections will continue in both chambers, with the expectation that leading Members in both the House and Senate will again introduce bills in the various committees. With a new chairman at the helm of the House Permanent Select Committee on Intelligence, the approach pursued by the leadership of the committee may vary given private sector privacy concerns and continued White House opposition to the proposed Cyber Intelligence Sharing and Protection Act (CISPA). The Senate has moved forward with information sharing legislation in a bipartisan fashion in the past. We anticipate that approach will continue.

We also anticipate introduction of bills in the 114th Congress similar to those we have seen in the past, such as those focusing on the need to strengthen the capabilities of the U.S. Department of Homeland Security (DHS) in the area of cyber—maintaining a civilian agency as a partner to the private sector. Others will include a focus on codifying the mandate of: the National Cybersecurity and Communications Integration Center (NCCIC), strengthening the hiring abilities of DHS to build and maintaining a cybersecurity workforce, increasing investments in cybersecurity research and development, and updating the Federal Information Security Modernization Act (FISMA).

The annual appropriations bills will also continue to be a vehicle for moving cybersecurity-related provisions, including language that restricts purchases from specifically targeted Chinese entities based on supply chain security issues that were included in the House’s FY 2015 Commerce-Justice-Science appropriations bill.

At the end of the day, it is clear that the Obama Administration will continue to use its executive authority to address cybersecurity concerns and will remain actively engaged in the implementation of the February 2013 Cybersecurity Executive Order (EO) 13636 and Presidential Policy Directive (PPD-21). The release of the Cybersecurity Framework in 2014, almost exactly a year from the issuance of EO 13636, and the recently issued EO on data security, signals that other EOs may be in the works and should be closely watched.

Since the issuance of EO 13636, almost every department and independent agency has taken an active role on cybersecurity issues in the last nearly two years as concerns grow over the impact of cybersecurity attacks on the sixteen Critical Infrastructure (CI) sectors defined in the EO. The Securities and Exchange Commission (SEC), for example, has begun spot checks of companies to ensure adequate filings on cyber risk. The Federal Trade Commission (FTC) has filed 53 lawsuits against hotels and retailers using its consumer protection authorities, and is seeking greater enforcement and rulemaking powers from Congress. The Federal Communications Commission (FCC) has begun efforts to look at ways to address the lack of existing cybersecurity regulations on the communications sector. It is safe to say that there will be an increasingly activist oversight role by every one of these agencies in the last two years of the Obama Administration.

On the international front, concerns in a post-Snowden world have tied together the bilateral and multilateral negotiations on cybersecurity and privacy. The European Union is working on its own cybersecurity regime under the Network and Information Systems (NIS) Cybersecurity Directive along with the European Program for Critical Infrastructure Protection. The North Atlantic Treaty Organization (NATO) recently issued a statement about rules of engagement on a cyber-attack. The Russian and Chinese governments recently reaffirmed the principle of national sovereignty in cyberspace. We can expect more discussion in the international realm on cybersecurity and privacy issues as governments focus more attention on the balance needed between security and privacy protections.



## **Counterterrorism.**

As the 113th Congress comes to a close, concern about growing radicalism around the world will likely lead to increased funding for counterterrorism efforts. In the FY 2015 Continuing Resolution (CR), Congress included a provision to address the President's request for \$500 million to train and equip Syrian rebels in their fight against ISIS. While the CR does not provide new funding, it does authorize the Pentagon to reprogram funds to cover the actions, which are strictly limited to training and equipment. We expect that there will be a renewed effort to provide funding to fight ISIS as Congress considers how to finalize the FY 2015 appropriations process in the lame duck session.

## **Pandemic Preparedness and Ebola.**

The outbreak of Ebola in West Africa and its spread to the United States and Europe has focused attention on how well the government is prepared to deal with homeland security issues and preparedness for a possible pandemic in the U.S. While pandemics and bioterrorism have been on the list of major homeland security concerns for some time, the recent Ebola cases here have demonstrated a lack of adequate coordination and response both from the U.S. and between federal, state, and local governments. Members of Congress have called for a host of actions, including immediate bans on all travelers from West Africa from entering the US, refusing landing rights to any aircraft that has been in West Africa until it has undergone thorough cleaning and disinfection, and imposing a 21-day quarantine on all travelers from anywhere in Africa. We expect Congress to immediately look at the funding needs of the Centers for Disease Control (CDC) and DHS during the lame duck session in addition to the additional \$88 million in funds provided in the Continuing Resolution passed prior to recess and oversight hearings to abound.

## **Anticipated Congressional Committee Developments**

### **Senate Homeland Security and Governmental Affairs Committee.**

With the change in control of the Senate, we expect Senator John McCain (R-AZ) to become Chairman of the Armed Services Committee instead of the Homeland Security and Governmental Affairs Committee (HSGAC). As a result, Senator Ron Johnson (R-WI) will become Chairman and Senator Tom Carper (D-DE) would become the Ranking Member. In contrast to Senator Tom Coburn (R-OK), who tended to focus on government mismanagement and inefficiency, Senator Johnson has made clear that he will be focused on cybersecurity, homeland security, and counterterrorism issues under the committee's jurisdiction. Senator Johnson has raised a number of public concerns over the possibility that terrorists affiliated with ISIS could deliberately infect themselves with Ebola and then travel to the U.S. to spread the disease here. He also has been a vocal advocate of having U.S. ground troops in Iraq and Syria to take the fight to ISIS. It is expected that the committee will maintain a bipartisan approach and work on these issues and a host of others including chemical facility security, REAL-ID implementation to name a few.

### **Senate Appropriations Subcommittee on Homeland Security.**

Senator Dan Coats (R-IN) likely will become Chairman of the Senate Appropriations Subcommittee on Homeland Security. Assuming she wins the December 6 runoff election, Senator Mary Landrieu (D-LA) will be the Ranking Member. As a result, we expect a slight shift from a FEMA focus under Senator Landrieu to more of a focus on DHS's security, cybersecurity, and counterterrorism mission. Senator Coats has called for doubling the number of Transportation Security Administration (TSA) agents at airports and for reviewing the Visa Waiver Program for vulnerabilities that terrorists might exploit. Like its House counterpart, the subcommittee will likely favor increased funding for measures relating to border security. The recent terror attacks in Canada may lead both subcommittees to appropriate additional money to better secure the northern border.

### **Senate Select Committee on Intelligence.**

With the retirement of Senator Saxby Chambliss (R-GA), the new Chairman will be Senator Richard Burr (R-NC). Senator Burr is expected to continue the bipartisan approach long the mainstay of the committee and continue efforts with now Ranking Member Senator Dianne Feinstein (D-CA) on a host of matters. Cybersecurity will remain a core focus for both of them. Senator Burr has been among those calling for the deployment of American Special Operations forces against ISIS, and he can be expected to use this post to push for a more robust Administration approach to counterterrorism and, in general, for the equities of the intelligence community. With the approach of the 2016 presidential election, there may a push from the majority to focus on Benghazi and the rise of ISIS.

### **Senate Commerce, Science and Transportation.**

Current Ranking Member Senator John Thune (R-SD) will be the Chairman of the Committee, and Senator Bill Nelson (D-FL) will become Ranking Member. Senator Thune played a central role in the Senate Commerce Committee's passage of cybersecurity legislation in the 113th Congress and is expected to continue to play an active role in cybersecurity issues during his chairmanship. The committee will also focus on a host of other matters, including aviation security and TSA issues. Senator Thune also recently issued a call for a complete ban on all flights from affected West African countries and is expected to continue to raise concerns over the broader level of preparedness in the U.S. from Ebola.

### **House Homeland Security Committee.**

In the House, Representative Michael McCaul (R-TX) will remain the Chairman of the House Homeland Security Committee, and the Ranking Member will again be Representative Bennie Thompson (D-MS). Chairman McCaul is a strong advocate of enhancing DHS's capabilities, and a leader on cybersecurity issues, strengthening border security, and aviation security. He has been vocal on the need to deal with the Ebola crisis and concerned about the growing rise of Isis and terrorism. We will likely see legislation introduced that is similar to the cybersecurity bills the committee approved in the 113th Congress.

### **House Appropriations Subcommittee on Homeland Security.**

The Chairman of the House Appropriations Subcommittee on Homeland Security will remain Representative John Carter (R-TX) and the Ranking Member will continue to be Representative David Price (D-NC). As with its authorizing counterparts, the Subcommittee's Republican majority continues to emphasize immigration issues, border security and to favor increased spending in this area, while generally casting a more critical eye on other DHS funding, especially funding unrelated to counterterrorism.

### **House Permanent Select Committee on Intelligence.**

With current Chairman Mike Rogers (R-MI) retiring, there will be a change in leadership of the committee. Representative Mac Thornberry (R-TX) is next in line in seniority, but we expect that he will take the helm of the House Armed Services Committee instead. As a result, a number of Members have expressed interest in the Chairmanship, including Representatives Peter King (R-NY), Devin Nunes (R-CA), Jeff Miller (R-FL), and Mike Pompeo (R-KS). All of these Members would be expected to continue its strong support for the intelligence community in its post-Snowden efforts as well as on counterterrorism issues. In the tradition of both chambers' intelligence committees, Chairman Rogers worked closely with Ranking Member Dutch Ruppersberger (D-MD), and that bipartisan approach is expected to continue under the new leader.

### **Anticipated Agency Developments**

We do not anticipate major changes in the leadership of DHS over the next two years. However, Congress will need to quickly fill the shoes of Transportation Security Administrator John Pistole, who recently announced that he will step down at the end of the year after four years leading the agency. He leaves having improved TSA relations with Congress and having moved the agency toward a focus on core threats while working to improve the experience travelers have with TSA's through programs such as TSA's Precheck program. President Obama has yet to nominate a successor to Mr. Pistole. Filling the job of the TSA Administrator has historically been challenging. In the meantime, current Deputy Administrator Melvin Carraway is expected to serve as Acting Administrator.

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# INTERNATIONAL POLICY ISSUES

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## Major Policy Developments

With Republicans in control of the Senate, including the Senate Foreign Relations Committee, President Obama will face increased challenges to his foreign policy initiatives. As has been the case in this Congress with a GOP-controlled House of Representatives, we anticipate increased oversight and investigation (and, inherently, public criticism) of Obama Administration activities in the Senate as well next year. Approval of treaties—which require a two-thirds vote of the Senate—will be more difficult, as will Senate confirmation of ambassadors and senior State Department officials.

It is important to note the Republican Party is not a monolith in terms of its approach to foreign policy. Neoconservative hawks, such as Senators John McCain (R-AZ) and Lindsey Graham (R-SC), promote an activist and interventionist foreign policy. Tea Party Republicans, such as Senators Rand Paul (R-KY) and Ted Cruz (R-TX), prefer more limited U.S. global engagement. A large group of traditionally centrist Republicans may be buttressed by newly elected Senators. This tension and debate will continue to play out in the style and substance of Republican reaction to foreign affairs developments and the Obama Administration's objectives.

### **Ebola.**

The first travel-related case of Ebola from Liberia, which resulted in two U.S. nurses infected during treatment of a stricken individual, was a wake-up call for Congress and the Obama Administration. With the Ebola crisis expected to continue in West Africa for at least another six months, there is general bipartisan support for a stronger response to the crisis. Republicans will continue to advocate for stronger travel restrictions, with some, such as top Republicans on the Senate Foreign Relations Committee, advocating that more efforts and resources be directed to affected West African countries. Republicans could advance legislation during the lame duck session that focuses on suspending visas to nationals living in affected African countries. Possible legislative vehicles for addressing Ebola will be the FY 2015 government funding bill (either another Continuing Resolution or an Omnibus) or the FY 2015 National Defense Authorization Act.

