

EXECUTIVE SUMMARY

This Executive Summary provides a brief overview of the issue areas covered in the broader advisory that follows.

Pre-111th Congress

- **Post-Election Legislative Period.** Democratic leaders are expected to offer an economic stimulus package of at least \$150 billion during the lame duck session scheduled for the week of November 17. Some members are pushing for a proposal as large as \$300 billion. It is widely expected that the proposed stimulus package will include provisions found in the \$60 billion package passed by the House that ultimately stalled in the Senate last September. In addition to \$23 billion in infrastructure investments, that bill included temporary extensions of unemployment insurance and FMAP assistance for states. Outlook for passage of the new stimulus plan has gained traction recently as Federal Reserve Chairman Ben Bernanke testified before Congress that such legislative action would be “appropriate” under current circumstances, and the White House has stated that it would be open to discussions about the new package.

111th Congress

- **Economy and Financial Regulation.** With the nation facing unprecedented economic turmoil, federal legislators, in coordination with the White House, have created an economic stabilization package, The Emergency Economic Stabilization Act of 2008, in an attempt to calm the markets and restore confidence in the nation’s financial system. In the 111th Congress, it is expected that the House Financial Services Committee and Senate Banking Committee, as well as the government reform and oversight committees of both houses, will continue to hold extensive hearings that focus on the market generally, and specifically on the implementation and oversight of the stabilization package. Additionally, it is anticipated the Congress will consider a massive restructuring of the financial system, as well as the issues of executive compensation and the regulation and oversight of hedge funds and other financial sectors.
- **Energy/Climate.** With increased Democratic majorities in the House and Senate, it is clear that efforts to promote renewable energy sources will be at the forefront of the legislative agenda. However, given the recent fluctuation in the price of oil, incentives and mandates for renewable energy sources may be necessary to jump start the market. A number of key energy issues could be impacted by a larger democratic majority in the Senate. In particular, the national Renewable Portfolio Standard (RPS) has a much better chance of gaining approval. In general, much debate in the 111th Congress is likely to focus on whether incentives or mandates will be more effective in lowering national dependence on oil. Specific issues likely to be addressed are the use of tax incentives to spur investment in renewable energy, an overhaul of the nation’s transmission infrastructure, the use of cap-and-trade programs to address climate change, a revival of nuclear power and the use of incentives to spur carbon capture and storage (CCS).
- **Healthcare.** The economic crisis has intensified the need for Congress to comprehensively reform the U.S. healthcare system. Promises that past congresses and administrations hedged on are coming due for the 111th Congress. With larger Democratic majorities in the House and Senate, it is likely that the 111th Congress will work to promote employer-sponsored and group health insurance markets, create new pooling mechanisms for individuals without job-based coverage and expand public programs like

Medicaid and S-CHIP to new populations. It has been proposed that such policy changes be financed through system improvements like electronic health record adoption, pay-for-performance policies, greater emphasis on primary care services and chronic disease management, increasing generic drug substitution, allowing the re-importation of prescription drugs and creating a pathway for follow-on biologic products or “biosimilars.”

- **Education.** The Senate Health Education, Labor and Pensions Committee (HELP) and House Committee on Education and Labor will likely make re-authorization and reform of the No Child Left Behind Act (NCLB) a policy priority in the first part of the 111th Congress. Additionally, higher education affordability will likely remain a priority, with the fundamental policy debate centering on public versus private funding of student loans.
- **Taxes, Pensions, Employee Benefits.** As Congress and the new Administration strive to implement promised policies, while struggling with a troubled economy and increased deficit projections, the business sector (as well as higher income individuals) will be viewed by a Democratic Congress as a source of revenue. Business taxpayers will be faced with tough decisions as to whether to continue to support popular business tax provisions when the revenue source may be from within the same sector. Internal and global pressures will also put new focus on tax reform.
- **Pensions and Employee Benefits.** In the areas of employee benefits and pensions, the decline in 401(k) plan balances will create new focus on whether current pension plans are adequately secure. Legislation requiring increased disclosure of plan fees will resurface. Executive compensation will continue to receive scrutiny. The future of employer-provided health benefits, including possible mandates, the tax exclusion and ERISA preemption issues, will be part of any health care reform debate.
- **Trade/Customs.** The 111th Congress is likely to emphasize fair trade over free trade and to have an increased focus on enforcement, labor and environmental concerns. Business interests should be wary of developments that could restrain trade or disadvantage certain sourcing venues, and should plan for a protracted fight over the redefinition of trade policy and U.S. trade negotiating objectives.
- **Transportation.** Increasing revenue to support reauthorization of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) will be a top priority of the 111th Congress. However, with increasing the gas tax no longer a viable option, it is uncertain what revenue sources Congress will turn to. Still, with aging infrastructure a major issue, Congress will explore various new, innovative ways to fund SAFETEA-LU reauthorization. Additionally, it is likely that the House will work quickly to move a bill to reauthorize the Federal Aviation Administration (FAA) that is similar to action taken during the 110th Congress.
- **Telecommunications, E-Commerce & Privacy.** The preeminent issue facing the Senate Commerce Committee, House Energy and Commerce Committee, Federal Communications Commission and the Department of Commerce at the outset of the 111th Congress will be the DTV transition. Additionally, four committees — Senate Commerce, Senate Judiciary, House Energy and Commerce and House Judiciary — will need to begin negotiating the reauthorization of the Satellite Home Viewer Extension and Reauthorization Act (SHVERA). Among e-commerce issues likely to be taken up by the 111th Congress, online behavioral advertising, comprehensive privacy legislation, identity theft and data security, spyware, phishing and health information technology (HIT) privacy are likely to be on the agenda.

- **Intellectual Property.** Patent reform will remain a prominent subject in the 111th Congress, with the focus of efforts on finding common ground between the provisions of competing Senate bills — the Patent Reform Act of 2007 (i.e., the Leahy-Hatch bill) and the Patent Reform Act of 2008 (i.e., the Kyl bill) — as each is likely to be re-introduced as new legislation. Additionally, Senator Olympia Snowe’s (R-ME) Anti-Phishing Consumer Protection Act, which she is expected to re-introduce, could again bring phishing and the issues of cybersquatting, WHOIS privacy and ICANN deficiencies back into focus in both the Senate Judiciary and Commerce Committees.
- **National Defense/Homeland Security.** The economic downturn will likely affect a variety of spending initiatives in foreign and defense policy and homeland security issues, including major weapons and programming initiatives. Regardless, the wars in Iraq and Afghanistan will remain a top priority, and will receive significant funding. The heavy demands of funding these two wars simultaneously — including calls for significantly increased troop deployments in the latter — are likely to necessitate supplemental legislation. Other issues likely to receive attention are our nation’s dealings with Iran and North Korea, torture, the fate of the Bush Administration’s European missile defense deals and free-trade. Additionally, cyber-attacks, which have increased in frequency and magnitude over the past two years, will need to be addressed. However, with measures to address the current economic downturn sure to consume the majority of federal funding, the new administration will need to utilize the private sector in fighting cyber crime, either through partnerships, incentives or coercion. Other major homeland security issues include development of an approach for screening incoming cargo to protect the nation from nuclear, radiological or other WMD attacks, and promoting the operational cohesion of the Department of Homeland Security.

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INTRODUCTION

Not since 1993-1994, the early years of the Clinton Administration, and — before that — 1977-1980, during the Carter Administration, were the Democrats in control of the House, Senate and White House. Of course, there was not a filibuster-proof majority in the Senate at that time. With the Senate Democrats shy of a filibuster-proof majority in the 111th Congress, and the financial turmoil and the dramatic explosion of the national debt, the leadership will not have as easy a path to moving priority legislation that comes with a price tag. While the solid Senate majority will likely create smoother passage for legislation than in the last few years, the influence of the moderates, both Democratic and Republican, will be significant as they will be in a position to give (or deny) the 60 votes needed to be free of legislative roadblocks. Additionally, many of the newly-elected senators hail from states that tend to be swing or Republican states and, consequently, may be hesitant to blindly follow a Democratic agenda that is viewed as too extreme. The two independent senators, both of whom caucus with the Democrats, also have the potential to be influential. Senator Bernie Sanders (I-VT) is expected to continue to caucus with the Democrats, but Senator Joseph Lieberman (I-CT) may strengthen his already close relationship with Senator John McCain (R-AZ), and be more amenable to siding with the minority on certain issues upon his return to the Senate.

Earlier in the campaign, President-elect Obama (D) discussed broad agendas for reforming healthcare, promoting energy independence and efficiency, and improving our national infrastructure. However, these priorities have been cast against evolving economic realities. As the housing crisis grew and the stock market tumbled, focus turned primarily to the economy. The nation has changed in the past two months, and the world has changed, as the global credit markets have floundered in the face of significant recessionary trends. Despite the enactment of a near trillion dollar rescue package, the markets have continued to be erratic and consumer confidence is at one of the lowest points in recent history. At the same time, the wars in Iraq and Afghanistan continue, costing billions of dollars per day, and putting still more pressure on the increasing deficit.

The need to address significant problems with the health care system, our aging infrastructure, job losses and energy costs still exists. However, the Administration now faces an even more difficult battle, given the limited financial resources. The national debt, which was approximately \$5.7 trillion as accumulated over the history of our country to December 29, 2000, is approximately \$10.5 trillion as of October 30, 2008, almost doubling over the last 8 years. During approximately the same time period, the federal government has gone from closing fiscal year 2000 with a \$236 billion surplus, to closing fiscal year 2008 with a \$455 billion deficit.