### **Russia Sanctions.**

Many Senate Republicans (as well as Democrats) favor stronger sanctions against Russia. Senator Bob Corker (R-TN), for example, introduced the Russian Aggression Prevention Act (S. 2277) on May 1, 2014. This bill was endorsed by 26 other Republicans, including members of the Senate Republican leadership. No Democrats co-sponsored the bill. Just prior to the recess, Senate Foreign Relations Committee Chairman Robert Menendez (D-NJ) and Ranking Member Corker introduced the Ukraine Freedom Support Act (S. 2828), which would authorize the imposition of new sanctions against Russia. In a show of bipartisan support for Ukraine, the Senate Foreign Relations Committee unanimously reported the legislation on September 18, hours after Ukrainian President Petro Poroshenko addressed a joint session of Congress.

If enacted into law, S. 2828 would codify existing sanctions implemented by executive order, impose broad sanctions on Russia's defense, energy, and financial sectors, and increase military and non-military assistance for Ukraine. It would also authorize restrictions on non-US financial institutions for certain transactions with sanctioned Russian persons or businesses. When Congress returns for the lame duck session, Senate leadership must determine whether to bring the bill to the floor for a vote. There are no Russia sanctions bills currently pending in the House, but the lower chamber would face pressure to consider the Senate-passed bill if it moves in the lame duck session.

As an alternative, incoming Chairman Corker might instead prefer to move his bill next year. That legislation would codify existing sanctions implemented by executive order, impose sanctions against specific Russian banks and energy companies—including their senior executives—and authorize lethal military assistance for Ukraine and other former Soviet states. By codifying sanctions imposed by the President pursuant to executive orders, the bill would negate the President's ability to amend and lift sanctions based on U.S. foreign policy objectives and would require another act of Congress to be lifted. Given the political climate in Washington and bipartisan support for Ukraine, most Senate Republicans would vote for this bill if it is considered by the Senate. Chairman Corker may seek to reintroduce the bill in 2015 so that he could shepherd it through the committee process.

## **Iran Sanctions.**

The P5+1 interim agreement with Iran is set to expire in the middle of the lame duck session on November 24, 2014. (The two sides could yet extend the negotiations if necessary to hammer out the technical components of a deal.) Many congressional Republicans, including senior members of the Senate Foreign Relations Committee, have expressed concern that the Obama Administration may not make a good deal with Iran or may lift sanctions (established by Executive Order rather than by statute) without extracting sufficient reciprocal concessions from Iran. They have increasingly called for Congress to approve any final agreement, even though it is not a treaty that would require Senate advice and consent. Republicans have also expressed concern that the Obama Administration may seek to effectively lift the sanctions codified into law by indefinitely suspending their application. Republican sanctions hawks, such as Senator Mark Kirk (R-IL), are prepared to introduce legislation requiring the administration to receive explicit authorization to lift any sanctions against Iran. Assuming a breakdown in the negotiations, a Republican-controlled Congress could be expected to approve legislation to impose further sanctions.

In the recent past, the Senate has voted unanimously in favor of applying more sanctions against Iran, despite the Obama Administration's objections. The House has also readily imposed additional sanctions, and would likely do so again.

## **Syria/Iraq/ISIL/AUMF.**

As President Obama seeks to develop and implement a strategy to respond to ISIL, as well as to the Assad regime in Syria, he will continue to find it difficult to secure congressional support where necessary. While Congress has provided short-term authorization and funding to train and equip vetted members of the Syrian opposition, the program must be renewed before the earlier of either passage of longer-term authorization, or by December 11, 2014. Though likely to be renewed, this issue will surely prompt additional debate on both sides of the aisle regarding the effectiveness of the program and the ultimate end-goal in Syria. With respect to Iraq, Republicans in Congress will likely continue to press the Administration to enhance direct support for Kurdish forces. Some top Republicans in both chambers will also likely push for the introduction of a limited number of U.S. Special Operations ground forces in Iraq and Syria. More broadly, Congress and the Administration will continue to differ on the need for a new Authorization for Use of Military Force (AUMF) to support the Obama Administration's actions in both Iraq and Syria. This parallel debate surrounding the bounds of the President's "war powers" and whether the post-9/11 AUMF should be repealed-and-replaced or amended will likely prompt additional hearings and draft legislation.

## **China.**

In general, Republicans, especially the more hawkish wing of the party, tend to be tougher on China than Democrats. However, there are many nuances within that broad characterization. With change of Senate control, we expect more support for providing resources to the U.S. military's pivot to Asia, more proposals to support allies (such as Japan, Philippines, Vietnam, and India) in defending against what many Members view as Chinese maritime and territorial ambitions, and more scrutiny of Chinese trade and human rights practices, especially in light of developments in Hong Kong.

## **Africa.**

With the rise of Boko Haram in West and Central Africa and continued security challenges in the Maghreb, Somalia, and Central African Republic, Republicans will likely continue to focus on counterterrorism initiatives and broadening bilateral trade with Africa. Congress will also debate reauthorization of the African Growth and Opportunity Act next year before it expires on September 30, 2015.

## **Climate Change.**

Beginning in November 2015, the United Nations Climate Change Conference will convene in France with a goal of creating a binding international treaty for all countries to address climate change. Approval of any treaty requires a two-thirds vote by the Senate. Given Republicans' traditional skepticism of comprehensive climate change initiatives and UN-led processes, the Administration will have a very difficult time winning support for any climate change agreement, especially one that would require new limits on U.S. greenhouse gas emissions. We thus anticipate that the Administration will be forced to continue to pursue the President's climate change agenda through regulatory action by the Environmental Protection Agency.

## **Benghazi.**

A special committee in the House of Representatives is currently conducting an investigation of the 2012 attack on the U.S. Consulate in Benghazi, Libya. With Republicans in control, the Senate may consider convening a similar special committee or renew investigations under the auspices of the Senate Foreign Relations Committee or other relevant committees. Given the negative impacts such an investigation could have on a potential Hillary Clinton presidential campaign, there will be strong interest in keeping this issue in the public eye through 2016.

## Other Issues.

Many other issues could take an increasingly partisan tone where Republicans could seek to disrupt or alter President Obama's agenda or use the oversight process to criticize the Administration. These include:

- Reauthorization of the expiring Export-Import Bank charter (June 30, 2015), something House Financial Services Chairman Jeb Hensarling (R-TX) and other Republicans oppose;
- Responding to the child refugee crisis from Latin America, especially Guatemala, which intersects with the larger debate over border security and immigration reform; and
- Funding for foreign assistance generally, and United Nations operations specifically, which Republicans traditionally seek to limit.

## Anticipated Congressional Committee Developments

Senator Bob Corker (R-TN) will lead the Senate Foreign Relations Committee in the 114th Congress. Senator Robert Menendez (D-NJ), the current Chairman, will become Ranking Member. Under the leadership of Senator Corker, the committee will likely increase attention to strengthening the U.S. military, diplomatic, and economic response to ongoing conflicts in Ukraine, Iraq, and Syria. The potential exists for changes to Senate Appropriations Subcommittee leadership, but it is possible that current Ranking Member Senator Lindsey Graham (R-SC) and current Chairman Senator Patrick Leahy (D-VT) could just trade positions.

In the House, Representative Ed Royce (R-CA) will continue to chair the House Foreign Affairs Committee and Representative Elliot Engel (D-NY) will continue as the Ranking Member. Current Chairwoman Kay Granger (R-TX) of the House Appropriations State-Foreign Operations Subcommittee is term-limited. Unless she is granted a waiver, the subcommittee will see a new chairman. It is anticipated that current full Committee and State-Foreign Operations Subcommittee Ranking Member Nita Lowey (D-NY) will continue in her position.

## Anticipated Agency Developments

Currently, substantial changes at the Department of State and the White House's National Security Council are not anticipated. However, with the retirement of Deputy Secretary of State Bill Burns, the White House soon will need to nominate a replacement. Depending on the nominee, there may be a reorganization of some of the other senior department leaders.

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In our last post-election analysis two years ago, we focused on the challenges and opportunities that could arise from the looming “fiscal cliff” that drove legislation during the lame duck session in 2012. Following a New Year’s Eve agreement between Congress and the Administration, which addressed the confluence of significant tax increases for most working Americans and the onset of the spending, sequester, 2013-2014 held promise for a significant discussion about comprehensive tax reform. The cliffhanger deal reset the tax revenue baseline by some \$4 trillion and made permanent most of the Bush tax cuts in controversy through three presidential elections (2004, 2008, and 2012). The agreement was considered by some to be a table setter for comprehensive tax reform and, with the Bush tax cut fight resolved, there was some degree of optimism that both sides could move forward on a broader reform package.

However, over the past two years, the quest for fundamental tax reform has proceeded in fits and starts but not taken flight, leaving the lame duck Congress to wrestle with important but smaller-bore issues like tax “extenders.” While both congressional tax writing committees have been working to advance comprehensive tax reform legislation—including, notably, the release of the Camp Tax Reform Draft last February, as well as a series of draft proposals from then Senate Finance Committee Chairman Max Baucus in November 2013—more concentrated congressional action has been lacking. And, while the White House and Treasury Department have continually kept the notion of tax reform afloat, very little has been done to suggest tax reform is a top priority. Will anything change in 2015?

Even though the odds are against it, there is a plausible reason to think both Congress and the Administration may be interested in moving tax reform higher on their priority lists. If that happens, tax reform, particularly business tax reform, remains a possibility in 2015. Why? Unlike the debate over taxation of individuals—where the political parties have fundamentally incompatible views likely to remain fixed through the next presidential election—a great deal of overlap exists between key congressional tax writers and the Administration on business tax reform. There is commonality in the desire to broaden the corporate tax base while lowering the U.S. corporate tax rate, the highest in the industrialized world. There are also some related factors—a spate of cross border mergers, including inversions, increased activity in the OECD, and a bipartisan desire for increased infrastructure in the United States—that have started to refocus the Administration and congressional policymakers and stakeholders on the need for reform.

Leading tax writers will certainly attempt to push forward with an eye on achieving tax reform—in whole or in part—during 2015. If that proves too ambitious, tax writers and congressional leadership will focus on using 2015 and 2016 to lay the groundwork necessary to achieve reform in 2017. Under any scenario, we expect consequential tax reform discussion, planning, and drafting to continue next year.

## Anticipated Congressional Committee Developments

We expect that Senator Orrin Hatch (R-UT) will assume the Chairmanship of the Senate Finance Committee in the 114th Congress, with Senator Ron Wyden (D-OR) serving as Ranking Member. Both Senators Hatch and Wyden are committed tax reformers and will continue to press for comprehensive tax reform for individuals, pass-through business entities, and corporations.

The Senate Finance Committee has operated with a 13-11 Democrat-Republican majority during the 113th Congress. With Republicans taking control of the Senate next year, that ratio will change pending an agreement governing Committee ratios by the Senate Leaders. However, with just one departure expected from the Committee (retiring Sen. Jay Rockefeller (D-WV)) the overall roster will look much the same, with a few additional Republicans added to the powerful Committee.

In the House, the Chairmanship of the Ways and Means Committee will be open following the pending retirement of Representative Dave Camp (R-MI). Representatives Paul Ryan (R-WI) and Kevin Brady (R-TX) are running to succeed Chairman Camp, with the Republican Steering Committee expected to vote on the matter in the coming weeks, and Representative Ryan favored to win. Regardless of who takes the chair, both Members are interested in pursuing tax reform. Representative Sandy Levin (D-MI) is expected to continue serving as Ranking Member. While Levin is open notionally to the prospect of tax reform, the differences between Ryan and Levin (or Brady and Levin) are starker than their Senate counterparts. Aside from the change in leadership, the Ways and Means Committee roster will remain stable, with just a few additions expected given the small number of retiring Committee members.