With the Senate Democrats just shy of the 60 votes needed for a filibuster-proof majority, and the number of House Blue Dogs increasing, the moderates of both parties have the potential to be extremely influential.

In light of the significant changes taking place with the new Administration and the new Congress, we have prepared the following advisory to outline some of the key legislative issues we expect to be considered over the next two years.

PRE-111TH CONGRESS

Post-Election Legislative Period

Congressional Lame Duck Session / Organizational Meetings

The Senate is scheduled to return from recess on November 17 for a lame duck session, the focus of which is expected to be organizational meetings and consideration of a stimulus package to jump-start the economy. The House is also planning to be in Washington that day for organizational meetings, and, while it has yet to be announced officially, it is expected that the House will hold a lame duck session as well. It is likely that Senate Majority Leader Harry Reid (D-NV) and House Speaker Nancy Pelosi (D-CA) will use the session to introduce a second economic stimulus package. However, it is not clear whether the package would garner the support of House and Senate Republicans, or that President Bush would be willing to sign the bill. Although the focus of the lame duck session will be the stimulus package, it is possible that the Senate will also use the session to debate other pressing issues, such as an omnibus package of public lands bills and a measure to extend unemployment benefits, which were not passed prior to the election.

Budget/Stimulus

Democratic leaders are expected to offer an economic stimulus package of at least \$150 billion during the lame duck session. Some members are pushing for a proposal as large as \$300 billion. Earlier this year, the Congress passed a stimulus package that provided rebate checks to many Americans, as well as the bailout bill which authorized the federal government to spend \$700 billion to purchase distressed assets from the nation's banks, but the economic downturn continued and there is strong support for taking further action. Comments made by Democratic leadership indicate that a second stimulus package would be focused on investments in infrastructure to stimulate job creation and tax cuts for the middle class. Additionally, states could receive funds to offset the loss of revenue from property and other state and local taxes, businesses could be provided tax benefits and additional resources could be used to try to prevent more home foreclosures. Business interests are already lining up to try to secure tax benefits in the potential stimulus package.

The outlook for successful passage of the new stimulus package gained traction recently when Federal Reserve Chairman Ben Bernanke testified before Congress that such legislative action would be "appropriate" under current circumstances. While the White House opposed a stimulus plan passed in the House in September, it has recently telegraphed that it would be open to discussions about a new package. Some Democrats have suggested that, if the Republicans refuse to compromise during the lame duck session, the stimulus package would be considered again next year once Democrats have increased their margins in Congress and President-elect Obama has been inaugurated.

Organization of the Congress and the New Administration

Congress

Senate Committees will change dramatically with Senator Joe Biden's (D-DE) ascension to Vice President. Senator Biden's departure sets off a chain reaction among existing Senate Chairmen. This change could be exacerbated by other Senators leaving to serve their former colleagues in President-elect Obama's Cabinet.

Next in line on Foreign Relations, where Senator Biden currently has the top spot, is Senator Chris Dodd (D-CT), who currently serves as Banking Committee Chairman. Should Senator Dodd take the helm of Foreign Relations, the opening at Banking could be filled by next in line Senator Tim Johnson (D-SD), Senator Jack Reed (D-RI) or Senator Chuck Schumer (D-NY). Of course, if Senator Dodd, who represents an insurance-heavy state, decides to remain as Banking Chairman to deal with the financial crisis, the next in line at Foreign Relations would be Senator John Kerry (D-MA).

On the Appropriations front, should Senator Robert Byrd (D-WV) decline to remain as Chairman of the Appropriations Committee, Senator Daniel Inouye (D-HI) would be next in line. Senator Inouye, who currently serves as Chairman of the Commerce Committee, would likely be replaced by Senator Jay Rockefeller (D-WV), thereby opening up the Chairmanship of the Senate Intelligence Committee. Next in line for the top post there is Senator Dianne Feinstein (D-CA).

Also of interest is the fate of Senator Joseph Lieberman (I-CT), who was a strong advocate for Senator John McCain's (R-AZ) failed presidential run despite spending the last two years caucusing as a Democrat and helping give the Democrats a tenuous majority. While Senator Lieberman was granted the Chairmanship of the Senate Homeland Security and Governmental Affairs Committee, Democrats are expected to replace him as Chairman given their newly increased majority. Next in line for the post would be Senator Carl Levin (D-MI), who currently chairs the Armed Services Committee. The shuffling committee leadership is likely to become even more chaotic as several current chairmen are being discussed as potential Cabinet members.

On the House side, the increased majority will certainly increase the ability of the House leadership to press the Democratic agenda, but the impact is likely to be less than in the Senate. Although there are expected to be some changes in committee chairmen and House leadership as some members are tapped for senior posts in the Obama Administration, those changes are unlikely to have the ripple effect that will occur in the Senate. The influx of new members will alter the makeup of the Committees and the ratios may change, but the real difference will be felt among the moderates of the Democratic Party. The number of Blue Dogs is expected to grow, making the group even more influential and enabling them to exert more influence over the Democratic agenda, moderating efforts to push legislation that may be considered more extreme.

New Administration

The transition team has begun work and President-elect Obama has asked Representative Rahm Emanuel (D-IL) to be his Chief of Staff. Phil Schiliro, who previously worked for former Senate Majority Leader Tom Daschle (D-SD), was chosen to head up President-elect Obama's legislative affairs transition effort. It is anticipated that he will ultimately serve as the White House legislative affairs director.

The transition team will be led by three co-chairs: John Podesta, Valerie Jarrett and Pete Rouse, also a former staffer of Senator Daschle. The co-chairs will be assisted by an advisory board comprised of individuals with significant private and public sector experience: Carol Browner, William Daley, Christopher Edley, Michael Froman, Julius Genachowski, Donald Gips, Governor Janet Napolitano, Federico Peña, Susan Rice, Sonal Shah, Mark Gitenstein, and Ted Kaufman. Gitenstein and Kaufman will serve as co-chairs of Vice President-elect Biden's transition team. Members of the senior transition staff will be:

- Chris Lu – Executive Director
- Dan Pfeiffer – Communications Director

- Stephanie Cutter – Chief Spokesperson
- Cassandra Butts – General Counsel
- Jim Messina – Personnel Director
- Patrick Gaspard – Associate Personnel Director
- Christine Varney - Personnel Counsel
- Melody Barnes – Co-Director of Agency Review
- Lisa Brown – Co-Director of Agency Review
- Phil Schiliro – Director of Congressional Relations
- Michael Strautmanis – Director of Public Liaison and Intergovernmental Affairs
- Katy Kale – Director of Operations
- Brad Kiley – Director of Operations

The Economic and National Security/Homeland Security transition “leader” will be announced very shortly. Additionally, the transition team will then begin the process of filling more than 3,300 positions, including about 1,600 Schedule C jobs, 700 positions for non-career Senior Executive Service members, 300 presidential appointee slots, 400 Cabinet and sub-Cabinet jobs that require Senate confirmation (known as PAS positions), 200 U.S. attorneys, marshals and federal judges and 200 ambassadors. In a departure from previous transitions, this year’s transition process will begin online, and in many instances will utilize the experience of the nonprofit, nonpartisan Council for Excellence in Government to vet the nominees.

The phone number for the transition headquarters is 202-540-3000. The official website for the transition is www.change.gov.

111TH CONGRESS

Economy and Financial Regulation

The last several months have seen nearly unprecedented economic turmoil as the credit markets essentially froze, restricting access to capital for businesses large and small and causing several major financial institutions to fail or be forced into mergers. Plummeting housing prices and job losses have exacerbated the problems, causing many to speculate that the nation is in a recession. At the center of this economic downturn are the financial institutions; not just banks, but investment companies and securities firms as well. With many of these institutions struggling, federal legislators, in coordination with the White House, created an economic stabilization package to attempt to calm the markets and restore confidence in our financial system.

The Emergency Economic Stabilization Act of 2008 provides resources to the Treasury Department to purchase troubled assets held by struggling financial institutions, to get those assets off the books and help stabilize the markets. The law also enables Treasury to purchase shares in troubled companies, such that when the markets turn around the shares can be resold with a potential benefit to taxpayers. Passage of the package was hard-fought, and required compromise on the part of both parties. The public continues to remain skeptical of the legislation, in many ways viewing it as a bailout of reckless Wall Street firms.

As the legislation enters its implementation phase, it will do so under a new President and new Treasury Secretary. The new Treasury Secretary will no doubt face significant scrutiny by the Congress, which is struggling to demonstrate to the American people that the rescue package will work and was worth the significant cost.

As the new Administration takes shape, both the House Financial Services Committee and Senate Banking Committee will continue to hold extensive hearings on the implementation and oversight of the Emergency Economic Stabilization Act of 2008. In recent months, hearings have been held on possible additional measures that could be taken to address the market crisis, problems in the auction rate securities markets, activities of the Federal Housing Finance Agency and the role played by credit ratings agencies in the marketplace. It is expected that these committees, as well as the government reform and oversight committees of both houses, will continue to hold hearings that focus on the market generally and implementation of the stabilization package.

It is anticipated that Congress will focus on issues that may be tangentially related to the core issue of market turmoil, including executive compensation (See "Taxes, Pensions, Employee Benefits") and hedge fund regulation and oversight. The hearings held during the end of the 110th Congress should be viewed as a precursor to hearings that will be held in the 111th, with additional emphasis on the investigatory role of Congress.

In addition to the market stabilization package, Congress will almost certainly consider a massive restructuring of the financial system. On October 21, 2008, at the end of the 110th congressional session, the House Financial Services Committee held a hearing to assess the extent to which an outdated financial regulatory system contributed to the nation's financial crisis, and whether adoption of a more robust system could facilitate a speedy recovery. At the hearing, Chairman Barney Frank (D-MA) offered a preview of the actions Congress would take during the 111th Congress, stating that House leaders would likely form a select committee to explore a rewrite of the regulatory structure governing the financial industry. Despite calls from Republicans for a cautious approach to new regulation, the hearing left no doubt that House Democrats believe that the

financial crisis was caused by a lack of regulatory oversight and, during the 111th Congress, they intend to pursue a dramatic regulatory overhaul featuring a robust supervisory regime. The “cautious approach” suggested by Republicans may well be muted by significantly increased majorities in the House and Senate. The Obama Administration is also expected to take more of a hard line approach to additional regulation and ensuring significant transparency in the government’s acquisition of troubled assets. Additionally, expect efforts to either limit or require significant public disclosure of executive compensation packages in addition to stricter oversight by federal regulators.

FY09 Appropriations and FY10 Budget

Prior to the presidential election, Congress passed the Defense and Homeland Security Appropriations bills for FY09. However, the FY09 appropriations process for domestic spending is on hold as separate bills addressing the federal domestic agencies and programs and state and local assistance did not get enacted before Congress left for the election. Upon its return in January, Congress needs to decide whether to complete the FY09 process through passage of the remaining bills, or extend a continuing resolution which locks into place spending for the year at FY08 levels.

The Budget process for FY10 will also be difficult. The budget submitted by President-elect Obama in February will likely be an outline that will be subsequently augmented with details to simply allow the new Administration time to adequately prepare a budget reflecting President-elect Obama’s priorities. The budget resolution process will likely be delayed as a result. However, domestic spending priorities will likely see an increase in funding over the FY09 levels.

Predatory Lending

In prior Congresses, Democrats in the House and Senate proposed comprehensive legislation intended to prohibit certain practices considered to be predatory. In particular, these bills focused on home mortgages and were based on various state laws that sought to curb such practices as “flipping” and up-front financing of certain fees, as well as requiring “ability to pay” assessments for lenders. In the wake of the mortgage crisis, it is likely that additional legislation could be considered to crack down on such practices. Along with potential predatory lending legislation, the Congress may again seek to roll back certain provisions of the bankruptcy code to allow bankruptcy judges to reduce bloated mortgages to more manageable amounts and to provide additional foreclosure relief to those in danger of losing their homes. Though the financial industry was successful in the 110th Congress in turning back the bankruptcy code revisions, increased Democratic majorities in Congress and a Democratic president could embolden another attempt.

Omnibus Consumer Lending/Credit Card Legislation

In hearings and markups during the 110th Congress, several Democratic members expressed an intention to develop comprehensive consumer legislation that would address concerns with the credit and debit card practices of financial institutions. Although the Federal Reserve Board and other financial regulators are currently considering comments filed on similar proposals, some in Congress have expressed a strong desire to move forward with legislation that would address perceived abuses in the credit card industry. Legislative proposals that could be considered include: capping credit card interest rates, limiting overdraft fees and late fees, regulating the method of applying payments and limiting changes in interest rates due to other defaults.

Interchange Fees

Legislation introduced in both the House and Senate would directly regulate the rates paid by merchants to Visa and MasterCard for processing credit and debit card transactions. The House Judiciary Committee passed legislation that would require credit card companies and merchants to negotiate with one another (and provide an antitrust exemption to do so), but it stalled after a jurisdictional issue was raised by House Financial Services Committee Chairman Frank. Companion legislation in the Senate did not see any action, but staffers have indicated that they believe the legislation will be introduced early in the 111th Congress and there will be significant pressure to move forward with legislation. It is uncertain what impact the current financial crisis will have on this issue moving forward, as the crisis has been detrimental to credit card companies, merchants and consumers alike.

Internet Gambling

Chairman Frank introduced several pieces of legislation in the 110th relating to Internet gambling, including legislation that would block implementation of regulations promulgated under the Unlawful Internet Gambling Enforcement Act. Hearings during the 110th Congress indicated bipartisan concern about the proposed regulations, and it is possible that additional legislation could be offered relating to financial institutions' role and responsibility in policing Internet gambling activity. Financial services companies face significant new compliance obligations and costs under the proposed regulations at a time when they are struggling, raising the question of the next Congress reversing, or potentially limiting, the application of the regulations. In addition, studies indicate that significant tax revenue could be collected if Internet gambling became a licensed, regulated activity and with increased budgetary pressures, it is possible that interest in enacting such legislation may grow.

ENERGY / CLIMATE

Energy emerged during the campaign as one of the top issues. Urging the nation to move more quickly to independence from foreign oil will be a priority of President-elect Obama. With the increased Democratic majorities in the House and Senate, it is clear that efforts to promote renewable energy sources will be at the forefront of the legislative agenda. A number of key energy issues could be impacted by a larger democratic majority in the Senate. A national Renewable Portfolio Standard (RPS) could see a much better chance of gaining approval. The RPS has received anywhere from 53-57 votes over the past several years. Representatives Tom Udall (D-NM) and Mark Udall (D-CO) have been strong advocates in the House for the RPS, and both will be replacing opponents of the RPS in the Senate.

Renewable Energy Tax Credits

Similar to other sources of energy, tax incentives have been used as a means to spur investment in renewable energy. Whether it be a production-based credit such as the Production Tax Credit (PTC) for wind, biomass, geothermal, and other technologies, or an up-front Investment Tax Credit (ITC) for solar, these politically popular credits have been integral to the growth of renewables.

However, for a number of reasons, both substantive and political, these credits have traditionally been extended for a very short duration (one or two years). This does not provide renewable energy companies or investors the market certainty necessary to support long-term investment. At the same time, as more and more renewables are put on-line, the cost of these incentives continues to rise, causing further complications in light of pay-as-you-go provisions and finding necessary offsets.

The economic recovery package passed in October, 2008, provided an extension to these and other tax incentives. The solar ITC was extended for eight years but other credits were for much shorter durations, including the PTC for wind, which received a 1-year extension. Renewable energy advocates will be seeking a long-term extension of the PTC in 2009.

Key questions for legislators and industry alike are the timeframe for the extension of the tax credits, what size they should be, and, ultimately, how they fit into the overall agenda given the increasingly scarce monetary resources. Additionally, Congress will face a broader policy consideration as to whether the current approach of short-term extensions is sustainable for renewables or if other policy options should replace them.

Renewable Portfolio Standard / Renewable Energy Standard

A Renewable Portfolio Standard RPS or Renewable Energy Standard RPS would require a percentage of electricity to come from renewable energy technologies. Twenty-six states currently have some form of an RPS but that has provided a patchwork of different policies, some far more effective than others. The House passed a 15 percent by 2020 RPS (with up to 4 percent of that from energy efficiency) twice in the 110th Congress but it failed to achieve the 60 votes necessary in the Senate. President-elect Obama has called for 25 percent RPS by 2025, and increased Democratic majorities in Congress, especially if Democrats have a filibuster-proof Senate majority, could lead to significant increases in the RPS.

Policymakers will need to determine whether a federal RPS should be included as part of a broad energy policy, and if so, whether other incentives such as tax credits should be reduced or eliminated. Additionally, it is unclear how an RPS system, which would provide tradable Renewable Energy Credits (RECs) to meet requirements, would work if a cap-and-trade system were enacted.

Transmission

With a significant emphasis on federal energy policy in the campaign, there may be an increased federal effort to encourage investment in the nation's aging transmission system. Major expansion and upgrades to the current system will be necessary to maintain reliability and to deploy large-scale domestic energy production, both from traditional energy sources as well as renewable projects. Legislators will need to determine whether they should build on the Energy Policy Act of 2005 and increase federal authority over transmission siting and do even more to encourage investment in transmission infrastructure. In addition, the Obama Administration will select a new chair of the Federal Energy Regulatory Commission who will likely influence these policies.

Climate Change

President-elect Obama supports the implementation of a cap-and-trade program which sets a limit or cap on the amount of emissions, and gradually requires further reductions over time until the national emission reduction target is achieved. The programs would then allow those companies that exceed the emission cap to purchase credits from companies that have emission reductions.

Policy considerations for legislators include which sectors of the economy should be covered under the program; at what level should the emission cap be set; and what should the overall emission reduction target be. President-elect Obama supports an 80 percent reduction of CO₂ by 2050, which many Republicans consider too ambitious and many in industry will strongly oppose. Additionally, legislators will need to address whether allowances should be set aside for non-emitting resources such as nuclear power and renewable energy, and how auction revenue from the sale of credits should be distributed.

Nuclear Power

With the call for increased domestic energy production, nuclear power is poised for a revival, and climate change concerns also favor nuclear power as the technology is emission-free. At the same time, there are issues related to the cost of a nuclear power plant, the storage of spent nuclear fuel, and national security concerns due to the risk of proliferation of nuclear materials. Some have called for nuclear to be included as part of a national clean energy requirement along with renewables, and President-elect Obama has also indicated his support of this position. However, significant costs and environmental concerns will need to be considered.

Carbon Capture and Storage

Coal remains the primary source of electricity for the nation and our coal resources are abundant. At the same time, with the likely call for emission reductions, utilities that rely on coal for a large percentage of their electricity production will face long term challenges to meet the requirements. Technologies such as carbon capture and storage CCS are gaining traction as part of that solution. Under CCS, the CO₂ would be separated and then stored or “sequestered” underground in deep repositories. Many in the oil industry are already injecting CO₂ into the ground as a means to bring oil to the surface, through a process known as enhanced oil recovery.