## Lame Duck Session: Tax Extenders

As noted in the introduction, with 55 temporary tax provisions having expired at the end of 2013, a tax extenders measure is on the relatively short list of “must pass” items in the lame duck session. Even though the House and Senate have taken very different approaches on extenders, resolution—of some duration—in the lame duck is likely. Expired tax provisions that pack political punch include the very popular Research and Development (R&D) tax credit; the active financing exception (AFE) and controlled foreign corporation (CFC) look through; provisions affecting capital cost recovery including bonus depreciation and enhanced limits on small business expensing; and the ability of individuals to deduct state and local income taxes.

Congress has allowed extenders to lapse many times in the recent past. Most recently, in both the 2010 and 2012 lame duck sessions, Congress passed two-year extensions of most expiring provisions, making the extensions retroactive to the beginning of 2010 and 2012, respectively.

The leaderships of both the Democratic-led Senate and Republican-led House have acknowledged that extenders must be addressed in the lame duck, but there has been considerable disagreement as to what final legislation should look like. The Senate Finance Committee reported bipartisan legislation, the EXPIRE Act, from the Committee in May, which would extend nearly all expired provisions for two years (2014 and 2015), thereby preventing an \$85 billion tax increase on individuals and corporations from taking effect. Efforts to advance the legislation through the full Senate ended quickly though due to a disagreement over amendments. Rather than opting for a short-term extension of all expired provisions, the House has passed a handful of bills making select extender provisions permanent at much greater cost. Under the House approach, dozens of provisions that expired at the end of 2013 remain unaddressed. Provisions the House has passed include permanency of the R & D credit, bonus depreciation, increased limits on small business expensing, a variety of S-Corporation provisions, and some charitable items including the exclusion for charitable distributions from an IRA account. In addition, though not passed through the House floor, the Ways and Means Committee reported legislation making permanent the AFE and CFC look through provisions.

With the 2014 tax filing season closing in, there will be significant pressure to deal with these provisions in lame duck. Although both the House and Senate will seek to defend their preferred approach to extenders, it is more likely that the Senate's lowest common denominator approach will prevail, as it has historically. Despite the objections of some, there will not be much appetite to get into the hard politics of picking and choosing between various extensions during the truncated lame duck session.

The duration of the extensions is another matter, though, with a few different possibilities. The House could accede to the Senate's desire to enact two years of extensions. Alternatively, the House could demand that the Senate agree to a one-year only extension (retroactive to January 2014). And, finally, as a wild card play, there could be discussions about whether to blend the House and Senate approaches, working off the Senate's base bill while making one or more of the expired provisions permanent. The odds of a one- or two-year bill remain high, but a broader deal that involves making various provisions permanent remains a longer shot. In addition to representing sound policy, permanent extensions might also help set the table for tax reform by making it easier for both sides to agree on a revenue baseline.

## Corporate Inversions

While the political discourse on corporate inversions quieted in the weeks leading up to the elections, the September release of the Obama Administration's proposed regulatory restrictions on inversion transactions has kept focus on the issue while impacting various pending inversion transactions. After a raft of announced deals in June and July, very few new inversion deals have been announced since then, and a number of proposed deals have been dropped.

The Obama Administration and many congressional Democrats have called for an immediate ban on inversions, and some influential tax writers have introduced various legislative proposals in an attempt to achieve that result. At the outset of the debate, leading Republican tax writers staunchly opposed stand-alone legislation addressing inversions, maintaining that the best way to prevent US-based companies from locating abroad is through comprehensive tax reform that lowers the high US corporate tax rate and adopts a more competitive territorial system of taxation. This continues to be the dominant Republican position. However, following several months of inversion announcements, some Republicans began to refine their positions.

Still, Congress recessed in mid-September without passing any form of inversion legislation, and it is unlikely that there will be an intense amount of inversion-related legislative activity in the lame duck. Influential Republican lawmakers continue to oppose standalone inversion legislation, including House Ways and Means Committee Chairman Camp, who recently reiterated his position that comprehensive reform is the only viable path forward. While the Senate's leading Republican tax writer, Senator Orrin Hatch, has taken a slightly different approach, suggesting that there may be steps short of comprehensive tax reform that could be taken to address corporate inversions, Senate Republicans and Democrats do not appear close to a deal.

The Administration has said it will follow its September notice with proposed regulations at some point in the future, though Treasury and IRS could take some time before producing such regulations. In addition to building on the Treasury Notice released in September, Treasury has pointedly noted it is reviewing additional items that may apply to inverters, or to a larger group of inbound companies, relating to deductibility of interest expense.

## Next Year: Tax Reform Efforts To Continue

While at a minimum important steps towards tax reform will occur in 2015, enacted legislation is less likely, though not impossible. The Administration continues to acknowledge the need for tax reform, and tax writers on both sides of the aisle will want to move ahead. In order to be realistic, however, there will need to be relatively quick buy-in and leadership on the issue from the Administration, which means real negotiation with congressional Republicans on a host of important issues.

There are also seemingly intractable differences between the parties on the taxation of individuals, leaving discussion of corporate or business reform as the more fruitful endeavor. Indeed, there is much overlap between the Administration and congressional Republicans on the issue of corporate tax reform.

Both the Camp Draft and the Administration's 2012 Framework for Business Tax Reform move in similar directions. In the Framework, the President advocated reducing the top corporate rate from 35 to 28 percent, while providing manufacturers with additional tax preferences that would effectively lower their tax rate to 25 percent, with even lower rates for firms engaged in "advanced manufacturing." In addition, the Framework would expand, simplify, and make permanent the R & D tax credit. The Administration proposed revenue raisers to fully offset the cost of these changes. Specific items include repeal of Last In First Out (LIFO) accounting, repeal of tax preferences available for fossil fuels, limitations on tax preferences allowed for the purchase of insurance products and by insurance companies, taxation of carried interest as ordinary income, and new rules that change the depreciation schedule for corporate jets from five to seven years. Since those changes alone do not come close to paying for the proposed tax rate reduction, the Framework also includes a menu of options that, while short on detail, suggest the types of additional corporate tax base "broadeners" the Administration will pursue during tax reform. These include lengthening depreciation schedules, reducing the deductibility of interest as an ordinary and necessary business expense, and encouraging greater parity between large corporations and "large non-corporate counterparts" (presumably by subjecting some large pass-through entities to entity-level taxation). Similarly, the Camp Draft would eliminate a host of these (and other) tax expenditures while lowering the corporate rate to 25 percent.

International tax issues will be a significant focus in the tax reform debate, both with respect to the international operations of U.S. businesses and the treatment of inbound investment. In contrast to the congressional Republican view that corporate reform should also be used to transition from a worldwide system of taxation toward a territorial system, the President's proposal would establish a minimum tax on U.S.-based multinational corporations' foreign earnings, eroding the use of "deferral" of foreign-source income. The Administration punctuates its position by stating that a "pure territorial system could aggravate, rather than ameliorate, many of the problems in the current tax code" (emphasis added). However, should corporate reform negotiations take place, it is likely this would be a point of negotiation with the Congress rather than a hard-and-fast view; rejecting a "pure" territorial system still leaves plenty of room for discussion with those who are seeking to move towards a territorial system, as most countries have neither pure territorial nor pure worldwide systems of taxation, but rather combine elements of both. In fact, the Camp Draft moves a bit farther than some proponents would like by instituting a minimum tax on worldwide "intangible" income of US based multinationals.

In addition, Congress and the Administration have begun to focus on the potential use of related-party debt by foreign-based companies operating in the United States. The expressed concern is that the U.S. subsidiaries of foreign companies may carry a particularly high or "excessive" amount of related-party debt in order to generate large deductions, further eroding the U.S. tax base. Under 163(j) of the Internal Revenue Code, inbound companies can deduct net interest expense up to 50 percent of

adjusted taxable income (ATI, or cash flow) on an annual basis (unless they have a debt to equity ratio below 1:5 to 1 in which case their deductions are not limited). Some recent 163(j) proposals have targeted former U.S. companies that have inverted while others have focused on inbound investment more broadly. In the latter category, the Camp Draft tweaks 163(j) for inbound companies by reducing allowable deductions for net interest expense from the current limit of 50 percent of ATI to 40 percent. Other proposals, including in the Administration's most recent budget, would more radically reduce allowable interest deductions (though not for financial institutions) to a U.S. subsidiary's "proportionate share" of a companies' worldwide interest expense. A "proportionate share" of interest expense is defined as the ratio of earnings the U.S. subsidiary has to the companies' worldwide earnings (as reported in financial statements). This proposal is estimated by Treasury to raise \$48.5 billion over ten years. Yet other proposals, such as that from Senator Charles Schumer (D-NY), would limit interest deductions to 25 percent of ATI (while also eliminating the excess limitation and interest expense deduction carry forwards) but would apply only to inverted companies.

The tax code has also attracted the attention of those who are interested in using tax reform to help fund the significant shortfall in the highway trust fund. As a result, both the Administration and Chairman Camp have looked to a one-time tax on overseas earnings of US-based multinationals as a source of revenue for funding infrastructure in the US. Specifically, the Camp Draft would mandate companies pay tax at a reduced rate on historic overseas earnings over an eight-year period, with the revenue—some \$126 billion as currently drafted—diverted to the highway trust fund. Such an action would at a minimum close most of the gap between expected trust fund revenue and currently-authorized spending levels for several years.

## Estate Tax

Further reform of federal estate, gift, and generation skipping taxes could figure prominently on the tax policy agenda in the 114th Congress. In September of this year, 30 House Members sent a letter to House Republican Leadership requesting a floor vote on the Death Tax Repeal Act at the earliest possible opportunity. Representative Kevin Brady, as the sponsor of this bill and leading proponent of estate tax reform in the House, will press forward with similar efforts early in 2015. While outright repeal will face challenges from a closely divided Senate and the Administration, further reductions in maximum estate tax rates and increases to personal exemption levels could be in play should more comprehensive tax reform measures advance.

## Pension and Retirement Savings

The close of the 113th Congress brings certain change to the state of play on retirement issues. Senator Tom Harkin (D-IA) (Senate HELP Committee Chair), Representative Dave Camp (R-MI) and Representative George Miller (D-CA) (Education and Workforce Committee Ranking Member) are retiring at the end of their current terms. These changes on top of last year's committee leadership departures (Senate Finance Committee Chair Max Baucus and House Education and Workforce Subcommittee on Health, Education, Labor, and Pensions Rob Andrews) mean that the leadership lineup of the committees of jurisdiction on pension matters will look very different when the new Congress opens.

Further, the new Republican majority in the Senate likely will put Senators Lamar Alexander (R-TN) and Orrin Hatch at the helms of the HELP and Finance Committees, respectively. The Republican majority will give Senator Mike Enzi (R-WY), one of the Senate's top pension experts (and former Chairman of the HELP Committee), a powerful foundation to advance his pension reform priorities, including easing the rules on repayment of 401(k) plan loans, which was the centerpiece of his Shrinking Emergency Account Losses (SEAL) Act proposal, introduced in 2013. In addition, with Hatch chairing the Finance Committee, his proposal to strengthen and reform much of the nation's public and private pension benefit system, the Secure Annuities For Employees (SAFE) Retirement Act, is likely to garner additional attention.

In contrast to the changes in key committee leadership, the pension and retirement issues that the committees will face will be familiar. For example, Congress's attraction to pension rules as a source of revenue for other initiatives will continue. Highway funding legislation signed by President Obama last August changed the interest rates used to determine the amounts employers are required to contribute

to the pension plans they sponsor in a manner that reduced required contributions, which are tax deductible, and, as a result, increased tax revenues. Similarly, Representative Paul Ryan, likely the new Ways and Means Committee Chairman, may take up his predecessor's proposals to increase tax revenues by lowering limits on IRA contributions and other changes to the tax treatment of retirement plan contributions, as part of tax reform effort in the new Congress.

Multiemployer plan funding issues remain as well. Stakeholder groups and key committee staff are committed to completing a legislative package to address significant underfunding in a few very large plans. The current funding rules, however, expire at the end of this year pursuant to the Pension Protection Act of 2006. These rules, in their current form, are currently part of the tax extenders package (discussed elsewhere in this analysis). The likelihood of broader legislative action during the lame duck session is constrained by the other congressional calendar and competing priorities. Nonetheless, a bipartisan, bicameral group of congressional staff, supported by an active stakeholder coalition, will continue their efforts to fix the multiemployer pension plan funding situation.

The drumbeat for wholesale reform of the nation's private retirement system quieted a bit during the 113th Congress. Senator Harkin had previously held a series of hearings to showcase his proposal—USA Retirement Plans—but made little headway during the 113th. In addition, the Ways and Means committee made a significant investment in developing options for the pension component of its tax reform efforts. To the extent that tax reform is reinvigorated by the new Congress, these, and other pension reform concepts, are likely to resurface as well.

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# TECHNOLOGY AND COMMUNICATIONS

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## Major Policy Developments

The technology and communications policy agenda will shift in the 114th Congress under uniform Republican control. First, we expect Congress' long-dormant but much discussed effort to update the Communications Act of 1934 to take on new energy. Leading members of the House Energy and Commerce Committee (House E&C Committee), including Representatives Fred Upton (R-MI) and Greg Walden (R-OR), initiated a formal process to update communications policy to better reflect modern realities by kicking off the #CommActUpdate in 2013. In doing so, the Committee published a series of white papers identifying issues for public discussion, invited public comment, and later conducted a series of meetings where stakeholder members of the wireless, wireline, and video industries presented their views on communications policy reform for the benefit of Committee and personal office staff. We expect those efforts to continue into 2015, but with additional focus as Senator John Thune (R-SD) assumes the chairmanship of the Senate Commerce, Science & Transportation Committee (Senate Commerce Committee).

We do not think it is likely that Congress will send a consensus reform proposal to the President's desk during the 114th Congress, but do expect the House E&C Committee to make significant progress and to advance legislation that could either pass on the House floor or serve as the foundation for further bicameral discussions. Regardless, we expect both chambers to advance the discussion significantly as committee leaders on both sides of the Capitol work together to address communications policy reform.

We anticipate that both chambers will advance video policy reform discussions that began in earnest in the 113th Congress. That discussion will certainly play a central role in the #CommActUpdate process, as new content-delivery models using the Internet continue to evolve and disrupt the marketplace. At the end of October, Federal Communications Commission (FCC) Chairman Tom Wheeler circulated a notice of proposed rulemaking proceeding that addresses whether online video distributors should be classified as multichannel video programming distributors (MVPDs), and should therefore have access to the same regulatory rights and responsibilities as existing cable and satellite TV providers. This proceeding could stimulate an already robust discussion playing out on Capitol Hill regarding the future of video policy, both inside and outside of the #CommActUpdate process.

We expect a renewed focus on FCC procedural reform legislation. The House made progress during the 113th Congress in this area as members of the E&C Committee crafted H.R. 3675, the "Federal Communications Commission Process Reform Act of 2014," a compromise that passed by a voice vote at both the committee level and on the House floor. While the Senate failed to consider H.R. 3675 or its counterpart, S. 1989, FCC procedural reform legislation will receive a fresh hearing in 2015 as Chairman Thune and Senator Dean Heller (R-NV) – who introduced S. 1989 and is the leading reform proponent in the Senate – are in a position to control the agenda and pursue procedural reforms at the FCC. Whether Senators Thune and Heller are able to secure a filibuster-proof majority remains to be seen. We also expect reform proponents to prioritize procedural reform early in 2015 while the FCC continues its public interest examination of several major transactions, including proposed combinations between Comcast and Time Warner and AT&T and DirecTV.

We do not expect the composition of the Commission to change during 2015. FCC Commissioner Michael O'Rielly has been recently re-nominated for another term. Commissioner Jessica Rosenworcel's current term will expire in 2015 and there is no reason not to expect her re-nomination as well.

More broadly, Republican control of Congress will also result in more aggressive oversight of the regulatory agenda at the FCC and the National Telecommunications and Information Administration (NTIA) of the Department of Commerce. First and foremost, the House E&C Committee and the Senate Commerce Committee will likely pay close attention to the FCC's progress implementing the Broadcast Television Incentive Auction, which both the FCC and members of Congress are counting on to generate funds for a nationwide interoperable wireless network for first responders that Congress first authorized through the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act). The FCC has recently announced that the auction will now likely take place in the first part of 2016. Second, the committees will also pay close attention to the FCC's effort to promulgate a final rule in the Open Internet proceeding. That docket received unprecedented public comment in 2014 after the FCC issued a notice of proposed rulemaking in response to the U.S. Court of Appeals for the District of Columbia's order vacating two of the central tenets of the original Open Internet rules.



Finally, we expect the House and Senate to closely scrutinize the NTIA's role coordinating U.S. policy at the World Radiocommunication Conference (WRC) 2015, which will be convened by the International Telecommunication Union (ITU) in Geneva, Switzerland. Republican House E&C Committee and Senate Commerce Committee members expressed strong interest in the international policy issues surrounding the ITU's World Conference on International Communications (WCIT), which convened in 2013, and we expect similar issues implicating Internet governance and freedom of speech to rise again in 2015.

### Anticipated Congressional Committee Developments

Senator John Thune (R-SD) will lead the Senate Commerce Committee in the 114th Congress. Senator Bill Nelson (D-FL) is widely considered to be the front-runner to become Ranking Member.

In the House, Representative Fred Upton (R-MI) will continue to chair the Energy & Commerce Committee and Representative Greg Walden (R-OR) will continue to chair its Communications and Technology Subcommittee. Both these chairmen are likely to continue pursuing the #CommActUpdate process, which began in earnest in late 2013 and continued throughout 2014. With Representative Henry Waxman (D-CA) retiring, two Democratic Members are vying to serve as Ranking Member: Representatives Anna Eshoo (D-CA) and Frank Pallone (D-NJ). While we do not expect the Ranking Member to be able to drive the direction of communications policy in the House, the Ranking Member race could pose subtle implications for the direction of the policy-making process. Representative Eshoo, for example, maintains a robust relationship with the technology community in her Silicon Valley district, while Representative Pallone's relationships are more closely aligned with traditional incumbent providers. Those affiliations could become important in the event that large-scale communications reform legislation gains traction, or if the committee takes up more narrowly tailored reforms that address online video issues.

With Representative Lee Terry (R-NE) having lost his re-election bid, the Commerce, Manufacturing and Trade Subcommittee will be under new leadership. Many senior Members have an interest in leading the subcommittee, which has primary jurisdiction over the full committee's privacy and cybersecurity issues. Representative Jan Schakowski (D-IL) will likely continue serving as Ranking Member of the subcommittee.

### Video Reform

Efforts to reform the treatment of video providers (broadcasters, cable TV, satellite TV, "over the top" (OTT) (e.g., online) and others) appear likely to accelerate after the 2014 mid-term elections and into 2015 with the new Congress and at the FCC. These efforts would seek to clarify, in particular, the regulatory status of emerging video distribution technologies and providers with the intent to improve competition and consumer choice. The first issues likely to be addressed concern retransmission consent rights for satellite TV interests and others, as well as the treatment of OTT video distributors.

In the House, Representative Walden, Chairman of the Communications and Technology Subcommittee, has indicated that instead of using the House's STELA (Satellite Television Extension and Localism Act (H.R. 4572)) legislation to address retransmission consent or other video reform issues, Congress should instead attempt to resolve these and other issues in a more comprehensive rewrite of federal communications law.

Assuming that Senator Thune will chair the Senate Commerce Committee, we anticipate he will also pursue a broader rewrite of current federal communications law. This effort would seemingly start with the several video reform issues that have already been debated in the current committee, such as retransmission consent. Current Senate Commerce Committee Chairman Jay Rockefeller (D-WV) and Ranking Member Senator Thune had sought to include in the Senate's STAVRA (Satellite Television Access and Viewer Rights Act (S. 2799)) bill a "local broadcast a la carte" provision that would have enabled satellite pay TV subscribers to choose what local TV stations they want and are willing to pay for. Senators Rockefeller and Thune agreed to drop the provision to enable the bill to be reported out of the committee, but Senator Thune has indicated he would continue to pursue the "local choice" proposal, perhaps as part of a larger effort to update the Communications Act.

With both the Senate and House considering changes to the issue of retransmission consent, the FCC is more likely to consider making changes to its rules on the topic as well. In March 2011, the FCC opened a proceeding to re-examine and update its rules for retransmission consent more generally, including providing more guidance regarding the requirements for "good faith" negotiations between TV broadcasters and MVPDs (e.g., cable and satellite TV providers). A primary impetus for initiating the proceeding was several high-profile retransmission consent negotiation impasses that resulted in consumers temporarily losing access to popular programming.

In its 2011 notice of proposed rulemaking, the FCC had proposed to specify additional examples of *per se* violations of this good faith requirement and to revise the "totality of the circumstances" standard for determining when negotiations are conducted in good faith. Another proposal was to improve the notice that must be provided to consumers prior to a possible service disruption by extending this requirement to non-cable MVPDs and broadcasters as well as cable TV operators and to require that the notice be given if a renewal or extension agreement has not been executed 30 days prior to the current consent agreement's expiration, even if service is ultimately not lost. The FCC is likely to move forward on these issues in 2015.

Another likely video reform issue concerns the regulatory status of the OTT video distributors (sometimes also termed “online video providers”). An OTT video distributor is a provider of a channel lineup (so called “vertical linear stream” of programming) “over the top” of a third-party’s facilities, such as the Internet delivery of video programming where the provider does not own the underlying Internet network. If such online video distributors are classified as MVPDs, they would have access to local TV stations as well as broadcast and cable “vertically integrated” programming on nondiscriminatory terms and conditions through must-carry, retransmission consent, and program access rules, thus putting them on equal regulatory footing as existing cable and satellite TV providers. Verizon has recently voiced its support for classifying OTT video distributors as MVPDs. On October 28, Chairman Wheeler circulated a notice of proposed rulemaking that includes making this change. If adopted, classifying OTTs as MVPDs would mean that on-line distributors of video programming, such as Aereo, could more effectively compete against established providers. Broadening the regulatory classification of MVPDs to reach new online video programming providers would seem to be consistent with these goals.

## Mergers and Acquisitions

We believe that changes in congressional leadership will not have a material impact on the pending proposed mergers of Comcast and Time Warner cable or AT&T and DirecTV or policies affecting mergers and acquisition activity in the telecommunications industry. The largest driver of mergers and acquisitions in the U.S. telecommunications industry will continue to be the rising demand for mobile services, which require scarce and valuable wireless spectrum. The use of smartphones and tablets running mobile applications is resulting in rapid increases in wireless data use. The continued growth of machine-to-machine applications, used in industrial automation, logistics, Smart Grid, etc., is also fueling wireless data use.