There are questions regarding CCS and how quickly the technology can be utilized. The most recent energy tax bill included some new incentives to spur CCS development but the industry is unlikely to take advantage of these incentives for many years to come. This could change, however, if significant new emissions restrictions are placed on coal-burning plants — especially if the approach taken is one of mandates rather than incentives for emission reductions.



HEALTHCARE

The health sector will receive renewed attention and focus from policymakers in a busy, fast moving and dynamic environment throughout 2009. While sweeping systems reforms on the scale envisioned by President-elect Obama are less likely than they were before the current financial crisis and Congress' massive \$700 billion response to it, incremental but nonetheless substantial changes to public and private programs are still likely in the 11th Congress. This legislative process will create unique challenges and opportunities for all stakeholders.

Committee leaders in both the House and Senate appear poised to move beyond debate and discussion and into action next year, even in the face of competing resource demands, such as economic stabilization and stimulus.

The health agenda is packed but not yet formally set. Several expiring provisions provide key deadlines for legislative action around which reform activity could occur, including

- the expiration of temporary measures funding the State Children's Health Insurance Program (S-CHIP), on March 31, 2009;
- the expiration of a temporary moratorium on the implementation of seven Medicaid regulations, on April 1, 2009; and
- the expiration of temporary measures forestalling dramatic shortfalls in Medicare physician payments, on December 31, 2009

Potential exists to delay and consolidate consideration of these items, which could result in a larger health care bill later in the year. Other early calendar items that will likely signal more specific policy outcomes are the nomination hearings for senior cabinet agency officials in the new Administration, including senior leaders for the Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS), expected early in the first quarter, and the release of President-elect Obama's first federal budget proposal, expected in February. The budget and its expanding deficit, pegged at \$438 billion in 2008 not including further spending measures this year, is likely to accelerate proposals that generate efficiencies and reduce system costs overall, like quality incentive and pay-for-performance programs. The nonpartisan Congressional Budget Office (CBO) will identify and analyze specific savings proposals that could be used to reduce the deficit, expand coverage, or both, in a new analysis expected December 10th. Current "pay-as-you-go" rules require Congress to offset the cost of new spending proposals with equal savings policies.

General Healthcare Reform

Leading Congressional voices on health reform are crafting plans independent of, but in consultation with, President-elect Obama. Senate Finance Committee Chairman Max Baucus (D-MT) and Senate Education, Labor and Pensions (HELP) Committee Chairman Edward Kennedy (D-MA), along with Senator Ron Wyden (D-OR), and Senate Finance Committee Ranking Republican Chuck Grassley (R-IA) and Senate HELP Committee Ranking Republican Mike Enzi (R-WY) are likely to continue holding hearings and promoting reform proposals that expand coverage through a mix of modifications to public and private programs, and reforms to the Internal Revenue Code and/or Employee Retirement Income Security Act. In the House,

Ways and Means Chairman Charles Rangel (D-NY) and Energy and Commerce Committee Chairman John Dingell (D-MI), supported by Subcommittee Chairmen, Pete Stark (D-CA) and Frank Pallone (D-NJ), will each play a leadership role in crafting new coverage policies and reform options. Representative Henry Waxman (D-CA) has announced plans to challenge Rep. Dingell for chairmanship of the Energy and Commerce Committee. Likely Ranking Members Dave Camp (R-MI) at Ways and Means and Joe Barton (R-TX) at Energy and Commerce will be looked to by the Republican caucus for leadership on policies that promote market solutions, patient choice, and cost containment. Representative Paul Ryan (R-WI), a leading advocate of consumer-directed health care options like Health Savings Accounts, is also expected to play a strong role.

Both parties propose to at least partially finance their policy changes through system improvements like electronic health record adoption, pay-for-performance policies, greater emphasis on primary care services and chronic disease management, increasing generic drug substitution, allowing the re-importation of prescription drugs, and creating a pathway for follow-on biologic products, or “biosimilars.”

On major health-related legislation, a 60-vote majority could speed passage of policies that historically have fallen just shy of the supermajority mark, like card check legislation that would promote labor union organization — a major domestic priority for Democrats, which fell nine votes short of passage last year. On virtually all other health and entitlements legislation 60 votes are needed for passage. Unless Democratic budget writers adopt reconciliation instructions and utilize that process to pass legislation with a mere simple 51 vote majority, an outcome we consider unlikely, all health care policy is expected to be negotiated and drafted with the goal of getting to 60 votes, an outcome made easier under expanded Senate Democratic majorities.

Medicare

Physician Services. Physicians treating Medicare patients will see a 20.6 percent reduction in their reimbursements on January 1, 2010, if Congress does not enact legislation preventing it, as it has periodically to close off similar scheduled reductions since 2001. Full scale reform of the payment formula that produces the negative updates would be costly and so is probably unlikely to happen in 2009. However, expect the pending payment cliff to be a catalyst to “patch” the system and forestall future cuts.

Managed Care. At least one viable financing option for offsetting the cost of the physician payment “fix” is the elimination of extra subsidies currently paid to managed care plans under the Medicare Advantage program.

Other Providers. Adjustments to automatic updates for institutions, facilities and other providers and suppliers serving Medicare beneficiaries in the traditional fee-for-service program could help pay for the cost of correcting the physician payment problem, for the creation of new Medicare benefits, or both. The non-partisan Medicare Payment Advisory Commission (MedPAC), a federal advisory body that advises Congress on Medicare payment issues, is expected to release payment recommendations for all providers in its annual report due in March.

Prescription Drugs. Democratic leaders like Representative Henry Waxman (D-CA), who are concerned about Part D premium increases, dual eligibles, and beneficiaries that fall into the coverage gap or “doughnut hole” are likely to promote greater government control over the five year old program.

Comparative Effectiveness Research. Interest is rising in policies that would promote comparative effectiveness research (CER) as a tool to better manage patient care, improve quality and promote system-wide efficiencies.

The link between CER and payment and coverage decisions, and the potential savings such a link could create, will be a major question if Congress establishes an independent academy or center to conduct it.

New Initiatives. Congress is likely to launch pilot projects testing new approaches to delivery and payment systems in Medicare, including quality improvement policies, the use of broader payment bundles for select services, and primary and preventive care improvement initiatives. Still other delivery system changes and discrete demonstrations could be tested at the urging of individual Members, like Senator Max Baucus (D-MT), who is expected to release a “white paper” detailing options for delivery system reform before the end of the year.

S-CHIP

Funding for the joint state-federal coverage program for children is set to expire on March 31, 2009, but bipartisan support for it is high even as differences over proposed expansions have split parties. Senators Jay Rockefeller (D-WV) and Orrin Hatch (R-UT) are expected to play lead roles in negotiations on the Senate’s behalf. Early in the year, lawmakers could pass a temporary extension of current law to give them through the end of the year to craft a new, long-term compromise.

Medicaid

The pending debate over economic stimulus is likely to include broader discussion of providing increased federal assistance to states for rising Medicaid costs. Coming at a critical juncture for the program that, according to a recent analysis from CMS, is increasing at an alarming rate projected to total \$674 billion in 2017, Congress will have to consider expanded entitlement pressures in connection with calls to grow the program further.

False Claims Act

Legislation to reform and expand the 1986 law allowing private individuals, or whistleblowers, to bring suits on behalf of the federal government progressed through both the House and Senate Judiciary Committees this year and is expected to be revived in 2009. Possible revisions include authorizing an expanded class of plaintiffs, increasing damages and extending the statute of limitations, among other things. Momentum for passage is expected to increase if Democrats win greater majorities. For health care providers who are often the target of False Claims Act litigation, reform of the statute could create significant new exposure.

Transparency

Initiatives to impose greater transparency on the financial ties between academic medical centers, physician groups, universities, and pharmaceutical and device manufacturers are likely to gain traction as concerns about their influence over clinical decision making and patient care emerge from news accounts and Congressional investigations.

Non-Profit Hospitals

Led by Senator Chuck Grassley, Senate Finance Committee Ranking Member, a two-year investigation into the appropriateness of favorable tax treatment for non-profit hospitals that fail to provide measurable community benefits is likely to advance model legislation proposing a quantitative test for tax exemption, new rules around hospital governance and controls on executive compensation.

Health IT

Bipartisan will to foster broader dissemination and adoption of health information technology remains strong, despite funding, privacy and legal concerns about the precise operation of implementation programs. (For a more detailed discussion of privacy issues, please see “Health Information Technology (HIT) Privacy Legislation”.) Notwithstanding recent roadblocks, interest and bipartisan agreement on principles remains strong, and further attempts at enactment are expected next year. Adoption of HIT is consistently cited by policymakers as a means of improving clinical quality and system efficiency.

Food and Drug

While Food and Drug Administration (FDA) reform has largely been overshadowed by health care reform efforts, several key issues are likely to see action:

Food and Drug Safety Legislation. In response to concerns about imported products ranging from heparin to melamine, House Energy and Commerce Committee Chairman John Dingell (D-MI) and House Oversight and Government Reform Chairman Henry Waxman (D-CA) have put forth product safety legislation which would require testing and sampling standards for imported food and drug products, country of origin labeling, foreign agency inspection posts, enhanced inspection powers, and other measures to monitor and control imported food and medical products. This is expected to be one of the first issues taken up by the House Energy and Commerce Committee in the next Congress.

Biogenerics. As lawmakers strive to find ways to lower drug costs, legislation to create a regulatory pathway for biosimilar or follow-on-biologics will be a priority in the next Congress. A bipartisan Senate bill sponsored by Senate Health, Education, Labor and Pensions (HELP) Committee Chairman Edward Kennedy (D-MA) and Ranking Member Mike Enzi (R-WY) progressed last year, but divisions over competing versions stalled efforts to come to a consensus in the House. Details of a workable abbreviated FDA approval process for biosimilars remain uncertain, but proponents, such as large employers, managed care plans, and generic drug manufacturers, are likely to remain active and push for a legislative pathway.

Tobacco. The 110th Congress failed to pass legislation to give FDA regulatory authority over tobacco and ultimately left the issue on the table. Although Chairman Waxman’s tobacco regulation proposal passed the House in July, it failed to be taken up by the Senate, facing the threat of a filibuster by Senators Mike Enzi (R-WY) and Richard Burr (R-NC). FDA regulation of tobacco, which would likely require testing of tobacco product components and could ban certain flavor additives, remains a priority issue for Chairman Waxman and Chairman John Dingell, even as its enactment would present challenges to the resource-pressed agency.

New FDA Commissioner. In the post-David Kessler era, the expansive extent of FDA’s authority is clear. As such, the Congress has sought accountability and control over the agenda of the Agency through a confirmation hearing and vote for the Presidential appointment of Commissioners. Chairman Kennedy generally believes that the head of FDA should be a medical doctor with few if any ties to industry, essentially requiring all candidates, in recent years, to come from government or academia.

EDUCATION

No Child Left Behind Reauthorization

The Senate Health, Education, Labor and Pensions Committee (HELP) and House Committee on Education and Labor will likely make re-authorization and reform of the No Child Left Behind Act (NCLB) a policy priority in the first part of the 111th Congress. The hallmark of NCLB was its requirement of higher accountability standards for teachers, students, and schools, and its increase in available choices to parents in deciding where their children will be schooled. Despite being heralded at the time as a major bipartisan achievement, NCLB has come under intense criticism for increasing demands on teachers and schools without providing the necessary financial resources to achieve the goals.

Senate HELP Committee Chairman Ted Kennedy (D-MA) and House Education and Labor Committee Chairman George Miller (D-CA), who led the NCLB reform efforts previously, will likely retain their chairmanships next Congress. President-elect Obama made education a major part of his domestic platform and pledged to fully fund NCLB. He also promised to make additional reforms to the program, including the improvement of the assessments used to track student progress to measure readiness for college and the workplace and improve student learning in a timely, individualized manner.

Higher Education Assistance

Student lending was one of the first casualties of the financial crisis and will continue to be a major focus of concern for education policymakers. Last spring, many private lenders stopped making student loans because of a tightening in the credit markets and reduction in subsidies by the federal government upon passage of the College Affordability and Accessibility Act in 2007. Congress took steps to guarantee access to student loans with the Ensuring Continued Access to Student Loans Act of 2008 and a subsequent extension of that program until 2010. Higher education affordability will remain a priority of a Democratic Congress.

The fundamental policy debate over student lending will center on public versus private funding. Currently, student loans for higher education are provided through the federal government via the Direct Loan Program or through private lenders, like Sallie Mae, through the Federal Education Loan Program. Leading Democrats, like Chairman Kennedy and President-elect Obama, have made strong statements in favor of eliminating private lending markets and shifting all the money to direct government loans. President-elect Obama has also proposed a \$4,000 education tax credit and has called for the streamlining and simplification of the federal loan application process.

TAXES, PENSIONS, EMPLOYEE BENEFITS

Fiscal Challenges

Business taxpayers face a difficult time in the upcoming Congress. The new Congress and Administration will face significant fiscal challenges due to the present economic environment, the enactment of more than \$100 billion in unpaid-for tax cuts as part of the Emergency Economic Stabilization Act, and the as yet unknown effects of the troubled asset purchase provisions of that Act. Budget conscious “Blue Dog” Democrats are expected to increase pressure to pay for any tax cuts or increased spending. As Congress and the new Administration strive to implement promised policies while struggling with a troubled economy and increased deficit projections, the business sector (as well as higher income individuals) will be viewed by a Democratic Congress as a source of revenue. Business taxpayers are likely to face increasingly difficult choices as to their most important tax priorities.

Expiring “Bush” Tax Cuts and the “Middle Class”

Absent legislative action, the so-called Bush tax cuts expire on January 1, 2011; failure to act would give rise to one of the largest historical tax increases. Neither the Republican approach of wanting to make the tax cuts permanent nor the Democratic approach of letting many provisions expire and restructuring the tax laws to reduce the tax burden on the “middle class,” can be accomplished easily. Under current budget scorekeeping, the “pay-as-you-go” rules, an extension of any of the tax cuts, would need to be paid for; similarly, merely allowing the provisions to expire would not result in revenue that could be used to offset other tax reductions. Thus, choices will have to be made as to whether and how to pay for any extension of the provisions or other tax relief.

Expiring Tax Provisions

The usual suspects of expiring tax provisions, including the research and development (R&D) tax credit, were extended through 2009 in the Emergency Economic Stabilization Act of 2008. Although these and other tax provisions in the legislation were only partially offset, the offsets included cutbacks of previously-enacted tax cuts. This foreshadows things to come for the 111th Congress. As budget pressures increase, business taxpayers will need to evaluate whether to support extension of these provisions, when the source of offsets may be from within their own business sector. A number of revenue-raisers were left on the table after passage of the legislation, and these (and more) are expected to resurface with greater life in the 111th.

Tax Reform

Global dynamics, as well as internal budget pressures, are likely to make tax reform an increased priority. U.S. corporate tax rates, as well as other aspects of our tax system, have long been highlighted as a factor making the country less competitive. It is not only Republicans who have been interested in tax reform; Democratic Ways and Means Committee Chairman Charlie Rangel (D-NY) last year introduced a comprehensive tax reform bill (H.R. 3970) which, among other things, would have lowered the corporate tax rate and broadened the tax base. A prolonged debate and battle over tax policy, both corporate and individual, is expected to take significant time in the new Congress and be a focus of the new Administration.

Retirement Benefits

The dramatic negative impact the recent financial crisis has had on 401(k) plan balances brings retirement income security issues to the forefront for the new Congress and Administration. Proposals requiring increased disclosure of 401(k) plan fees, such as those from the 110th Congress by House Education and Labor Committee Chairman George Miller (D-CA), Representative Richard Neal (D-MA), and Senator Tom Harkin (D-IA) and Senate Special Committee on Aging Chairman Herb Kohl (D-WI), will have new impetus. The overall policy focus is expected to be on increasing pension coverage and providing greater protection for pension benefits. Specific legislative initiatives that have gained attention include proposals relating to further regulation of investment options under 401(k) plans, Pension Benefit Guaranty Corporation-like pension insurance for 401(k) plan benefits, automatic enrollment IRAs, increased spousal protections for defined contribution plans, and proposals to encourage pension payouts in the form of annuities. Defined benefit plans will also be a part of the mix. The economic downturn raises questions as to the ability of employers to meet the new, stricter funding requirements of the Pension Protection Act. Policy makers are also still seeking ways to shore up the declining defined benefit plan system.

Executive Compensation

Since the enactment of Code Section 409A in 2004, Congress has continued to take a hard look at executive compensation. Proposals to curtail executive compensation are likely to be increasingly attractive to a Democratic Congress as a means of raising revenue. We expect to see again the \$1 million dollar cap on nonqualified deferred compensation that previously passed the Senate and was in a bill introduced this year by Senator Hillary Clinton (D-NY). The executive compensation restrictions included in the Emergency Economic Stabilization Act provide guidance as to additional restrictions that are likely to gain attention. These include further cutbacks on the ability of companies to deduct executive compensation, such as expanding the current \$1 million limit so that it applies to private companies as well as public companies, and reducing the amount that can be deducted. Additionally, key Democrats, including House Speaker Pelosi (D-CA), Senate Majority Leader Reid (D-NV) and House Financial Services Committee Chairman Barney Frank (D-MA) have pressed for further restrictions on executive compensation with respect to financial institutions receiving federal funds through that Act.

Employer-Provided Health Care

With more than 80 percent of Americans receiving health coverage through the workplace, it is inevitable that employer-provided health benefits will be a part of and/or substantially affected by any major health care reform proposals. The tax laws are an integral part of the employer health market—the unlimited exclusion for employer-provided health benefits is a major contributor to health coverage through work. The cost of the exclusion is substantial—an estimated loss of Federal income tax dollars of over \$100 billion a year. A bipartisan group of Senators, led by Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Chuck Grassley (R-IA), have recently announced a proposal to require employers to report the value of health coverage on employees' W-2s in order to raise awareness about the cost of coverage. Even for a Democratically-controlled Congress that has been traditionally opposed to limiting the exclusion for employer-provided health, the significant price tag may be too hard to ignore given current budget issues. Employers, insurers and others with an interest in the employer market need to be alert to a variety of issues as health care reform moves forward, including the extent to which employers will be required to provide coverage or

will retain flexibility to design health benefits, the extent to which tax law changes may affect the employer market, whether there will be a continuing role for consumer oriented options, and whether ERISA preemption of State laws will be preserved or eroded.