Aside from upcoming government auction of new Advanced Wireless Services spectrum in November, the largest wireless carriers, Verizon Wireless, AT&T, Sprint, and T-Mobile, will have to obtain additional spectrum by acquiring the smaller competitors that remain. In addition, the wireless carriers will continue to try to exploit spectrum bands that have not traditionally been used to provide terrestrial mobile services. The other driver of mergers and acquisitions in telecommunications will be the explosive growth in demand for broadband capacity. Both the number of broadband customers and the amount of bandwidth they consume will continue to grow. For example, broadband customers on cable systems now exceed the number of customers that view TV via cable service. The merger of Comcast and Time Warner Cable would place about 35% of the nation’s broadband customers under one company. Other smaller cable companies are likely to follow Comcast’s lead in order to stay competitive with Comcast’s increasing purchasing power and economies of scale. In addition, the extension of broadband access to the currently unserved (rural) areas of the country is likely to attract increased investment and consolidation. About one-fifth of the

U.S. population now lacks broadband access. Extending broadband to this segment of the population will require an improvement in the economies of scale of the providers serving these markets or increased cost support and subsidies. Both of these would make the smaller, rural service providers more attractive for consolidation or acquisition.

## E-Rate

At the urging of the White House, and with congressional support, in July the FCC, in a partisan vote, adopted changes to “modernize” the \$2.4 billion annual E-Rate Program and begin a shift in emphasis to supporting robust broadband inside classrooms and libraries, with \$1 billion targeted for that effort over each of the next five years. The E-Rate Program, which is ultimately funded by consumers out of the universal service fund (USF) charge on their phone bills, provides annual support to qualifying K-12 schools and libraries for a specified list of eligible telecommunications and Internet-related services and equipment. Although the FCC was able to fund the first two years of modernization from projected unused funds or savings, one issue left for 2015 was the demand to expand the annual size of the Program funding, in part to address the out years of the five-year initiative. There has been no baseline increase since the program cap was established in 1997 and an inflation adjustment was only put in place in 2010.

However, such an expansion of funding was viewed negatively by both Senator Thune and Representative Walden; the latter had previously urged the FCC to cap the overall USF. Their opposition was reflected as well by the dissenting opposition of the two Republican appointees on the FCC, Commissioners Ajit Pai and Michael O’Rielly. Senator Rockefeller, one of the authors of the E-Rate Program, favored expansion of the cap, but he is retiring. Senator Nelson, who would likely replace him, wrote the FCC in general support of modernization of the Program.

While several petitions for reconsideration of elements of the July order have been filed at the FCC, the agency has released the Eligible Services List for Funding Year 2015, and we expect that process to go forward.

Nevertheless, as part of its modernization action the FCC sought and has received comments on future E-Rate Program funding options. It is also reportedly looking at how other elements of the USF might support the schools that are eligible beneficiaries. Recent filings at the FCC, particularly by educational organizations and institutions, have renewed the call for dollar expansion that would as much as double the size of annual program funding. If the FCC decides to increase the cap, particularly by potentially increasing the burden on consumers through the USF charge on their phone bills, we expect that Chairman Wheeler would be called to task by Representative Walden and Senator Thune. In any case, we would expect ongoing oversight as the modernization rules are implemented starting in late this year.

## Wireless Infrastructure

With the explosive growth in demand for wireless services, the FCC has sought to facilitate more expeditious deployment of the infrastructure needed to meet that demand while balancing state and local rights, consistent with Congress' directive in Section 332(7) of the Communications Act. In 2012, Congress supplemented that authority where the deployment involved sharing existing infrastructure (i.e., collocation of new transmission equipment on an existing wireless tower or base station) in Section 6409 of the Spectrum Act. That statute also addressed other actions (removal or replacement of such equipment), which similarly did not substantially change the physical dimensions of an existing facility. To date there has been little congressional controversy over the FCC's actions to implement this new authority, which until very recently has been largely the provision of limited guidance about application of the new statute.

However, encouraged primarily by the wireless industry, which expects to continue to deploy thousands of new or modified sites in the years ahead, in late October the FCC released a lengthy ruling to further facilitate infrastructure sharing, including shared transmission equipment such as Distributed Antenna Systems that can support multiple service providers simultaneously. There will also be exclusion from certain environmental and historic preservation requirements in limited instances involving shared infrastructure. The agency also clarified some of its prior guidance regarding Section 6409 and rulings regarding the timing requirements for municipal action.

Many municipalities participated in this latest proceeding, and, as these new rules take effect over the course of the year ahead, it remains to be seen whether there will be concern that the FCC, in engaging a policy balancing act, has swung the pendulum too far in any respect. So far congressional response has not indicated as such. Still, oversight as these new rules take effect seems likely.

## Broadcast Television Spectrum Incentive Auction

Pursuant to the Spectrum Act, the FCC is planning on conducting the first ever "incentive auction" of spectrum to be repurposed from broadcast TV use through the auction. The incentive auction is a voluntary, market-based means of repurposing spectrum by encouraging broadcast TV licensees to voluntarily relinquish spectrum usage rights in exchange for a portion of the proceeds from an auction of new licenses to use the repurposed spectrum. The FCC, which had planned to hold the auction in mid-2015, is now targeting to start the auction in early 2016.

The Spectrum Act's provisions authorizing the FCC to hold the incentive auction were supported by both Republicans and Democrats in Congress. Republican control of the Senate and the House of Representatives may result in more aggressive oversight of the FCC's implementation of the incentive auction, but further legislation regarding the incentive auction is not expected. Should the auction slip past the first half of 2016, however, the presidential election that year may have a more substantial impact on the incentive auction.

The National Association of Broadcasters (NAB) and Sinclair Broadcasting have challenged various aspects of the FCC's report and order regarding the incentive auction in the U.S. Court of Appeals for the D.C. Circuit. The cases are proceeding on an expedited schedule. Briefing will begin in November 2014, and the final briefs are due on January 27, 2015. The oral argument is expected to be completed in the first half of 2015, and a decision by the court could come in mid-2015.

Additional action by the FCC also is anticipated in the next year. In the next few weeks, we expect the FCC to consider a notice of proposed rulemaking to preserve one vacant television channel after the auction for use by unlicensed devices. The FCC will issue an "Auction Procedures Public Notice" in which it will make final determinations and provide detailed explanations and instructions for potential auction participants. The FCC also will continue its dialogue with broadcasters to make sure they are fully informed of the opportunities presented them by the incentive auction. In addition, we anticipate that the FCC will issue orders in the next year in pending rulemaking proceedings to address the operations of services affected by the incentive auction – including unlicensed white spaces devices, wireless microphones, and Low Power Television – as well as in a rulemaking proceeding to establish rules to govern the interference relationship between broadcast television and wireless service in the 600 MHz Band after the auction.

## Net Neutrality/Reclassification

Net neutrality is likely to remain one of the most contentious and consequential issues facing the Congress and the FCC. The central issue is whether broadband providers, such as Comcast and Verizon, will be allowed to enter into "paid prioritization" agreements in which "edge providers," such as Amazon and YouTube, pay to have their content delivered to end-users on an Internet "fast lane." The FCC's prior effort to ban this practice was struck down earlier this year by the D.C. Circuit, which held that Section 706 of the Telecommunications Act of 1996 gave the FCC significant authority to regulate Internet traffic, but that the agency had run afoul of the statutory prohibition against applying Title II common carrier regulation to entities that are not providing a telecommunications service.

In the wake of that decision, FCC Chairman Wheeler initially proposed new rules that would preserve some key net neutrality principles—such as requiring broadband providers to disclose network management practices and banning them from blocking access to individual websites—while allowing most paid prioritization agreements. Chairman Wheeler's proposal, which is now under consideration by the FCC, pleased no one. House Democrats (like Representatives Waxman and Eshoo) urged the FCC to reclassify broadband service as a telecommunications service and to exercise authority under Title II to ban paid prioritization. By contrast, Senate Republicans—such as Senators Thune and Roger Wicker (R-MS)—expressed opposition to any form of government regulation in this area.

The FCC is expected to issue a new “Open Internet” order by the end of the year. At this point, the Chairman seems poised to support a so-called hybrid approach that would leave the retail broadband service largely deregulated, but declare that the wholesale relationship with various content providers would be a Title II common carrier service. While the latest proposal would impose limited Title II regulation, it also would allow carriers to charge content owners for additional prioritization, in contrast to President Obama’s recent comments opposing this practice. The two Republican Commissioners, Pai and O’Rielly, are virtually certain to oppose any new net neutrality rules. In order to get the votes of the two other Democratic Commissioners, Mignon Clyburn and Jessica Rosenworcel, Chairman Wheeler may have to agree to significant restrictions on paid prioritization. The Republican majorities on Capitol Hill are likely to respond with legislation that curbs significantly the FCC’s authority and with aggressive oversight.

### Municipal Broadband/Federal Preemption

The FCC is currently considering two petitions requesting the agency to use its authority under Section 706 to preempt State laws that prohibit or restrict municipalities from constructing, owning, and/or operating their own public broadband networks. FCC Chairman Wheeler believes that such laws—which are in effect in at least 20 States—improperly restrict competition, thereby impeding the development of the Internet infrastructure. Congressional Democrats, led by Senator Ed Markey (D-MA), generally support the Chairman’s position.

Chairman Wheeler will face significant obstacles in his efforts to preempt state municipal broadband restrictions. First, neither of the Republican Commissioners support preemption, which they view as an unlawful infringement on state’s rights. Second, any effort by the FCC to preempt these laws arguably contravenes a prior U.S. Supreme Court decision, which held that the FCC cannot interfere in a state’s oversight of its political sub-divisions unless Congress “states plainly” in the statutory language that the FCC is authorized to do so. Section 706 contains no such “plain statement.” Finally, any FCC preemption order would spark strong opposition from congressional Republicans.

Indeed, the House has already adopted an amendment to the Financial Services and General Government Appropriations Act (H.R. 5016), offered by Representative Marsha Blackburn (R-TN), to block funding for any effort by the FCC to preempt state laws restricting municipal broadband. On the Senate side, in July, nearly a dozen Republicans, including Senators Ted Cruz (R-TX) and Marco Rubio (R-FL), sent a letter to Chairman Wheeler expressing concern that the FCC would “force taxpayer-funded competition against private broadband providers.” The Republican controlled Senate could transform its concern into legislation curtailing the FCC’s Section 706 authority. Such action could also affect the agency’s ability to use Section 706 to adopt net neutrality rules.

### FCC Enforcement

With the appointment of Enforcement Bureau Chief Travis LeBlanc earlier this year, the FCC is ramping up its already aggressive enforcement posture, issuing a prolific number of record actions, and taking steps to modernize The Bureau, including, increasing the size of consumer protection-related penalties, and hiring several former litigators to serve as Bureau management. The Bureau shows no signs of slowing down post-election and appears to be on the fast track to modernizing the FCC’s enforcement actions and policies.

In bolstering its prosecutorial expertise, the FCC has filled a number of senior Enforcement Bureau management positions with attorneys from outside the FCC (and the Beltway). The Bureau has also made it a priority to issue record actions across the board, addressing a number of diverse issues. Recently, the Bureau issued actions penalizing: the sale and use of illegal signal jamming devices (proposing both the largest monetary penalty against an individual for jamming (\$48,000, as well as the largest fine to a company for jammer violations (\$34.9M)); communications made in violation of the Do-Not-Call rules (issuing the FCC’s largest ever such settlement (\$7.5M)); breaches of privacy protocols (entering into the largest settlement in FCC history addressing Customer Proprietary Network Information (\$7.4M, and proposing the largest penalty for consumer privacy violations (\$10M)); and the placement of unauthorized charges on consumer bills, i.e., cramming (requiring a \$105M settlement—the largest enforcement action in FCC history).

In addition, and as part of its efforts to modernize the Bureau, the FCC has made news in new areas of enforcement, including WiFi blocking and data security breaches. The Bureau’s foray into data security enforcement was highlighted by the Commission’s recent announcement that the FCC has joined the Global Privacy Enforcement Network, an international group of privacy regulators and enforcers that promotes law enforcement collaboration on cross-border privacy enforcement actions. Creation of the USF Strike Force also signals an increased focus on enforcement in that area as well. However, September comments by FCC Inspector General David Hunt in testimony before the House Subcommittee on Communications and Technology highlighting a perceived blur in jurisdiction between the Office of the Inspector General (OIG) and the Strike Force may lead to heightened scrutiny from Congress on USF Strike Force actions and coordination efforts with OIG.

Given his background enforcing one of the country’s toughest consumer protection regimes in California, Enforcement Bureau Chief LeBlanc appears ready to bring an increased sense of consumer awareness to the FCC’s police arm, having stated on record that he will not pursue “one-off” violators and junk fax senders to the same degree as the Bureau has previously, but that he will go after the worst offenders, focusing on the 21st century consumer. Thus far, the Bureau has made good on this promise. Given Congress’s focus on the FCC’s ability to create and adequately enforce net neutrality rules, intervention from Congress in other areas of FCC enforcement seems unlikely.



## Cybersecurity and Telecommunications

On June 12, 2014, Chairman Wheeler delivered a speech at the American Enterprise Institute (AEI) in which he sought to solidify the FCC's role in addressing cybersecurity issues in the communications sector. He expressed his intent for the FCC to build upon and enhance cybersecurity work that has been undertaken by other parts of the federal government and the private sector. To this end, he appointed a new team to lead the FCC on cybersecurity issues comprised of Admiral Dave Simpson, the Chief of the Public Safety and Homeland Security Bureau (PSHSB), and Cleve Johnson, Chief Counsel for Cybersecurity. The Chairman also created a new division in the PSHSB: the Cybersecurity and Communications Reliability Division. Admiral Simpson comes to the issue with direct experience designing, implementing, and protecting critical communications networks for the U.S. military in Iraq and elsewhere around the world.

Together with this team, Chairman Wheeler sketched guiding principles for the FCC moving forward that emphasize privacy and cross-sector cooperation. In his AEI speech, Chairman Wheeler made it clear that, while the FCC has a "fundamental" responsibility to promote network security, it will not seek to regulate cybersecurity, at least not initially. He stressed that the FCC will first look to industry and the market, with input and coordination with the FCC. More specifically, Chairman Wheeler explained that he has directed FCC staff to pursue activities in support of three "central pillars": (1) foster information sharing, especially in real-time, within the communications sector and with other stakeholders regarding the identification, reporting and mitigation of cyber threats, (2) foster the development of risk management processes and standards in conjunction with the private sector and other governmental bodies, and (3) in collaboration with academia, government, and the private sector, identify and foster the development of security innovations for hardware, software, and firmware, as well as further professionalize the cybersecurity workforce.

The mid-term election is not expected to have a significant impact on the FCC's role in cybersecurity. In February 2013, President Obama signed a cybersecurity Executive Order (EO) that addressed the needs for increased cybersecurity among all 16 Critical Infrastructure (CI) sectors, including the communications sector. However, independent agencies were not subject to the EO. Chairman Wheeler has stepped up his agency's efforts in this space, and, while it currently uses the Administration's current lens of a voluntary, risk-based cybersecurity framework developed through public-private cooperation, he has also said he would use his regulatory authority if he felt he needed to. These activities could be the subject of congressional oversight interest.

Though the FCC has vigorously expressed its commitment to cybersecurity it has yet to move forward in its new mission in a substantive way. To date, the FCC has not issued any guidance or opened any formal proceedings. However, an interim report on cybersecurity for the communications sector is expected in early 2015 from the Communications Security, Reliability and Interoperability Council (CSRIC III), a federal advisory committee that advises the FCC on communications security and reliability issues. In October 2014, the FCC held a Technology Demonstration Expo to recognize National Cybersecurity Month. The expo was meant to educate consumers on best practices to protect themselves from cybersecurity threats. These developments, along with recent enforcement actions relating to carrier failures to maintain data security, though measured, lead us to believe that 2015 will see increased activity in cybersecurity by the FCC.

## Telephone Consumer Protection Act

As court litigation under the Telephone Consumer Protection Act (TCPA) continues to grow at an unchecked rate, and headline-making settlements are regularly announced for tens of millions of dollars, we predict additional FCC action in this area by the end of the year. The FCC faces mounting pressure from hundreds of organizations ranging from nonprofits to Fortune 50 companies to provide regulatory relief, as well as pressure from Congress, including a letter signed by a 15 House Republicans and questions at oversight hearings asking the agency to address the almost 30 pending petitions in the FCC's TCPA docket. The agency has also signaled that it is likely to move forward with enforcement action under the TCPA, issuing a "Robocall" advisory shortly before the election warning entities of activities that will trigger prosecution under the statute.

## Internet Governance

The United States has been a strong advocate of the current "multistakeholder model" for Internet governance, which includes extensive mechanisms for industry participation along with governmental input in Internet decision making. Supporters of this approach argue that private sector primacy in the decision making process are necessary to maintain flexibility and responsiveness to drive continuing growth of the Internet as an engine of economic prosperity. There appears to be little likelihood of a change in fundamental U.S. support for this industry-focused governance model, which has been perceived to have produced such important results. This does not mean, however, that there will not be steps taken that might raise relevant issues, either as it affects domestic or international policies. These steps relate both to measures to regulate and to further "deregulate" the internet.



There has been some legislative activity in the current Congress, with the bi-partisan H.R. 1580, “[t]o affirm the policy of the United States regarding Internet governance” passing the House in May 2013. However, more recent House Republican bills have sought to restrict or delay a long-planned transition away from U.S. government oversight to an international multistakeholder model. Specifically, H.R. 4342, “Domain Openness Through Continued Oversight Matters (DOTCOM) Act of 2014,” H.R. 4367, “Internet Stewardship Act of 2014,” and H.R. 4398, “Global Internet Freedom Act of 2014,” seek to prevent the Administration from relinquishing formal oversight of Internet administration without additional consideration. Internationally there have been calls by foreign countries to allow for more governmental involvement in Internet administration, perhaps through the ITU or other inter-governmental mechanisms.

Despite recent congressional concerns about the loss of U.S. government control of Internet administration, the transition to a more global multistakeholder approach has been contemplated since 1998. Over the longer term, U.S. government and private sector interest will continue to strongly resist a transition away from an industry-focused model to an international governmental model that would transfer responsibility to the ITU or other international decision making bodies.

The current governance model has led to extraordinary growth from a technical and economic standpoint and the fundamental objective of the United States will be to continue to have a single, unified Internet administered in a way that mitigates potential governmental control of information flows and technological development. But important governmental interests remain (e.g., Internet freedom, privacy and security issues, and technical matters), and they will continue as an important ingredient in policy making. What one can say for sure is that importance of the Internet in wide variety of contexts, including basic principles of Internet governance, will do nothing but increase.

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# TRADE POLICY

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## Major Policy Developments

With Republicans now in control of the Senate, President Obama may find more support for his trade policy agenda. The Republican Party traditionally supports pro-business free trade policies, and Senate Republicans are expected to be stronger proponents of free trade in the 114th Congress. Though some House Republicans, particularly those elected as part of the Tea Party movement, and liberal Democrats have expressed concern about the lack of congressional involvement in free trade negotiations, House Republicans are generally supportive of renewing the “fast track” Trade Promotion Authority (TPA) necessary to implement any signed trade agreements by sending them to Congress for an up-or-down vote, without subjecting them to normal procedures such as amendments and filibusters. That said, the Obama Administration will still need to increase its engagement with House and Senate Republicans and moderate Democrats to ensure passage of TPA renewal in the 114th Congress. With a narrow majority in the Senate, Senate Republicans may need to agree to incorporate certain labor and environmental provisions generally viewed more favorably by Democrats in order to secure enough votes to pass TPA.

These dynamics could similarly affect other trade legislation, such as Trade Adjustment Assistance (TAA) for U.S. workers in industries harmed by imports, renewal of the expired Generalized System of Preferences (GSP), renewal of the African Growth and Opportunity Act (AGOA), and customs reauthorization legislation.

Apart from trade policy, Republicans are likely to focus on using the tools of trade to advance foreign policy objectives, including potential sanctions against Russia and Iran. While sanctions policy traditionally falls under the purview of the Senate Banking Committee, the Senate Foreign Relations Committee has become increasingly active in this area during the 113th Congress. Senate Foreign Relations Committee Ranking Member Bob Corker (R-TN), who is expected to become the next committee chairman, has already introduced strict Russia sanctions legislation, which goes further than both the Obama administration’s current sanctions and a pending bipartisan Russia sanctions bill.

### Trade Promotion Authority (TPA) Renewal.

Although the Obama Administration has stated that it does not believe it needs renewal of TPA to reach final agreement on the Trans-Pacific Partnership (TPP) or the Transatlantic Trade and Investment Partnership (TTIP), its negotiating partners have argued that they cannot view any U.S. offers as final offers without TPA since otherwise Congress would have the ability to amend the agreement. As Chairman of the Senate Finance Committee, Senator Orrin Hatch (R-UT) would prefer for Congress to pass TPA before the Obama Administration reaches final agreements on TPP and TTIP. He, outgoing Senate Finance Committee Chairman Ron Wyden (D-OR), and outgoing House Committee on Ways and Means

Chairman Dave Camp (R-MI) hope to negotiate a compromise TPA bill for consideration during lame duck, but this is increasingly unlikely. Moreover, Senate Majority Leader Harry Reid (D-NV) did not mention TPA or any other trade legislation in his plans for the lame duck session, and the House Leadership has also not prioritized potential consideration of TPA in the lame duck. Some Republicans may prefer not to introduce a negotiated bill during lame duck so that they can instead consider TPA in 2015 when they will have more control over the final bill.

### Trans-Pacific Partnership (TPP).

After missing the initial 2013 deadline for completion, the 12 TPP countries have been working feverishly toward President Obama’s new aim for completion by the November 2014 APEC summit in China. However, TPP completion is intricately intertwined with bilateral talks between the United States and Japan on market access in automobiles and agriculture, and the two countries have yet to come to an agreement. Moreover, TPP countries are still working to narrow down remaining issues, including addressing non-conforming measures, financial services, e-commerce, localization of servers, IP, and rules of origin. Negotiators hoped to complete the agreement before the Asia-Pacific Economic Cooperation (APEC) meetings get underway in Beijing, but it appears that TPP will likely not be concluded before 2015. This timeline would give the Obama Administration time to push for passage of TPA first.

### Transatlantic Trade and Investment Partnership (TTIP).

Initially, the U.S. and EU set an ambitious goal of concluding TTIP by the end of 2014, but it has become clear that deadline is untenable. Since its launching in 2013, the U.S. and EU have participated in seven rounds of formal negotiations. At the most recent round, the EU tabled a proposal for a sanitary and phytosanitary (SPS) chapter, as well as papers on automotive and chemical regulatory sectors. Much of the momentum and outlook for TTIP has been stalled by elections on both sides of the Atlantic, but especially in the EU, as candidates have focused their efforts on protecting their domestic base. TTIP is not expected to be concluded until at least 2016. Therefore, Congress is likely to devote more attention to TPP in the near future.