INTERNATIONAL TRADE

Although trade issues were debated in the months leading up to the election, these issues may take a backseat to domestic financial concerns in the 111th Congress. President-elect Obama's ascension to the presidency foreshadows a change in some areas of trade policy, but leadership in the House and Senate remains essentially unchanged. Senate Finance Committee Chairman Max Baucus (D-MT) and House Ways and Means Committee Chairman Charles Rangel (D-NY) are expected to lead trade efforts in Congress. These leaders' general support for free trade may be curtailed by stronger Democratic majorities in both the House and Senate, and by key leaders, including House Speaker Nancy Pelosi (D-CA). Accordingly, conservative Democrats and those from districts with strong exporting constituents may emerge as a critical swing voting bloc on the future direction of trade policy. Although it may be constrained by the global financial climate, this Congress is likely to emphasize fair trade over free trade and to have an increased focus on enforcement and labor and environment concerns. Business interests should be mindful of developments that could restrain trade or disadvantage certain sourcing venues, and should begin planning now for a protracted fight over the redefinition of trade policy and U.S. trade negotiating objectives in the 111th Congress.

North American Free Trade Agreement (NAFTA)

President-elect Obama has stated that he supports free trade, but that trade policy should focus on opening foreign markets to create benefits for American workers. During his campaign, he stated that he would seek renegotiation of portions of the NAFTA to update labor and environmental standards in the agreement and the Democratic Party platform calls for such negotiations. In fact, he may simply try to incorporate new terms into side-letters on these topics and seek greater enforcement commitments. Both Canada and Mexico could seek concessions for any provisions renegotiated at the United States' request. It remains unclear whether President-elect Obama will pursue meaningful changes to NAFTA or what opportunities or risks such efforts would pose for companies trading in the NAFTA territory.

Colombia FTA

The Bush Administration concluded free trade agreements (FTAs) with Colombia, Panama, and South Korea, but none of these FTAs has been implemented, and each faces an uphill battle in this Congress. When the Bush Administration presented the Colombia FTA to Congress earlier this year, trade promotion authority (TPA) should have triggered a 90-day consideration period and required a yes-or-no vote, but House Democrats under Speaker Pelosi suspended the fast-track rules and refused to bring the FTA for a vote. A lame-duck Congress could vote on the bill this year; but the likelihood of such a vote is uncertain. Because the agreement already was formally submitted to the 110th Congress, the next Congress may not be bound by TPA procedures. President-elect Obama, like many Democrats in Congress, has stated that he opposes the Colombia FTA because the Colombian government has not done enough to curb violence against union leaders in that country. Moreover, Chairman Baucus has indicated that he will not support the Colombia FTA until Congress passes additional trade adjustment assistance legislation.

Korea FTA

It is unlikely that the new Administration will ask Congress to vote on the FTA with Korea, based on President-elect Obama's stated belief that it offers insufficient access to the Korean market for U.S. automobiles. Korea's hesitation to open its market to U.S. beef and concerns about labor provisions in the FTA have also generated opposition in Congress. Moreover, key trade and environmental organizations oppose the FTA's investment provisions. On the other hand, strategic considerations about the overall U.S.-Korea relationship and relations with other countries in Northeast Asia, especially China, may also be reflected in this position on the FTA with Korea.

Panama FTA

The relatively non-controversial Panama FTA, which the Bush Administration declined to present to Congress as long as Congress delayed a vote on Colombia, could pass, but it would probably not be implemented until late 2009.

Future FTAs

As with NAFTA, President-elect Obama has promised to focus on enforcement of existing FTAs instead of passing or negotiating new FTAs. Bills like the Trade Accountability, Development and Employment (TRADE) Act, which was introduced in the 110th Congress by Representative Mike Michaud (D-ME) and Senator Sherrod Brown (D-OH), sought to require review and possibly renegotiation of labor, environmental, product safety, trade remedies, and enforcement provisions in existing FTAs, and would have prohibited President Bush from signing any FTA until *after* Congress approved it. While this bill likely will be left pending at the end of this year, it may be indicative of the sentiment of a growing bloc of members in the 111th Congress and the potential for the legislation to be revived next year bears watching.

Doha Round Negotiations

Multilateral negotiations in the World Trade Organization (WTO) broke down again the summer of 2008, and it remains uncertain whether meaningful compromise can be reached. A key question for proponents of multilateral trade liberalization will be the degree to which the WTO process is linked to the reconstruction of the global financial architecture that will occupy the minds of leaders and legislators worldwide in 2009. President-elect Obama has spoken in support of the United States' decision not to concede last summer to an agreement that was not in the United States' best interest. He has nonetheless asserted that he wants to revive WTO negotiations and build a new consensus on trade, a proposal that pleases both organized labor and those seeking increased global market access. Even if the new Administration favors a renewal of WTO negotiations, however, it will face institutional barriers to further liberalization in the form of key WTO members that oppose new grants of access to their markets, including China, India, and Japan. On the key issue of agricultural subsidies, it is not clear the extent to which President-elect Obama would agree to limit U.S. subsidies or the extent to which he feasibly could do so following passage of the Farm Bill in June 2008. Additionally, he will have to win the support of Congress for any international agreement that is reached.

Trade with China

The US-China trade relationship is set to enter a prolonged period focused on enforcement of existing commitments, and on the impact that emergency policy decisions taken to ameliorate the financial crisis may have on importers and exporters in both markets. In the near term, Beijing is certain to be unwilling to undertake further market liberalizations as China attempts to protect exporters from significant harm due to a global economic recession. President-elect Obama will take office only to inherit a slate of pending WTO disputes with China, and may anticipate congressional pressure regarding food and product safety, protection of intellectual property rights, and the effect of new Chinese export taxes on critical commodities bound for U.S. markets. Additionally, safeguards on certain textile and apparel products from China will end on December 31, and Representatives Howard Coble (R-NC) and John Spratt (D-SC) have already issued a “dear colleague” letter, requesting extension to China of a program that monitors textile and apparel imports from Vietnam. House Ways and Means Committee Chairman Rangel subsequently asked the International Trade Commission (ITC) to establish such a monitoring program, and the ITC agreed to do so. Although one of President-elect Obama’s stated objectives during his campaign was to combat China’s currency regime, China’s monetary policy is a key tool now providing near term stability to both the Chinese domestic and international financial systems. It is unlikely that the new Administration will have either the leverage or interest in pressing Beijing for radical changes to its currency policy at a time when China’s continued purchase of U.S. debt instruments remains critical to a global financial recovery.

Trade Sanctions

Statements made prior to the election suggest that the new Administration will have an increased focus on diplomacy in international relations, and this could impact trade sanctions policy. One key question is whether there will be an effort to end prohibitions on travel to Cuba and to ease sanctions related to remittances to family members in Cuba. During the campaign, President-elect Obama said he favored easing sanctions on Cuba if Cuba released all political prisoners.

Another key question is what change in policy toward Iran the new Administration might advocate. While President-elect Obama has been critical of the Bush Administration’s policy toward Iran, both he and Vice President-elect Biden (D) support Iran sanctions. As Chairman of the Senate Foreign Relations Committee, Vice President-elect Biden favored increasing the extraterritorial reach of the sanctions by holding U.S. parent companies liable for their non-U.S. subsidiaries’ transactions in or with Iran. Thus, while there may be little change in the general policy toward Iran, changes in the character or application of existing sanctions, such as whether the new Administration might seek to leverage sanctions in the context of broader diplomatic engagement with Iran, could have a significant impact on the operations of multinational companies.

Cargo Security

The incoming Administration will have to resolve a growing conflict between the congressional mandate for one hundred percent scanning and the Department of Homeland Security’s (DHS) decision to pursue an alternative route of securing cargo. The Security and Accountability for Every Port Act (SAFE Port Act) mandated one hundred percent scanning of all U.S. bound container cargo, but DHS has indicated that it plans to pursue an alternative route focusing on “high-risk trade corridors” rather than one hundred percent

scanning. House Homeland Security Committee Chairman Bennie Thompson (D-MS) has sharply criticized DHS and Homeland Security Secretary Michael Chertoff for ignoring the congressional mandate to implement 100 percent scanning at foreign ports by 2012. Questions remain as to how the new Administration will pursue implementation of the SAFE Port Act.

TRANSPORTATION

Transportation Reauthorization

The previous transportation spending bill, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which was passed in 2005, is set to expire on September 30, 2009. However, unlike in past years when debate regarding transportation bills centered on which Members' road and infrastructure projects to allot money to, a major shortfall in the Highway Trust Fund, resulting from high gas prices causing a decrease in consumer consumption thereby reducing the amount of money raised by the federal gas tax, has shifted debate to discussions regarding which funding mechanisms would be most effective. At the end of the 110th Congress, the House Transportation and Infrastructure Committee and the Senate Environment and Public Works Committee held hearings on how to revamp funding sources for transportation spending. However, with the nation now entrenched in a major economic crisis, there are fewer potential solutions for the funding problem, as increasing the gas tax is no longer a viable option.

Increasing revenue to support reauthorization of SAFETEA-LU will be a top priority of the 111th Congress. President-elect Obama has acknowledged the need for increased revenue and, while he does not support raising the gas tax, he has said he is open to looking at a variety of funding ideas.

FAA Reauthorization

In the 110th Congress, lawmakers agreed that there is a pressing need to address the mounting challenges facing the commercial airline industry by, among other things, overhauling the national air traffic control system, addressing skyrocketing fuel prices, eliminating unfair taxes and enhancing the safety and security of the national air transportation system. However, House and Senate lawmakers were unable to compromise on a plan to pay for such upgrades. Consequently, the debate over Federal Aviation Administration (FAA) reauthorization will carry over to the 111th Congress. According to House Transportation and Infrastructure Committee Chairman James Oberstar (D-MN), his panel will work quickly next year to move a bill to reauthorize the FAA that is similar to what the House passed during the 110th Congress (H.R. 2881). The FAA's current authorization is set to expire at the end of March 2009. President-elect Obama has stated that he will engage the general aviation community in the FAA decision making process and take steps to ensure that government continues to determine how best to meet the needs of aviation practitioners.