Other Trade Policy Issues:

- Renewal of the Generalized System of Preferences (GSP): GSP expired in July 2013 and has not yet been renewed. One of the obstacles to renewal was Russia’s continued participation in the program. However, President Obama notified Congress in May 2014 that Russia would no longer be eligible, thus eliminating this hurdle. Several lawmakers view reauthorization of GSP as a vehicle to provide more support for Ukraine, which could provide impetus for its renewal.

- **Renewal of the Trade Adjustment Assistance (TAA):** TAA would provide funds and training for U.S. workers “displaced” due to import competition. TAA is not popular with Republicans, but it could be included in a package with TPA to incentivize more Democrats to vote for TPA.
- **Miscellaneous Tariff Bill (MTB):** Congress was unable to pass another omnibus MTB in the 113th Congress, which would have provided import duty relief for thousands of U.S. small businesses. The bill was derailed after several Republicans, including Senator Tom Coburn (R-OK), argued that the duty relief represented earmarks. Although Senator Coburn is retiring, many Members who share his concern are returning next year.
- **Customs Reauthorization:** The Senate has not advanced the Trade Facilitation and Trade Enforcement Authorization Act (S. 662) beyond holding committee hearings since its introduction in 2013. The House has not considered customs reauthorization legislation since it introduced the Customs Trade Facilitation and Enforcement Act (H.R. 6642) in the 112th Congress. While Republicans understand that this is an issue of importance for the business community, it is a lower priority issue for Congress.
- **Renewal of the African Growth and Opportunity Act (AGOA):** AGOA does not expire until September 2015, and no reauthorization language has been introduced yet. It garners general bipartisan support, so it could advance in the 114th Congress.
- **Other Trade Negotiations:** In 2015, the Obama administration will continue negotiating agreements at the World Trade Organization on environmental goods, services, and trade facilitation, and is maintaining relationships through regional bodies like APEC and bilateral dialogues with countries like China. The relevant congressional committees may conduct oversight hearings.

### **Russia Sanctions.**

Many Senate Republicans (as well as Democrats) favor stronger sanctions against Russia. Senator Bob Corker (R-TN), for example, introduced the Russian Aggression Prevention Act (S. 2277) on May 1, 2014. This bill was endorsed by 26 other Republicans, including members of the Senate Republican leadership. No Democrats co-sponsored the bill. Just prior to the recess, Senate Foreign Relations Committee Chairman Robert Menendez (D-NJ) and Ranking Member Corker introduced the Ukraine Freedom Support Act (S. 2828), which would authorize the imposition of new sanctions against Russia. In a show of bipartisan support for Ukraine, the Senate Foreign Relations Committee unanimously reported the legislation on September 18, hours after Ukrainian President Petro Poroshenko addressed a joint session of Congress.

If enacted into law, S. 2828 would codify existing sanctions implemented by executive order, impose broad sanctions on Russia’s defense, energy, and financial sectors, and increase military and non-military assistance for Ukraine. It would also authorize restrictions on non-U.S. financial institutions for certain transactions with sanctioned Russian persons or businesses. When Congress returns for the lame duck session, Senate leadership must determine whether to bring the bill to the floor for a vote. There are no Russia sanctions bills currently pending in the House, but the lower chamber would face pressure to consider the Senate-passed bill if it moves in the lame duck session.

As an alternative, incoming Chairman Corker might instead prefer to move his bill next year. That legislation would codify existing sanctions implemented by executive order, impose sanctions against specific Russian banks and energy companies—including their senior executives—and authorize lethal military assistance for Ukraine and other former Soviet states. By codifying sanctions imposed by the President pursuant to executive orders, the bill would negate the President’s ability to amend and lift sanctions based on U.S. foreign policy objectives and would require another act of Congress to be lifted. Given the political climate in Washington and bipartisan support for Ukraine, most Senate Republicans would vote for this bill if it is considered by the Senate. Chairman Corker may seek to reintroduce the bill in 2015 so that he could shepherd it through the committee process.

### **Iran Sanctions.**

The P5+1 interim agreement with Iran is set to expire in the middle of the lame duck session on November 24, 2014. (The two sides could yet extend the negotiations if necessary to hammer out the technical components of a deal.) Many congressional Republicans, including senior members of the Senate Foreign Relations Committee, have expressed concern that the Obama Administration may not make a good deal with Iran or may lift sanctions (established by Executive Order rather than by statute) without extracting sufficient reciprocal concessions from Iran. They have increasingly called for Congress to approve any final agreement, even though it is not a treaty that would require Senate advice and consent. Republicans have also expressed concern that the Obama Administration may seek to effectively lift the sanctions codified into law by indefinitely suspending their application. Republican sanctions hawks, such as Senator Mark Kirk (R-IL), are prepared to introduce legislation requiring the administration to receive explicit authorization to lift any sanctions against Iran. Assuming a breakdown in the negotiations, a Republican-controlled Congress could be expected to approve legislation to impose further sanctions. In the recent past, the Senate has voted unanimously in favor of applying more sanctions against Iran, despite the Obama Administration’s objections. The House has also readily imposed additional sanctions, and would likely do so as well again.

## Anticipated Committee Developments

In the Senate, Finance Committee Ranking Member Orrin Hatch (R-UT) is expected to ascend to the chairmanship of the committee without any challenges. He is a pro-trade Republican with a long history of supporting FTAs and other trade legislation. However, he will seek to ensure that Congress passes TPA before the Obama administration reaches an agreement on TPP or TTIP. Senator Ron Wyden, committee chairman for the 113th Congress, is expected to become Ranking Member.

Foreign Relations Committee Ranking Member Bob Corker (R-TN) is expected to become the next committee chairman. He is expected to take a hardline policy stance against Russia and push for stronger sanctions. Senator Robert Menendez, who held the gavel during the 113th Congress, is expected to become Ranking Member.

With Representative Dave Camp's (R-MI) retirement as Chairman of the House Committee on Ways and Means, the committee will be under new leadership next year. Representatives Paul Ryan (R-WI) and Representative Kevin Brady (R-TX) are pursuing the gavel. Both Members generally have a strong pro-trade orientation. Representative Sander Levin is expected to continue to serve as Ranking Member.

Representative Ed Royce (R-CA) will continue to chair the House Foreign Affairs Committee and Representative Elliot Engel (D-NY) will continue as the Ranking Member.

## Anticipated Agency Developments

Currently, there are no major changes anticipated at the Office of the United States Trade Representative and Department of the Treasury. Ambassador Michael Froman's TPP and TTIP negotiating teams are set, and election-related reshuffling is not expected. Similarly, there are no indications of departures by the Treasury Department leaders responsible for crafting and enforcing sanctions policy, Under Secretary of the Treasury for Terrorism and Financial Intelligence David Cohen and Office of Foreign Assets Control Director Adam Szubin.

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# TRANSPORTATION AND INFRASTRUCTURE

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## Major Policy Developments

Transportation and infrastructure issues are poised to be a prominent part of the 114th Congress. The next Congress will face the need to extend or reauthorize the nation's surface transportation and aviation programs, with funding and policy challenges involved in each. Passenger and freight rail safety reauthorization will be on the agenda, along with legislation addressing key commercial and competition issues for the nation's railroads. Implementation and funding of the recently enacted Water Resources Reform and Development Act of 2014 (WRRDA)—and in particular, the landmark new Water Infrastructure Finance and Innovation Act (WIFIA) loan program it created—will also be a major issue.

With this range of issues on the agenda, the 114th Congress is shaping up to be both busy and highly consequential for transportation and infrastructure stakeholders. Our analysis focuses on the most significant and complex challenges facing Congress and the Administration—charting the future course of the surface transportation program—and the opportunities and challenges in implementing the WRRDA bill and WIFIA program.

## Surface Transportation

The surface transportation program is at a crossroads, and the 114th Congress may prove decisive in setting the future direction for federal investment in the nation's highway and mass transit systems. Since 2008, incoming revenue into the Highway Trust Fund (HTF), primarily from the gas tax, has been insufficient to support authorized expenditure levels and is continuing to lose ground. The federal gas tax, which is set at a fixed 18.4 cents per gallon, has not been increased since 1993. At the same time, increases in fuel efficiency and changes in driving patterns have led to decreasing gas tax revenue, resulting in an ever-widening gap between revenue and authorized spending levels.

With the HTF again facing insolvency, Congress enacted legislation on July 31, 2014, to transfer \$10.9 billion from the General Fund to the HTF to maintain current funding levels through May 30, 2015. Since 2008, Congress has transferred approximately \$67 billion from the General Fund to the HTF to maintain its solvency. Together with the funding patch, Congress extended the most recent two-year authorization, the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), until the end of May.

Only months after being sworn in, the 114th Congress will confront the need to reauthorize or extend the federal surface transportation program and the fundamental question of how to pay for it. The most recent Congressional Budget Office (CBO) projections indicate that \$22 billion in new revenue will be needed to extend the program for an additional two years through the end of FY 2016, \$52 billion will be needed for a four-year reauthorization through FY 2018, and \$85 billion in new revenue will be needed for a six-year reauthorization through FY 2020. The question of *how* to pay for the surface transportation program, in turn, is inextricably tied to the question of *what* to fund and what the federal role in transportation investment should be.

Heading into the 114th Congress, this large and growing structural deficit, coupled with serious questions about the political viability of further General Fund transfers, brings the surface transportation program to a potential inflection point. The 114th Congress and the Obama Administration will face three fundamental choices for the future of the program: (1) increasing the gas tax or raising dedicated new revenue from other sources; (2) reducing spending to align with available revenue, and deciding what to fund within the revenue constraint; or (3) continuing the General Fund transfers and short-term policies that have sustained the program since 2008. There is also certain to be increasing debate over “devolution”—in essence, reducing or substantially eliminating the federal gas tax and federal role, and devolving the financing and administration of surface transportation program to the states.

In many ways, MAP-21 was a transitional bill, setting the stage for these decisions ahead. Responding to the constrained funding environment, MAP-21 focused on maximizing the value of existing resources. It expanded innovative financing opportunities, increasing funding for the TIFIA low-interest loan program nearly tenfold. It broadened tolling opportunities and took steps to facilitate public-private partnerships (PPPs). It streamlined the environmental process to accelerate project delivery and encourage innovative delivery methods. Most significantly, it took steps to define and prioritize systems that are in the federal interest, targeting over 60 percent of highway funding to an expanded National Highway System consisting of the nation's most important highways, and requiring the designation of a Primary Freight Network consisting of the nation's most significant freight corridors. In short, MAP-21 could provide the framework for moving the program forward largely intact with additional revenue or the beginnings of a blueprint for fundamentally refocusing the federal role to operate within available HTF revenues.



## Forecast for the 114th Congress

The run-up to the election provided renewed indications that the surface transportation program will be a key point of focus for the 114th Congress—and a potential area for common ground. At the same time, congressional leaders and the Administration will confront a financing challenge that has long eluded solution and that runs squarely into the politics of raising revenue in today's political climate and still recovering economy.

In early October, House Speaker John Boehner (R-OH) was asked what the new Congress and Administration could achieve next year. He pointed to two things, replying that “tax reform, a big highway bill, certainly are in the realm of doable.” Rather than continuing to “butt heads” with the Administration for the remainder of the President's term, the Speaker spoke of an opportunity to find “common ground” on overhauling the tax code and moving a major transportation bill.

There remains broad opposition to increasing the gas tax—the most basic option—as a financing mechanism. Earlier this year, as Congress was facing the expiration of MAP-21, House Transportation and Infrastructure (T&I) Committee Chairman Bill Shuster (R-PA) ruled out a gas tax increase and Senate Environment and Public Works (EPW) Committee Chairman Barbara Boxer (D-CA) flatly told stakeholders that “we're not going to get a gas tax increase.” The Obama Administration has never supported increasing the gas tax. However, a range of other ideas has been floated, each with its own difficulties.

One possibility is raising revenue for transportation through tax reform, linking the two pieces of legislation as Speaker Boehner did. The Obama Administration's recent budget proposals and \$302 billion surface transportation reauthorization proposal, the GROW America Act, called for generating revenue through “pro-growth business tax reform,” but did not provide further details. Dating back to the so-called Super Committee process, the bi-partisan “Gang of Six” proposed maintaining the current gas tax but raising \$133 billion over ten years for transportation as part of comprehensive tax reform.

There has been particular focus in Congress on “repatriation,” or tax changes that would encourage or require companies with overseas income to repatriate it to the United States, with resulting tax revenues used to fill the shortfall in the HTF. Outgoing House Ways and Means Chairman Dave Camp (R-MI) included a mandatory repatriation proposal in his comprehensive tax reform draft as part of the transition to a new corporate tax system, which Administration officials said was in the “same zip code” as their thinking. Senate Majority Leader Harry Reid (D-NV) and Senator Rand Paul (R-KY) have also been proponents of a repatriation solution. However, Senate Finance Ranking Member Orrin Hatch (R-UT), who will be the next Chairman of the Finance Committee, has taken the position that repatriation should only be done as part of comprehensive tax reform. As we discuss in the tax policy portion of our analysis, the prospect for comprehensive tax reform remains uncertain.

A number of other options have been floated to stabilize the HTF. Chairman Boxer has proposed six revenue options to the tax-writing committees. While she has not released these proposals publicly, she has previously expressed her support for transitioning from a tax at the pump to a tax on gasoline at the wholesale or refinery level as a means of increasing revenue. Chairman Shuster has not advocated any specific solution, but has called for “all options to be on the table.” Under his leadership, the T&I Committee established a Panel on 21st Century Freight Transportation that reviewed recommendations made by previous blue ribbon commissions for new freight user fees such as container fees, customs duties, and ticket taxes for passenger rail improvements.

There have also been various proposals to link transportation and energy revenues, either through expanding domestic oil and gas drilling and devoting the new revenues to transportation (a Republican proposal from the 112th Congress), or new taxes on oil sales (a Democratic proposal from the 111th Congress). Others have proposed indexing the gas tax for inflation or converting the current fixed per-gallon tax to a percentage sales tax. There does not appear to be any political will for converting to a mileage-based fee or Vehicle Miles Traveled (VMT) tax, although many experts point to the VMT as the most sustainable solution.

The other fundamental choice is to reduce spending to align with HTF receipts. There is a view that if additional revenue cannot be raised, the federal program must live within its means and investment should be refocused on the areas of greatest federal interest and with the greatest importance to the nation's economic competitiveness.

Proponents of this view generally call for available revenues to be bolstered through further expansions in innovative financing, tolling and PPPs, and for federal requirements to be further streamlined to reduce costs and provide states with maximum flexibility. Indeed, under any scenario, there is broad consensus that federal transportation policy should take steps to facilitate and expand PPPs and innovative finance. There is also broad support for tolling in connection with adding new highway capacity and for High-Occupancy Toll (HOT) lanes, but tolling existing, general-purpose lanes on the Interstate remains divisive.

Just as each proposal for raising new revenues faces challenges, there will also be significant pressure to avoid large-scale cuts to transportation spending. Without additional revenue, spending would have to be cut by more than 30% to stay within available HTF balances. Influential stakeholders have strenuously opposed such cuts in the past. Construction projects and jobs would be affected in every state and district. Further, while many in the transportation sector are hopeful about expanded innovative financing, PPPs, and the use of tolls, there is also a broad consensus that these mechanisms only work for a limited number of projects and are a supplement to—and not a substitute for—base system revenues.

In any scenario, there are likely to be voices calling for an end to dedicated HTF funding for mass transit. Of the 18.4 cent-per-gallon gas tax, 2.86 cents is dedicated to the Mass Transit Account to support \$8 billion in annual HTF outlays for transit. While the House has generally been less supportive of funding for urban transit systems, the debate over MAP-21 confirmed there is a fundamental core of bi-partisan and bi-cameral support for dedicated transit funding. At the same time, there are signs of increasing interest in finding ways for transit users to contribute to a financing solution, and proposals for new transit user fees could emerge as part of the debate.

Ultimately, the fundamental question facing the 114th Congress is whether and how to raise additional revenue, followed by the question of what the federal program will look like under the various constraints. With the change of party control of the Senate, we expect there to be a more fundamental and concerted debate about the future of the HTF that will give voice to the different options and alternatives outlined here. At any funding level, the Republican-controlled Congress is likely to favor accelerating the direction and reforms in MAP-21 and will likely seek to prioritize investment in the higher order systems, further streamline the environmental process, and make greater use of tolling, innovative financing and PPPs. By contrast, Senate Democrats and the Obama Administration will want to maintain the policies embodied in MAP-21. The MAP-21 Reauthorization Act released in May 2014 under Chairman Boxer's leadership, for example, continues MAP-21's program structure and funding levels essentially intact, only adding a new, relatively small freight program.

After years of short-term policies, the next Congress could well prove decisive in setting the future direction for the nation's highway and transit policy. At the least, the future of the surface transportation program is shaping up to be a key point of focus. With the current extension expiring at the end of May, the 114th Congress will confront these issues along with a window of opportunity for major legislation before the next presidential election.

## Water Infrastructure

On June 10, 2014, President Obama signed WRRDA into law. WRRDA made significant reforms to expedite the Army Corps of Engineers (ACOE) project development process, provided new flexibility for project sponsors to accelerate work with non-federal funds, and created a new process to request and secure required congressional authorizations in the absence of project earmarks. It increased the amount of Harbor Maintenance Trust Fund revenues dedicated to harbor maintenance projects, a top priority for the nation's ports. And, recognizing the nation's massive water infrastructure investment needs and the limitations on federal funding, it took historic steps to advance innovative finance and public-private partnerships for water infrastructure projects, authorizing a new Public Private Partnership Pilot Program and the landmark new WIFIA loan program.

Modeled on the highly successful TIFIA transportation loan program, WIFIA was created to provide a new, low-cost financing tool to supplement existing resources and help meet the nation's water infrastructure needs – which total more than \$2 trillion over the next 25 years for drinking water and wastewater projects alone. WIFIA will provide long-term loans at U.S. Treasury interest rates and is open to drinking water and wastewater projects, as well as projects under the ACOE for flood control, navigation and other purposes. Because funds only have to be appropriated to cover the risk of default, and because of the extremely low historic default rates on water and sewer projects, CBO estimated that every \$1 appropriated could support up to \$33 in loans for drinking water and wastewater projects – meaning that the authorization of \$20 million in the first year could support more than \$600 in WIFIA loans, and that the \$50 million authorization in the final year of WRRDA could support over \$1.5 billion in annual loans.

## Forecast for the 114th Congress

With WIFIA enacted into law, the focus turns to securing appropriations and to implementation at the Environmental Protection Agency (EPA), which will administer the loan program for drinking water and clean water projects, and the ACOE. Given the breadth and depth of support among utilities and local governments nationwide for WIFIA's creation, as well as the interest WIFIA has generated since enactment, there is an opportunity ahead for an aggressive and coordinated effort to secure the required appropriations.

As WIFIA was enacted well into the FY 2015 appropriations process, funding was not included in the pending versions of the House and Senate appropriations bills. However, both the House Interior and Environment Appropriations Subcommittee and Energy and Water Appropriations Subcommittee included language in their Committee reports directing EPA and the Army Corps to develop and submit an implementation plan for WIFIA as a basis for funding. EPA in particular has been moving quickly to engage stakeholders, secure feedback, and develop an implementation plan. Industry stakeholders are therefore focused on the possibility of securing appropriations in the final FY 2015 appropriations legislation, with the hope of allowing at least EPA's component of WIFIA to be operational this fiscal year. In any event, securing the required appropriations to stand up a robust WIFIA program will be a major point of focus in the 114th Congress.

While WIFIA will benefit many types of projects from day one, most stakeholders agree that a key technical change is needed to maximize its effectiveness. Specifically, to address a budgetary scoring issue, WRRDA included language prohibiting WIFIA loans from being combined with tax-exempt financing. Because WIFIA cannot fund the entire project cost, the restriction on using tax-exempt bonds is a real constraint, and amending this provision is a top priority for water utility stakeholders. There is a view that the extension or reauthorization of the surface transportation program could provide an ideal vehicle to remove this restriction without raising scoring problems.

## Anticipated Congressional Committee Developments

### **Senate Committee on Environment and Public Works.**

Senator James M. Inhofe (R-OK) is expected to become the Chairman of the Senate EPW Committee with jurisdiction over both highways and water infrastructure, with Senator Boxer (D-CA) becoming the Ranking Member. Senator Inhofe has been a consistent champion for robust federal investment in the nation's infrastructure, citing it along with defense as two fundamental roles for the federal government. While believed to be fully open to the right financing solution, Senator Inhofe has also previously called for reducing or offsetting spending in other areas of the federal government to fund the surface transportation program from the General Fund if new revenue cannot be found, saying the federal government should prioritize its investments.

### **Senate Committee on Banking, Housing and Urban Affairs.**

Senator Richard Shelby (R-AL) is expected to take over as Chairman of the Banking Committee with jurisdiction over transit. With Senator Tim Johnson (D-SD) retiring, we expect that Senator Sherrod Brown (D-OH) will serve as Ranking Member. Senator Jerry Moran (R-KS) is expected to become Chairman of the Subcommittee on Housing, Transportation, and Community Development, with Senator Robert Menendez (D-NJ) moving over to become Ranking Member.

### **Senate Committee on Commerce, Science and Technology.**

Senator John Thune (R-SD) is expected to become Chairman of the Commerce Committee, which has jurisdiction over aviation and rail

policy – both of which will be focal points in the 114th Congress. With Senator Jay Rockefeller's (D-WV) retirement, Senator Bill Nelson (D-FL) is expected to become Ranking Member. Senator Kelly Ayotte (R-NH) is expected to become Chairman of the Aviation Subcommittee, with Senator Maria Cantwell (D-WA) as Ranking Member. Senator Roy Blunt (R-MO) is expected to become Chairman of the Surface Transportation Subcommittee, with Senator Richard Blumenthal (D-CT) as Ranking Member.

### **House Committee on Transportation and Infrastructure.**

Chairman Bill Shuster (R-PA) will continue as Chairman. With Representative Nick Rahall (D-WV) having lost his bid for re-election, Representative Peter DeFazio (D-OR) is likely to take the Ranking Member slot, giving up that position on the Natural Resources Committee. Chairman Shuster is expected to continue running the Committee in a bi-partisan fashion whenever possible and to drive for solutions that will put the HTF on a stable footing. Representative Frank LoBiondo (R-NJ) will remain as Chairman of the Subcommittee on Aviation, with Representative Rick Larsen (D-WA) staying on as Ranking Member. With Representative Tom Petri (R-WI)'s retirement, Representative Sam Graves (R-MO) will likely take over as Chairman of the Subcommittee on Highways and Transit. Representative Eleanor Holmes-Norton (D-DC) will remain the Ranking Member. With both authorizations expiring in 2015, the T&I Committee will have to address both the surface transportation and Federal Aviation Administration (FAA) bills next year, setting up these subcommittees to be very active in the 114th Congress.

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## Contact Information

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# ABOUT SQUIRE PATTON BOGGS

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For our clients to succeed in this complex environment, they need access to relevant information and astute advice, either within their own jurisdiction or across multiple locations. Locally, regionally, or globally, they need inspired insights that will enable them to understand and navigate the shifting landscapes they operate within.

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