Funding for Infrastructure

Testifying before the House Budget Committee on October 20, Federal Reserve Chairman Ben Bernanke told members of Congress that he endorsed the idea of a new economic stimulus bill. Chairman Bernanke's statement revived efforts of House Democrats to introduce a broad stimulus package that would focus in large part on infrastructure projects. However, if such a package is not passed by the 110th Congress during the upcoming lame duck session, increasing funding for infrastructure will undoubtedly be a top priority of the Democratic Congress heading into next year. It is likely that a stimulus bill introduced in the 111th Congress would look very similar to the \$150 billion plan unveiled by House Speaker Nancy Pelosi (D-CA) in mid-October, which would pour federal funds into "ready-to-go" infrastructure projects. President-elect Obama endorsed Pelosi's plan during his campaign, and is likely to sign a similar package into law as president.

TELECOMMUNICATIONS, E-COMMERCE & PRIVACY

The Digital Television (DTV) Transition

Congress has mandated that on February 17, 2009, all full-power television stations must switch their analog signals to digital, which will require all Americans receiving over-the-air broadcasts to have digital televisions or to purchase converter boxes that are capable of receiving digital broadcasts. Given that the current level of consumer and industry preparedness for this transition remains uncertain, we anticipate that, at the start of the 111th Congress, oversight hearings will be held in the Senate Commerce Committee and House Energy and Commerce Committee with the Federal Communications Commission, the National Telecommunications and Information Administration and industry participants as they work to ensure a smooth transition to DTV. Current Senate Commerce Committee Chairman Daniel Inouye (D-HI), who may be replaced by Senator Jay Rockefeller (D-WV), has pointed out that, with the DTV transition coming just 29 days after inauguration, potential problems in the transition would be an "albatross around the neck" of the Obama administration. Regardless of who chairs the Committee, however, the DTV transition will be the primary issue facing the Committee at the outset of the new Congress.

President-elect Obama indicates he is "committed to working with the Senate and House Commerce Committees and the appropriate agencies to ensure that this transition happens without significant disruption and inconvenience." Further, William Kennard, an Obama adviser and former Federal Communications Commission Chairman, has said that he would recommend that someone on the transition team be named to monitor the progress of the transition.

Online Advertising and Behavioral Targeting

The 111th Congress is expected to take up the issue of online advertising early in the session, following two Senate hearings and one House hearing during the second session of the 110th Congress and calls by Democratic Subcommittee Chairmen for legislation to address "behavioral marketing" models. Behavioral marketing or "targeting" involves the targeting of online ads to match consumers' interests based on information collected about them when browsing the Internet.

While there are several different business models involving behavioral targeting as well as various technologies that have come under scrutiny by Congress and the Federal Trade Commission (FTC), the latter half of the 110th Congress saw a more particular focus on consumer privacy concerns raised by the potential future implementation of such advertising practices by Internet service providers, particularly telecom and cable companies. Existing models, however, remain exposed to potential far-reaching legislation expected to be introduced in the House Energy & Commerce Committee by Telecom & Internet Subcommittee Chairman Ed Markey (D-MA), who has called for an online privacy “bill of rights” (see “Comprehensive Privacy Legislation”). Additionally, Senate Commerce Committee’s Interstate Commerce Subcommittee Chairman, Byron Dorgan (D-ND), has also said that legislation may be necessary to address such potential privacy concerns.

The draft legislation that we anticipate being introduced could be similar to, or even go beyond, the FTC’s proposed behavioral marketing principles, which already represent a significant departure from existing U.S. privacy law in regard to its call for affirmative consumer consent (opt-in) to a business’ use of non-personal information for marketing purposes, among other provisions. As the behavioral targeting issue moves forward at both the FTC and in Congress, it is anticipated that it will be broadened in its potential application to a wide range of businesses, including those providing online banking and financial services or selling retail goods and other Internet services. Therefore, businesses that either purchase online advertising (i.e., advertisers) or provide services in the entire chain of online advertising (e.g., ad networks, online publishers, etc.) should remain alert to the development of this issue and the likely introduction of restrictive federal legislation early in 2009.

SHVERA Reauthorization

In December 2004, Congress enacted the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), which amended certain copyright laws and the Communications Act of 1934. Congress intended that SHVERA would modernize satellite television policy and enhance competition between satellite and cable operators. Among other provisions, SHVERA authorized certain provisions of the Communications Act that govern satellite retransmission of distant broadcast signals and extended satellite operators the same authority as cable operators to carry “significantly viewed” signals. SHVERA also instructed the U.S. Copyright Office to publish reports recommending legislative changes to the Copyright Act’s statutory licensing system, which the Copyright Office published in June 2008.

Because SHVERA is set to expire in 2009, and because of the Copyright Office’s report recommending certain changes to the current licensing system, this issue is almost certain to see action early in the 111th Congress. A workable reauthorization bill must be crafted by the Senate Commerce, Senate Judiciary, House Energy and Commerce and House Judiciary Committees, as all four enjoy concurrent jurisdiction over this important intersection of telecommunications and intellectual property law.

Comprehensive Privacy Legislation

House Energy and Commerce Committee Chairman John Dingell (D-MI), a strong proponent of privacy legislation, is expected to advance “comprehensive” privacy legislation through the House. Leading Democrats on the House Energy and Commerce Committee, most significantly Representative Ed Markey (D-MA), Chairman of the Telecommunications and Internet Subcommittee, have also called for such legislation. Included in such legislation may be a vast array of other related issues, such as the regulation of the collection and use

of personal information, restrictions on the sale and use of Social Security numbers, mandates on industry to further secure data and notify consumers of breaches of security, prohibitions on deceptive practices such as spyware, phishing and pretexting, and additional limits on online marketing and behavioral advertising practices, some of which are discussed elsewhere in this section.

It is worth noting that privacy issues may also gain further traction in the House Financial Services Committee and the House Judiciary Committee. While the Senate may take longer to act, the Senate Commerce Committee appears to have enough supporters of privacy legislation to pass a similarly broad bill and may once again take up such legislation. However, action in this Committee may well depend on how Senate Chairmanships are settled after Vice President-elect Biden's departure from the Senate Foreign Relations Committee. Senate Judiciary Committee Chairman Patrick Leahy (D-VT) has also been a strong advocate for privacy legislation in the past and should be expected to support broad-based privacy legislation in the next Congress as well.

President-elect Obama has expressed an interest in addressing what he perceives to be an "ID Divide." According to Professor Peter Swire, one of Obama's privacy advisors, "the ID Divide leaves those without proper means of identification or with compromised ID unable to participate in the most basic functions of everyday life in our economy and democracy." During his presidency, President-elect Obama hopes to address the ID Divide and reform the current identification system by limiting the need for full identification. Such aspirations will likely color his policy decisions in regard to future privacy legislation.

Identity Theft and Data Security

During the 110th Congress, several data security and breach notification bills – each one designed to address concerns over identity theft – were reported from congressional committees. While data security is one of the four key "fair information principles" which form the basis for most privacy legislation, the prior call for uniform national standards regarding commercial data security obligations and security breach notification has declined as 44 state data breach bills have been enacted in the past few years. Contributing to this result was a Democrat-controlled Congress that was less likely to pass a federal law preemptive of states' data breach laws. While it will again be on the agenda, it is uncertain at this point whether data security legislation will have a better chance of passage in the 111th Congress.

President-elect Obama would likely support a federal data security bill given that, as a Senator in the 110th Congress, he co-sponsored The Personal Data Privacy and Security Act of 2007, a federal data breach notification bill, sponsored by Chairman Leahy and Senate Judiciary Committee Ranking Member Arlen Specter (R-PA). Further, President-elect Obama has said that he plans to create the position of national cyber-security adviser who will advise on the coordination of data security efforts across the federal government, implement a truly national cyber-security policy and tighten standards to secure information. President-elect Obama has also proposed to appoint the first chief technology officer for the federal government, a position designed to ensure that the federal government and its agencies have the right infrastructure, policies and services to protect employee and consumer privacy.

Spyware, Phishing

In the 110th Congress, spyware legislation stalled in the Senate, after passing the House for the third straight Congress, in part due to the perception that the existing state laws were adequate and a need for federally preemptive legislation was unnecessary. We anticipate that a bipartisan Senate spyware bill may be introduced in the next Congress; however, the number of proponents of such legislation has lessened as the House spyware bill has expanded into a more traditional online privacy bill. The House Energy and Commerce Committee may also reintroduce its bill for the fourth consecutive Congress. Additional bills are also likely to be introduced on phishing, a growing public concern and emerging issue in state legislatures. In the 110th Congress, Senators Olympia Snowe (R-ME) and Bill Nelson (D-FL) introduced the Anti-Phishing Commerce Protection Act and are expected to re-introduce legislation in the next Congress.

President-elect Obama has, as part of a broader Internet security strategy, indicated that he plans to increase the FTC's enforcement budget to fight spam, spyware, phishing and other cybercrime.

President-elect Obama's Innovation Agenda

In hopes of promoting technological innovation, President-elect Obama has called for a permanent extension of a frequently expiring research and development tax credit for U.S. companies. Additionally, he announced, among other things, a desire to (1) invest in technologies to promote development of commercial-scale renewable energy, (2) implement policies to improve the information and communications technology used to support public safety, (3) strengthen funding for biomedical research, (4) double federal financing of basic research in physics, life sciences, mathematics and engineering over the next 10 years, and (5) allow greater federal government funding for research on stem cells derived from embryos produced for in vitro fertilization. Each of these proposals may appear in the form of new legislation introduced early in the 111th Congress.

Health Information Technology (HIT) Privacy Legislation

Efforts to enact legislation that protects electronic health records will likely intensify during the 111th Congress. In particular, there will likely be a push, led by Senator Snowe, to require stronger notification following breaches of health databases that expose personal health records. Senator Snowe attempted to inject such a provision during the 110th Congress in the Wired for Health Quality Act and she may continue to raise these concerns in the 111th Congress. (See "Health IT".)

INTELLECTUAL PROPERTY

Patent Reform Bill

Patent reform will likely remain a prominent subject for debate early in the 111th Congress. In September 2007, the U.S. House of Representatives passed its version of the Patent Reform Act of 2007. Senate Judiciary Committee Chairman Patrick Leahy (D-VT) and Senator Orrin Hatch (R-UT) sponsored the Senate version (Leahy-Hatch bill), which though bipartisan and reported by the Senate Judiciary Committee, was not taken up by the full Senate after negotiations broke down over a variety of unsettled issues.

Looking forward, the Senate approach to patent reform legislation will initially center on finding common ground between the provisions now embodied in the Patent Reform Act of 2007 (the Leahy-Hatch bill) and those in the Patent Reform Act of 2008, introduced by Senator Jon Kyl (R-AZ), as each are likely to be re-introduced as new legislation at the outset of the new Congress. The pace and tone of the patent reform debate will depend on the composition of the Judiciary Committee and the policies endorsed by President-elect Obama. On the House side, Representative Howard Berman's (D-CA) anticipated departure as Chairman of the House Judiciary Committee's Intellectual Property Subcommittee leaves open the question of who will advance, and naturally shape, the patent reform debate in the House.

Copyright, Trademark and Cybersquatting Issues

The Judiciary Committees are expected to take up issues that were not completed this year, such as an orphan works bill. Additionally, Senator Olympia Snowe (R-ME) is expected to reintroduce the Anti-Phishing Consumer Protection Act, which was co-sponsored by Senator Bill Nelson (D-FL) and referred to the Senate Commerce Committee during the 110th Congress. Although the recently enacted Enforcement of Intellectual Property Rights Act of 2008 and the prominence of patent reform legislation may limit debate over other intellectual property legislation, Senator Snowe's bill, which addresses cybersquatting, could receive more attention from a trademark standpoint in the 111th Congress.

NATIONAL DEFENSE / HOMELAND SECURITY

The economic downturn will likely affect a variety of spending initiatives in foreign and defense policy and homeland security issues, but it is too early to predict specific cuts and battlegrounds. A priority of President-elect Obama and the Democratic majority in the Congress may be establishment of a date certain – albeit more distant than many called for during the 2008 election campaigns – for the withdrawal of U.S. troops from Iraq. It remains to be seen how his views on dialogue with Iran, North Korea and other regimes will translate into administration policy and congressional activity.

While President-elect Obama protested certain aspects of military spending during the campaign, the regular defense authorization and appropriations bills are expected to be adequately funded. At the same time, the heavy demands of funding the wars in Iraq and Afghanistan – including Obama's calls for significantly increased troop deployments in the latter – are likely to necessitate supplemental legislation. These same demands, along with U.S. domestic economic considerations, will likely force a trade-off in certain priorities.

Although the congressional majority can be expected to respond positively to President-elect Obama's call for increases in the U.S. military deployment in Afghanistan, it is unlikely that the new Administration will seek congressional authorization for major new weapons programs or other Department of Defense initiatives. Another potential source of contention is the fate of the Bush Administration's European missile defense deals. The Obama Administration and Democratic majority in the Congress may not approve funding for the programs or may seek to alter them in ways that slow or halt their implementation.

On the homeland security front, cyber attacks have increased in frequency and magnitude over the past two years and will need to be addressed. However, with the current economic downturn sure to consume the majority of available federal funding, the new administration will need to utilize the private sector in fighting cyber crime, either through partnerships, incentives or coercion.

Another major homeland security issue is whether the United States should take a risk-based or vulnerabilities-based approach to screening cargo. (See "International Trade")

A key issue affecting the Department of Homeland Security (DHS) specifically is operational cohesion. DHS was made up of 22 component agencies that are still struggling to integrate personnel and management systems. The inability for DHS leadership to work together as a team was evidenced most starkly in the failures associated with Hurricane Katrina. However, while DHS' lack of operational cohesion is a serious problem, the ability for DHS to integrate will depend largely on whether the issue is a presidential priority.

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If you have any questions or would like additional information please contact your Alston & Bird attorney or any of the following:

Selected Members of Alston & Bird’s Legislative & Public Policy Team

Senator Thomas A. Daschle
tom.daschle@alston.com
202.756.3156

Jonathan M. Fee
jon.fee@alston.com
202.756.3387

Michael Marshall
michael.marshall@alston.com
202.756.4856

Carolyn E. Smith
carolyn.smith@alston.com
202.756.3566

Senator Bob Dole
bob.dole@alston.com
202.654.4848

Patrick A. Fitch
patrick.fitch@alston.com
202.239.3930

Paul G. Martino
paul.martino@alston.com
202.756.3439

Dwight C. Smith, III
dwight.smith@alston.com
202.756.3325

Robert C. Jones
bob.jones@alston.com
202.239.3903

Marshall F. Harris
marshall.harris@alston.com
202.654.4857

Naotaka Matsukata
nao.matsukata@alston.com
202.756.5591

T. Michael Tennant
mike.tennant@alston.com
404.881.7838

Paul M. Architzel
paul.architzel@alston.com
202.756.3492

Dennis O. Garris
dennis.garris@alston.com
202.756.3452

Rudy S. Missmar
rudy.missmar@alston.com
202.756.3034

Tamara Rae Tenney
tamara.tenney@alston.com
202.756.3489

Jacqueline C. Baratian
jacqueline.baratian@alston.com
202.756.3484

Elinor A. Hiller
elinor.hiller@alston.com
202.756.3401

Oscar N. Persons
oscar.persons@alston.com
404.881.7249

Julie Klisch Tibbets
julie.tibbets@alston.com
202.756.3444

Jennifer E. Bell
jennifer.bell@alston.com
202.756.3416

Timothy J. Hogan
timothy.hogan@alston.com
202.756.3001

Mark H. Rayder
mark.rayder@alston.com
202.756.3562

Timothy P. Trysla
tim.trysla@alston.com
202.756.3420

Jody Lee Bennett
jody.bennett@alston.com
202.756.3473

Jacob M. Isler
jake.isler@alston.com
404.881.4950

Colin T. Roskey
colin.roskey@alston.com
202.756.3436

Jason M. Waite
jason.waite@alston.com
202.756.3455

Henry J. Birnkrant
henry.birnkrant@alston.com
202.756.3319

Peter M. Kazon
peter.kazon@alston.com
202.756.3334

Marc J. Scheineson
marc.scheineson@alston.com
202.756.3465

Thomas G. Walker
thomas.walker@alston.com
704.444.1055

Edward Britan
edward.britan@alston.com
202.756.3364

Stephanie A. Kennan
stephanie.kennan@alston.com
202.756.3159

Thomas A. Scully
thomas.scully@alston.com
202.756.3459

Marion T. R. Watkins
marion.watkins@alston.com
202.756.4863

Jennifer L. Butler
jennifer.butler@alston.com
202.756.3326

Brian E. Lebowitz
brian.lebowitz@alston.com
202.756.3394

Donald E. Segal
donald.segal@alston.com
202.756.3449

Kenneth G. Weigel
ken.weigel@alston.com
202.756.3431

Jon R. Chase
jon.chase@alston.com
202.756.3443

Pamela Keeney Lina
pamela.lina@alston.com
404.881.4935

Bobbi Jo (BJ) Shannon
bj.shannon@alston.com
202.756.3344

Charles W. Wheeler
chuck.wheeler@alston.com
202.756.3308

Kipp A. Coddington
kipp.coddington@alston.com
202.756.3408

Robert C. Lower
bob.lower@alston.com
404.881.7455

Kevin D. Sheldon
kevin.sheldon@alston.com
404.881.4653

Tiffani V. Williams
tiffani.williams@alston.com
202.756.3412

Robert T. Cole
bob.cole@alston.com
202.756.3306

Kathryn J. Marks
kathryn.marks@alston.com
202.756.3479

Regina Sherick
gina.sherick@alston.com
202.756.3383

Marilyn K. Yager
marilyn.yager@alston.com
202.756.3341

Thomas E. Crocker
thomas.crocker@alston.com
202.756.3318

Diego Marquez
diego.marquez@alston.com
202.756.3003

Eric A. Shimp
eric.shimp@alston.com
202.756.3409

ATLANTA

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

CHARLOTTE

Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS

Chase Tower
Suite 3601
2200 Ross Avenue
Dallas TX 75201
214.922.3400

LOS ANGELES

333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK

90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE

Suite 600
3201 Beechleaf Court
Raleigh, NC 27604-1062
919.862.2200

SILICON VALLEY

Two Palo Alto Square
Suite 400
3000 El Camino Real
Palo Alto, CA 94306-2112
650.838.2000

VENTURA COUNTY

Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.756.3300

www.alston.com

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